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A B S T R A C T

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This column provides a country by country analysis of the latest legal developments, cases and issues relevant to the IT, media and telecommunications' industries in key jurisdictions across the Asia Pacific region. The articles appearing in this column are intended to serve as 'alerts' and are not submitted as detailed analyses of cases or legal developments.

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1. Hong Kong

1.1. Facebook seeking an injunction to prevent online games promoter from using the Facebook website

On 28 February 2014, Facebook commenced legal proceedings against two individuals and MiniMax Game Entertainment Limited, generally seeking an injunction to prevent them from using the Facebook website and damages relating to their alleged unlawful behaviour.

MiniMax is a Hong Kong based company that develops, supplies and markets online games.

According to the Writ filed by Facebook, it alleges (amongst other things) that the defendants had engaged in unlawful interference and harassment, and conspiracy to injure or defraud, by their unauthorised, illegitimate, unlawful and unauthorised use and access of the Facebook website and its systems.

It is not clear from the Writ exactly what actions the defendants had allegedly taken that gave rise to this action. However, according to the South China Morning Post, the Office of the Telecommunications Authority (now the Office of the Communications Authority), received several complaints

in 2013 regarding unsolicited advertising that were sent via Whatsapp for a game being promoted by MiniMax.

In light of the above, it appears possible that Facebook has brought an action against MiniMax to prevent it from using the Facebook website due to MiniMax's marketing activities. However, this is pure speculation at this point, as no further details have been provided at this stage as to what led to the action.

What this case does indicate though, is Facebook's willingness to take an active approach against companies and individuals to prevent them from using the Facebook website in a manner that Facebook finds objectionable.

1.2. Taking clandestine photos of celebrities – an unfair collection of personal data?

On 6 January 2014, the Administrative Appeal Board confirmed the Privacy Commissioner's decision against two local magazines; Sudden Weekly and Face Magazine.

The Privacy Commissioner had found that the taking of clandestine photographs of local actors by Sudden Weekly and Face Magazine breached the Data Protection Principle 1(2) ("DPP 1(2)") of the Personal Data (Privacy) Ordinance. Under DPP 1(2), personal data may only be collected by means that are lawful and fair in the circumstances.

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Whilst media organisations are generally not obligated to obtain a celebrity's prior consent before they take photographs of them, it is necessary to take into account their reasonable expectation of privacy. In this case, the photographs were taken from far away whilst the actors were at home, through the use of special photographic equipment. In such circumstances, it was found by the Privacy Commissioner that the actors were reasonably entitled to expect privacy at their residence. Enforcement orders were issued requiring the magazines to permanently delete the photographs; to establish privacy guidelines on the monitoring of the collection of personal data via covert or long-distance photo shooting; and to take all reasonable and practicable steps to ensure that its staff comply with such guidelines, e.g. through training.

The magazines issued an appeal against the Privacy Commissioner's findings. One of the main arguments raised by the magazines, was that the taking and publication of the photographs was in the public interest, as the actors are considered "idols" or "role models", and the public is concerned about their behaviour. In particular, the magazines argued that the photographs revealed that the relevant actors had been lying about cohabitating together.

Whilst the Administrative Appeal Board did confirm that public interest must be taken into account and balanced against the requirement to collect personal data fairly, public interest does not equate to "things that the public is interested or curious to know".¹ In this case, the Administrative Appeal Board found that it was not in the public's interest for the magazines to take and publish photographs showing the actors' daily life and intimate acts at their private residence, and it confirmed the Privacy Commissioner's findings that the photographs were taken by unfair means in breach of DPP 1(2). As such, the magazines are required to comply with the enforcement orders.

From the decision rendered by the Administrative Appeal Board in Administrative Appeal No. 6/2012, it appears that the situation may be different if, say, photographs were taken that show a politician taking drugs in front of his ground floor window at his private residence, which is clearly visible from a public street where the photos were taken. In this case, it is arguable that the data subject could not have had a reasonable expectation of privacy, since his window would be clearly visible to the public from the street, and this is a situation that concerns public interest, as it involves an important public figure committing an offence.

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2. Malaysia

2.1. *The guide in dealing with direct marketing under the Personal Data Protection Act (PDPA) 2010*

The Personal Data Protection Department recently issued a Proposal Paper [No.2/2013] requesting feedback or opinions on

¹ Administrative Appeal No. 6/2012 of the Administrative Appeals Board.

the "Guide in Dealing with Direct Marketing Under the Personal Data Protection Act (PDPA) 2010" ("Paper"). In summary, the salient provisions in the Paper are summarised below.

The Paper acknowledges that the application of the law on direct marketing activities varies depending on the medium through which the marketing is delivered, namely, through postal or electronic communications such as SMS, email, phone call and fax.

The Paper states that data protection law imposes "strict obligations on the use of personal data for direct marketing via electronic communications compared to traditional postal marketing". Direct marketing via electronic communications is stated as "more intrusive than the traditional postal marketing" in terms of privacy impact.

2.1.1. *Postal direct marketing*

The Paper provides that an organisation that has not obtained personal data from an individual directly, such as from the public domain, should inform the individual concerned of the original source of the personal data so as to enable the original organization to be contacted.

For mail received through home or office letter boxes to be considered to be direct marketing it must meet two criteria:

- (i) it must be addressed to a named person; and
- (ii) it must be about product or service promotion.

The Paper states that the law does not apply to all unaddressed mails such as those addressed to the occupant, the resident or the house owner which do not involve the use of personal data.

The basic rules for direct marketing are:-

- (i) consent of the individual is required to use their personal data for direct marketing purposes;
- (ii) an individual must be given a right to refuse such use of their personal data at the time the data is collected using free "opt-out" facilities; and
- (iii) in the case of direct marketing by electronic means, an opt-out right must also be made available on every subsequent marketing message.

2.1.2. *Electronic communications direct marketing*

The Paper stipulates that direct marketing organisations are not allowed to use electronic communications for direct marketing except in the following situations:-

- (i) individuals have given explicit consent to do so;
- (ii) personal data of individuals have been obtained in the course of a sale of products or services;
- (iii) individuals have been informed of the identity of direct marketing organisations, purpose of collecting individuals personal data and the persons to whom the said personal data may be disclosed;
- (iv) materials of the direct marketing to be given are limited to similar products and services only; and
- (v) means of refusing the use of individuals personal data for direct marketing purposes at the time of collection are provided;

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