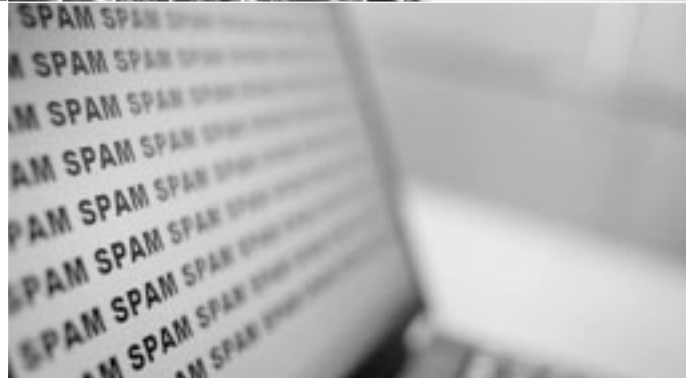


# LEGAL UPDATE

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In the recent landmark patent infringement case of *Trek Technology (Singapore) Pte Ltd v FE Global Electronics Pte Ltd and Others and Other Suits* [2005] SGHC 90, the Singapore High Court dealt with the issue of amending a patent in the midst of infringement proceedings for the first time. It was also the first time an argument of alleged misrepresentation had been raised to challenge the validity of a patent. The Court ruled in favour of Trek Technology (Singapore) Pte Ltd which was represented by our Davinder Singh SC, Tony Yeo and Joanna Koh. We are pleased to bring you a report on this case in “*Trek Goes To Court Over ‘ThumbDrive’*”.

This issue also looks at the recently enacted Building & Construction Industry Security of Payment Act which seeks to address payment problems in the construction industry by providing a statutory framework to ensure a level playing field for all stakeholders in the industry. “*Dealing with Payment Problems in the Construction Industry*” highlights some features of this new legislation.

In “*Recent Tax Developments - The Advance Ruling System*”, we bring you a sneak preview of the Income Tax Act (Amendment) Bill 2005 which will be given legal effect from 1 January 2006. The Bill proposes the setting up of an advance ruling system where taxpayers can seek advance rulings to specify the tax treatment under existing legislation from the Inland Revenue Authority of Singapore.

Finally, “*A Tragedy of the Commons*” examines current efforts to deal with the issue of spam globally and to explore a legislative framework in Singapore to address this problem.

We hope you will enjoy this issue of *Legal Update*.

Warm regards,

**Directors**  
**Drew & Napier LLC**

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## Trek Goes To Court Over “ThumbDrive”



### EXECUTIVE SUMMARY

In a recent landmark and closely watched patent infringement case, the Singapore High Court (“the Court”) ruled in favour of Trek Technology (Singapore) Pte Ltd (“Trek”) in its patent infringement actions against a number of defendants in Singapore. The patent concerned the ThumbDrive device which is a universal serial bus (“USB”) enabled computer data storage device now commonly used in place of floppy drives and even CD-Rom drives. “ThumbDrive” is a registered trade mark belonging to Trek.

The suit by Trek also encompassed an application to amend the patent pursuant to Section 83 of the Singapore Patents Act (“the Act”). This was the first time that a Singapore court had to deal with issues of amending a patent whilst in the midst of patent infringement proceedings.

### INTRODUCTION

Trek was awarded its patent for the ThumbDrive device in April 2002 by the Intellectual Property Office of Singapore (“IPOS”). At that time, the ThumbDrive device was

beginning to gain widespread popularity because of its universality, compactness, portability and ease of use. Trek commenced proceedings against a number of defendants for patent infringement for the sale of devices which infringed Trek’s patent. The suit was heard in 2004 before the Honourable Justice Lai Kew Chai.

The defendants (collectively referred to as “the Defendants”) were:

- (i) M-Systems Flash Disk Pioneers Ltd (“M-Systems”), the manufacturer of a product known as Diskey (“the Diskey”);
- (ii) Electec Pte Ltd (“Electec”) which purchased the Diskey from M-Systems; and
- (iii) FE Global Electronics Pte Ltd (“FE Global”) which bought the Diskey from Electec and then distributed and sold the product in Singapore.

#### INFRINGEMENT OF THE PATENT CLAIMS

The device at the centre of the patent infringement proceedings was the Diskey which Trek alleged had infringed on its patent on the ThumbDrive. The issue of whether the Diskey fell within the scope of Trek’s patent was quickly disposed of by the Court as the Defendants did not deny that the Diskey contained each and every element of the claims of the patent.

The Judge held that “*based on the evidence before this court, there [was] no dispute that the defendants made, sold or offered for sale, or kept for disposal in Singapore, devices that were clones of the ThumbDrive.*”

#### ACTS OF INFRINGEMENT

##### “Offer to dispose” of the Diskey in Singapore over the Internet

One of the unique and interesting issues that arose in this case was whether M-Systems had “*offered to dispose*” of the Diskey through a series of websites that linked its websites to FE Global’s and Electec’s Singapore websites. M-Systems said there was no such offer as it had no control over the links and thus, there was no evidence that it had offered to dispose of the Diskey in Singapore.

The Court disagreed and found, on the evidence, that M-Systems’ website had “Singapore” on the list of countries where the Diskey was sold, and FE Global’s name also appeared under the “Singapore” listing. The Court also found that the primary M-Systems website provided an avenue for the user in Singapore to purchase

the Diskey with a link to the FE Global/Electec websites. Relying on the case of *Euromarket Designs Inc v Peters* [2001] FSR 20, the Court opined that a reasonable user looking at the websites would understand that an offer to dispose of the Diskey was being made in Singapore. Further, M-Systems also admitted that there was a distribution agreement “*of one sort or another*” between itself and FE Global to jointly promote the Diskey. Accordingly, the Court found that M-Systems had “*offered to dispose*” of the Diskey in Singapore within the meaning of Section 66 of the Act.

##### Joint tortfeasorship/Conspiracy to infringe

Trek had relied on the common law grounds of joint tortfeasorship and conspiracy to infringe in its action against the Defendants. Trek argued that the links between the Defendants’ websites and the continued supply and sale of the Diskey, despite clear notice of the patent were evidence of a conspiracy to infringe the patent, and that the business arrangement between the Defendants showed that the acts constituting infringement were carried out in furtherance of a common design, thereby making the Defendants joint tortfeasors.

The Court stated that for parties to operate in furtherance of a common design, it was “*not necessary for them to have mapped out a plan*” and that “*tacit agreement*” was enough. Therefore, the Court agreed with Trek that on the evidence, a case of joint tortfeasorship had been made out against the Defendants. The Court, however, felt that the “*threshold for conspiracy*” was a high one to cross and held that Trek had not proven its case on this point.

#### VALIDITY OF THE PATENT

##### Technical grounds

Besides the defence of non-infringement, the Defendants raised the defence that Trek’s patent for the ThumbDrive was invalid. They relied on a total of over 46 prior art to persuade the Court that the patent was invalid for lack of novelty, obviousness and was incapable of industrial application.

The Court rejected the Defendants’ arguments and held that they had failed to show that any of the prior art disclosed an integrated mass storage device with an integrated plug, or that the patent lacked inventive step. The Court held that the patent could teach a skilled addressee the workings of a portable mass storage device with an integrated plug for direct connection to the USB socket of a computer.

“... an amendment to a patent should be permitted unless there were compelling reasons against the amendment, such as “grave misconduct by the patentee” or “bad faith”. ”

### Misrepresentation

Another interesting and novel point in this case was the Defendants’ reliance on Section 80(1)(g) (now Section 80(1)(f)(ii) of the Act) which stated that a patent may be revoked on the ground that it was obtained on a misrepresentation. This was the first time in Singapore that such a challenge was mounted in court by a defendant in patent infringement proceedings.

The Court held that the onus was on the Defendants to show that the alleged misrepresentation was a “*materially inducing factor*” in deceiving the Registrar of Patents into granting the patent. In this case, the Court held that there was no evidence that the alleged misrepresentations had “*materially induced*” the Registrar and accordingly dismissed the Defendants’ challenge under Section 80(1)(g) of the Act.

### APPLICATION TO AMEND THE PATENT

In the course of the proceedings, Trek made an unprecedented application for the patent to be amended. Section 83 of the Act allows for a patent to be amended during patent infringement proceedings, unless the amendments resulted in the specification disclosing additional matter or if it extended the protection conferred by the patent. According to Section 25(5) of the Act, the amendments must also satisfy the basic criteria that the claims be “*clear and concise*”. Based on the technical documents and the evidence of the experts, the Court held that the amendments had satisfied the criteria.

However, apart from technical objections, the Defendants raised substantial issues as to whether the Court should exercise its discretion in favour of the amendments. The Court traced the history of the judicial authorities on the issue of the scope of this discretion, starting with the considerations set out in *Smith Kline & French Laboratories v Evans Medical Limited* [1989] FSR 561, and went on to consider the more recent cases of *Instance v CCL Label Inc* [2002] FSR 27, and *Mabbuchi Motor KK’s Patents* [1996] RPC 387. Taking all three cases

into consideration, the Court held that an amendment to a patent should be permitted unless there were compelling reasons against the amendment, such as “*grave misconduct by the patentee*” or “*bad faith*”. The Court was of the view that, given the transparent system of patent applications in Singapore and around the world, where examination reports were available for public inspection, adverse parties were “*able to evaluate the validity and strength of patents which have been filed. Adverse parties are therefore less likely to be surprised (and consequently prejudiced) by subsequent amendments which may be sought by the patentee, even if this takes place in the course of patent litigation*”.

In particular, the Court held that the duty of the patentee to disclose all relevant information did not compel the disclosure of privileged documents, as indicated by the English Court of Appeal in *Oxford Gene Technology v Affymetrix Inc (No. 2)* [2001] RPC 18. The Court also held that if the privilege was not waived by the patentee, the Court was not entitled to draw an adverse inference against the maintenance of privilege.

As to the issue of delay, the Court held that the appropriate juncture to question whether the amending party had been guilty of unreasonable delay was the time when it was first made aware of the need to amend. In particular, the Court held that “*mere knowledge of some prior art does not mean that Trek knew of the need to amend the patent*”. Following the decision of Pumfrey J in the *Instance* case, the Court held that Trek was entitled to seek the advice of patent agents on whether there was a need to amend and what form such amendment should take.

Accordingly, the Court allowed the patent to be amended.

### CONCLUSION

The Trek decision is significant in that it dealt with novel issues in patent litigation in Singapore. These include the reliance on misrepresentation as an attack on the validity of a patent, and the amendment of a patent in the course of an infringement action.

Of further interest is the issue of the sale of an infringing article over the Internet. In such instances, the Court will adopt the approach in the *Euromarket* case and look into the "purpose and effect of the advertisement in question" before deciding whether there was an offer to dispose of the infringing article in Singapore.

If a reasonable user looking at a website would understand that an offer to dispose of an infringing product was being made in Singapore (for example, a website providing an avenue for a user in Singapore to purchase the product with a link to other websites), an "offer to dispose" of the infringing product would arise within the meaning of Section 66 of the Act.

**Editor's Note:**

Trek Technology (Singapore) Pte Ltd was represented by Davinder Singh SC, Tony Yeo, and Joanna Koh of Drew & Napier LLC.

The Defendants have filed an appeal against the decision and the hearing is fixed for February 2006.

*Case: Trek Technology (Singapore) Pte Ltd v FE Global Electronics Pte Ltd and Others and Others Suits [2005] SGHC 90*

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# Dealing With Payment Problems In The Construction Industry



## EXECUTIVE SUMMARY

In an effort to address payment problems in the construction industry and to create a more level playing field for all parties in the industry, the Building and Construction Authority (“BCA”) undertook extensive consultation with industry stakeholders to look into the implementation of security of payment legislation in Singapore to facilitate payments and cash flow throughout the construction value chain. The resulting bill was passed in Parliament last year, and the Building & Construction Industry Security of Payment Act (“the Act”) came into effect on 1 April 2005. The Act regulates payments at all levels of the construction industry. In this article, we examine some key features of this legislation.

## INTRODUCTION

The Act was enacted with the primary purpose of dealing with payment problems within the construction industry by providing a statutory framework to ensure that all stakeholders involved in the construction industry obtain timely, adequate and regular payments.

The Act was derived mainly from legislation in the United Kingdom (the Housing Grants, Construction & Regeneration Act 1996) and New South Wales (the Building and Construction Industry Security of Payment Act 1999). The Act seeks to balance the interests of developers, contractors and sub-contractors to “*smoothen the cash flow across the industry and provide some respite*”.

The key provisions of the Act provide for:

- i) a statutory right to payment for any person who carried out construction work or supplied goods or services under a construction contract or supply contract;
- ii) a fast-track adjudication regime for disputed claims;
- iii) a statutory right to suspend work if the adjudicated amount is not paid. “Pay when paid” clauses are now ineffective and unenforceable; and
- iv) a right to make direct payment to sub-contractors/ suppliers, and default provisions where the construction contracts are silent on payment terms.

#### AMBIT OF THE ACT

The Act applies only to written construction contracts made on or after the commencement date of the Act. It does not apply to works on residential properties that do not require building plans submission under the Building Control Act.

The Act is confined to contracts for construction work, goods and services.

“Construction work” has a technical meaning which is specifically defined in Section 3 of the Act. It includes the “construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures”, mechanical and electrical work performed in any building, structure or works, “external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension”, and “the painting or decorating of the external or internal surfaces of any building, structure or works”.

“Goods” refer to “materials or components to form part of any building, structure or works arising from construction work”, or “plants or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work”.

“Services” include “feasibility studies”, “planning services”, “professional engineering services”, “project management services in relation to construction work”, “exterior or interior decoration or landscape advisory services”, and the “provision of labour to carry out construction work”.

So long as the construction work is carried out, or goods or services are supplied in Singapore, the Act applies even if the construction or supply contracts are not governed by the Singapore law.

#### KEY PRINCIPLES

##### Right to progress payment (Section 5 of the Act)

At common law, unless expressly or impliedly provided under an agreement with regards to stage payments, contractors are usually only entitled to payment after they have substantially completed the works. This has now changed under Section 5 of the Act which endows persons with the statutory right to progress payment by providing that “[a]ny person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment”.

##### Adjudication (Sections 13 to 22 of the Act)

The Act also introduces a new fast track adjudication process which allows the claiming party to seek an independent assessment of the monies payable under any progress claim.

Under the Act, if a party is unhappy with the amount assessed by the architect, and paid under any progress claim, that aggrieved party can refer the dispute to an adjudicator (to be appointed by the Singapore Mediation Centre). The adjudicator will review the claim and make his decision.

It should be noted that under the Act, a panel of three other adjudicators can further review any previous decisions made by the adjudicator. The adjudicator's decision is not final and binding. Instead, the dispute will only be finally and conclusively determined at trial or at arbitration.

Adjudication is offered as a less costly alternative (compared to arbitration and litigation) to resolve payment disputes. The fee payable to an authorised nominating body, for example, the Singapore Mediation Centre, shall not exceed \$500 for each adjudication application or \$1,000 for each adjudication review application. For fees payable to an adjudicator, including a review adjudicator or a panel of review adjudicators, the rate shall not exceed \$2,000 per day or \$250 per hour. In cases where the claimed amount exceeds \$20,000, a maximum of 10 per cent of the claimed amount shall be charged, or a maximum of \$2,000 in other cases.

Adjudication also provides a faster way of resolving disputes as the time required for an adjudication to take place (up to the first adjudication) can be as quick as 21 days after the request for the appointment of an adjudicator.

##### “Pay when paid” clauses (Section 9 of the Act)

Contractors had, in the past, included “pay when paid” or “pay if paid” provisions in their contracts. Such clauses purport to provide that payments will only be made to the sub-contractors after the main contractors have themselves

been paid. Previously decided cases in Singapore have upheld such “pay when paid” clauses, for example, in *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694.

Such “pay when paid” provisions are now unenforceable under Section 9(1) of the Act which provides that “[a] pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract”.

#### Right of suspension (Sections 23 and 26 of the Act)

Under the Act, there is now a right to suspend work in the event of any non-payment of an adjudicated amount.

This provision effectively allows a subcontractor to cap the maximum exposure under his contract to one month’s worth of work. In the past, the subcontractor would have had to bear the risk of a wrongful suspension where the superior contracting party fails to make payment of monies under the contract. The strict procedures stipulated in the Act must, however, be followed. A subcontractor may suspend work/supply of goods only if:

- i) the subcontractor has served on the superior contracting party a notice in writing of his intention to suspend construction work or supply of goods/services;
- ii) the subcontractor has served on the principal (if known) and the owner concerned a copy of the notice;

- iii) seven days have elapsed from the day the subcontractor served the notice on the superior contracting party, the principal and the owner; and
- iv) the subcontractor has not been paid the adjudicated amount.

Once the suspension is lifted, there will be, in effect, an automatic extension of time to cover the corresponding period of suspension under the Act.

#### Direct payment from principal (Section 24 of the Act)

It is now possible to request payment directly from the principal, and payment by the principal will automatically discharge its debt to the defaulting contractor. It should be noted that the principal has the discretion on whether to make payment or not.

The key benefit of this clause is that a principal will be more willing to make direct payment to ensure that the works proceed as smoothly as possible.

#### CONCLUSION

With the coming into force of the Act on 1 April 2005, a new era in the construction industry has dawned. Hopefully, this will remedy the poor payment practices in the industry, by ensuring that any person who carries out construction work under a construction contract, or supplies goods or services under a supply contract, is entitled to receive and recover payments promptly.

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# Recent Tax Developments - The Advance Ruling System



## EXECUTIVE SUMMARY

In an effort to provide greater clarity and certainty to taxpayers in Singapore, an advance ruling system will be formalised and given legal effect with effect from 1 January 2006.

The details of the proposed advance ruling system are set out in the Seventh Schedule of the Income Tax Act (Amendment) Bill 2005 which was released for public consultation in June 2005.

In this article, we will examine the salient features of the proposed advance ruling system in Singapore and highlight some of its similarities and differences with the tax ruling regimes in Australia, Belgium, New Zealand, the United Kingdom ("the UK") and South Africa.

## INTRODUCTION

Presently, the Inland Revenue Authority of Singapore ("IRAS") provides advance rulings to taxpayers to specify

the tax treatment under the existing income tax legislation for proposed business arrangements upon their written requests. However, under the Income Tax Act ("ITA"), the Comptroller of Income Tax ("the Comptroller") is not empowered to give such rulings. As such, the rulings are not binding and have no legal effect.

The advance rulings are also given on an ad-hoc basis and presently, there is no formal procedure in place to obtain a ruling from IRAS. Moreover, not every taxpayer is aware that IRAS issues such rulings.

To address these issues, Singapore will introduce a binding advance ruling system, subject to the enactment of the legislation in Parliament.

## ADVANCE RULING SYSTEM

### Features of the system

An advance ruling is a written interpretation of how a provision or certain provision in the ITA applies to:

- i) a specific taxpayer; or
- ii) a proposed arrangement; or
- iii) a specific taxpayer in a proposed arrangement.

The proposed advance ruling system is only applicable to income tax issues under the ITA.

As the issuance of an advance ruling involves an interpretation of the tax laws in relation to how certain issues under a proposed arrangement will be treated for tax purposes, a request for a ruling must be one where there are issues requiring an interpretation of the law and not merely seeking to know what is already stated in the law. Advance rulings given by IRAS are private and confidential in nature and the Comptroller will not release the rulings to the public.

In its circular released on 8 June 2005, IRAS stated that a ruling is binding in two ways:-

- (i) a ruling will only apply to the applicant and the particular arrangement that was the subject of the ruling request. Under certain circumstances, the ruling will have a fixed validity period and will be provided in respect of specific provisions of the ITA as stated in the ruling. The applicant will not be able to rely on a ruling given for a different arrangement, even though the circumstances may appear to be similar. The applicant also cannot rely on a ruling given to someone else for a transaction similar to his; and
- (ii) a ruling will bind the Comptroller to apply those statutory provisions in the manner set out in the ruling that has been issued.

As indicated in (i), the Comptroller can stipulate a validity period for a particular ruling within which the proposed arrangement must be carried out. If the arrangement stipulated in the ruling is not carried out within the validity period of the ruling, the ruling will automatically lapse.

Under the proposed system, advance rulings are final and will not be subject to the appeal process provided in the ITA. Although the applicant taxpayer does not have any available recourse to challenge the ruling issued by IRAS, he is not bound by the tax treatment prescribed in the ruling. However, if there is an issue in his tax returns for a particular year of assessment which has been the subject of a ruling, he is required to indicate whether an advance ruling has been obtained and whether or not he has relied on the ruling in completing his tax returns.

This no-objection feature in the Singapore advance ruling system is substantially similar to that in the UK. However, it is different from the private ruling system in Australia. Under the Australian system, an applicant who is dissatisfied with the outcome of the private ruling may object to it in the same manner as that for an objection against an assessment provided that an assessment has not been made for the particular year and the arrangement to which the ruling relates has not become due and payable.

#### Fee structure

Upon the lodgment of an application with IRAS for an advance tax ruling, an application fee of \$525.00 (inclusive of Goods & Services Tax ("GST")) is payable. This initial fee is non-refundable even if the ruling request is subsequently rejected. In addition, IRAS will charge a time-based fee of \$131.25 (inclusive of GST) per hour for the time taken to provide the ruling.

If IRAS agrees to give a particular advance ruling application priority and expedite the processing time for the ruling request, it can charge up to two times the application fee and time-based fee.

Once a request for a ruling is accepted by IRAS, the applicant will be notified of the expected release of the advance ruling and the estimated fees payable. If the applicant withdraws his request for an advance ruling before the ruling is issued, all the fees incurred up to the time of the withdrawal request shall be payable by the applicant.

New Zealand has a similar fee structure in respect of a private ruling application. An initial application fee of NZ\$310.00 is payable and a time-based fee of NZ\$155.00 per hour is also imposed for private rulings. However, it is interesting to note that there is no fee requirement in Australia and the UK for the issuance of rulings.

#### Processing time

IRAS has stated in its circular that it will ensure that every effort is made, as far as reasonably practicable, to minimise the fees which an applicant is liable for. To that end, IRAS will endeavour to provide a ruling within eight weeks from the date of application. If the process is likely to take more than eight weeks due to its complexity, IRAS will inform the applicant of the expected timeframe at the outset.

In New Zealand, it is anticipated that rulings will generally be processed within six weeks. However, the process may be extended to three or four months depending on the complexity of the matter and the additional submissions which have to be made to the authorities.

Under the Belgian advance ruling system, advance rulings are to be granted within three months from the date of application. Similarly in Australia, the Commissioner of Taxation has to respond to a ruling application within three months. If no ruling is issued within the stipulated timeframe, the applicant can request that the Commissioner provide him with written reasons for the delay.

#### Withdrawal of the ruling

Under the proposed advance ruling system in Singapore, the Comptroller may at any time withdraw a ruling by notification to the taxpayer and stating the reasons for the withdrawal. This feature is also found in the South African tax ruling system which was introduced in 2004.

However, in the UK, a post-transaction ruling cannot be withdrawn unless legislative changes are subsequently

introduced or where the taxpayer has provided incomplete or inaccurate information.

#### CONCLUSION

The proposed advance ruling system is a welcome measure to improve certainty on tax issues under the Singapore income tax regime. The experience in many countries has shown that the advance ruling system is useful in providing clarity and certainty for a particular transaction and to assist taxpayers in meeting their tax obligations.

The system also provides a means for IRAS to collate information on tax-driven transactions undertaken by taxpayers. It is further envisaged that the introduction of the regime is likely to result in a change of approach to tax practice in Singapore, bringing about an increased level of interaction between tax practitioners and IRAS.



*(from left) Karen Tan, Stacy Choong, Teoh Lian Ee*

We are one of the few Singapore law practices with a specialist tax and trust practice and full-time tax and trust specialists. Led by **TEOH LIAN EE**, the Tax, Trusts, Estate Planning & Probate Business Group provide advice on all areas of income tax, goods and services tax, property tax, stamp duty, estate duty, customs and excise and other taxes, duties and impositions. Submissions and representations to the Inland Revenue Authority of Singapore (IRAS), in respect of queries, disputes, advance rulings, settlements or investigations, are part of our practice. Our tax specialists are also familiar with criminal matters such as tax evasion, as with civil matters, and have strong trial experience in tax litigation and prosecution. The Group has represented clients in disputes with the IRAS.

The Group also handles the planning of estates and the use of trusts and multi-jurisdictional wills. We advise high networth individuals on the most efficient and effective structures for estate planning, asset preservation, provision for minors and descendants and tax planning. We are familiar with the concerns of settlors and testators. Our tax and trust lawyers assist clients in probate and administration matters, and in making submissions and representations to the Estate Duty Department in estate duty disputes and settlements.

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# A Tragedy Of The Commons



## EXECUTIVE SUMMARY

The debate on whether to adopt an opt-in or opt-out regime in relation to the receipt of unsolicited commercial e-mail (otherwise known as spam) occupies centre-stage in Singapore's search for an effective legislative solution to spam. However, placing too much emphasis on the issue of consent could obscure other more important issues. This article argues that to combat spam, the economic motivation behind spamming must first be understood. A workable solution lies in increasing the costs of spamming such that any expected returns would be marginal.

## INTRODUCTION

E-mail spam exemplifies a tragedy of the commons where spammers use resources without bearing the entire cost of those resources, leaving the externalities to be borne by consumers. In 2003, an estimated two trillion spam messages were sent over the Internet, costing Internet subscribers worldwide US\$9.4 billion in lost productivity, network system upgrades, unrecoverable data and increased personnel costs. In Singapore alone, spam accounts for an annual \$23 million loss in productivity.

The relatively low cost of sending bulk e-mail to individual addresses means that marketing costs can be recovered even if the response rate is very low. In November 2002, the Wall Street Journal reported that a return rate as low as 0.001 per cent can be profitable.

In May 2004, the Info-communications Development Authority of Singapore ("IDA") and the Attorney-General's Chambers ("AGC") released a joint consultation paper, the *Proposed Legislative Framework for the Control of E-Mail Spam* (the "Consultation Paper") to seek guidance and feedback on the proposed legislative framework to control spam. 51 out of the 60 respondents commented on the opt-out regime proposed in the Consultation Paper. Of this number, only 13 respondents supported the proposal for an opt-out regime. At the time of writing (August 2005), the legislature has yet to reach a decision, perhaps due to the complexity of the arguments raised by both sides of the opt-in/opt-out camps. Empirical evidence, however, seems to suggest that neither approach alone may effectively reduce the volume of spam. Therefore, an over-emphasis on the opt-in/opt-out debate is unlikely to resolve

any real issues. This article seeks to provide an overview of the opt-in and opt-out approaches, and explores other crucial complementary features that anti-spam legislation should have. Briefly, these features should focus on increasing the costs of sending spam.

### WHAT IS SPAM?

Commercial spamming started in force on 5 March 1994 when a pair of United States lawyers, Laurence Canter and Martha Siegel, began using bulk Usenet postings to advertise their services. The duo went on to widely promote spamming through both Usenet and e-mail as a new means of advertising. Within a few years, the focus of spamming moved chiefly to e-mail, where it remains today.

The ability to send e-mail from a computer programme is built into popular operating systems such as Microsoft Windows and Unix. The only ingredient to be added is the list of email addresses targeted. Spammers obtain e-mail addresses by a number of means: harvesting addresses from Domain Name System listings or Internet web pages, guessing common names at known domains (also known as dictionary attacks), and “e-pending” or searching for e-mail addresses corresponding to specific persons, such as residents in an area. Many spammers also utilise programmes called “web spiders” to find e-mail addresses on Internet web pages.

The Consultation Paper proposes to define spam as “*unsolicited commercial e-mail*” transmitted from or received in Singapore in bulk. However, under the proposed law, not all unsolicited commercial bulk e-mail would be disallowed. Unsolicited commercial e-mails that comply with the minimum standards for an opt-out regime and other prescribed requirements will be treated as legitimate communications. The proposed opt-out regime is the most controversial of these requirements and merits further comment.

### OPT-IN VERSUS OPT-OUT

The Consultation Paper explains that an opt-out regime involves “*the distribution model of sending unsolicited e-mail... and allowing the recipient to request removal*”. Opt-out laws typically require senders to honour the request of recipients to remove them from a sender’s mailing list. In other words, completely unsolicited messages may be sent, unless or until a recipient has indicated otherwise. In contrast, in an opt-in regime, the sender cannot send any unsolicited commercial e-mails unless the intended recipient first consents to the receipt of such e-mails.

Critics allege that opt-out laws “legalise” spamming. Commenting on the United States’ CAN-SPAM Act of 2003, which also adopts an opt-out regime, the Coalition Against

Unsolicited Commercial Email argued that the CAN-SPAM Act gave “*each marketer in the United States one free shot at each consumer’s e-mail inbox*”.

On the other hand, critics of opt-in laws contend that they unreasonably burden legitimate businesses. This view was echoed by a number of respondents to the Consultation Paper who supported the opt-out approach. Compelling statistics cited by direct marketers showed that some e-mail users want to receive unsolicited offers via e-mail and closing that channel entirely is overly restrictive and burdensome.

A review of the empirical data does not break the dead heat. In February this year, the New York Times reported that the CAN-SPAM Act had resulted in little or no effect on the flow of spam, and that the amount of spam saturating the Internet had actually increased since the law came into effect in 2004.

Supporters of the opt-in regime are unable to victoriously wag the accusing finger. In April 2005, the British anti-virus software company, Sophos, reported that Australia, whose Spam Act of 2003 utilises an opt-in regime, re-entered its list of the top 12 countries from which spam is sent.

### INCREASING THE COSTS TO SPAMMERS

Game theory shows that cooperation (in context, adherence to the law) maximises every individual’s benefit in the long run, while defection maximises an individual’s benefit in the short run at the expense of destroying it in the long run. Thus, a theoretical solution to averting the “tragedy of the Internet” is to simply have a group of far-sighted netizens who can see their long-term interest, that is to say, netizens who are willing to comply with the law to prevent spam from over-flooding the Internet.

However, the incentive to break the law by spamming is great, given the low short-term costs involved and proportionately higher returns. In the discussion paper, *Countering Spam: How to Craft an Effective Anti-Spam Law*, the International Telecommunication Union observed that the benefits (e.g., profits) received by spammers may be offset by the technical, social and legal costs of sending spam. As a result, any effort to increase costs, whilst maintaining or decreasing the benefit spammers receive, will tend to reduce the overall rate of spamming. Therefore, in drafting our own anti-spam laws, effective mechanisms should be put in place to increase the costs associated with spamming.

There are several possible ways in which the proposed spam law can be drafted to increase the costs to spammers; some are more controversial than others. First, the right to take private action against spammers should extend beyond

Internet Service Providers (“ISPs”) to all legal persons affected. While individuals and firms may not usually have the necessary resources to carry out an investigation to bring about court action, such an extension from the current proposal would enable businesses with adequate resources to vindicate their rights. More often than not, these would be the same businesses most severely affected by spam. The right balance, however, would be to adopt a suitable legislative stance to minimise the likelihood of frivolous claims.

It is suggested that high upfront costs should also be imposed on spammers. The legislature could consider revising upwards the quantum of damages from the current contemplated \$1.00 for every unlawful e-mail sent if the current limit should prove inadequate as a form of deterrent against spamming activities.

While it is not apparent from the Consultation Paper as to whether fines will be imposed on spammers, it is suggested that such a measure be considered. The United States and Australia already have a system of fines in place. In this regard, any fines which may be imposed should compound at a geometric rate, increasing with the number of unlawful e-mails sent. Convicted spammers could also be prohibited from subscribing for Internet service for a reasonable

period of time. After all, if irresponsible road users may have their driving licenses suspended or revoked, spammers could be censured analogously.

Lastly, the legislature could implement an incentive scheme for whistle blowing against spamming activities. Such a scheme may alleviate some of the difficulties associated with tracking spammers down.

One important caveat remains. Netizens need to appreciate that spam is a worldwide problem. At present, 77 per cent of all spam received in Singapore comes from overseas. Although it may be difficult for the ordinary user to distinguish between domestic and foreign spam, the proper gauge of success, at least in the short run, is whether our proposed spam laws are effective in reducing spam originating from Singapore.

## CONCLUSION

While the Consultation Paper advocates a “*multi-pronged*” approach to fighting spam, the crucial question is which prong merits greater emphasis. Regardless of whether an opt-in or opt-out approach is ultimately adopted, the ability to significantly increase the costs of spamming through legislation would be one of the greater successes in the fight against spam.

Drew & Napier LLC is widely recognised as Singapore’s leading Info-communications and Technology practice. From drafting Singapore’s first interconnection, market access and infrastructure sharing framework to regulate the duopoly prior to 2000, to the formulation of the IDA Telecom Competition Code following full liberalisation after 2000, Drew & Napier lawyers have been behind every major industry milestone. Our extensive experience in the info-communications and technology sector is our clients’ assurance that we will be able to see them through the most demanding transactions.

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