

AMENDMENTS TO THE CHINESE TRADE MARK LAW Effective 1 December 2001

Details of Major Changes

For a brief summary, please download our summary paper from the “publications” page of our website <http://www.lloydwise.com> or contact us for a copy.

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1. Background

The first Chinese Trade Mark Law was enacted on 23 August 1982. Revisions were made in the Decision on the Revision of the Trade Mark Law of the People's Republic of China on 22 February 1993.

The most recent revisions were issued on 27 October 2001 and came into force on 1 December 2001 along with new Implementing Regulations and Transitional Provisions.

The most recent revisions were made in order to comply with the provisions of the TRIPS agreement.

2. Definition of a Trade Mark

The Old Law limited trade marks to any distinctive word or device or combination thereof¹. The Amended Law now defines a trade mark as any "visually perceptible" mark able to distinguish the goods/services of one undertaking from the goods/services of other undertakings. Three-dimensional marks, colours, letters, numbers and of course words and devices, and any combination thereof are specifically included. Smells and sounds, not being "visually perceptible" marks, would appear to have been excluded. The wording "able to be represented graphically" used in the laws of other countries has not been adopted.

Article 3 has been amended to make it clear that the term "trade mark" includes service marks, collective marks and certification marks. Definitions of collective and certification marks are now incorporated in the law, but the procedures for registration of such marks are still detailed elsewhere (in the new Procedures for the Registration and Administration of Collective Marks and Certification Marks which came into effect on 1 June 2003). The registration of "special marks", which are those used in national or international cultural or sporting events are still provided for separately under the Regulations for the Administration of Special Marks.

Further restrictions relating to three-dimensional marks have been included in new Article 12 which prohibits registration of three-dimensional signs which are the shape of the goods covered by the mark where the shape is dictated purely by the function or use of the goods; and three-dimensional signs that are the inherent natural shape of the goods themselves.

3. Filing an Application and Claiming Priority

Separate applications must still be filed in each class of interest².

China has been a member of the Paris Convention since 1985 and for clarification, the right to a priority claim has now been included in the body of the Trade Mark Law as Article 24. Priority may also be claimed from the date of first use of mark at an international exhibition recognised or sponsored by the Chinese Government³.

4. Co-Ownership of Trade Mark Registrations

Co-ownership of trade mark registrations is now permitted in China⁴.

5. Examination

If a trade mark application is refused, the applicant may file a request for review on refusal with the Trade Mark Review and Adjudication Board (TRAB), a panel of senior examiners. The TRAB's Decision on Review on Refusal was final under the Old Law⁵, but an appeal to the People's Courts has now been provided for⁶.

¹ Article 7 of the Old Chinese Trade Mark Law

² Article 12 of the Old Law; Rule 9 of the Implementing Regulations to the Old Law; Article 20 of the Amended Chinese Trade Mark Law; Rule 13 of the Implementing Regulations to the New Law.

³ Article 25 of the Amended Chinese Trade Mark Law.

⁴ Article 5 of the Amended Chinese Trade Mark Law.

⁵ Article 22 of the Old Chinese Trade Mark Law and Rule 17 of the Implementing Regulations to the Old Law.

⁶ Article 32 of the Amended Chinese Trade Mark Law; Rule 28 of the Implementing Regulations to the New Law.

6. Absolute Grounds of Refusal

Prohibited Marks

Art. 8 of the Old Law has been amended as shown in bold below (now Art. 10 of the Amended Law):

- a. *those identical with or similar to the State name, national flag, national emblem, military flag, or decoration, of the People's Republic of China and those identical with the names of the locations of the Central Government State Authority or those identical with the names or devices used in conjunction with distinctive buildings;*
- b. *those identical with or similar to the State names, national flags, national emblems or military flags of foreign countries except with the permission of the relevant State Government;*
- c. *those identical with or similar to the flags, emblems or names, of international inter-governmental organisations, except with the permission of the relevant organisation and only where the public will not be misled;*
- d. *those identical with or similar to the official signs and/or inspection seals used for exercising control and providing guarantees, except with relevant permission;*
- e. *those identical with or similar to the symbols, or name, of the Red Cross or the Red Crescent;*
- f. *[those relating to generic names or designs of the goods in respect of which the trade mark is used;] Moved to new Art. 11 – see “Distinctiveness and Acquired Distinctiveness”, below*
- g. *[those having direct reference to the quality, main raw materials, function, use, weight, quantity or other features of the goods in respect of which the trade mark is used;] Moved to new Art. 11 – see “Distinctiveness and Acquired Distinctiveness”, below*
- h. *those having the nature of discrimination against any nationality*
- i. *those having the nature of exaggeration and fraud in advertising goods; and*
- j. *those detrimental to socialist morals or customs, or having other unhealthy influences.”*

7. Geographical Signs

Art. 8 of the Old Law has been amended (in Art. 9 of the Amended Law) as shown in bold below:

“The geographical names of the administrative divisions at or above the county level and foreign geographical names well-known to the public shall not be used as trade marks, but geographical names having other meanings or used as collective or certification marks shall be excluded. Where a trade mark using any of the above-mentioned geographical names has been approved and registered, it shall continue to be valid.”

Further provisions concerning geographical marks are included in new Article 16 which prohibits both the registration and use of a mark where a geographic indication concerning the goods covered by the mark is included as *part* of mark, but the goods do not come from the geographic location indicated in the mark such that this is misleading to the public. “Geographic indications” covered by the prohibition include indications of origin, quality, reputation, distinctive characteristics or other special features of the goods attributable to the geographic region’s natural or man-made characteristics; or other signs that would mislead the public.

8. Distinctiveness and Acquired Distinctiveness

Previously, there was no concept of “acquired distinctiveness” in the Chinese Trade Mark Law, but new Article 11 has, importantly, included this possibility.

Article 11 prohibits the registration of marks which are:

- (a) the generic names or inherent design of the goods concerned;
- (b) those having direct reference to the quality, essential raw materials, function, use, weight, quantity or other features of the goods in respect of which the trade mark is used; and
- (c) those marks which are lacking distinctiveness

unless it can be shown that the mark has acquired distinctiveness through use and is capable of distinguishing the goods/services of one undertaking from those of other undertakings.

9. Prior Rights

In China, there are still no formal rights in unregistered trade marks *per se* but it is possible to oppose a trade mark application or apply for cancellation of a Chinese trade mark registration on the ground of “bad faith” even when one’s own mark has not been registered or is pending registration in China. Whilst this does not equate to the “first to use” system of many other countries, it does go some way towards assisting aggrieved owners of unregistered marks (see also “Cancellation” below), since misappropriation of marks is still common in China.

Some new provisions have been added to assist trade mark owners whose marks have been misappropriated. New Article 15 makes it clear that if a trade mark owner’s agent or representative applies to register a mark in the agent or representative’s own name, and the application is opposed by the trade mark owner, the mark will not be registered. This codifies what has been happening in practice to date.

Further, new Article 31 makes it clear that it is not permitted to register marks in which others have some prior rights (eg. copyright), or to use unfair means to register marks which are in use by others and in which the owner has developed some reputation (in China).

The provisions of new Articles 15 and 31 are now specifically identified in the cancellation section as being grounds for cancellation (see “Cancellation” below). The opposition section does not list specific grounds, but the presence of new Articles 15 and 31 make it possible for these grounds to be used in opposition actions.

10. Relative Grounds of Refusal

Marks must still have been registered or “preliminarily approved” (approved for registration) before they can be cited against Chinese trade mark applications⁷. Similarly, registered marks which have been cancelled or not renewed can, within 1 year of cancellation or non-renewal, be cited against an application for registration of the same or a similar mark⁸ whether or not those marks have been cancelled on the ground of non-use.

11. Opposition

Time limits

The Old Law required opposition actions to be filed within 3 months of the date of publication of a mark in the Chinese Trade Mark Journal⁹. This time period was interpreted by the Trade Mark Office as expiring *the day before* the three month anniversary of the publication date, which often caused difficulty for applicants. Unfortunately, the wording in the Amended Law¹⁰ is identical to that used in the Old Law and thus the opposition deadline will still expire the day before the 3 month anniversary of publication.

Further, the opposition deadline continues to be unextendible.

Grounds

There are still no specific grounds of opposition detailed in the Law, so we expect the Trade Mark Office to continue the practice of accepting opposition actions on the same grounds that an examiner might object to an application (not distinctive, too close to an earlier filed mark etc.), but now with the addition of the possibility of objection on the grounds of “bad faith”, prior rights or misappropriation by an agent or representative (new Articles 15 and 31).

⁷ Article 17 of the Old Law, Corresponding to Article 28 of the Amended Chinese Trade Mark Law.

⁸ Article 32 of the Old Law, Corresponding to Article 46 of the Amended Chinese Trade Mark Law.

⁹ Old Article 19 of the Chinese Trade Mark Law.

¹⁰ Article 30 of the Amended Chinese Trade Mark Law.

Procedure

Under the Old Law, after filing of an opposition, the opposed party was provided with a copy of the opposition documents and given 30 days to respond. This is the same under the New Law¹¹. After the opposed party had responded or the time limit for responding has expired, the opposition was considered by the Trade Mark Office. No further formal correspondence was entered into. The opposed party's reply was not copied to the opposing party. Hearings are in practice currently not provided for despite a requirement for the Trade Mark Office to "hear" both sides arguments¹². The Trade Mark Office has, however, been known in recent years to allow the odd informal discussion with the relevant parties. This does not presently happen as a matter of course, but this may change in the future.

Appeals

If either party in an opposition action is dissatisfied with the decision of the Trade Mark Office, an appeal may be lodged with the Trade Mark Review and Adjudication Board (TRAB)¹³. The decision of the Board was final under the Old Law, but Article 33 of the Amended Law now allows either party to appeal the decision of the TRAB to the People's Courts. The Court will require the other party to join the proceedings. Generally speaking, appeals are permitted only on decisions issued after the law came into force pursuant to the Interpretation by the Supreme People's Court on Issues Relating to the Jurisdiction over and the Scope of Application of Law on Hearing of Trademark Cases which came into force on 21 January 2002.

Settlement, Consent and Co-existence agreements

Even if the parties involved settle their dispute privately and inform the Trade Mark Office, the Trade Mark Office may still continue with consideration of the validity of the opposed mark, and registration of the mark in question will still be refused if the Trade Mark Office deems appropriate. This does not appear to have changed in the Amended Law.

Backdating Rights in Opposed Marks

Under the Amended Law, Article 34, if an opposition is unsuccessful, the mark will be registered and the rights in the mark will be backdated to the date 3 months from first publication of the mark.

12. Renewal

Unlike in other countries, Chinese trade mark registrations are re-examined each time they are renewed and applications for renewal could, under the Old Law, be refused on the grounds that a mark is no longer registrable¹⁴. There is no similar provision under the Amended Law.

13. Assignments

Assignments must still be recorded in the Chinese Trade Mark Office, must be signed by both the assignor and the assignee and can only be recorded after a mark has been registered¹⁵.

One new provision has been added, however, and that is to stipulate that the assignee only has exclusive rights in the mark after the date on which the assignment is published in the Chinese Trade Mark Journal¹⁶.

In addition, Rule 17 of the Implementing Regulations to the Amended Law now provides that pending trade mark applications can also be assigned.

¹¹ Rule 18 of the Implementing Regulations of the Old Law; Rule 22 of the Implementing Regulations of the New Law.

¹² Article 22 of the Old Chinese Trade Mark Law; Article 33 of the Amended Chinese Trade Mark Law.

¹³ Article 22 of the Old Law; Article 33 of the Amended Chinese Trade Mark Law

¹⁴ Rule 22 of the Implementing Regulations to the Old Chinese Trade Mark Law

¹⁵ Article 25 of the Old Law; Corresponding to Article 39 of the Amended Chinese Trade Mark Law

¹⁶ Article 39, paragraph 2, of the Amended Chinese Trade Mark Law

14. Licences

No changes have been made to the provisions for recordal of licences under the Amended Law. Trade mark licence agreements must still be in writing, must be recorded in the Chinese Trade Mark Office before they take effect, may be recorded against registered marks only and will be announced in the Chinese Trade Mark Journal¹⁷.

Where a trade mark is licensed, the licensee and the origin of the goods/services must still be indicated on the goods/services that bear the registered trade mark¹⁸.

Under the old Implementing Regulations, there were penalties for not recording trade mark licences¹⁹ and this is still the case under the Amended Implementing Regulations.

15. Marking

Marking registered trade marks with an indication that they have been registered was compulsory under the Old Law²⁰, but under the Amended Law, the wording has been changed from “must” to “may”, making the marking of products optional²¹.

16. Well-Known Marks

The requirements of the Paris Convention have now been inserted into the Chinese Trade Mark Law. New Article 13 prohibits the unauthorised registration and use of *unregistered* well-known marks and their translations on any goods/services identical or similar to the goods/services on which the well-known mark is used, where such registration and use is sufficient to mislead the public as to the origin or the goods/services concerned.

Further, Article 13 also prohibits the unauthorised registration and use of *registered* well-known marks and their translations on goods/services dissimilar to the goods/services for which the mark has been registered, where such registration and use is sufficient to mislead the public as to the origin or the goods/services concerned and is sufficient to affect the well-known trade mark owner’s interests in the mark.

According to new Article 14, the following factors will be taken into consideration when the Trade Mark Office or other authorities are determining whether or not a mark is “well-known”:

- a. The extent to which the relevant public (ie. the *Chinese* public familiar with the field of industry concerned) are familiar with the mark;
- b. How long the mark has been in use;
- c. The extent, frequency and length of time of advertisement of the mark and the countries in which it has been advertised;
- d. The number of trade mark registrations for the mark world wide; and
- e. Other factors contributing to the mark becoming well-known.

These requirements have been taken from the official notice “Tentative Provisions for the Recognition and Administration of Well-Known Trade Marks”, promulgated on 14 August 1996.

17. Defensive Trade Marks

These are not provided for in either the Old or the Amended Chinese Trade Mark Law. However, as a practical measure, applications for registrations in classes covering goods/services the applicant does not provide are commonly filed, because of the need for a registration in order to prevent others from using or

¹⁷ Article 26 of the Old Law; Corresponding to Article 40 of the Amended Chinese Trade Mark Law.

¹⁸ Article 26 of the Old Law; Corresponding to Article 40 of the Amended Chinese Trade Mark Law.

¹⁹ Rule 35 of the Implementing Regulations to the Old Law; Rule 44 of the Implementing Regulations to the New Law.

²⁰ Article 7 of the Old Chinese Trade Mark Law and Rule 26 of the Implementing Regulations to the Old Chinese Trade Mark Law.

²¹ Article 9 of the Amended Chinese Trade Mark Law; Rule 37 of the Implementing Regulations to the Amended Law.

registering one's mark (although the new provisions for well-known marks (see "Well-Known Trade Marks", above) and those covering misappropriation (see "Prior Rights" above) make this less important than it once was).

It is necessary to "use" these "defensive" marks in order to avoid cancellation for non-use and at present this can be achieved by three-yearly advertisements in appropriate publications.

18. Cancellation

Old Article 27 has been expanded to include three different cancellation scenarios:

1. If the registered trade mark in question is in contravention with:
 - a. Article 10 – the mark is a prohibited sign or geographical reference (see "Absolute Grounds of Refusal" above);
 - b. Article 11 – the mark is generic, descriptive or indistinctive (see "Distinctiveness and Acquired Distinctiveness, above"); or
 - c. Article 12 – the mark is an unregistrable three-dimensional sign (see "Definition of a Trade Mark", above).

Or where the registration was acquired by fraud or any other unfair means, the Chinese Trade Mark Office may cancel the registration of its own accord, or any person or organisation may apply to the Trade Mark Review and Adjudication Board for cancellation of the mark, *at any time after registration*.

2. If the registered trade mark in question is in contravention with:
 - a. Article 13 – the mark is a well-known mark or a translation of a well-known mark not owned by the applicant (see "Well-Known Marks", above);
 - b. Article 15 – the application was filed in the name of the trade mark owner's agent or representative (see "Prior Rights", above);
 - c. Article 16 – the mark is an unregistrable geographic sign (see "Geographical Names, above); or
 - d. Article 31 – the mark is a mark in which others have some prior rights (eg. copyright); or unfair means have been used to register the mark, the mark is in use by others and the owner has developed some reputation in the mark - ie. the mark has been registered in bad faith (see "Prior Rights", above).

The true trade mark owner, or any interested party may apply to the Trade Mark Review and Adjudication Board for cancellation of the mark, *within five years after the registration date* unless the mark in question is a well-known mark and the applicant is the true owner of the mark in which case the five year time limit does not apply.

3. If any person "disputes" a registered trade mark, an application for cancellation may be filed with the Trade Mark Review and Adjudication Board for cancellation, *within five years of the date of approval of the trade mark registration*. The expression "disputes" was used in the Old Law and in practice means that the applicant for cancellation owns an earlier Chinese trade mark registration or application preliminarily approved for registration. It is not clear why the time limit for this provision begins on the date of approval of a mark for registration as opposed to the registration date, as is the case with the first two provisions. In practice, this could be the difference of a couple of months. The previous time limit for such cancellation actions was only one year.

Definition of "Bad Faith", "Fraud" and "Unfair Means"

An expanded definition of exactly what constitutes "bad faith, fraud or other unfair means" is found in Rule 25 of the Implementing Regulations of the old Chinese Trade Mark Law, and it remains to be seen whether the same definition will be included in the new Implementing Regulations. We do not, however, expect the definition to change. The old definition is:

- (1) *"to fabricate or withhold the truth or forge an application and the related documents in the registration;*
- (2) *to violate the principles of honesty and credit and plagiarise, counterfeit or translate any well-known trade mark of another party in the registration;*
- (3) *to acquire a trade mark registration in the name of a trade mark agent but without the authorisation of the trade mark proprietor who entrusts him in the registration;*
- (4) *to infringe any legal prior rights of another party in the registration; and*
- (5) *to use any other unfair means to acquire a registration."*

Most cancellation actions filed on the grounds of bad faith are filed on the basis that the applicant knew or should have known that the mark belonged to another party.

Cancellation for Non-Use

Registered marks may also be cancelled on the ground that they have not been used for a successive period of three years²², and no amendment has been made to these provisions.

Appeals

Cancellation decisions issued by the Trade Mark Review and Adjudication Board may now be appealed to the People's Courts²³ within 30 days of the date of receipt of the decision.

19. Amendment of Marks and Obvious Errors

Amendment of registered marks is not permitted in China. If a mark is being used in a form different to the form in which it was registered, a new application for registration should be filed²⁴.

New provisions²⁵, however, make it clear that obvious errors in both application and registration documents may be corrected, at the discretion of the Trade Mark Office. This is a welcome addition.

20. Passing Off

There is still no equivalent to the common law tort of passing off in the Chinese Trade Mark Law. For the passing off of unregistered marks, the closest legislation is the Unfair Competition Law, but this extends only to the passing off of well-known unregistered marks.

21. Infringement

Rights conferred by a registration

Article 3 of both the Old and Amended Laws reads simply "The trade mark registrant shall enjoy an exclusive right to use the trade mark, which shall be protected by Law". Article 37 of the Old Law, now Article 51 of the Amended Law further limits trade mark rights to the exclusive right to use a registered trade mark on the goods/services for which it has been registered. No changes have been made to these provisions.

Infringing Acts

Article 38 of the Old Law listed the acts which are deemed to be an infringement of Chinese registered trade mark rights, and these have been amended as shown in bold below in Article 52 of the Amended Law:

- (1) *"to use a trade mark that is identical with or similar to a registered trade mark in respect of the same or similar goods without the authorisation of the proprietor of the registered trade mark;*
- (2) *to sell goods **that infringe the rights in a registered trade mark**;*
- (3) *to counterfeit, or to make, without authorisation, representations of a registered trade mark of another person, or to sell such representations of a registered trade mark as were counterfeited, or made without authorisation;*
- (4) ***to alter the mark without the permission of the proprietor of the registered trade mark and to sell goods bearing the altered mark***
- (5) *to cause, in other respects, prejudice to the exclusive right of another person to use a registered trade mark."*

Rule 41 of the old Implementing Regulations went on to further define the infringing acts covered by paragraph (5) above and similar provisions are retained as Rule 51 of the amended Implementing Regulations:

²² Article 30, paragraph 4 of the Old Chinese Trade Mark Law, corresponding to Article 44, paragraph 4 of the Amended Chinese Trade Mark Law.

²³ Article 43 of the Amended Chinese Trade Mark Law.

²⁴ Article 22 of the Amended Chinese Trade Mark Law.

²⁵ Article 36 of the Amended Chinese Trade Mark Law.

- (1) *to use any word or device that is identical with or similar to the registered trade mark of another person, in respect of the same or similar goods, as the designation or decoration of the goods, which is so sufficient as to mislead the public; and*
- (2) *to provide any person intentionally with such facilities as storage, transportation, post service and concealment in infringing the exclusive right of another person to use a registered trade mark."*

Defences

A defense to infringement has been included in Article 56 of the amended Trade Mark Law. Where suspected infringers can prove that they acquired the goods concerned legally and they can provide full details of the supplier of the goods as well as being able to prove that they did not know the goods infringed the legitimate trade mark rights of others, they will not be liable for payment of any compensation or damages (though it would appear they would still technically be considered to be infringing).

22. Legal Action

Actions for infringement of Chinese trade mark registrations may be taken to the People's Courts or to certain Administrative Authorities²⁶.

Administrative Authorities

There are several Authorities that can be used, the most common being the Administrative Authority for Industry and Commerce. The Administrative Authorities have branches in all provinces and have the power to conduct *ex parte* raids, seize and seal up goods and copy and/or seize relevant documents²⁷. They issue decisions that can include directions for cessation of sale of infringing goods; destruction of infringing goods; destruction of moulds and/or other tools or machines used to apply the mark to the infringing goods; payment of fines; and directions for the publication of apologies or "self criticisms"²⁸.

The new powers of the Administrative Authorities differ slightly from those under the Old Law²⁹ in that the destruction of goods was not provided for earlier and Administrative Authorities now no longer have the power to direct infringers to pay damages. Administrative Authorities may now, on request, only mediate between the two parties on the issue of damages.

A further amendment has been made in Article 53. The Amended Law requires the two parties to resolve their infringement dispute through negotiation. Where the parties are not willing to negotiate or negotiation is unsuccessful, proceedings may be instituted either in the People's Courts or the Administrative Authorities. It is hoped that this amendment won't require trade mark owners to actually make contact with Chinese infringers before taking action as this, in our experience, is more likely to result in destruction of evidence and disappearance of the infringer than in the satisfactory resolution of the infringement situation. It would appear however, on the face of it, that the trade mark owner can be "not willing to negotiate" and therefore could proceed directly to action in the People's Courts or Administrative Authorities.

If the infringing party does not abide by any or all of the directions given in the decision of the Administrative Authority, the Administrative Authority may request the People's Courts to direct compulsory execution of the decision³⁰.

Decisions of the Administrative Authorities can be appealed to the People's Courts³¹.

²⁶ Article 39 of the Old Law; Articles 53 and 55 of the amended Chinese Trade Mark Law.

²⁷ Article 55 of the Amended Chinese Trade Mark Law.

²⁸ Articles 53 and 55 of the Amended Chinese Trade Mark Law.

²⁹ Rules 42 & 44 of the Implementing Regulations to the old Chinese Trade Mark Law

³⁰ Article 39 of the Old Law; Article 53 of the amended Chinese Trade Mark Law.

³¹ Article 39 of the Old Law; Article 53 of the amended Chinese Trade Mark Law.

The People's Courts

To date, the People's Courts have been, in comparison to the Administrative Authorities, slow, inefficient and more expensive. However, the Courts were able to award much more significant damages than the Administrative Authorities and were better at dealing with complex cases or cases where infringement is extensive and very serious.

Amendments to the Trade Mark Law in respect of the powers of the People's Courts, as outlined below, are hoped to improve the prospects of successful and efficient enforcement of trade mark rights through the Courts.

The first of these amendments is found in Article 57 which clarifies the procedure for applying to the Courts for an order for cessation of infringing activities prior to instituting legal proceedings, where there is evidence that the proprietor of the trade mark in question will suffer irrevocable harm if infringement were allowed to continue. Trade mark proprietors may also apply for property preservation orders to be enacted prior to the issuance of an order to cease infringing activities. These procedures were previously available to trade mark owners under the Chinese Civil Procedure Law and indeed, applications for property preservation under Article 57 are required to satisfy the requirements of Articles 93, 94, 95, 96 and 99 of the Civil Procedure Law which are as follows:

Chinese Civil Procedure Law (Official English Translation)

Article 93 – Any interested party whose lawful rights and interests would, due to urgent circumstances, suffer irretrievable damage without immediately applying for property preservation, may, before filing a lawsuit, apply to the People's Court for the adoption of property preservation measures.

The applicant must provide security; if he fails to do so, his application shall be rejected.

After receiving an application, the People's Court must make an order within 48 hours; if the court orders the adoption of property preservation measures, the execution thereof shall begin immediately.

If the applicant fails to bring an action within 15 days after the People's Court has adopted the preservation measures, the People's Court shall cancel the property preservation.

Article 94 – Property preservation shall be limited to the scope of the claims or to the property relevant to the case.

Property preservation shall be effected by sealing, restraining, freezing or other methods as prescribed the Law;

After the People's Court has frozen the property, it shall promptly notify the person whose property has been frozen.

The property that has already been sealed up or frozen shall not be sealed up or frozen for a second time.

Article 95 – If the person against whom the application for property preservation is made provides security, the Peoples' Court shall cancel the property preservation.

Article 96 – If an application for property preservation is wrongfully made, the applicant shall compensate the person against whom the application is made for any loss incurred from property preservation.

Article 99 – If the party concerned is not satisfied with the order made on property preservation or execution, he may apply for reconsideration which may be granted only once.

Execution of the order shall not be suspended during the time of reconsideration.

Article 58 of the amended Trade Mark Law reiterates the above property preservation provisions in respect of evidence preservation in circumstances where there is a likelihood that evidence may be destroyed or lost or difficult to obtain later on. There is one significant difference, however, and that is that although under Article 93 of the Civil Procedure Law it is compulsory to provide security in advance of the Court taking property preservation measures, for evidence preservation under Article 58 of the Trade Mark Law, provision of security is at the Court's discretion.

This may be a positive development since in the past the Courts have often requested prohibitively high levels of security (usually linked to the damages requested to be awarded) before proceeding with property preservation orders. It is hoped that more reasonable levels of security, or indeed in some cases no security, will now be required for evidence preservation depending on the evidence in question.

Damages

New Article 56 sets out the method by which the Courts and Administrative Authorities (through mediation) should assess damages. Damages should be calculated on the basis of the total profit made by the infringer through their infringing activities or the losses made by the trade mark proprietor as a result of the infringing activities; plus an award of costs to compensate the trade mark proprietor for reasonable fees incurred in taking the infringement action.

If the profit made or the losses suffered are difficult to determine, the Courts may impose a fine of not more than 500,000RMB Yuan (approximately US\$60,200).

Article 56 of the amended Trade Mark Law provides, however, that where suspected infringers can prove that they acquired the goods concerned legally and they can provide full details of the supplier of the goods as well as being able to prove that they did not know the goods infringed the legitimate trade mark rights of others, they will not be liable for payment of any compensation or damages.

23. Offences

Certain acts of trade mark infringement are considered criminal offences if they are "serious enough"³². Under the "Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trade Marks"³³, which have not been changed, this includes only those infringing acts where the identical mark has been used in respect of the same goods as the goods for which the mark has been registered. This has been confirmed in new Article 59.

Criminal liability is still assessed under the Criminal Law, Articles 213, 214 and 215 to which there has been no amendment.

24. Anti-Corruption Measures

New Articles 60, 61 and 62 deal with the internal supervision of relevant officials. Article 60 bars officials of the Trade Mark Office and the Trade Mark Review and Adjudication Board from acting as Trade Mark Agents or being involved in manufacture of goods. Article 61 requires the Authority for Industry and Commerce to establish an internal supervision system. Article 62 provides for prosecution of offending officials under the Criminal Law or under administrative regulations.

³² Article 40 of the Old Law; Article 59 of the amended Chinese Trade Mark Law.

³³ Promulgated on 1 December 1993