This update highlights some key commercial and intellectual property developments across the UK, European Union, Mainland China, Hong Kong and the United States.

UK and European Union

Reforms to the Community Trade Mark framework

On 23 March 2016, a new EU Trade Mark Regulation came into force. The Regulation reforms the Community Trade Mark regime. For example, there are some terminology changes. The Office for Harmonization in the Internal Market (OHIM) will be re-established as the 'EU Intellectual Property Office' and Community Trade Marks (CTMs) will now be known as 'EU Trade Marks'.

One impact of the reforms concerns the scope of the goods/services covered by existing CTMs. Where a CTM uses a class heading from the Nice Classification, that CTM will now be deemed to cover only those goods/services that fall within a 'literal interpretation' of the class heading. Prior to the new Regulation, use of a class heading would mean that the CTM would be deemed to cover all of the goods/services in the alphabetical list of goods/services relevant to the class covered. The impact could be that the protection afforded by some CTMs will be limited or potentially even ineffective as the CTM may no longer cover the goods/services that it did previously.

As part of the EU trade mark reforms, owners of CTMs applied for before 22 June 2012 (or International Registrations designated or subsequently designated to the EU before 22 June 2012), with a class heading are being given an opportunity to rectify their registrations. They will be able to add specific goods/services from the alphabetical lists corresponding to the classes within which the CTM is registered to reflect the goods/services actually provided under the trade mark. This will define the scope of the mark and ensure that the CTM continues to provide effective trade mark protection. There is no fee for doing this but there is a time-limited window of between 23 March and 24 September 2016.

New framework for transatlantic data flows agreed

After two years of negotiation, the European Commission and the US Government have agreed upon a new transatlantic data flow framework to replace the 'Safe Harbor' program, the legal basis for which was invalidated by the European Court of Justice in October 2015. This is known as the EU-US Privacy Shield. The United States and the European Union have released a package of EU-US Privacy Shield materials which flesh out the agreed framework and set out the Privacy Shield Principles. In order to rely on the Privacy Shield to effect transfers of personal data from the EU, an organisation "must self-certify its adherence to the [Privacy Shield] Principles to the US Commerce Department or its designee".

Before organisations can rely on the Privacy Shield, a number of steps remain to be implemented, including submission of the package to the Article 29 Working Party (comprising national data protection authorities) for an opinion (which is likely by the end of March) and discussion with Member States and the European Data Protection Supervisor. These stakeholders may have concerns about the substance and enforceability of the package. Ultimately, the European Commission will need to formally adopt an adequacy decision before it takes effect. Even then, the Privacy Shield may be challenged before the European Court of Justice, as Safe Harbor was last year. It is difficult, therefore, to predict when the approval process will be complete, and organisations can rely on the Privacy Shield. Until such time, consent, model contract clauses and binding corporate rules remain the only viable options for effecting data flows to the US.

New compliance requirement under the Modern Slavery Act 2015

A new piece of compliance legislation for commercial organisations, the Modern Slavery Act 2015, is now in force. Section 54 of the Act requires commercial organisations carrying on business in the UK and with a global turnover of £36 million or above to prepare a 'slavery and human trafficking statement' each financial year setting out the steps it has taken in that year to ensure that slavery or human trafficking has not taken place in its supply chains or in any part of its own business. The requirement to provide this statement applies to organisations with a financial year ending on or after 31 March 2016. The statement must be signed by a director and approved by the Board before being published in a prominent position on the organisation's website or otherwise supplied to anyone who requests a copy. Failure to provide a statement is likely to result in damage to the organisation's reputation. In addition, the Secretary of State is empowered to seek an injunction against a non-compliant organisation ordering it to produce the statement. Failure to comply with an injunction is contempt of court for which the sanction is an unlimited fine.

The objective of the Act is to ensure transparency around the activities of large organisations and to create a level playing field between those organisations adopting ethical business practices and those that are not. The Home Office has produced guidance for organisations on their obligations under s54 of the Act.

For more information on any of the items included for the UK or EU, please feel free to call Alastair Purssell.

China

Public opinions sought for Anti-Unfair Competition Law (revised draft for review)

The State Administration for Industry and Commerce has recently released the revised draft of Anti-Unfair Competition Law asking for public opinions by 25 March 2016. Compared to the existing version, the amendment is more specific and strict on the unfair trading practices conducted by companies. The draft specifies that a business operator shall not leverage its comparatively dominant position to conduct any of the following unfair trading practices: (i) limit the person with whom the other side of the transaction establishes a transactional relationship, without good reason; (ii) limit the other side of the transaction to purchase the designated commodities, without good reason; (iii) limit the transaction conditions relevant to the other side of the transaction, without good reason; (iv) overcharge or make unreasonable requests to the other side of the transaction to provide additional economic benefits; and (v) attach other unreasonable conditions.

Public opinions sought for Guidelines for Application of Lenient Treatment Rules in Horizontal Monopoly Agreement Cases ("Guidelines 1") and Guidelines for Operator Commitment in Anti-Monopoly Cases ("Guidelines 2")

Under Guidelines 1, an operator involved in a monopoly agreement may apply to the competent anti-monopoly law enforcement agency under the State Council for lenient treatment before any measure specified under Article 39 of the Anti-Monopoly Law is taken by the agency. Under Guidelines 2, once a law enforcement agency holds that a suspected monopoly constitutes a monopoly after investigation, the agency shall make a legitimated decision on punishment and will no longer accept any commitment made by the operator.

Public opinions sought for three patent related documents

The State Intellectual Property Office has issued the Guidelines for the Determination of Patent Infringements (draft for review), the Guidelines for the Rules of Evidence on Patent-related Administrative Law Enforcement (draft for review) and the Guidelines for Administrative Mediation of Other Patent Disputes (draft for review) asking for public opinions by 5 April 2016. The Guidelines for the Determination of Patent Infringements expressly identify actions that will not infringe patent rights and actions that would be defined as joint infringement. The Guidelines also provide several examples to help with understanding the provisions. It is likely that these guidelines will come into force in 2016.

Measure for the Supervision and Administration of the Quality of Fiber Products coming into force on 31 March 2016

On 3 February 2016, the General Administration of Quality Supervision, Inspection and Quarantine promulgated the Measures for the Supervision and Administration of the Quality of Fiber Products, which will become effective on 31 March 2016, replacing Administrative Measure for the Quality Supervision of Wadding Fiber Products promulgated in 2006. It is important for companies to ensure that the quality of their fiber products meets the requirements. One of the requirements is that the manufacturer of fiber products should keep records on raw materials and the records should be maintained for at least two years.

Public opinions sought for Guidelines on Anti-Monopoly Law Enforcement against IPR Abuse

In February, The State Administration for Industry and Commerce issued the Guidelines on the Anti-Monopoly Law Enforcement in the Abuse of Intellectual Property Rights (7th draft of the State Administration for Industry and Commerce) asking for public opinions. The guidelines aim to further clarify the distinction between abuse of intellectual property rights affecting regular competition and proper use of IPR, in response to the Qualcomm case in 2015. The completed version will come out in early 2016.

Ministry of Environmental Protection is working on implementing rules for the Action Plan for Water Pollution Prevention

Water pollution, like air pollution, has been recognised as an important issue in China. Last year the State Council issued the Action Plan for Water Pollution Prevention and now the Ministry of Environmental Protection is drafting the implementing rules of the Plan, which are expected to come out in early 2016. One of the objectives for the Action Plan is to close all the manufacturing projects that are in conflict with the requirements for environmental protection and Ministry of Environment Protection is in charge of this objective.

For more information on any of the items included for Mainland China, please feel free to call Nicholas Chan.

Hong Kong

Licensing and notification requirements

In Hong Kong, under the Import and Export Ordinance and its subsidiary legislation, all textiles imports from and exports to the Mainland of China, and textiles exports to the USA, unless exempted, must be covered by consignment-specific textiles licences or notifications lodged by registered traders under the Textiles Trader Registration Scheme ("TTRS"). In addition, manufacturers producing cut-and-sewn garments in Hong Kong for export to the USA are required to lodge a Production Notification ("PN").

However, having regard to developments in the global textiles trading environment, the

Trade and Industry Department dispensed with these textiles control arrangements as from 21 November 2014: (1) to cease the licensing and TTRS notification requirements for all textiles imports and exports; and (2) to cease the PN requirement for all cut-and-sewn garments.

In other words, from 21 November 2014, all textiles imported to or exported from Hong Kong do not require any textiles licence. Traders registered under TTRS do not need to lodge notifications to cover their textiles shipments. Also, manufacturers are not required to lodge PN for any cut-and-sewn garments manufactured in Hong Kong. More information can be found in trade circulars from the Trade and Industry Department dated June 2014 and October 2014

Textiles Trader Registration Scheme

Notwithstanding the cessation of textiles import and export licensing requirements (see above), the Trade and Industry Department continues to provide the registration service under TTRS.

TTRS is a voluntary registration scheme provided for under the Import and Export (General) Regulations, Chapter 60 of the Laws of Hong Kong, subsidiary legislation A of the Laws of Hong Kong. Starting from 21 November 2014, companies with a valid Business Registration in Hong Kong, and which are importing textiles from the Mainland of China or exporting textiles to the Mainland of China or the USA, are eligible to apply for registration under the TTRS.

Under section 20X of the Legislative Council Ordinance, Chapter 542 of the Laws of Hong Kong, traders who have been registered under the TTRS for a period of 12 months immediately before making the application for registration as an elector, and are carrying on business as textiles traders, are eligible to be registered as electors of the Textiles & Garment functional constituency.

Competition law issues

The Competition Ordinance, Chapter 619 of the Laws of Hong Kong, ("CO") came into full commencement on 14 December 2015. The key prohibitions take the form of two "Conduct Rules" of cross-sector application. The First Conduct Rule prohibits agreements and concerted practices (that is, cooperation arrangements between parties falling short of an 'agreement' as such) that have the object or effect of restricting competition in Hong Kong. The Second Conduct Rule prohibits a business with substantial market power from abusing that power by engaging in conduct that has the object or effect of restricting competition in Hong Kong.

Various exclusions and exemptions are provided for in the CO. For example, immunity from the Conduct Rules can be granted to an agreement or conduct that: (1) enhances economic efficiency (subject to satisfaction of prescribed criteria); (2) is performed by an undertaking entrusted with the operation of services of general economic interest; or (3) is made in compliance with a legal requirement.

This will impact on all organisations conducting business in Hong Kong.

For more information on any of the items included for Hong Kong, please feel free to call Nicholas Chan.

United States

Trade Enforcement and Trade Facilitation Act (Federal Regulation)

The Trade Facilitation and Trade Enforcement Act of 2015, H.B. 644, was signed into law on February 24, 2016. The Act may have far-reaching impacts on U.S. companies that use foreign suppliers. The Act allows the government to confiscate or turn away items being imported that it reasonably suspects were made using forced or child labor. The Act also requires Customs and Border Protection to file an annual report with

Congress, describing its enforcement efforts each year.
Under the Trade Facilitation and Trade Enforcement Act, companies will need to determine the true origin of their critical supplies and components. It may be necessary to review supplier codes of conduct, and revise them if necessary, to ensure that needed goods will not be rejected at Customs. Companies will need to work with their foreign suppliers to ensure they can show that the products at issue are not made using forced or child labor. Audit and verification programs can be established to satisfy this inquiry, however any such programs must be shown to be valid and robust – particularly for at-risk products. More information is available here.

Ambiguous Terms for Maintenance Fee (Federal 4th Cir. Case)

North Carolina Farm Bureau Mut. Ins. Co. v. Clear Technology, Inc., 601 Fed. Appx. 181 (4th Cir. 2015).

This case concerned conflicting terms regarding a maintenance fee found in a Master Agreement and a Purchase Order. The Purchase Order was subject to, and incorporated, the terms of the Master Agreement. The Master Agreement incorporated any subsequent purchase orders. The disputed term in this case appeared on its face to be a recurring license fee, which did not fit into either of the fee categories set out in Master Agreement. The inconsistency between the fees described in the Master Agreement and those in the Purchase Order rendered the maintenance fee term susceptible to more than one interpretation. It was unclear whether the fee was for optional maintenance or to maintain the license. The Court determined that the fee provision was ambiguous. As a result, it may be advisable to examine any purchase orders to ensure fee terms do not conflict.

Business Method Patents (Federal USPTO case)

OIP Technologies, Inc. v. Amazon.com, Inc., 788 F.3d 1359 (Fed. Cir. 2015).

This case concerned the infringement of a patent concerning a computer-implemented method for pricing a product for sale. The Court determined that the patent involved no more than an abstract idea coupled with routine data-gathering steps and conventional computer activity, not constituting patentable subject matter. The infringement claims were directed to the concept of offer-based price optimization. This concept of offer-based pricing was similar to other fundamental economic concepts found to be abstract ideas by the Supreme Court and this court. The fact that the claims did not pre-empt all price optimization or may be limited to price optimization in the e-commerce setting did not make them any less abstract. At best, the claims described the automation of the fundamental economic concept of offer-based price optimization through the use of generic-computer functions. Relying on a computer to perform routine tasks more quickly or more accurately was insufficient to render a claim patent eligible. This ruling will be relevant if patent protection for any computer-implemented method involving data gathering is sought.

For more information on any of the items included for the US, please feel free to call Huu Nguyen or Sarah Rathke.