



Making a Mark

An Introduction to Trade Marks for
Small and Medium-sized Enterprises



SMBROSS



About the cover

The  mark appearing in the background of the cover is a pending trade mark application of SMI Association of Malaysia.

All the other marks appearing in the background of the cover are registered trade marks of SMI Association of Malaysia .

About mark

Bees are probably the world's greatest pollinator. As bees travel from blossom to blossom in search of nectar, they transfer pollen from plant to plant, thus fertilizing the plants and enabling them to bear fruit. The U.S. Department of Agriculture estimates that about one-third of human diet is derived from insect-pollinated plants and that the bee is responsible for at least 60% of this pollination.

In view of the importance and contribution of bees in our eco system, SMI Association of Malaysia has chosen bees as the mascot of SME Recognition Award, acknowledging its team spirit, effectiveness, loyalty as well as the social contribution towards a win-win environment.

Disclaimers:

The information contained in this guide is not meant as a substitute for professional legal advice. Its main purpose is limited to providing basic information on the subject matter.

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Preface

SMI Association is a trade organization with the prime objectives of promoting the interests and enhancing the knowhow of small and medium scale enterprises (SMEs) in Malaysia, and to assist in developing the Malaysian SMEs.

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development of all its Member States, while safeguarding the public interest. Malaysia is a member of WIPO.

WIPO has created a series of international guides under the theme “Intellectual Property for Business,” which seek to explain the basics of IP from a business perspective (available for free at: www.wipo.int/sme/en/documents/guides). The first guide in this series, entitled “Making a Mark,” is aimed at entrepreneurs and managers of small and medium-sized enterprises (SMEs), who are encouraged to use the guide with a view to integrating their trade mark strategy into their overall business strategy.

SMI Association is proud to present this new booklet, which is a national adaptation of WIPO’s publication “Making a Mark.” This customized guide is based on Malaysian legislation, practices, forms, fees, institutions, case law and the specific administrative procedures available in the country.

I wish to thank WIPO for its financial assistance to cover the costs of printing this publication. I wish to thank the trade mark owners for allowing the use of images for visual illustration of the points made in the publication. I also wish to thank Mr. Tan Sin Su, Head of Intellectual Bureau of SMI Association of Malaysia, for the editorial effort and the Intellectual Property Corporation of Malaysia (MyIPO) for reviewing the content of the publication.

Lastly, I hope this booklet will enhance Malaysian SMEs’ knowledge on trade marks and provide the impetus for SMEs to exploit the power of trade marks in their business strategies. On this note, I wish you every success in your business ventures.

Chua Thiam Wee,
National President,
SMI Association of Malaysia

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1. Trade Marks

What is a trade mark?

A trade mark is a sign capable of distinguishing the goods or services produced or provided by one enterprise from those of other enterprises.

In Malaysia, any distinctive words, letters, numerals, devices, brands, headings, tickets, names, signatures, labels or combinations used to distinguish goods or services may be considered a trade mark (See Sections 3(1) and 10(1) of Trade Marks Act 1976). Marks in other than languages are also registrable, provided that a certified translation and transliteration are provided.

- Slogans could be considered as trade marks if they are inherently distinctive or have acquired distinctive characters through use. Slogans consisting of laudatory phrases or merely advertising phrases giving purely promotional information are not registrable.
- Single colour marks are registrable in Malaysia if they can be represented graphically using an internationally recognized colour identification code and the marks have become capable of distinguishing the goods or services of one undertaking from another through very extensive use. However, there is so far no single colour mark being allowed registration in Malaysia.

- Three-dimensional marks, audio marks and smell marks are not registrable as trade marks in Malaysia. Trade Marks Act 1976 is currently being reviewed. It is expected that three-dimensional marks will be registrable under the new revised Trade Mark Act 1976.

Examples

Word:

The logo for 'minox' is written in a bold, lowercase, sans-serif font. The letters are black and have a slightly irregular, hand-drawn appearance.

Registration number: 03013703

Courtesy: MST Stainless Steel Sdn. Bhd.

Logotype:



Registration number: 06005554

Courtesy: J.R. Auto Oil Seals Sdn Bhd.

Combination of letters with logotype:



Registration number: 03004021

Courtesy: Gintell (M) Sdn. Bhd.

What are trade marks for?

The main function of a trade mark is to enable consumers to identify a product (whether a good or a service) of a particular company so as to distinguish it from other identical or similar products provided by competitors. Consumers who are satisfied with a given product are likely to buy or use the product again in the future. For this, they need to be able to distinguish easily between identical or similar products.

By enabling companies to differentiate themselves and their products from those of the competition, trade marks play a pivotal role in the branding and marketing strategies of companies, contributing to the definition of the image, and reputation of the company's products in the eyes of consumers. The image and reputation of a company create trust which is the basis for establishing a loyal clientele and enhancing a company's goodwill. Consumers often develop an emotional attachment to certain trade marks, based on a set of desired qualities or features embodied in the products bearing such trade marks.

Trade marks also provide an incentive for companies to invest in maintaining or improving the quality of their products in order to ensure that products bearing their trade mark have a positive reputation.

The Value of Trade Marks

A carefully selected and nurtured trade mark is a valuable business asset for most companies. For some, it may be the most valuable asset they own. This is because consumers value trade marks, their reputation, their image and a set of desired qualities they associate with the mark, and are willing to pay more for a product bearing a trade mark that they recognize and which meets their expectations. Therefore, the very ownership of a trade mark with a good image and reputation provides a company with a competitive edge.

The estimated value of world's five most valuable trade marks as published in July 2006 by Business Week and Interbrand are:

COCA-COLA	USD 67,000 million
Microsoft	USD 56,926 million
IBM	USD 56,201 million
GE	USD 48,907 million
INTEL	USD 32,319 million

Source: Interbrand web-site

2. Protecting Trade Marks

How can your company protect its trade mark(s)?

In Malaysia, trademark protection can be obtained through registration or through use. In some countries, you can only establish rights in trade marks when you actually register them. To register a trade mark in Malaysia, you need to file the appropriate application form (Form TM5) at the Intellectual Property Corporation of Malaysia (MyIPO) (see Annex IV for contact details).

Is it compulsory to register a company's trade marks?

Registration is not compulsory in Malaysia to establish rights in a mark, nor is it required to begin use of a mark. An unregistered mark may still be protected under the common law action known as "passing-off". However, it is highly advisable to register your trade mark, as registration provides distinct advantages beyond the rights acquired by merely using a mark.

What advantages does registration provide to your company?

- Registration, under the Trade Marks Act 1976, gives you the exclusive right to prevent others from marketing identical or similar products under the same or a confusingly similar product anywhere in the country. In contrast, a passing-off action is limited to the territory where the trade mark is actually being used.
- It makes trade marks easier to enforce,

as it reduces the burden of proof in legal proceedings: (a) the trade mark is presumed to be distinctive; and (2) the owner of a registration is presumed to be the owner of the mark for the goods and services specified in the registration. In contrast, in a passing-off action, the owner of the mark needs to show that the trade mark is distinctive, which is not always easy to prove.

- It puts all concerned on notice of your claim to exclusive rights in the registered mark. Other traders, whether they conduct a search of the Trade Marks Register of MyIPO or not, are deemed to be aware that your trade mark is registered. This may dissuade them from adopting a similar mark to yours.
- A registered trade mark may be more easily licensed to other companies, thus providing an additional source of revenue for your company, or may be more easily the basis for a franchising agreement.
- On occasion, a registered trade mark with a good reputation among consumers may also be used to obtain funding from financing institutions that are increasingly aware of the importance of brands for business success.

Given the value of trade marks and the importance that a trade mark may have in determining the success of a product in the marketplace, it is critical to make sure that it is registered in Malaysia and in the relevant export market(s). Without trade mark registration, your investments in

marketing a product may become wasteful as rival companies may use the same or a confusingly similar trade mark for identical or similar products. If a competitor adopts a similar or identical trade mark, customers could be misled into buying the competitor's product thinking it is your company's product. This could not only decrease your company's profits and confuse your customers, but may also damage the reputation and image of your company, particularly if the rival product is of inferior quality.

Is the registration of the trade name of your company sufficient?

Many people believe that by registering their business and its trade name at the business registry, this name would also be automatically protected as a trade mark. This is a rather common misconception. It is important to understand the difference between trade names and trade marks.

A trade name is the full name of your business, such as: "Gintell (M) Sdn. Bhd." and it identifies your company. It often ends with Sdn. Bhd. or Bhd., which denotes the legal character of the company.

A trade mark, however, is the sign that distinguishes the product(s) of your company. A company may have various trade marks. For instance, Gintell (M) Sdn. Bhd. may sell one of its products as  but another as . Companies may use a specific trade mark to identify all their products, a particular range of products or one specific type of product. Some companies may also use their trade name, or a part of it, as a trade mark and should, in that case, register it as

a trade mark. For instance, Gintell (M) Sdn. Bhd. also uses  as a trade mark.

Registration of a trade mark is done at MyIPO while registration of a trade name is done at the Companies Commission of Malaysia (visit www.ssm.com.my for contact details).

Who is authorized to apply for trade mark registration?

In general, any person who intends to use a trade mark or to have it used by third parties can apply for registration. It can be either an individual or a legal entity.

What are the main reasons for rejecting an application?

While selecting a trade mark it is helpful to know which categories of marks are usually not acceptable for registration. There are two broad grounds for rejection of trade mark applications. These are "absolute grounds" and "relative grounds".

Absolute grounds:

Applications for trade mark registration in Malaysia are usually rejected on "absolute grounds" in the following cases:

- Generic terms. For example, if your company intends to register the trade mark CHAIR to sell chairs, the mark would be rejected since "chair" is the generic term for the product.
- Descriptive terms. These are words that are usually used in trade to describe the product in question. For example, the mark SWEET is likely to be rejected for marketing chocolates as being

descriptive. In fact, it would be considered unfair to give any single chocolate manufacturer exclusivity over the word “sweet” for marketing its products. Similarly, qualitative or laudatory terms such as “RAPID”, “BEST”, “CLASSIC” or “INNOVATIVE” are likely to give rise to similar objections unless they are part of an otherwise distinctive mark. In such cases, it may be necessary to include a disclaimer clarifying that no exclusivity is sought for that particular part of the mark.

- Deceptive trade marks. These are trade marks that are likely to deceive or mislead consumers as to the nature, quality or geographical origin of the product. For example, marketing margarine under a trade mark featuring a COW would probably be rejected, as it would be considered misleading for consumers, who are likely to associate the mark with dairy products (i.e. butter).
- Marks considered to be contrary to public order or morality. Words and illustrations that are considered to violate commonly-accepted norms of morality and religion are generally not allowed to be registered as trade marks.
- Flags, armorial bearings, official hallmarks and emblems of states and international organizations which have been communicated to the International Bureau of WIPO are usually excluded from registration.
- Marks claiming intellectual property rights. These are trade marks which consist of or contain any of the words “Patent”,

“Patented”, “By Royal Letters Patent”, “Registered”, “Registered Design” or “Copyright”.

- Surnames may not as a general rule be registered in Malaysia. In contrast, names represented in a special or particular manner may be registered.
- Geographical names may not as a general rule be registered, but there are some exceptions to the rule.

Two of the most common mistakes of SMEs are that they are inclined to choose trade marks that are descriptive or have direct reference to the character or quality of the goods or services. These applications will face objections under Sections (10)(1)(d) and 10(1)(e) of the Trade Marks Act 1976.

A full list of marks that are subject to statutory restrictions for registration is included in regulations 13, 13A, 14 and 15 of the Trade Marks Regulations 1997 and includes words like “Bunga Raya”, “Seri Paduka Baginda Yang di-Pertuan Agong”, “Ruler of a state”, “ASEAN”, etc.

Relative grounds:

Applications are rejected on “relative grounds” when the trade mark conflicts with prior trade mark rights. Having two identical (or very similar) trade marks for the same type of product could cause confusion among consumers. MyIPO checks for conflicts with existing marks, including unregistered well-known marks, as a regular part of the registration process. In contrast, many other trade mark offices only do so when the trade mark is challenged by a third party after

publication of the trade mark. In either case, if the trade mark is considered to be identical or confusingly similar to an existing one for identical or similar products, it will be rejected or opposed, as the case may be.

What should be kept in mind when selecting or creating a trade mark?

Selecting or creating an appropriate trade mark is a critical step, as it is an important element of the marketing strategy of your business. So what is an appropriate trade mark for your product(s)? Evidently, there are no hard and fast rules. But the following five-point checklist may be useful.

Five Point Checklist for Selecting Your Trade Mark

- Check that your trade mark of choice meets all the legal requirements for registration (see reasons for rejecting applications on pages 8 to 10).
- Do a trade mark search to make sure that it is not identical or confusingly similar to existing trade marks for identical or similar products (see page 13).
- Make sure the trade mark is easy to read, write, spell and remember and is suitable to all types of advertising media.
- Make sure the mark does not have any undesired connotations in your own language or in any of the languages of potential export markets.
- Check that the corresponding domain name (i.e. Internet address) is available for registration. (for more on the relationship between trade marks and domain names see page 20).

While selecting one or more words as your trade mark you should also take into consideration the implications of selecting certain types of words:

- **Coined or “fanciful” words.** These are invented words without any intrinsic or real meaning. Coined words have the advantage of being easy to protect, as they are more likely to be considered inherently distinctive.

Example: Malstar is a registered trade mark of SPY Marketing Sdn. Bhd.

Courtesy: SPY Marketing Sdn. Bhd.

Registration No.: 02008869

- **Ordinary word marks:** These are words that have meanings that have no relation to the products they advertise. While these types of marks will also be easy to protect, they may require heavy advertising to create the association between the mark and the product in the minds of consumers.

Example: The trade mark KANCIL (Registration No.: 02002325) for internet related services.

Registering a Trade Mark - Step by Step

The Applicant

As a first step, you have to send or hand in a duly completed Form TM5, which will include the contact details of the applicant, a graphic illustration of the mark, a description of the goods or services and/the class for which your business wishes to obtain trade mark registration, a duly attested statutory declaration on ownership of the mark and pay the required fees of RM250. A copy of Form TM 5 is included in Annex I. An applicant may also file a trade mark application via MyIPO's web-site at www.myipo.gov.my.

The Trade Mark Office

When MyIPO receives your application it allocates an application number to your application. The following further steps would be taken by MyIPO to register a trade mark:

1. Formal examination: MyIPO examines the application with respect to compliances to formality requirements such as proper filling in of the application form (Form TM5) and the payment of prescribed fee.
2. Substantive examination: MyIPO examines your application to verify whether it complies with all the legal requirements for registration (for instance, whether your marks fall into a category which is excluded from registration on absolute grounds and whether your mark is in conflict with any prior mark on the Trade Marks Register in the relevant or related class(es)). MyIPO will thereafter issue either an acceptance letter (Form TM29) or an objection letter (Form TM70).
3. Publication and opposition: If the examiner accepts your mark or if the objections are overcome, you will receive an acceptance letter inviting you to pay the prescribed publication fee of RM450. On payment of the fee and on provision of the requisite artwork, your mark will be advertised in *Warta Kerajaan* (Government Gazette). Following this, there is a period of two months for anyone who wishes to oppose your registration.
4. Registration: If there is no opposition within the prescribed period, or if an opposition is overcome, your mark will be entered in the Trade Marks Register and a certificate of registration will be issued to you. The initial registration is valid for 10 years from the date of application.
5. Renewal: The mark may be renewed indefinitely by completing a renewal form (Form TM12) and paying the required renewal fee of RM420, but the registration may be canceled entirely for certain goods or services if the trade mark has not been used for a period of three years. Where the renewal form was not filed prior to the expiration of the last registration but was filed within one month from the date of expiration of the last registration, an additional fee of RM630 must be paid accompanied by Form TM 13. In that case, the Registrar will renew the registration without removing the mark from the Register. Once removed, a registration must be restored before it can be renewed, subject to a restoration fee of RM670 as well as a penalty fee being paid.

A flowchart with an outline of the processes involved for registration is included in Annex II.

- **Suggestive marks.** These are marks that hint at one or some of the attributes of the product. The appeal of suggestive marks is that they act as a form of advertising. A slight risk, however, is that some countries may consider a suggestive mark to be too descriptive of the product.

Example: The trade mark RECHARGE (Registration No.: 88000665) for soft drink would hint at the fact that the drink helps recharge your energy. However, some trade mark registries may find the mark too descriptive and thus may not register it. In Malaysia, the applicant would need to adduce evidence that the mark has become capable of distinguishing the goods of the applicant through extensive prior use.

Irrespective of the type of mark you choose, it is important to avoid imitating existing trade marks. A slightly altered competitor's trade mark or a misspelt well-known or famous mark is unlikely to be registered.

Example: EASY WEAR is a registered trade mark for teenage clothing. It would be unwise to try to sell the same or similar products using the trade mark EEZYWARE as it would probably be considered confusingly similar to the existing mark and is unlikely to be registered.

What happens if MyIPO objects to your mark?

You have two months, unless you file a request for an extension of time, to file a response either to convince MyIPO that the objections are not justified, or overcome the objections in some other way such as deleting part of your specification. If the objection is maintained after MyIPO has considered your response, you can apply for a hearing to put forward your case before the Hearing Officer who shall decide on your application. You have further avenue of appealing to the High Court of Malaysia if the outcome of the hearing is not in your favour.

How long does it take to register a trade mark?

The time taken for the registration of a trade mark, from the filing date to the issuance of certificate, is about eighteen months for a smooth application. The time will be longer should MyIPO raise objection to your mark on absolute and/or relative grounds or should your application face opposition. Make sure that you apply for registration of a trade mark well in advance so that its registration is secured in time for its use in the advertising and marketing of the relevant products.

What are the costs associated with trade mark creation, protection and use?

It is important to keep in mind, and properly budget, the costs related to trade mark creation and registration:

- There may be costs associated with the creation of a logo or word to be used as a trade mark, if this task is outsourced.
- There may be costs for conducting a trade mark search (see below).
- There are fees payable to MyIPO on submission of an application and on acceptance of the application for publication. Companies choosing to use a registered trade mark agent to assist in the registration process would face additional costs but would probably save significant time and energy in following the registration process. The fees payable to MyIPO for each application (i.e. per class and per trade mark) are:

Appointment of agent, if applicable (Form TM 1)	RM30
Filing of application (Form TM 5)	RM250
Publication (Form TM 29)	RM450

How can you find out if your chosen trade mark might conflict with other registered trade marks? What is a trade mark search?

Before submitting an application for registering a trade mark, you should ensure that a proper trade mark search has been carried out. MyIPO will object to your trade mark application if someone else has already registered or applied to register a mark which is the same or similar to yours in the way it looks or sounds; and for the same or similar goods or services. A trade mark search can tell you if there are any such identical or similar

marks on the Trade Marks Register. It will help you determine whether you should apply to register your mark in its present form or to modify it or to coin another mark altogether. It also serves to help you avoid trade mark infringement and potential lawsuits.

You can either make a trade mark search yourself or hire the services of a trade mark agent. Either of you can do the search at the search gallery of MyIPO (on payment of an hourly rate). or online (RM5 for each trade mark record printed). Online search is free provided you do not need to view details on any of the trade mark record. The fee for viewing and printing each trade mark record is RM5. For this purpose, you need to deposit a minimum RM 1,000 which can also be utilised for payment of online application filing fee or other prescribed fee. In future, you may be able to pay by credit card on the amount usage instead of having to place an initial deposit of RM 1,000. You should bear in mind that any such trade mark search is only preliminary. It may be difficult to make sure that your trade mark of choice is not “confusingly similar” to existing validly-registered trade marks. This is why the guidance of an experienced trade mark agent, who is familiar with the practice of the trade mark office and court decisions, may be very helpful.

Trade marks are grouped into “classes” according to the goods or services they serve to identify (see the international classification system in Annex III). You may therefore begin by familiarizing yourself with the 45 different trade mark classes.

- A trade mark search gives you an indication of the availability of the mark.
- If it is uncertain if a particular mark is sufficiently distinctive to qualify for registration, it would be advisable to obtain also a preliminary advice from MyIPO. You will have to file Form TM 4 and pay a fee of RM100. Otherwise, if any objections are raised, you will only come

to know of this when the mark is examined by MyIPO, and you will thereafter need to take steps to overcome such objections, thereby delaying registration.

- Even having done a trade mark search, your trade mark can still be rejected, if it is in conflict with an (unregistered) well-known trade mark. For more information on well-known trade marks, see page 15.

A Well-classified System [place in a box]

While filling in your trade mark application form you are required to indicate the goods and/or services for which you wish to register your trade mark and to group them according to classes. These refer to the classes in the trade mark classification system. The trade mark classification system allows for the storage of data on registered trade marks in an orderly manner in relation to the types of goods or services. This makes it easier to retrieve information from trade mark databases. It is critical to register your trade mark in all classes in which you intend to use your trade mark.

Malaysia follows the International Trade mark Classification system (the so-called Nice system for classification of word marks), which has 34 classes for goods and a further 11 for services. More information on the Nice classification system is available in Annex III. See also: www.wipo.int/treaties/en/classification/nice/.

Example:

How are products classified? Let us take an example. If your company is producing knives and forks, then your trade mark application should be made for the corresponding goods in class 8. If, however, you wish to market other kitchen utensils (such as containers, pans or pots) using the same trade mark you will also have to register the mark for the corresponding goods in class 21. In Malaysia you would have to make a separate application for each class of product whereas in some countries you may cover a number of classes with a single application.



Do you need a trade mark agent to file a trade mark application?

MyIPO does not require you to engage the service of a trade mark agent to file an application: you may file the application yourself. However, the services of a trade mark agent skilled in conducting trade mark searches and familiar with the detailed procedure for trade mark registration may be used to save time, ensure that you apply for protection in the appropriate trade mark class(es) and avoid refusal on absolute grounds. The service of a trade mark agent would be useful in cases where your application faced objection from MyIPO or opposition from a third party.

If you apply for trade mark registration abroad you may be required to have a trade mark agent who is resident in the relevant country.

For how long is your registered trade mark protected?

A registered trade mark mark is valid for 10 years from the application date. Registration may be renewed indefinitely for consecutive periods of 10 years provided renewal fees are paid in time. Make sure that someone in your company is made responsible for ensuring timely renewal of trade mark registrations in all countries of continuing interest to your business.

Outsourcing Trade Mark Creation

Designing a trade mark is a creative process. In most countries, a creator automatically owns the copyright over creative or artistic works, such as the artwork of a trade mark. Therefore, when the creation of a trade mark is outsourced, it is usually best to clarify issues of copyright ownership in the original agreement and/or to make sure the copyright over the trade mark is formally assigned to your company.

Is trade mark registration in Malaysia valid internationally?

The legal rights arising out of a trade mark registration are normally limited to the territory to which they pertain; so, ordinarily, valid registration of a trade mark in Malaysia gives you rights only in Malaysia unless your mark is considered to be a well-known mark. (For information on well-known marks see page 17.)

Should you consider protecting your trade mark abroad?

All the main reasons for registering your trade mark in Malaysia also apply to the commercialization of your products in foreign markets. It is, therefore, highly advisable to register your trade mark abroad if you are currently engaged in export operations or intend to do so in the near future. Exporting goods bearing a distinctive trade mark will enable your export products to be recognized in foreign markets, allowing your company to build a reputation and image among foreign consumers that may result in higher profits for your company.

How can you register the trade mark of your company abroad?

If you have registered the trade mark of your company in the country where it is located (home country) but now wish to export or grant a license to use the trade mark in other countries, then it is advisable to register the trade mark abroad. There are three main ways to do so:

The National Route: Your business may apply to the trade mark office of each country in which it is seeking protection by filing the corresponding application in the required language and paying the required fees. As indicated earlier, a country may require you to use the services of a locally-based trade mark agent for this purpose.

The Regional Route: If you wish to apply for protection in countries which are members of a regional trade mark system you may apply for registration, with effect in the territories of all Member countries, by filing an application at the relevant regional office. The regional trade mark offices are:

- The African Regional Industrial Property Office
- The Benelux Trade Mark Office
- The Office for the Harmonization of the Internal Market of the European Union.
- The Organisation Africaine de la Propriété Intellectuelle.

The International Route: The Madrid system (administered by WIPO) allows you to register your trade mark in the more than 70 countries that are party to the system. Malaysia is not a member state of the Madrid system. Should you still wish to make use of the Madrid system, you should consult your trade mark agent on how you might be able to file such an application in a country who is a member state of the Madrid system. This route is only possible if you have a commercial establishment in one of the member states of the Madrid system and your trade mark has been registered or applied for in or with effect in that country.

Advantages of using the Madrid system

The principal advantages of using the Madrid system are that the trade mark owner can register his trade mark in all the countries party to the system by filing:

- a single international application;
- in one language;
- subject to one set of fees and deadlines. Thereafter, the international registration can be maintained and renewed through a single procedure.

You can find more information on international registration of marks on the WIPO website: <http://www.wipo.int/madrid/>. A list of the Member countries of the Madrid system is available in Annex IV.

3. Types of Trade Mark

Trade marks	Marks used to distinguish certain goods or services as those produced or provided by a specific enterprise
Certification marks	Marks used to distinguish goods or services that comply with a set of standards and have been certified by a certifying authority.
Defensive marks	Well-known invented word(s) marks registered in respect of goods or services other than their goods and services but their registration cannot be removed from the Register on grounds of non-use.
Well-known marks	Marks that are considered to be well-known in the market and as a result benefit from stronger protection.

What are certification marks?

Certification marks are given for compliance with defined standards, but are not confined to any membership. Certification marks may be used by anybody who complies with the standards defined by the owner of the certification mark.

An important requirement for certification marks is that the entity which applies for registration is considered “competent to certify” the products concerned.

Example: The SIRIM symbol is the registered trade (certification) mark of SIRIM Bhd. The SIRIM symbol is a quality assurance symbol denoting that the products on which it is applied, complies with applicable quality standard.



Courtesy: SIRIM Bhd

What are well-known marks?

“Well-known marks” are marks that are considered to be well-known by the competent authority of the country where protection for the mark is sought. Well-known marks generally benefit from stronger protection. For example, well-known marks may be protected even if they are not registered (or have not even been used) in Malaysia. In addition, while marks are generally protected against confusingly similar marks only if used for identical or similar products, well-known marks are protected against confusingly similar marks for even dissimilar products, if certain conditions are met. The main purpose of this stronger protection is to prevent companies from free-riding on the reputation of a well-known mark and/or causing damage to its reputation or goodwill.

Example: Let us assume that WONDERCOLA is the famous trade mark of a soft drink belonging to Wondercola Inc. If the trade

mark WONDERCOLA is well-known in Malaysia for soft drinks, it would then benefit from automatic protection in Malaysia, even without registration or use. The protection would also be available for unrelated goods and services. That is to say that if another company decides to market other products, ranging from T-shirts to sunglasses, using the WONDERCOLA mark, it will have to seek the authorization of Wondercola Inc. or risk being sued for violation infringement of trade mark rights.

What are defensive marks?

Where a trade mark has become well-known as regards to any goods or services in respect of which it is registered, the proprietor of the mark could register the mark as a defensive mark in respect of other goods and services. A defensive mark must be an invented word(s) mark and its registration could not be removed from the Register on grounds of non-use. By registering a mark as a defensive mark, the proprietor can, under certain conditions, take infringement action instead of the more uncertain costly and lengthy action for passing-off.

What are series of marks and associated marks?

Several trade marks which resemble each other in material particulars, but differ in respect of one or other of certain criteria set out in subsection (1) of section 24 of Trade Marks Act 1976, may be registered as a series in one registration. However, since a registration must be in a single class, applications for a series registration cannot cover goods or services in more than one class even if they are goods or services of the same description.

The Trade Marks Act 1976 requires trade marks in the same ownership be entered in the Register as associated marks if the marks are identical or are confusingly similar and applied or registered in respect of the same goods/services or goods/services of the same description or of goods closely related to the services.

4. Using Trade Marks

Can you register a trade mark without having used it?

You may apply for registration in Malaysia before you have used the trade mark. But after registration you must ensure that the mark is used. A trade mark that has not been used for a period of three years following registration may be taken off the Register.

TM or ®?

The use of ®, TM, SM or equivalent symbols next to a trade mark is not a requirement and generally provides no further legal protection. Nevertheless, it may be a convenient way of informing others that a given sign is a trade mark, thus warning possible infringers and counterfeiters. The ® symbol is used once the trade mark has been registered, whereas TM denotes that a given sign is a trade mark; SM is sometimes used for service marks.

How should you use trade marks in advertising?

If your mark is registered with a specific design or font, make sure that the trade mark is used exactly as it is registered. Monitor its use closely as it is crucial for the image of your company's products. It is also important to avoid using your trade mark as a verb, a noun or in possessive form. Such usage may lead to vulgarization of your mark. Once this happens, the mark will come to be perceived by consumers as a generic term and it ceases to be a trade mark. Examples of wrong usages include "buy Synova", or "use Octolux". Always use your trade mark as adjectives to the generic name of the

underlying product. For example: "Minox ball valves" or "Air Master spoiler".

Can your company use the same trade mark for different products?

Different trade marks may be used for the different product lines of a company. Depending on its branding strategy, each company will decide whether to use the same trade mark for its products, extending the brand every time a new product is released, or to use a different mark for each product line.

Extending an existing brand to new products enables the new product to benefit from the image and reputation of the mark. However, the use of a new mark, more specific and relevant to the new product, may also prove advantageous and enable the company to target the new product to a specific customer group (e.g. children, teenagers, etc) or to create a specific image for the new product line. Many companies also chose to use a new brand in conjunction with an existing brand (e.g., Soffeel (Registration No.:04005982) and ELIZZER (Registration No.: 04005867) are generally used with L'AFFAIR (Registration No.: 99007636).



Courtesy: Laffair Corporation Sdn. Bhd.

Different companies adopt different strategies. Whatever your choice, you should make sure that your trade mark is registered for all categories of goods and/or services for which it is, or will be, used.

What should be kept in mind when using trade marks on the Internet?

The use of trade marks on the Internet has raised a number of controversial legal problems with no easy or uniform solution. One important problem stems from the fact that trade mark rights are territorial (that is, they are only protected in the country or region where the mark has been registered or used), whereas the reach of the Internet is global. This creates problems when it comes to settling disputes between persons or companies legitimately owning identical or confusingly similar trade marks for identical or similar goods or services in different countries. Legislation in this area is still developing and treatment may differ from one country to another.



What is a domain name and how does it relate to trade marks?

An important problem concerns the conflict between trade marks and domain names. Domain names are Internet addresses, and are commonly used to find websites. For example, the domain name 'wipo.int' is used to locate the WIPO website at www.wipo.int. Over time, domain names have come to constitute business identifiers thus often

coming into conflict with trade marks.

Therefore, it is important that you chose a domain name which is not the trade mark of another company, particularly a well-known trade mark. This is because many national laws, or courts, treat registration of the trade mark of another company or person as a domain name as trade mark infringement, popularly known as cybersquatting. If this happens, then, your business may not only have to transfer or cancel the domain name, but it may also have to pay damages or a heavy fine.

In order to find out whether a particular trade mark is already protected, you can directly contact the national or regional trade mark offices, many of which operate Internet-searchable trade mark databases. A list of such databases is available on WIPO's website at: www.wipo.int/amc/en/trademark/index.html

On the other hand, if the trade mark of your company is being used as a domain name or is being cybersquatted by another individual or company then you may take action to stop such misuse/infringement of the rights of your company. In such a case, one option would be to use WIPO's very popular online administrative procedure for domain name dispute resolution at: <http://www.wipo.int/amc/en/domains/>. This WIPO website includes a model complaint as well as a legal index to the thousands of WIPO domain name cases that have already been decided.

Can you license your trade mark to other companies?

Trade marks can be licensed to other companies. In such cases, the trade mark owner retains ownership and merely agrees to the use of the trade mark by one or more other companies. This is usually done on payment of royalties and involves the consent of the trade mark owner, which is usually specified in a formal licensing agreement. Depending on the nature of the agreement, the licensor often retains some degree of control over the licensee to guarantee that a certain quality is maintained.

In practice, trade mark licenses are frequently granted within broader licensing agreements, for example, franchising agreements or agreements including the licensing of other intellectual property rights such as patents, know-how and some degree of technical assistance for the production of a given product.

What does a franchising agreement have to do with trade marks?

The licensing of a trade mark is central to a franchising agreement. In franchising agreements the degree of control of the trade mark owner over the franchisee is generally greater than is the case for standard trade mark licensing agreements. In the case of franchising, the franchiser allows another person (the franchisee) to use his way of doing business (including trade marks, know-how, customer service, software, shop decoration, etc.) in accordance with a set of prescriptions and in exchange for compensation or royalty.

Example: Secret Receptipe, a lifestyle café chain, has become a household name following its debut in Malaysia since 1997. Secret Receptipe has successfully established its brand name in Malaysia, Singapore, Indonesia and Thailand by virtue of its fine quality cakes, fusion foods and distinctive service. The café has registered an impressive double digit growth for the past 5 years. By way of franchising, Secret Receptipe has expanded to a lifestyle café chain with over 130 café; each providing products of consistent quality. Under the new policy of the company, employees of the company will be given preference in taking up franchising rights in opening up new café under its franchising scheme. Secret Receptipe imparts its knowledge and experience to its franchisees and retains the right to supervise and control local franchises. As a crucial component of the franchising agreement the franchisees will also be authorized and obliged to use the SECRET RECEIPE trade mark.

Courtesy : Secret Receptipe Cakes & Cafe Sdn. Bhd.

Is there any restriction in selling or assigning the trade mark of your company to another company?

It is increasingly possible to sell or assign a trade mark independently from the business that currently owns it. In the case of sale or assignment of a trade mark in Malaysia, you are required to deposit a copy of the

agreement at MyIPO together with a duly executed Form TM 15 and pay the prescribed fee of RM180.

Do you need to register all small modifications to your trade mark?

Many trade marks, including some of the most famous, have slightly changed or evolved over the years in order to modernize the image of a company or adapt to new advertising media. Marks may be changed or adapted, but your company will have to be careful and consult with MyIPO or a competent trade mark agent as to whether a specific change will require the submission of a new application and payment of relevant fees (see page 13 for prescribed fees).



Registration number: 03011045



Registration number: 06007201



Registration number: 07012332

5. Enforcing Trade Marks

What should your business do if its trade mark is being used by others without authorization?

The burden of enforcing a trade mark is mainly on the trade mark owner. It is up to your company as a trade mark owner to identify any infringement and to decide what measures should be taken to enforce trade mark rights.

It is always useful to seek expert advice if you believe that someone is infringing your trade mark. An intellectual property lawyer would be the right person to give you information on the existing options in Malaysia and, presumably, also in neighboring countries to initiate action against counterfeiting and infringement and will provide you with advice on how to enforce your rights.

If you are faced with infringement of your trade mark rights, then you may choose to begin by sending a letter (commonly known as a “cease and desist letter”) to the alleged infringer informing him/her of the possible existence of a conflict. In writing such a letter, the assistance of a trade mark lawyer is recommended.

If your business considers the infringement to be willful and knows the location of the infringing activity, then it may wish to take surprise action by obtaining, with the help of a trade mark lawyer, a Trade Description Order from the Court to conduct a raid without prior notice to the allegedly offending company/person.

A cheaper and very often a faster and more effective alternative in the case of a registered trade mark is to lodge a complaint with the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs (see Annex IV for contact details) on the infringing action. The Enforcement Division has the power to take action on the alleged infringers. The Ministry could bring criminal action against the infringers under the Trade Descriptions Act 1972 as against merely civil action under the Trade Marks Act 1976. The threat of a custodian sentence is always much more effective compared to a legal action for civil damages.

The infringer may be compelled by the judicial authorities to inform you of the identity of persons involved in the production and distribution of the infringing goods or services and their channels of distribution. As an effective deterrent to infringement, the judicial authorities may order, upon your request, that infringing goods and materials be destroyed or disposed of outside the channels of commerce without compensation of any sort.

In order to prevent the importation of counterfeit trade mark goods in Malaysia, you may seek the assistance of the customs authorities at the border, that is, before the counterfeit goods have been distributed in Malaysia. (visit www.customs.gov.my for contact details). You could also make a border measure application to MyIPO by filing Form TM 30. You will be required to pay a fee of RM300 and a deposit as security.

In some instances, an effective way of dealing with infringement is through arbitration or mediation. Arbitration generally has the advantage of being a less formal, shorter and cheaper procedure than court proceedings, and an arbitral award is more easily enforceable internationally. An advantage of mediation is that the parties retain control of the dispute resolution process. As such, it can help to preserve good business relations with another enterprise with which your company may like to collaborate in the future. For more information on arbitration and mediation, see the website of the WIPO Arbitration and Mediation Center at: www.wipo.int/amc/en/center/index.html.

Useful websites for further information:

On other intellectual property issues from a business perspective:
www.wipo.int/sme/

On trade marks generally:

- “About IP” at the WIPO website: www.wipo.int/about-ip/en/
- International Trademark Association: www.inta.org

On practical aspects relating to the registration of marks, see list of websites of national and regional trade mark offices available in Annex I or www.wipo.int/directory.

On the Madrid system for the International Registration of Marks:
www.wipo.int/madrid/en

For a list of on-line trade mark databases maintained by industrial property offices throughout the world: www.wipo.int/amc/en/trademark/index.html/

On the International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement:
www.wipo.int/treaties/en/classification/nice

On the International Classification of the Figurative Elements of Marks under the Vienna Agreement:
www.wipo.int/treaties/en/classification/vienna/

On the conflict between trade marks and domain names:
www.wipo.int/amc/en/domains/
www.icann.org

On alternative dispute resolution procedures for domain names:
www.wipo.int/amc/en/center/wipo-adr.html /

**INTELLECTUAL PROPERTY DIVISION –
TRADE MARKS REGISTRY
TRADE MARKS ACT 1976
TRADE MARKS REGULATIONS 1997
APPLICATION FOR REGISTRATION OF A MARK
(Subregulation 18(1))**

1. Application is hereby made for the registration of a :

Trade mark

Defensive trade mark

Certification trade mark

Note: Please tick the box appropriate to the kind of mark for which registration is desired.

In the case of a trade mark a copy of the oath, sworn statement or statutory declaration by the applicant are true must be attached.

In the case of a certification trade mark a copy of a rules governing its use must be attached In the case of a defensive trade mark a copy of the statement of a case verified by a statutory declaration, must be attached.

In part

of the register.

(Insert A or B as appropriate)

(Five copies of this Form must be enclosed with this application)

2. Representation of mark:

Note: If the space provided is insufficient, the representation may be made on a separate sheet which must be firmly annexed to this form.

If the application is for a series of trade marks under section 24 a representation of each mark in the series must be given.

Representation must be clear and durable and comply with regulation 34.

If the mark is coloured and is to be limited accordingly, please tick this box.

3. List of goods or service:

4. Class

Goods or services falling within more than one international class must be subject of separate applications. Continue on a separate sheet if necessary.

5. Limitations, etc. :

Insert below any conditions, disclaimers or other limitations to which the registration will be subjected to.

If the mark contains or consist of a word or words in non- Roman characters or in a language other than English language or the national language a certified transliteration and translation as appropriate must be provided.

ANNEX I

6. Full name and address of applicant: _____
(Co. No.)

If the applicant resides abroad, an address for services in Malaysia must be provided.

7. Full name and address of agent (if any): _____

If this is the address for service and is not already on record, Form TM1 must be filed with this form

8. Agent's registration no. (if known): _____

9. Agent's own reference: _____

10. International Convention Priority Claim: _____

If priority date is claimed under International Convention or a bilateral arrangement, please give details below and attach the relevant documents.

Convention country:

Priority date claimed:

11. Date of first use of the mark in Malaysia (if any):

Declaration: I/We claim to be the bone fide proprietor of the mark whose registration is applied for and, where the mark has not been used in Malaysia, that the application is made in good faith and that I/We am/are entitled to be registered as the proprietor.

An agent signing this Form on behalf of the applicant must satisfy himself as to the truth of the declaration.

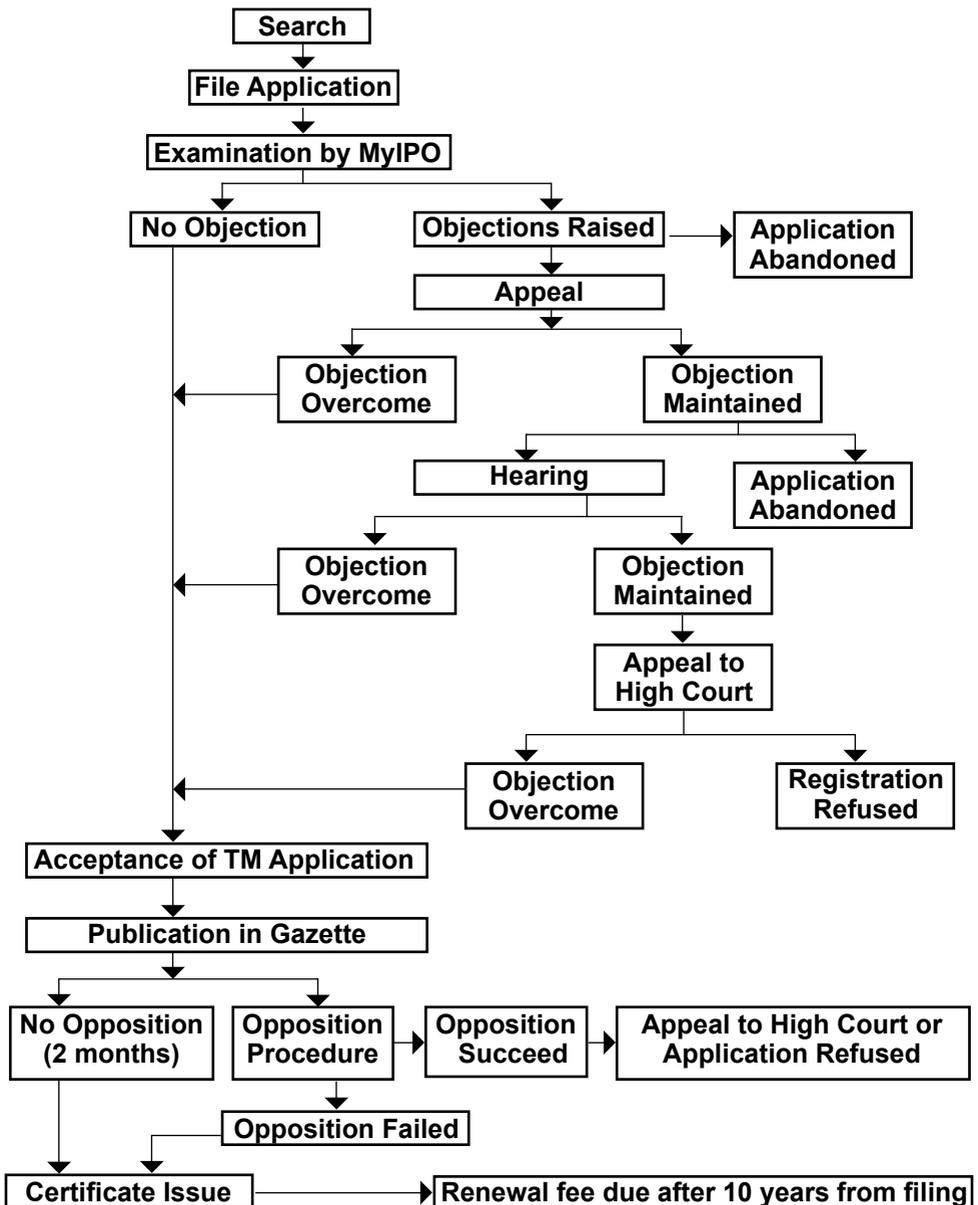
Signature:

Name of signatory (in block letters):

Date :

If the applicant is a partnership, the full names of all the partners must be stated.

Trade Mark Application Procedure In Malaysia



ANNEX III

International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement

Goods

1. Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuffs; tanning substances; adhesives used in industry.
2. Paints, varnishes, lacquers; preservatives against rust and against deterioration of wood; colorants; mordents; raw natural resins; metals in foil and powder form for painters, decorators, printers and artists.
3. Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrice.
4. Industrial oils and greases; lubricants; dust absorbing, wetting and binding compositions; fuels (including motor spirit) and illuminants; candles and wicks for lighting.
5. Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.
6. Common metals and their alloys; metal building materials; transportable buildings of metal; materials of metal for railway tracks; non-electric cables and wires of common metal; ironmongery, small items of metal hardware; pipes and tubes of metal; safes; goods of common metal not included in other classes; ores.
7. Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements other than hand-operated; incubators for eggs.
8. Hand tools and implements (hand-operated); cutlery; side arms; razors.
9. Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signaling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus.
10. Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopedic; orthopedic articles; suture materials.

11. Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes.
12. Vehicles; apparatus for locomotion by land, air or water.
13. Firearms; ammunition and projectiles; explosives; fireworks.
14. Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewelry, precious stones; horological and chronometric instruments.
15. Musical instruments.
16. Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks.
17. Rubber, gutta-percha, gum, asbestos, mica and goods made from these materials and not included in other classes; plastics in extruded form for use in manufacture; packing, stopping and insulating materials; flexible pipes, not of metal.
18. Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.
19. Building materials (non-metallic); non-metallic rigid pipes for building; asphalt, pitch and bitumen; non-metallic transportable buildings; monuments, not of metal.
20. Furniture, mirrors, picture frames; goods (not included in other classes) of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics.
21. Household or kitchen utensils and containers (not of precious metal or coated therewith); combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; steelwool; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes.
22. Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.
23. Yarns and threads, for textile use.
24. Textiles and textile goods, not included in other classes; bed and table covers.
25. Clothing, footwear, headgear.
26. Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers.
27. Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile).

ANNEX III

28. Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees.
29. Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats.
30. Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice.
31. Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt.
32. Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
33. Alcoholic beverages (except beers).
34. Tobacco; smokers' articles; matches.

Services

35. Advertising; business management; business administration; office functions.
36. Insurance; financial affairs; monetary affairs; real estate affairs.
37. Building construction; repair; installation services.
38. Telecommunications.
39. Transport; packaging and storage of goods; travel arrangement.
40. Treatment of materials.
41. Education; providing of training; entertainment; sporting and cultural activities.
42. Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; legal services.
43. Services for providing food and drink; temporary accommodation.
44. Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services.
45. Legal services; security services for the protection of property and individuals; personal and social services rendered by others to meet the needs of individuals.

In February 2008, 82 States were party to the Nice Agreement. They have adopted and applied the Nice Classification for the purposes of the registration of marks. Malaysia is a party to the Nice Agreement.

ANNEX IV

Entities Providing IP-Related Information or Assistance Services

Perbadanan Harta Intelek Malaysia (MyIPO)

Tingkat 32, Menara Dayabumi,
Jalan Sultan Hishamuddin,
50623 Kuala Lumpur.
Tel: 603-2274 8671
Fax:603-22741332
www.myipo.gov.my

SMI Association of Malaysia

18-3, Jalan USJ 9/5T
Subang Business Centre, 47620 Subang Jaya
Selangor Darul Ehsan
Tel:603-80261306 / 80261307
Fax:603-80261309
www.smisme.com

Ministry of Domestic Trade and Consumer Affairs Enforcement Division

Tingkat 24-26, Putra Place
100 Jalan Putra
50622 Kuala Lumpur
Tel:603-40436888, 40437888, 40492431, 40433366
Fax:603-40425615, 40437746, 40425819
www.kpdnhp.gov.my

Ministry of Science, Technology and Innovation

Aras 1-7, Blok C5
Pusat Pentadbiran Kerajaan Persekutuan
62662 Putrajaya
Tel: 03-88858000
Fax: 03-88889070
www.mosti.gov.my

Malaysian Technology Development Corporation (MTDC)

Level 2-5 MIDF Building
195A, Jalan Tun Razak
50400 Kuala Lumpur
Tel:603-21612000
Fax:603-21637570
www.mtdc.com.my

ANNEX IV

Multimedia Development Corporation Sdn Bhd

2360 Persiaran APEC
63000 Cyberjaya
Selangor Darul Ehsan
Tel:603-83153000
Fax:603-83188519
www.mdec.com.my

Small and Medium Industries Development Corporation (SMIDEC)

Aras 20, West Wing, Menara MATRADE
Jalan Khidmat Usaha,
off Jalan Duta,
50480 Kuala Lumpur
Tel:603-6207 6000
Fax:603-6201 6564
E-mail:smidec@smidec.gov.my
www.smidec.gov.my

Matrade

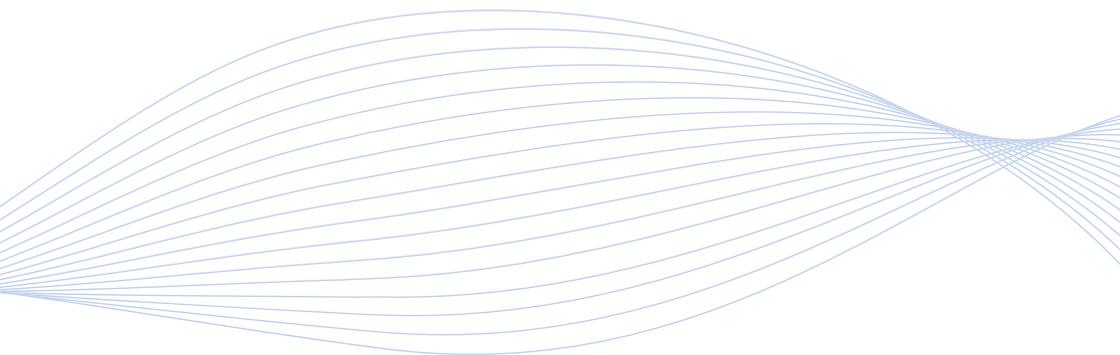
Menara MATRADE
Jalan Khidmat Usaha, off Jalan Duta,
50480 Kuala Lumpur
Tel:603-6207 7077
Fax:603-6203 7037
E-mail:info@matrade.gov.my
www.matrade.gov.my

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