



2017
Happy Year of the Rooster

Wilkinson & Grist has in 2016 continued to gain recognition as a leading law firm in Hong Kong for our different practices. We gratefully thank all our clients for their support throughout the year and will strive to serve our clients with our tradition of excellence through our professional and dedicated teams and staff in Hong Kong and Beijing China.

With the passage of the Patents (Amendment) Ordinance to reform the patent system as well as our continual support to the Hong Kong Government's initiatives under the IP Managers Scheme launched by the Intellectual Property Department, we look forward to another exciting and fruitful year of 2017.

Lastly, as we welcome the Year of the Rooster, we warmly wish for peace, prosperity and good health to all.

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NEW HONOURS



ASIA-PACIFIC DISPUTE RESOLUTION AWARDS 2016

For two consecutive years, we are honored to have won the award of “**National Law Firm of the Year – Hong Kong**”. This award strongly recognizes our outstanding dispute resolution and litigation practice in Hong Kong.



The Guide to Asia-Pacific's Leading Domestic Law Firms

We are pleased to have been named as **Outstanding Law Firm** for Dispute Resolution and Intellectual Property in Hong Kong in Asialaw Profiles 2017, the Guide to the best domestic and regional law firms in the Asia-Pacific region. The Guide provides law firm recommendations and editorial analysis of 18 practice areas in 24 jurisdictions. We are also **Highly Recommended** for Construction & Real Estate and Restructuring & Insolvency, and **Recommended** for Banking & Finance and Corporate/M&A Practices.



2016 Patent Survey

We are ranked again as **Tier 1 Law Firm** amongst Asia's Best Patent Practices in Hong Kong for both Prosecution and Contentious work in the 2016 Asia IP Patent Survey published by Apex Asia.



We are pleased to be awarded **Best for Banking Commercial Litigation** in Hong Kong in The 2016 Wealth & Money Management Awards by Wealth & Finance International. The Awards are dedicated to rewarding and recognising the hard work and dedication of everyone working in the vast industry of finance management and advisory.



For consecutive years, we have been **Recommended** in the practice areas of Dispute Resolution, Intellectual Property and Restructuring and Insolvency in Hong Kong in The Legal 500 Asia Pacific 2017, The Client's Guide to the best law firms and top lawyers.

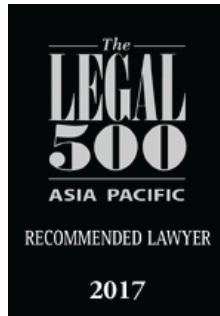
"[Wilkinson & Grist] is handling a shareholder dispute relating to a joint venture set up in Hong Kong. In other recent work, [it] represented Timothy Fok Tsun Ting in a dispute regarding the estate of his father, Henry Fok Ying Tung, [it] also acted for Penny's Bay Investment in a seabed reclamation and foreshore claim worth HK\$1.6bn."

"The well-established IP practice at Wilkinson & Grist fields eight partners, a large pool of associates, and patent and trade mark agents. Demonstrating its reputation in the market, the team was appointed by the Hong Kong government's IP department to advise SMEs participating in the IP Managers Scheme."

"The highly experienced [Restructuring and Insolvency] group at Wilkinson & Grist acts for listed companies, liquidators and creditors. [The group] recently advised the provisional liquidators of a company with subsidiaries incorporated in Hong Kong, the PRC, the Seychelles and the BVI."

Congratulations

We are proud of the recognition given to our lawyers and congratulate them on their achievements.



Keith Ho



Ivan Chu



Florence Chan



Lawrence Chan



Chloe Ma



Andrea Fong

Keith Ho, Ivan Chu and Florence Chan, Partners of our Dispute Resolution Practice Group, have been recommended in Hong Kong in Dispute Resolution & Litigation. **Lawrence Chan** and **Chloe Ma**, both Partners of our Restructuring and Insolvency Practice Group, have received the same honour in Restructuring & Insolvency. **Andrea Fong**, Head of our Intellectual Property Practice Group, has for consecutive years been recommended in Intellectual Property.



2016 Asia IP
Experts

Your Guide to Asia's Leading IP Advisers



Andrea Fong



Yvonne Chua

Andrea Fong and **Yvonne Chua**, respectively Partner and Consultant of Intellectual Property Practice Group, are both nominated and listed as amongst the very best lawyers for the Trademarks practice area in Hong Kong in the 2016 edition of Asia IP Experts published by Apex Asia, which identifies the leading IP lawyers in Asia and the Pacific.

Appointments

Through strong participation in major national and international bodies, our lawyers contribute to the community.

HKSAR Immigration Tribunal

Lawrence Chan, Partner, Dispute Resolution Practice Group, has been re-appointed as an Adjudicator of the Immigration Tribunal for a term of 2 years with effect from 1 October 2016.

HKSAR Registration of Persons Tribunal

Lawrence has also been re-appointed as an Adjudicator of the Registration of Persons Tribunal for a term of 2 years with effect from 1 December 2016.

HK Breast Cancer Registry

Yvonne Chua, Consultant, Intellectual Property Practice Group, has been re-appointed as a member of the Steering Committee of Hong Kong Breast Cancer Registry (HKBCR) for the term from 1 January 2017 to 31 December 2018. Being the most comprehensive and representative breast cancer surveillance data in Hong Kong, the HKBCR was established in 2007 by the Hong Kong Breast Cancer Foundation, a non-profit organization committed to breast cancer education, patients support, research and advocacy.

Licensing Executives Society China, Hong Kong Sub-Chapter

Annie Tsoi, Partner, Intellectual Property Practice Group, has been re-elected as council member (and elected as the treasurer) of the Licensing Executives Society China, Hong Kong Sub-Chapter (LESCHK) for the two-year term 2017-2018. LESCHK is part of an international IP organisation with over 10,000 members around the world involved in the business of IP.

HK Law Society Property Committee and Professional Indemnity Scheme Claims Committee

Cleresa Wong, Head of Real Estate Practice Group, has been appointed as a member of the Property Committee and a member of the Professional Indemnity Scheme Claims Committee by the Law Society of Hong Kong.

New Faces

We warmly welcome the following newcomers to our firm.

Pearl Fung joined our firm as a trainee solicitor in 2014. She was admitted as a solicitor in Hong Kong in October 2016 and joined our Corporate Practice Group as an associate. Her practice focuses on banking, commercial and corporate matters, including loan transactions, mergers and acquisitions, regulatory and compliance matters and commercial contracts.



Tracy Lam joined our firm as a trainee solicitor in 2014. She was admitted as a solicitor in Hong Kong in November 2016 and joined our Dispute Resolution Practice Group as an associate. She obtained her Bachelor of Business Administration (Law) degree and Bachelor of Laws degree and PCLL from The University of Hong Kong. She has experience in handling commercial and insolvency litigation, shareholder disputes, estate administration matters, regulatory and compliance matters as well as arbitration proceedings.



About Us

We are honoured to be one of the corporate sponsors to the We R Family Fund Raising Walkathon 2016 organized by We R Family Foundation and held on 18 December 2016. Our Senior Partner as well as Partners and Associates from our different Practice Groups participated in the Walkathon to show our support to the fund raising event.

We R Family
Fund Raising
Walkathon



Composers
and Authors
Society of
Hong Kong
Ltd

Mena Lo and **Annie Tsoi**, Partners of our Intellectual Property Practice Group, attended the 2016 CASH Annual Dinner cum Golden Sail Music Awards Presentation on 1 November 2016.



(From left to right) Mr Geoffrey Lau, Head of Media Licensing & Strategic Planning; our Annie Tsoi and Mena Lo; Mr Tak Ho Chung, Senior Business Manager, Media Licensing Department; Mr Kenrick Kwok, Assistant Licensing Manager, Media Licensing

Talks & Seminars

We are pleased to be involved in, and contribute to, legal education in Hong Kong, China and other regions.

Hong Kong
Intellectual
Property
Department

Mena Lo and **Annie Tsoi**, **Andrea Fong** and **Florence Lam**, Partners of our Intellectual Property Practice Group, spoke at the “Practical Workshop for IP Managers” at the Intellectual Property Department (IPD) on 4 November 2016 and 16 December 2016 respectively. These were the fourth and fifth workshops provided by our Intellectual Property Practice Group for IP Managers under the IPD’s IP Managers Scheme. The workshops aim at equipping IP Managers with the knowledge of managing the IP assets effectively and integrating IP assets into their overall business strategy.

Hong Kong
Trade
Development
Council

Howard Tsang, Partner of our Intellectual Property Practice Group and Head of our Beijing Office, participated in the Workshop of “IP and Legal Fundamentals for Licensing” as one of the Panel Speakers on 10 January 2017 in the Asian Licensing Conference 2017 organized by the Hong Kong Trade Development Council.



Publications

We are happy to provide upon request copies of the following published articles written by our lawyers.

“Beijing No 1 Intermediate Court recognizes IKEA marks as well known”

- Howard Tsang
- Esther Ho

Intellectual Asset
Management Magazine
28 September 2016

“SHARPVIEW refused registration under law of passing off”

- Florence Lam

Intellectual Asset
Management Magazine
5 October 2016

Conferences

Our members will be attending the following conferences and will be delighted to make arrangements in advance for meeting with clients and associates.

LES IMDM / Annual Conference

Paris, France, 21 – 25 April 2017

INTA Annual Meeting

Barcelona, Spain, 20 – 24 May 2017

ECTA Annual Conference

Budapest, Hungary, 28 June – 1 July 2017

MARQUES Annual Conference

Prague, Czech Republic, 19 – 22 September 2017

PTMG Autumn Conference

Toronto, Canada, 4 – 7 October 2017

AIPPI World Congress

Sydney, Australia, 13 – 17 October 2017

APAA Council Meeting

Auckland, New Zealand, 4 – 7 November 2017

Hong Kong



Raymond Chan



Kendrick Cheung

Court of Final Appeal confirmed that merchant cash advance contract was not a loan

The Money Lenders Ordinance (Cap 163) (“**MLO**”) contains a prohibition against carrying on business as a money lender without a licence. The MLO defines “money lender” to mean “every person whose business...is that of making loans...” and further defines “loans” to include “advance, discount, money paid for or on account of or on behalf of or at the request of any person...and every agreement (whatever its terms of form may be) which is in substance or effect a loan of money...”.

In the case *Secretary for Justice v Global Merchant Funding Ltd* (2016) 19 HKCFAR, the Court of Final Appeal (“**CFA**”) was called upon to decide whether a Merchant Cash Advance Sale and Purchase Contract (“**MCA Contract**”) between the defendant and various merchants was a “loan” within the meaning of the MLO.

Under the MCA Contract, the defendant would agree to purchase a fixed amount of a merchant’s future credit card receivables which would be collected from the credit card processor, in return for a one-off, upfront payment by the defendant to the merchant. Such payment would be of a smaller amount than the receivables. Each relevant merchant also gave an irrevocable instruction to the credit card processor to deduct a fixed percentage of the merchant’s credit card sales and to pay the defendant the deducted amount until the future receivables were collected in full.

In delivering the leading judgment, Ribeiro PJ held that:-

- (a) For the purpose of the MLO, “loan” means an agreement which has the legal substance or effect of a loan, and not an agreement with such economic or commercial substance or effect. Assuming that the transaction was not a sham, the court would decide whether a transaction was a loan by construing the relevant documents and analysing the legal effect of what the parties had actually agreed. The language of the parties was relevant but might be disregarded if it was consistent with what they had agreed.
- (b) The MCA Contract in question was an agreement for sale and purchase of receivables rather than a loan. The irrevocable instruction constituted an equitable assignment of the relevant receivables which took effect as and when they came into existence. While the transaction represented a form of finance indistinguishable in economic effect from a loan with interest, it

- was not a loan in legal substance and effect.
- (c) The transaction could not be an assignment by way of security as there was no question of the merchants getting back the property assigned.

Traditionally, block discounting (whereby a company assigns book debts arising from sales in blocks to a finance company in return for a lump sum payment calculated to provide a discounting charge to the finance company) is treated as sale of debts and not lending of money. The decision confirms this view and gives certainty to companies offering merchant cash advance products that they are unlikely to be regarded as money lenders solely by reason of such products. That said, these companies should still review their relevant documentation and avoid the use of terminology that may suggest that the transaction involves a loan.

Latest development in stamp duty on residential property transactions

Sharp rise in stamp duty

On 4 November 2016, the Government of Hong Kong raised the rates of ad valorem stamp duty on residential property transactions to a flat rate of 15 per cent on the transaction consideration or the value of the relevant property (whichever is the higher). The new flat rate became effective on 5 November 2016.

This new measure was taken to further cool down the private housing market after Government data showed that private housing prices had risen for the sixth consecutive month in September 2016, with an accumulative growth of 8.9%.

To give effect to the new measure, the Government will soon table before the Legislative Council a bill to further amend the Stamp Duty Ordinance (Cap 117) (“**SDO**”). The key features of the proposed amendments are:-

- (a) The proposed new ad valorem stamp duty (“**proposed new ADV**”) on the consideration or value of a residential property (whichever is the higher) is a flat rate of 15%. The proposed new ADV would replace the ad valorem Scale 1 rates, commonly known as “double stamp duty”, for Scale 1 rates are 2 times of the Scale 2 rates. Under both Scales, stamp duty payable would be more when the amount of consideration or value of the residential property concerned is higher, depending on which bracket the amount or value falls into.
- (b) The proposed new ADV applies to residential property transactions only. The stamp duty chargeable on non-residential property transactions continues to be subject to the Scale 1 rates or “double stamp duty”.
- (c) An instrument executed on or after 5 November 2016 for sale and purchase or transfer of residential property, unless specifically exempted or otherwise provided in the SDO, is subject to the proposed new ADV.



David Choi

- (d) The same exemptions and exceptions under which parties to a transaction may rely on to pay ad valorem stamp duty at Scale 2 also apply to the proposed new ADV. The common exemptions include those for a Hong Kong permanent resident buyer (“**HKPR buyer**”) who does not own any other residential property in Hong Kong at the time of his or her acquisition of a residential property.
- (e) The existing mechanism for refund of stamp duty paid above Scale 2 under the SDO for a HKPR buyer who disposed of an original property within 6 months from the date of his or her purchase of a new residential property remains unchanged.

The proposed new ADV means that there would be higher costs for investors in acquiring residential properties in Hong Kong. Nevertheless, it remains to be seen to what extent the new measure would be effective given the prevailing low interest rate environment, the general expectation that RMB will depreciate further and the appetite of mainland Chinese for residential properties in Hong Kong.

Refund of stamp duty available for single residential property only

The Court of Appeal recently overruled the lower court’s decision on the circumstances under which partial refund of stamp duty (paid above Scale 2) is allowed under section 29DF of the SDO.

In our May 2016 Newsletter, we discussed the case of *Ho Kwok Tai v Collector of Stamp Revenue* (HCAL 49/205). The Court of First Instance took the view that the references in section 29DF of the SDO to “an” original property should include more than one property. It held that refund was available to the applicant who disposed of his two existing residential properties within 6 months of his acquisition of a new residential property.

The Collector of Stamp Revenue appealed against the ruling. The Court of Appeal in CACV 52/2016 allowed the appeal on the following reasons:

1. Approach to statutory interpretation – the Court of Appeal held that notwithstanding the court’s readiness to consider the context and purpose of the legislation in any interpretative exercise, the court’s task was to ascertain the intention of the legislature “as expressed in the language of the statute”, and not “the legislative intent on its own”. The court therefore could not attribute to a statutory provision a meaning which the language, understood in the light of its context and purpose, could not bear.

Based on the proper construction of section 29DF, the Court of Appeal held that both the expression “original property” and the Chinese words “另一” (meaning “another one”) in the Chinese definition of the expression “原物業 (original property)” were not intended to refer to more than one property.

2. Time limit (ie not later than 2 months after the date of the conveyance on sale under which the original property is transferred or divested) within which an application for refund should be made under section 29DF(3)(c) – the Court of Appeal took the view that if two or more original residential properties could be transferred or divested, there could be more than one date of conveyance on sale. In such a case, the precise time limit for making the application for refund could not be determined.

It is now clear that partial refund of stamp duty is only available to a HKPR buyer who disposes of his or her *single* original residential property within the prescribed period.

Hong Kong Alerts

The Arbitration (Amendment) Bill 2016 introduced into Legislative Council

The Arbitration (Amendment) Bill 2016 was introduced into the Legislative Council for first reading and second reading debate on 14 December 2016. The Bill aims at clarifying the ambiguity in relation to the “arbitrability of IPR disputes”, in line with the Government’s policy to promote Hong Kong as a leading international arbitration center and an IP trading hub in the Asia-Pacific region.

The Bill provides amongst others that IPR disputes (which include any dispute over the enforceability, infringement, subsistence, validity, ownership, scope or duration of IPR, a transaction in respect of an IPR, any compensation payable for an IPR) will be capable of settlement by arbitration as between the parties to the IPR dispute.

If the Bill is passed by the Legislative Council, it is expected that more parties will be attracted to settle IPR dispute by arbitration in Hong Kong.

Adoption of the 11th edition of Nice Classification under the Trade Marks Ordinance (Cap 559)

As from 1 January 2017, the Hong Kong Intellectual Property Department adopted the 11th edition of WIPO’s Nice Classification (NCL (11-2017)) to classify goods and services for the purpose of registration of trade marks under the Trade Marks Ordinance (Cap 559). Class headings affected by the revisions are Classes 3, 6, 10, 14, 16, 17, 18, 20, 21, 22, 24, 26, 28, 31 and 45. Further, Explanatory Notes for Classes 5, 11, 29, 30, 35, 42 and 44 have been modified.

Details of the current revisions are available on the website of the World Intellectual Property Organization at:

http://www.wipo.int/edocs/mdocs/classifications/en/clim_ce_26/clim_ce_26_2.pdf.

China



Annie Tsoi



Shireen So

Cracking down of big scale fake labels factory in China

The Chinese authorities have successfully cracked down a fake labels factory through criminal raids and proceedings, which again demonstrates the determination of Chinese authorities in combating infringers and strengthening IP protection.

We are pleased to have represented our client S.T. Dupont in assisting the People's Procuratorate in the investigation of this case, which started with a factory in Guangzhou (in southern China) set up by the 1st Defendant (a Chinese individual) in early 2006 for the manufacture and sale of fake tags, labels and packaging materials featuring others' famous trademarks, including that of S.T. Dupont.

Aided by 8 other Defendants, the illegal business expanded with the 1st Defendant further opening shop and renting a warehouse. In 2012 alone, over 88 million pieces of unauthorized tags and labels (involving 55 international and national brands, including S.T. Dupont) were processed or manufactured by the infringer syndicate. In the same year, over 58 million fake tags and labels worth RMB 8.6+ million were sold, amongst which 306,280 pieces featured our client's famous "S.T. Dupont" trademark.

On 8 March 2013, the Public Security Bureau conducted raids against the shop, the warehouse and the factory and seized a total of 4.4 million pieces of fake tags and labels. A hard disk and a "U" Drive from the computer of the syndicate, which contained the relevant invoices and the sales figure, were also seized.

Whilst appeals were filed by the first two Defendants, the Inner Mongolia Ordos City Supreme People's Court upheld the 1st Instance decision in convicting all 9 Defendants for making and selling illegal copies of registered trademarks and aiding and abetting the destruction of evidence.

Taking into account the substantial quantity of illegal products, the amount of money and number of famous trademarks involved, the 1st, 2nd and 3rd Defendants, being the principals of the infringer syndicate, were heavily sentenced to 4 to 6 years of imprisonment and fined between RMB 2 and 3.5 million. The other Defendants who knowingly assisted the principals in the unauthorized dealing were sentenced to imprisonment of 1 to 2 years, in addition to fines. The total amount of fine imposed on all 9 Defendants amounted to RMB 9 million.

This case is a vivid example of how enforcement of IP rights can be achieved with success in China. With the correct strategy, speedy action and importantly, proactive cooperation between the brand owners and the enforcement authorities, forceful actions can be effectively carried out to dissolve sizeable illegal operations.

Fundamental changes to the procedures for establishing foreign-invested enterprises in China

Following the trial of the “negative list approach” applicable to foreign investment in the pilot free trade zones in China, the Standing Committee of the National People’s Congress of China has passed the *Decision of the Standing Committee of the National People’s Congress on Revising Four Laws including the Law of the People’s Republic of China on Wholly Foreign-owned Enterprises* 《全国人民代表大会常务委员会关于修改〈中华人民共和国外资企业法〉等四部法律的决定》 (the “**Decision**”). Pursuant to the Decision, the “negative list approach” would apply to the establishment of foreign-invested enterprises nationwide with effect from 1 October 2016.

The Decision has amended the *Wholly Foreign-owned Enterprises Law*, the *Sino-Foreign Equity Joint Ventures Law* and the *Sino-Foreign Cooperative Joint Ventures Law* to the effect that the establishment of and changes to foreign-invested enterprises (“**FIE**”) which fall outside the scope of the special administrative measures for the access of foreign investment (commonly referred to as the negative list) prescribed by the PRC government shall be subject to record-filing requirements instead of approval requirements.

The Chinese authorities have also promulgated other laws and regulations in relation to the Decision, including:-

- *The Circular of the State Administration for Industry and Commerce on Properly Conducting Registration of Foreign-Invested Enterprises subject to Filing* 《工商总局关于做好外商投资企业实行备案管理后有关登记注册工作的通知》, which provides further guidance in relation to the implementation of the Decision;
- *The Announcement of the National Development and Reform Commission and the Ministry of Commerce [2016] No 22* 《国家发展和改革委员会、商务部公告 2016 年第 22 号》, which clarifies that the scope of special administrative measures for the access of foreign investment shall cover the prohibited and restricted categories, and industries in the encouraged category with restrictions on shareholding or senior management personnel requirements, as set out in the *Catalogue for the Guidance of Foreign Investment Industries (Revised in 2015)* 《外商投资产业指导目录(2015 年修订)》; and
- *The Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises* 《外商投资企业设立及变更备案管理暂行办法》 (the “**Interim Measures**”), which provide for the record-filing procedures and requirements, supervision of record-filing of FIE and the sanctions for non-compliance, etc.



Raymond Chan



Pearl Fung

In particular, according to the Interim Measures, where the establishment of FIE does not fall within the scope of the negative list, it would be permissible for the record-filing formalities to be performed either (a) after obtaining the prior approval of the enterprise name but before the issuance of the business licence, or (b) within 30 days after the issuance of the business licence. As for changes to FIE, the record-filing formalities shall be performed within 30 days of the occurrence of the relevant change. In both cases, the relevant record-filing institution shall verify the completeness and accuracy of the information and relevant documents submitted and check whether the matters declared fall inside or outside the negative list, and shall complete the record-filing procedure, or notify the FIE that the matters declared fall within the negative list and inform the relevant department(s) (as the case may be) within 3 working days.

The promulgation of the Decision and the relevant laws and regulations in relation thereto is a major milestone in the reform of the foreign investment regulatory regime in China. By replacing the case-by-case approval requirements with the record-filing procedures for FIEs that fall outside the scope of the negative list, the new regime aims at simplifying the procedures for establishing and filing changes to such FIEs, improving efficiency and thereby facilitating foreign investment in the PRC. Meanwhile, the transition to the new regime may necessitate amendments to other existing laws and regulations relating to foreign investment, and as the implementation of the new regime progresses, new laws and regulations may also be promulgated. Foreign investors are advised to take note of any further developments in this area.

China Alerts

Adoption of the 11th edition of Nice Classification by the CTMO

As from 1 January 2017, the Chinese Trade Mark Office (CTMO) adopted the 11th edition of WIPO's Nice Classification to classify goods and services for the purpose of registration of trade marks in China. On such basis, the CTMO made corresponding adjustments to the Chinese *Classification Table of Similar Goods and Services*, introducing numerous new items. This 2017 Table applies to all trade mark applications filed in China on or after 1 January 2017.

New Rules on Several Issues Concerning the Trial of Administrative Cases Involving the Grant and Confirmation of Trademark Rights

On 10 January 2017, the Supreme People's Court ("SPC") promulgated the new *Rules on Several Issues Concerning the Trial of Administrative Cases Involving the Grant and Confirmation of Trademark Rights* ("Rules"). The Rules serve to refine the *Opinions on Several Issues Concerning the Trial of Administrative Cases Involving the Grant and Confirmation of Trademark Rights* issued by the SPC in 2010.

The Rules reaffirm some important legal issues and introduce improvements on various procedural matters relating to the protection of trademark rights in China. To name a few: merchandising rights are expressly recognized; the scope of "other undesirable influence" as referenced in the Trade Mark Law is clarified; and the factors affecting the determination of likelihood of confusion involving an unregistered well-known trademark are identified. The Rules will have binding effect on the Chinese courts, and are thus expected to bring significant impact and hopefully benefit the genuine trademark owners.

The Rules will become effective on 1 March 2017.

Notice: This newsletter is intended for general information only and should not be taken as legal advice of Wilkinson & Grist. For any enquiries, please contact Ms Anita Kwan at anitakwan@wilgrist.com.
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