LeadingLines

April 2016

JOYCE A TAN & PARTNERS

News

Welcome

We welcome associate, Laurelle He, who joins the firm's Corporate and Commercial team. Laurelle was admitted to practice as an Advocate & Solicitor in Singapore in 2015 and pursued a Bachelor of Arts degree before finding her calling in law.

Leading the Field

We are very pleased to announce the following:

Acquisition International - 2016 Intellectual Property Awards - Best IP Disputes Firm Singapore;
Finance Monthly Law Awards 2016 – Winner, Information Technology Lawyer of the Year Singapore
Corporate Intl Global Award 2016 - Patent Law Firm of the Year in Singapore
Corporate Intl Global Award 2016 - Boutique Multi Disciplinary Law Firm of the Year Singapore;
Chambers Asia Pacific 2016 – ranked for Intellectual Property in Singapore; and
M&A Today – Global Awards 2016 – IT Law Firm of the Year - Singapore.

Daniel Lim has been ranked in Chambers Asia Pacific 2016 as a leading individual for Intellectual Property Litigation.

Joyce A. Tan has been ranked as a Market-Leading Lawyer in Singapore by AsiaLaw Leading Lawyers 2016, a leading trademark attorney in the World IP Review Leaders Patent and Trademark Volumes and the World Trademark Review for the year 2016, a leading TMT Lawyer in Who's Who Legal: Technology, Media and Telecommunications, and a leading individual for both Technology, Media, Telecommunication and Intellectual Property (Non-contentious).

Sheena R. Jacob has been ranked as a world-leading patent lawyer in Who's Who Legal Patents 2016, as a leading trade mark practitioner in Euromoney's Expert Guides Trade Mark 2016 and in Chambers Asia Pacific 2016 as a leading individual for Intellectual Property (Non-contentious). The World Trade Review 2016 has also ranked her as a leading IP professional in the Transactions and Prosecution & Strategy Category and as a leading individual in the WIPR Leaders Patent and Trademark Volumes for 2016.

PDPC Takes Off its Gloves

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Singapore's privacy regulator, the Personal Data Protection Commission (PDPC), handed down a slew of enforcement decisions on 21 April 2016 against more than 10 companies. These were the first enforcement decisions issued by the PDPC under the data protection provisions of the Personal Data Protection Act (PDPA) and they provide an insight into the enforcement approach and the level of penalties in store for businesses that find themselves on the wrong side of the PDPA. Directions were issued against five organisations (four of which had financial penalties imposed on them), while six organizations received formal warnings.

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A New Funding Opportunity for High-Tech Start-Ups

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Founded in 2015, Singapore-based fintech startup CapBridge was formed to address the gap in the market for high-tech companies which need funding but do not meet the valuation requirements of traditional capital markets. It aims to provide a platform for high-growth, high-tech companies, particularly with market-disrupting technologies, which need funding in the earlier stages of their development and need to take advantage of scale, to connect with investors.

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Hearing the Child's Voice: Interview and Review

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In the recent case of AZB v AZC [2016] SGHCF 1, the Singapore High Court made a landmark pronouncement on the appropriateness of judicial interviews of children in the course of court proceedings. For many lawyers, it would seem that the courts have come full circle and are again embracing the time when it used to be common for High Court Judges to interview children in custody disputes, for example in THG v LGH [1996] 2 SLR 568.

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Recent Patent Developments

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IPOS operating as PCT ISA

In September 2015, Intellectual Property Office of Singapore (IPOS) commenced operations as an International Searching and Preliminary Examining Authority(ISA) under the Patent Cooperation Treaty (PCT). With this new option of IPOS as a competent ISA for PCT applications filed in Singapore, applicants have greater choice. In choosing IPOS to prepare the International Search Report, applicants can expect written opinions of high quality as 90% of the patent examiners are PhD holders with deep technical expertise, having been trained by a number of overseas offices including the European Patent Office. The patent examiners are also able to conduct searches both in English as well as directly in Chinese, since many examiners have bilingual capability and this can be useful to applicants intending to protect their inventions in China.

In terms of fees, there are refunds for search and examination fees of 25 to 75% in selecting IPOS as ISA for applicants with a Singapore application in respect of which an existing search report was conducted by IPOS.. This also means that applicants would need to be clear about their filing strategy and intended markets, so that the invention's patent portfolio can be managed accordingly. For applicants with a higher volume of patent filings annually, IPOS can also provide status reports so they have an overview of their patent portfolio in Singapore.

Foreign route to be retained for 3 years

At the same time, an announcement was made recently by IPOS that supplementary examination will be phased out gradually over 3 years. This latest development supersedes previous indications by IPOS that supplementary examination would be removed entirely for new application filed in 2017. This is welcome news. However, a fee will be introduced for supplementary examination from 2017 and the impact of this change will be reviewed after one year. For the time being, foreign applicants can continue to rely on foreign grants and supplementary examination to save costs.

Net Neutrality
To Have Or Not To Have?

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Imagine typing in the resource locator of your favourite search engine but being automatically redirected to its competitor and not being able to access your preferred facility no matter how hard you try. In this imagined scenario, you may be oblivious to the special deal that the competitor may have entered into with your Internet service provider to direct end users to its facility instead. Such backroom deals, typically in the pursuit of profit, can rob the consumer of the ability to access information on the Internet freely and openly. But should the Internet not be neutral, and allow information to be delivered to all equally? This has been the subject of active debate among policy makers, in particular, whether a neutral internet would better serve consumers and citizens instead.

In the USA, President Barack Obama pledged in his 2008 campaign to protect and push for net neutrality, if he were elected President. On 10 November, 2014 The Washington Post reported that President Obama explicitly pushed the government to "aggressively regulate Internet service providers such as Verizon and Comcast, treating broadband like a public utility as essential as water, phone service and electricity".

Eventually and on the back of 3.9 million proponents of net neutrality who wrote in to the US Federal Communications Commission ("FCC"), the five-member FCC team voted on February 26, 2015, in favour of the toughest possible rules to protect net neutrality, the key tenets of which the FCC stated as follows: (i) Internet Service Providers ("ISPs") may not engage in prioritisation by creating fast lanes for content providers who are willing to pay more for their content to be delivered to end users; (ii) ISPs are prohibited from blocking access to lawful content and services; and (iii) ISPs cannot throttle content or services by deliberately slowing access to legal content or services. Following on from this, ISPs were re-classified as common carriers under Title II of the Telecommunications Act in the US. With the re-classification, ISPs are subject to greater scrutiny and regulation, and are effectively regarded as a public utility provider, which should "serve the public interest…without discrimination".

Other countries like Brazil, Chile and the Netherlands have also rolled out similarly tough net neutrality targeted legislation. However, not all countries are as vigorous in the protection of net neutrality and the implementation of network management policies differ to varying degrees from country to country, where the net neutrality debate can be much more muted, and a strong regulatory approach may not be favoured.

In Singapore, the Info-communications Development Authority ("IDA") has stated that net neutrality generally refers to "Internet service or network providers treating all sources of Internet content equally, and the right of a consumer to access content and services on the Internet on a non-discriminatory basis". IDA recognises that proponents of net neutrality "claim that blocking or discrimination of Internet traffic by ISPs or telecom network operators curtails consumer choice and impedes innovation" and that without net neutrality, anti-competitive behaviour that can impact consumer interests include (i) abuse of significant market power by a dominant ISP or telecom network operator; (ii) engagement of unfair practices by an ISP or telecom network provider; or (iii) engagement in collusive behaviour by ISPs and telecom network providers.

As evident from IDA's Decision on Net Neutrality released in 2011, following its consideration of responses to its consultation paper, the approach to net neutrality in Singapore is three-pronged: (i) encourage "a competitive Internet access market via IDA's Telecom Competition Code ("TCC"), as competitive forces will reduce the incentives for ISPs and telecom network operators to engage in blocking or discriminatory conduct that restricts consumer choice"; (ii) focus on pushing for "information transparency" for consumers, on which IDA has published "A Guide To Residential Broadband in Singapore", and insists on ISPs publishing information on their "network management practices"; and (iii) impose on ISPs a minimum level of quality of service in order to "protect consumer interests" and ensure that quality does not degrade with competition.

Other countries that have adopted a similar approach based on the model of transparency and competition (in contrast to a strong regulatory approach like the USA), include Canada, the United Kingdom and the European Union.

No doubt, the debate of net neutrality will soon hit the global stage.

PDPC Takes Off Its Gloves

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In particular, in the Decision involving K Box Entertainment is instructive of a number of common mistakes under the PDPA. K Box operated a chain of karaoke outlets in Singapore, and was responsible for a data breach which resulted in the publication of the personal data of more than 300,000 of its customers. The data was accessed by an unknown hacker who exploited vulnerabilities in the system. After conducting an extensive investigation, the PDPC imposed a penalty of S$50,000 on K Box for breach of the Protection and Openness Obligations under the PDPA.

In relation to its Protection Obligation, the PDPC found that K Box had failed to make reasonable security arrangements. It did not enforce its password policy and had weak control over unused accounts which continued to be operational. Its security practices were poor, in that, for example, it had allowed the sending of unencrypted emails containing a large volume of personal data and it also failed to manage its IT vendor to ensure that the vendor had measures in place to protect personal data.

In finding that K Box also breached the Openness Obligation, the PDPC noted that K Box had no Data Protection Officer, in breach of this requirement under the PDPA, and also did not have a comprehensive privacy policy in place. The IT vendor was found to be a data intermediary under the PDPA and therefore subject only to the Protection and Retention Obligations under the PDPA.

However, the IT vendor was itself found to be in breach of the Protection Obligation by virtue of its practices and received a separate penalty of S$10,000. The PDPC found that had the vendor advised K Box of its obligations and such advice was rejected the PDPC could have taken this into account in assessing the vendor's culpability.

The Decision demonstrates the dangers involved in taking a careless approach to PDPA compliance. In this case, K Box did not put in place the basic compliance measures notwithstanding its handling of customer personal data.

Further, vendors who support companies that may not be interested in complying with the PDPA will have to themselves advise their clients of any gaps in security and recommend fixes. Clearly, a hands-off attitude by vendors to obvious lapses in security will mean that they will also find themselves culpable under the law if a data breach occurs.

The penalties in the other cases ranged from S$5000 to S $10,000. However, given that these are the first Decisions, it is anticipated that future penalties are likely to be higher as companies will find it more difficult to justify their non-compliance.

A New Funding Opportunity for High-Tech Start-Ups

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Target Companies

CapBridge targets companies with valuations of between US$100 million and US$300 million in the healthcare, infocomm and communications technology, and other high-tech industries, and who are seeking to raise funds of at least US$10 million. Typically, such companies would otherwise be required to approach venture capital firms for funding, and go through the arduous process of talking to hundreds of firms to land a deal. CapBridge offers the opportunity to short-cut this process through its online platform and connections with 366 global institutions with a deployable fund size of US$409 billion.

Itself a start-up, CapBridge has already raised around $3.5 million in funding to-date, including a $1.5 million grant from Singapore Exchange to develop its platform. With its recently-secured Capital Markets Services Licence from the Monetary Authority of Singapore, CapBridge is able to access a wider pool of investors for start-up companies participating on its platform.

How It Works

A company wishing to raise funds on the CapBridge platform must first identify a lead investor who has done due diligence on the company, and who sets the terms for the fund-raising round. This aims to shorten the time needed to raise funds as it avoids lengthy re-negotiations. If the company does not have a lead investor, it can use the CapBridge platform to find one, in which case it will be labelled as "Seeking Lead" to identify it to potential lead investors on the platform.

When a company is accepted by CapBridge to fund-raise on its platform, the company makes certain key documents available on the platform, such as its pitch deck, capitalization table, and term sheet prepared by the lead investor. Investors who are interested in participating in the round may use the platform to find out more about the company, or to commit to the round.

All funds committed by potential investors are held in escrow. Only when all legal documentation is executed and shares are issued will funds be transferred from escrow to the company's bank account. If the campaign is unsuccessful, funds are returned to the investor without any charge.

The CapBridge platform appears to have been well-received by both investors and technology companies. A press release published on CapBridge's website in June 2015 quotes Philip Lim, CEO of the commercialization arm of A*STAR as saying: "The launch of this platform is timely as it will help investors to be involved in companies with exciting technologies and great potential. We look forward to having our A*STAR spin-off companies to be onboard the CapBridge platform. We are confident that A*STAR's R&D portfolio will continue to build a strong pipeline of Singapore companies that will be attractive to investors."

Hearing the Child's Voice: Interview and Review

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This became less frequent when family cases were transferred from the High Court to the Family Court, although there were still rare occasions, for example in Shoba Gunasekaran v A Rajandran [2003] SGDC 54, where judges interviewed young children. Other professionals such as counsellors, psychiatrists and more recently, court appointed Child Representatives, then took on the role of interviewing children and transmitting their thoughts and views to the court. Reports such as Social Welfare Reports, Custody Evaluation Reports, Access Evaluation Reports and Assisted Access Reports were other tools used by judges instead of directly interviewing the children.

However, in AZB, Judicial Commissioner Debbie Ong did not shy away from interviewing the children in their parents' dispute over their care and control and access notwithstanding objections from their father's counsel. The children in question - 3 girls - were between the ages of 11 to 13.

The court made reference to Singapore's treaty commitments under the United Nations Convention on the Rights of Child and in particular, Article 12, as well as research studies which support the view that hearing the children's voice in divorce proceedings has proven to be beneficial both for the parties as well as the children. Her Honour also summarised the approaches in common law jurisdictions and the more recent developments favouring judicial interviews, particularly in England, Australia and New Zealand.

Reference was made to the earlier Court of Appeal decision in ZO v ZP and another appeal [2011] SGCA 25 which, whilst cautioning on concerns such as possible coaching,

did not negate the helpfulness of judicial interviews where the circumstances warranted.

Her Honour also gave helpful guidelines as to conducting judicial interviews:

1. Asking open-ended questions
2. Avoiding leading questions which may cause the child to choose between parents
3. Considering the age and maturity of the child
4. Whether the child has asked to speak to the Judge or has been pressured by a parent to do so
5. Being conscious of possible loyalty conflicts, guilt for the parents' separation or alienation from the other parent

In the instant case, the court gave the following reasons as to why it found it useful to interview the children:

1. The children indicated that they wished to speak to the judge
2. They were mature enough to express their views on matters which impacted their lives
3. The Judge did not think interviewing them would be dragging them into the fray, but thought it beneficial to allow them to express their views directly to her

The Judge concluded that, in this case, she found the children genuinely keen to speak to her and the interview to be helpful. It is hoped that post AZB, more resources will be channelled towards equipping judges with the necessary skills, providing a conducive environment to conduct such interviews as well eliminate any possible risks as much as possible. AZB also highlights the value of reviewing access arrangements to ensure that they continued to serve the children's welfare. It acknowledges the fact that families in the aftermath of divorce may need some time to reach more stable and durable parent-child relationships, and reviews afford the opportunity to see what works and what poses challenges to the family which may require tweaking.

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