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Key Amendments to the MCMC Content Code on Advertising

Joanne Kong highlights some important points advertisers should take note of in the recently revamped Content Code.



The Malaysian Communications and Multimedia Content Code (“Content Code”) is the main source for industry self-regulation and contains governing standards and best practices for content dissemination within the communications and multimedia industry in Malaysia. The Content Code was recently revamped to address policy gaps on content-related issues that are new within the fast-evolving industry and was registered on 30 May 2022.

This article seeks to cover key amendments in relation to advertisements disseminated through electronic mediums which include network, internet, online and digital platforms.

1 INTRODUCTION OF NEW DEFINITIONS

For clarification and reference, the Content Code includes various new definitions. Those more relevant to the advertising industry include without limitation the following terms:

- (a) Corporate Social Responsibility (CSR)
- (b) Digital Media
- (c) Influencer
- (d) Virtual Influencer
- (e) Marketing Communications
- (f) Online Marketplace
- (g) Online Marketplace Operator
- (h) Public Service Announcement (PSA)
- (i) Social Media

2 REDEFINITION OF 'INDECENT CONTENT'

Previous versions of the Content Code prohibited the portrayal of nudity and sex under any circumstances but under the revamped version, non-sexual content nudity based on art (e.g. travelogues with visuals of paintings and sculptures such as Renaissance paintings and Greek statues), information (e.g. programs on sex education) and/or sciences (e.g. programs on human biology) are allowed provided such content is not excessive or explicit in nature (i.e. not too prolonged, close up or gratuitous).

3 RAISE OF STANDARDS

To ensure that the self-regulation standards are constructive and meet the expectations of consumers, the standard of advertisements have been raised from 'reliable standards' to 'high standards'. In line with this, stricter standards for claims have been imposed on advertisers to hold ready documentary substantiation to enhance accountability for claims, testimonials and endorsements.

4 DEPICTION OF PRICES

Additional requirements have been included in addition to previous general provisions. Prices of products and services must now be shown as all-in or final prices. For example, flight prices must include all compulsory charges such as sales and service tax, airport tax, airport fee, destination airport taxes etc. If such charges cannot be calculated in advance, this must be clearly stated and information on how they will be calculated must be included. Relevant to Buy Now, Pay Later schemes, any quotation of instalment costs must clearly state the total price and the instalment frequency as the cost of the individual instalments.



5 AVAILABILITY OF PRODUCTS

Switch selling techniques are specifically prohibited in that advertisers shall not market cheap or unavailable products to entice consumers into buying higher-priced or different items. Advertisements shall also not make any false claims that the advertiser is about to stop trading or move premises to deprive consumers of the time and opportunity to make an informed choice.

6 DELETION OF UNACCEPTABLE PRODUCTS/SERVICES LIST

The previous list of unacceptable products/services which covered various items has now been deleted and replaced by catch-all provisions that advertisements cannot contain anything illegal or that might incite anyone to break the law, as well as anything that contravenes the ethical code of recognised professional bodies in Malaysia.

7 INTRODUCTION OF INFLUENCER MARKETING PROVISIONS

To cater to the growing popularity of influencer marketing and prevent consumers from being misled, advertisements which include the involvement of third parties such as influencers under a commercial arrangement must be clearly disclosed as being done in exchange for payment in cash or some other reciprocal arrangement. Such disclosure should be placed in the endorsement content with clear labelling such as the terms 'Advertisement', 'Advertisement Feature', 'Ad', 'Sponsored' etc. Vague or confusing terms such as 'Sp', 'Spon' and 'Collab' as well as standalone terms such as 'Thanks' and 'Ambassador' should be avoided. Disclosures in videos are required to be placed in the video itself instead of merely in the description while disclosures in live streams should be repeated periodically. If virtual influencers are used, this must be disclosed to prevent consumers being misled into thinking that they are interacting with real human beings.

8 PAID-FOR-SPACE ADS

Paid-for-space, material or programming in the style of normal editorial, material or programming should be advertised in a way which would not be mistaken as normal editorial, material or programming. Paid-for-space ads in news must include disclaimers or notifications through pop-up or push notifications, crawlers or other clear ways to indicate that the segment is paid.

9 ADVERTISEMENT OF INTOXICATING LIQUOR

In order to level the playing field of alcohol advertising, advertisements on intoxicating liquor are now allowed on electronic mediums with the exception of TV, radio and digital out-of-home (DOOH) advertising. Such advertisements are however subject to strict requirements such as those relating to governing age, prohibition for Muslims and the inclusion of responsible drinking messages.

10 USE OF RELIGION IN ADVERTISEMENTS

It is provided that the use of religion in any form of advertising is generally prohibited to preserve the sanctity and sensitivities of religion which shall not be exploited for commercial gain or have a tendency to create fear or disharmony among consumers.

11 FINANCIAL PRODUCTS AND SERVICES

Provisions have now been included to ensure that advertisements in relation to financial products and services comply with the relevant laws i.e. Financial Services Act 2013, Islamic Financial Services Act 2013, Money Services Business Act 2011 and all other relevant legislations, rules, guidelines and regulations. Advertisers dealing with securities must comply with the Capital Market and Services Act 2012, Division 3 (Advertising Guidelines) of the Prospectus Guidelines.

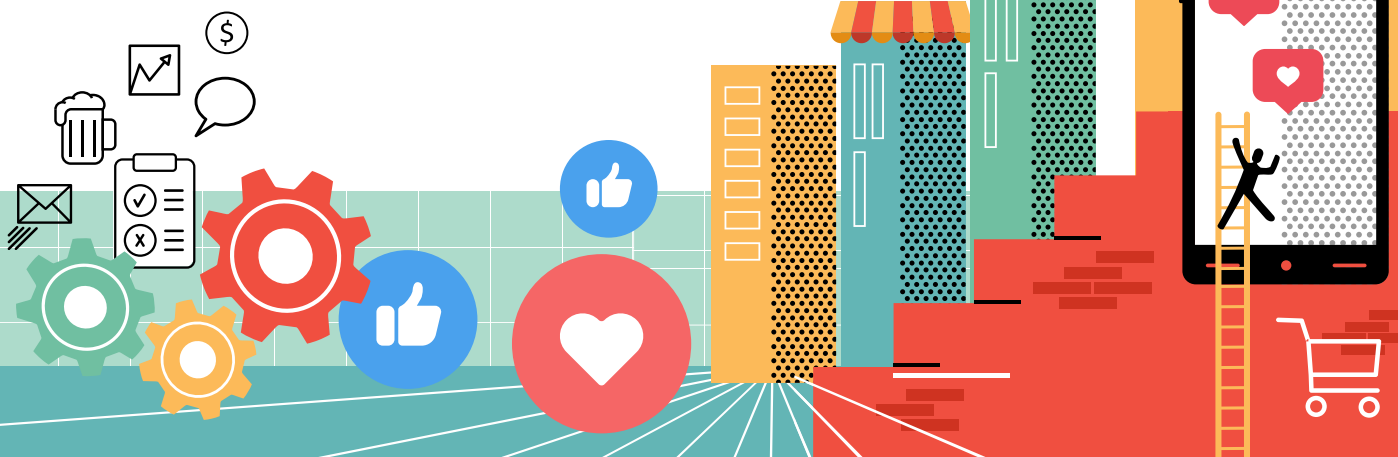
12 ADVERTISEMENTS BY LICENSED GAMBLING OR BETTING COMPANY

Licensed gambling or betting companies which were previously prohibited from all advertising under the Content Code are now allowed to do so under limited circumstances subject to compliance with the Common Gaming Houses Act 1953, Betting Act 1953 and other relevant legislation, rules, guidelines and regulations. Such companies are now allowed to issue Corporate Social Responsibility (CSR) and Public Service Announcement (PSA) messages subject to various specific requirements which include without limitation that such advertising must be done by a separate charitable arm different to the parent company. To ensure compliance, the Content Code provides extensive guidance in the form of various illustrations and examples.

In the event a gambling or betting company sponsors an event held in Malaysia, it is allowed to promote the event itself but cannot directly advertise its gambling and betting products or services. In this regard, the company can only use the event's logo and/or charitable arm logo which likewise must be different from its parent company.

This article only highlights the key amendments to the Content Code briefly and there may be other specific requirements advertisers should also take note of. For more information in relation to our media and advertising practice, please reach out to our team.

Joanne is a Partner at Wong Jin Nee & Teo. Her practice predominantly focuses on trademark prosecution, media and advertising clearance, and other compliance matters.





How to Choose a **Good Trademark**

Joyce Tan highlights the basics of selecting a strong trademark.

A good trademark identifies and distinguishes the source of a company’s product or service from those of competitors and helps a brand to stand out in the marketplace. On the other hand, a poor trademark will blunt marketing efforts and may not be eligible for protection. Selecting a strong and defensible trademark is thus important in building brand equity.

Here are some guidelines on what to consider in choosing a good trademark:

1 CONSIDER FANCIFUL OR ARBITRARY MARKS

The goal is to select a trademark which is as unique and distinctive as possible since the strength of a trademark depends on its distinctiveness. The more unique or distinctive a mark is, the higher the chances of registration as well as protection from third parties.

The strongest type of mark is a fanciful mark, that is, a coined or invented mark that does not have any meaning or exist in any language. Such a mark offers greatest protection since the use of the same or similar mark would strongly suggest deliberate copying or imitation. Examples of fanciful marks include KODAK for photography films, EPSON for printers, PEPSI for carbonated drinks and ADIDAS for clothing.

After fanciful marks, arbitrary marks are the next in terms of strength. Arbitrary marks consist of ordinary words but do not refer to the goods or services of interest. Examples of such marks are APPLE for computers and smart devices, CAMEL for cigarettes, VISA for financial services and DOVE for shampoo and body wash.

2 AVOID DESCRIPTIVE OR GENERIC MARKS

Descriptive or generic marks that merely describe the nature, quality or other characteristics of the products or services of interest are not registrable. This is as the registration of words which are commonly used in an industry would unfairly prevent interested parties from using such words to describe their own product or service. For example, while APPLE is acceptable for computers and smart devices as mentioned above, it is not registrable for apples since such term describes the actual goods. The phrase COLD & CREAMY for ice cream is also unlikely to be registrable as the phrase is a common phrase which describes the attributes of the product and other ice cream producers are also likely to use such phrase for their products.

Laudatory words such as “best”, “super”, “good” or “cheap” also fall within the category of descriptive marks and are usually not registrable.

3 WANT TO CONVEY AN IDEA WITHOUT BEING TOTALLY UNREGISTABLE? CONSIDER SUGGESTIVE MARKS

Suggestive marks are marks which imply or suggest the nature of the product or service but do not directly describe them. Examples include NETFLIX for entertainment services and COPPERTONE for sunscreen. While suggestive marks are popular amongst brand owners since less detail is needed to explain the product or service, it would still be best if a mark is totally irrelevant to the product or service since suggestive marks may still receive provisional refusals in Malaysia on grounds of descriptiveness.

4 AVOID MARKS THAT WILL CAUSE CONFUSION

Since the function of a trademark is to distinguish one trader from another, marks which are identical or confusingly similar to an earlier trademark are not registrable since they will cause the consuming public to be confused or mistaken about the source of a product or service. It is thus important to conduct pre-filing clearance searches to identify potential conflicting earlier marks and manage the risks of trademark infringement.

5 AVOID ELEMENTS THAT CANNOT BE REGISTERED

There are various elements which are not allowed to be included under trademark laws. Amongst others, marks which are contrary to law, public interest or morality such as marks consisting of profanity are prohibited from being registered. Some other examples include the prohibition of national emblems such as the national flower and specific international symbols such as the Red Crescent and Geneva Cross.

Trademarks undeniably remain valuable assets to a brand in the long run and a good trademark will no doubt increase the perceived value of a product or service. It is therefore crucial to invest in a strong trademark for better marketing positioning and to avoid wasting resources in pursuing an unregistrable trademark. For tailored advice on conceptualising a brand, please get in touch with our trademark professionals.

Joyce is an Associate at Wong Jin Nee & Teo. She is focused on trademark prosecution and has vast experience in worldwide trademark coordination.



AI Creations and Issues in IP Protection

Pua Siau Kee and Marcus Yau delve into the issues concerning the inventorship and authorship of IP conceived by artificial intelligence.

Professor at the University of Oxford, Nick Bostrom once said that artificial intelligence (“AI”) would be the last invention humans will ever need to make. Take for example the AI developed by British research company DeepMind Technologies - AlphaFold2 - an AI designed to determine a protein’s 3D shape or folding sequence from its amino-acid sequence for scientific research which went on to produce protein folding predictions that would take scientists years to produce.

In light of AI creations which require minimal input from its human counterpart, intellectual property laws would need to evolve to address the various issues brought about by the advent of AI, particularly, who should be the inventor (in relation to patents) or author (in relation to copyright) of the IP behind such creations?



Patents



POSITION IN OTHER JURISDICTIONS

Stephen L. Thaler, the creator of the AI, 'DABUS' (being the acronym for Device for the Autonomous Bootstrapping of Unified Sentence) claimed that DABUS had independently invented an innovative food container and devices and methods for attracting enhanced attention. Thaler had attempted to patent the inventions indicating DABUS as the inventor. However, Thaler's applications were rejected by, among others, the United States Patent and Trademark Office ("USPTO"), the European Patent Office ("EPO") and the Australian Patent Office ("APO") on the basis that the AI is not a natural person within the meaning of the respective laws and therefore cannot be registered as the inventor of a patent. While the same invention was accepted by the South African IP Office, it is worth noting that the patent system in South Africa is a depository system whereby substantive examination is not conducted. It therefore remains to be seen whether the patent will be challenged and invalidated there.

THE POSITION IN MALAYSIA

The issue has yet to be tested in Malaysia in the context of the Patents Act 1983 ("PA 1983"). That said, the same concern on the requirement for the inventor to be a "natural person" will likely come into question given that the PA 1983 defines an "invention" as "an idea of an inventor which permits in practice the solution to a specific problem in the field of technology that may relate to a product or process". However, it does not have a definition for "inventor".

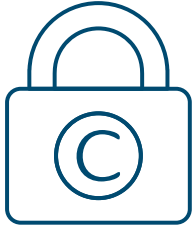
The right to apply for a patent as stated in Section 18 of the PA 1983 provides that any person may make an application for a patent either alone or jointly with another (person) and that subject to any contrary provision of the PA 1983, the rights to the patent shall belong to the inventor.

The Patents Regulations 1986 ("PR 1986") which supplement the legislative function of the PA 1983, made numerous references to the words "he" and "him" to address the information to be furnished

by the inventor. For example, Regulation 6 of the PR 1986 provides that if an inventor does not wish to be named in a patent, "he" may provide the Intellectual Property Corporation of Malaysia ("MyIPO") with a written declaration signed by "him" indicating such decision. Reading such provisions in the PA 1983 and PR 1986 together, it appears that the existing patent laws in Malaysia impliedly require the inventor to be a natural person.

While proponents for AI inventors would argue that Regulation 9 of the PR 1986 - which provides that the nationality of applicants which are not a natural person shall be the state it is constituted - seems to suggest that there is room for AI inventors to be legally recognised as an inventor within the PA 1983, it must be pointed out that the application of Regulation 9 is only confined to corporations or establishments and not AI inventors.

Copyright



POSITION IN OTHER JURISDICTIONS

On copyright, AIs potentially play the role of a tool in the creative process, like how the Google Pixel smartphones' image processing or Huawei smartphones' beauty mode edits or touches up a photo after it is taken. The authorship of such photo would usually be attributed to the person taking the photo. However, this assumption is now placed into question with the involvement of AI. Notably, Thaler has also tested the issue of authorship in the US by indicating an AI as the author of a two-dimensional artwork titled 'A Recent Entrance into Paradise' which was autonomously created by the AI but was denied copyright registration since the work was not created by a human being, a decision later re-affirmed by the Copyright Review Board of the US Copyright Office in early 2022. Thaler has since sued the US Copyright Office in a bid to overturn its decision.

THE POSITION IN MALAYSIA

While there has been no known instance of the law being tested for works produced by AI, we need not look too far to see that the Copyright Act 1987 ("CA 1987") also houses similar, exclusionary provisions which may disallow AIs from being recognised as the author of copyrighted works and disqualify such works from copyright protection.

Section 26 of the CA 1987 provides that the first ownership of a copyright shall generally vest in the author, barring any other situations such as (among others) where the work was commissioned by a third party or the author is the employee.

Section 3 of the CA 1987 defines an "author" in relation to the type of work involved. For literary, musical, or artistic works, the terms "writer", "composer" and "artist" are respectively used, whereas in relation to photographs, films, sound recordings, or broadcasts, the author generally refers to the "person" who made the arrangements for the creation of such works.

It should be noted that the Malaysian courts had on several occasions decided that a legal entity can be the author for sound recordings and broadcasts. Particularly, the court has in *Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552 held that the author of a sound recording was a sound recording company which made arrangements for the recording of the songs

referred to in the works. Further, in *MediaCorp News Pte Ltd. & Ors v MediaBanc (Johor Bharu) Sdn Bhd & Ors* [2010] 6 MLJ 657, it was held that the author of a broadcast could either be the person or corporate entity transmitting the program that was responsible for the selection of the contents of the program.

That said, there are indications that AI may not fit into the definition of "author" under Malaysian copyright laws. For literary, musical, or artistic works, it is rather certain that the existing legislation only provides for an author who is a natural person, given the way "author" is defined for these types of works. Further, the computation of the protection period for copyright which is based on the life of the author has little to no room to address the "lifeless" state of AIs.

Works created by AIs are also unlikely to qualify for copyright protection in Malaysia in view of Section 10 of the CA 1987 which requires the author of the work to be, at the time the work is made, a qualified person. The term "qualified person" in the CA 1987 (aside from explicitly stating the word "person") is defined to mean either an individual who is a Malaysian citizen or a body corporate established in Malaysia. Thus, AIs clearly would not fall within the definition of "qualified person" and will accordingly fail to qualify for copyright protection in Malaysia.

Development and Takeways

Authorities in foreign jurisdictions such as the UK Government has since considered if changes are required to the local intellectual property protection framework regarding the interplay between intellectual property rights and AI. On 28 June 2022, the UK Government has published its consultation outcome on, among others, how AI should be dealt with in the patent and copyright regimes. Taking into account the current state of AI, the UK Government has determined that it has no present plans to introduce changes to the UK patent laws concerning the AI-devised inventions, as well as to the copyright laws relating to computer-generated works without a human author. The UK Government has however indicated that it will keep these areas of law under review and will take appropriate action when intervention is necessary.

As the world has yet to discover the actual limits of AI, it remains to be seen where AI stands in terms of the eyes of the law. It is currently far from clear whether Malaysian laws should be reformed with provisions to address AI-devised inventions and works, and whether, for example, by conferring AI with legal personality, it will address the issues of IP inventorship and authorship correctly. Till then, it appears that the current landscape of IP laws will generally require a natural person to be the inventor or author in place of AI in relation to inventions and copyrighted works.

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Marcus is an Associate at Wong Jin Nee & Teo. His practice predominantly focuses on brand protection and enforcement, licensing and franchising, as well as advertising compliance work.

