Technology, Media and Telecommunications & Data Protection

The Malaysiakini Case: Liability of Online Intermediary Platforms as the Presumed Publisher for Third-Party Content – A Further Analysis

Introduction

Last month, the Federal Court in the case of *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Another* (Case No. 08(L)-4-06/2020) found Mkini Dot Com Sdn Bhd, the owner and operator of the Malaysian online news portal 'Malaysiakini' ("**Malaysiakini**"), guilty of contempt of court in relation to third-party comments that were posted on Malaysiakini's website.

In our previous Update, we set out the background facts leading up to the contempt proceedings and provided an interim analysis on the Federal Court's summary grounds of decision for both the majority and minority decisions. Essentially, the majority decision found Malaysiakini liable based on section 114A of the Evidence Act 1950 ("**EA 1950**") which raises the legal presumption that Malaysiakini, as the news portal owner, was the publisher of the said comments.

The recent issuance of the full grounds of judgment for both the majority and minority decisions ("**majority judgment**" and "**minority judgment**", respectively) has provided a clearer picture of the reasoning adopted by the Federal Court in arriving at its decision. Based on the full grounds of both judgments, this Update seeks to provide a further analysis on the Federal Court's finding in relation to the liability of online intermediary platforms as the presumed publisher under section 114A of the EA 1950 and examine its potential impact on content regulation in Malaysia.

Rebutting the Presumption of Publication under Section 114A of the EA 1950

As a recap, the main question at the core of the contempt proceedings in this case was whether Malaysiakini should be held liable as the presumed publisher of the offending comments, even though the said comments were authored by third-party internet users, and Malaysiakini was neither the direct author nor did they edit the comments. The contemptuous nature of the offending comments was never in dispute in this case as Malaysiakini had admitted, from the very outset of the contempt proceedings, that the comments were indeed offensive and contemptuous.

In order to establish its case against Malaysiakini, the Attorney General moved the Federal Court to invoke section 114A of the EA 1950 to deem Malaysiakini as the publisher of the offending comments based on the fact that (1) Malaysiakini depicted itself as the host of the comments, and (2) Malaysiakini facilitated the publication of the comments.

The full grounds of the majority judgment outlined the contentions put forward by Malaysiakini to rebut the presumption and deny liability for the offending comments. Principal among the contentions advanced by Malaysiakini were that:

(1) it had no knowledge of the existence of the offending comments prior to being notified by the police;

(2) there was a warning in its website's Terms and Conditions ("**T&C**") to warn its subscribers that any abusive posting offending the law or which creates unpleasantness would be banned;

(3) it runs a filter program that prohibits the publication of banned words and automatically flags suspected words for further review by a comments administrator; and

(4) section 98(2) of the Communications and Multimedia Act ("**CMA**") protects Malaysiakini from liability as Malaysiakini has adhered to the *"flag and take down"* approach prescribed in the Malaysian Communications and Multimedia Content Code ("**Content Code**").

However, all the contentions above were held by the Federal Court to be insufficient to rebut the presumption under section 114A of the EA 1950. The main contentions by Malaysiakini and the reasons for their rejection by the majority judgment are further examined below.

The Question of Knowledge

As explained in our previous Update, a key issue in this case is the quality of knowledge required for the purposes of establishing publication.

Based on our analysis of the summary grounds of decision, we had previously stated that the majority and minority decisions diverged on the quality of knowledge required, wherein the majority held that it is sufficient for the requisite knowledge to be inferred from the circumstances (or constructive knowledge as termed in the minority decision), while the minority decision took the position that proof of actual knowledge is needed.

Based on review of the majority judgment, the majority did not make an express finding on whether an "actual knowledge" or "constructive knowledge" standard would apply. However, the majority did find that knowledge can be deduced or inferred from the surrounding facts and circumstances of the case.

In determining the existence of knowledge based on the surrounding facts of the case, the majority judgment commented that Malaysiakini was ***expected to have foreseen*** the kind of comments that would be attracted by the publication of the article on Malaysiakini's website.

Based on the foregoing, the majority concluded that the irresistible inference to be drawn from the surrounding facts of the case is that Malaysiakini had knowledge of the offending comments. In this regard, their finding on this issue was primarily based on the following facts: (1) that Malaysiakini has complete editorial control over the comments that are posted on its news portal; and (2) that only Malaysiakini's director and its Editor-in-Chief denied knowledge of the comments in court.

Denial of Knowledge

The majority placed particular emphasis on the point that Malaysiakini must assume responsibility for the risks that follow from having complete editorial control over the comments posted on its news portal. While the majority acknowledged that Malaysiakini is a platform that publishes articles on matters of public interest, and encourages readership and public discussion, Malaysiakini ought to have known that by allowing such publication, it was exposed to the real risk of the nature and content of comments on the articles that it published, even though such comments were not authored by it.

Further, the court was of the view that all 10 editors that made up Malaysiakini's news portal editorial team should have come forward to deny and explain why they were individually unaware of the offending comments prior to being alerted by the police. It was not sufficient for Malaysiakini's director who was not involved in the editing process and the Editor-in-Chief (i.e., Steven Gan, the second respondent) to deny knowledge of the comments. As a result, the court concluded that the irresistible inference is that at least one of the other nine editors had notice and knowledge of the offending comments, and that Malaysiakini could not rely on mere denial to avail itself of the defence of ignorance.

However, it is interesting to note that the minority held that based on the evidence presented before the Court, it is reasonable to conclude that the Respondents did not know, nor were they aware of the existence or contents of the impugned comments, at the point in time when they were posted by the third party commenters. The minority further expressed that in this context, the suggestion in the majority judgment that all members of the editorial team should each affirm affidavits is not tenable, as the single affidavit of Malaysiakini's director had rebutted the presumption.

Compliance with the CMA and the Content Code

It is important to note that the issues with regards to compliance with the CMA and the Content Code, which were not fully addressed in the summaries of the judgments, are further elaborated upon in the full judgments of the majority and minority decisions.

Terms and Conditions of the Website

As part of its defence, Malaysiakini relied on the T&C published on its news portal which warned Malaysiakini's subscribers that abusive postings which offend any law or which create unpleasantness would be banned. However, the majority decision held that Malaysiakini cannot deny responsibility by merely inserting such *"self-serving"* caveats in its T&C to protect itself from liability without regard of the injury that the third-party content may cause to others. The majority further expressed that measures such as putting in place its T&C cannot be accepted as a complete defence, as it will allow the entire blame for the comments to *"unjustifiably and irresponsibly shift"* to Malaysiakini's third party online subscribers, while exonerating itself of all liabilities. The majority held the view that the postings were made possible only because Malaysiakini provided the platform for the subscribers to post the impugned comments, notwithstanding safeguards like the T&C being put in place.

Filtering and Reporting System and Flag and Take Down Approach

Malaysiakini argued that as it is an "Internet Content Hosting Provider" ("**ICH**") under section 10.0, Part 5 of the Content Code, it is not required to monitor activities on its site and consequently the liability for third party comments did not rest with them. Nevertheless, it still maintains a filter system and peer reporting system which were implemented as part of its takedown policy as a defence against potential liability for any offending comments. The filter system prohibits the publication of certain banned words and automatically flags suspected words for further review by a comments administrator, while the peer reporting system allows users to flag offensive or inappropriate comments for the comments administrator's further review.

In doing so, Malaysiakini contended that it had complied with the *"flag and take down"* approach prescribed by the Content Code and that such compliance with the Content Code is a defence to any legal action, prosecution or proceeding under section 98(2) of the CMA. It must be noted that the minority judgment expressed that this approach, as enacted by Parliament in the CMA and the Code, affixes an internet intermediary such as Malaysiakini with liability as a publisher from the point in time when they actually knew of the existence and content of the comments in question.

However, the majority judgment held that Malaysiakini's contention is *"bereft of merit"* and disregarded the *"overarching intent"* of the Content Code, as the overriding general principles and the underlying purpose of the Content Code must be viewed holistically. To do so, the majority referred to the general principles for content dissemination in Part 2 of the Content Code and section 10.1, Part 5 of the Content Code which provide that Malaysiakini must ensure that its users or subscribers are aware of the requirement to comply with Malaysian law including, but not limited to the Content Code.

Based on the above, the majority concluded that Malaysiakini had misconstrued the true position of the law found in both the CMA and the Content Code. It was in fact not in compliance with the Content Code and could not shield its liabilities by a *"piecemeal reading of the Content Code"*, and far from complying

with the Content Code, Malaysiakini may have breached the real objective of the Content Code. Therefore, the majority was of the view that the Content Code cannot act as a defence in this instance to protect Malaysiakini (or any publisher being an ICH) from any liability for contemptuous comments authored by third-party users that are published by the said ICH.

Freedom of Speech and Censorship of the Internet

Malaysiakini also sought to rely on section 3(3) of the CMA to argue that they are not allowed to censor the internet. However, the majority held that Malaysiakini cannot invoke section 3(3) of the CMA to absolve their responsibilities as the CMA and the Content Code must be viewed wholly as having the *"overriding purpose of not only promoting self-regulation by internet service or content providers, but also to regulate and censure that communications that take place on each information platform do not violate the fundamental rights enjoyed by others".* The majority further stated that whilst freedom of opinion and expression is guaranteed and protected by the Federal Constitution, it must be done within the bounds permissible by the law.

Measures to Apply to Avoid Liability for Third-Party Content

The majority also expressed the view that Malaysiakini cannot simply wait to be alerted by the police before removing any offending comments. In order to avoid liability for third-party content, the majority held that Malaysiakini must have in place a system that can detect and rapidly remove offensive third-party content.

It is not entirely clear as to what would be an acceptable timeframe to constitute a rapid removal of third-party content as there was no further explanation provided by the majority judgment. In Malaysiakini's case, the majority found it unacceptable that the offending comments were up on its news portal for three days before Malaysiakini received the police alert and only then proceeded to remove the offending comments, bearing in mind the wide reach of the news portal and the potential number of people who would have read the said comments before the removal.

Limitations on the Reach of the Decision

Although the present case against Malaysiakini is a criminal contempt action, we are of the view that the Federal Court's findings in relation to the liability of an internet intermediary platform as a publisher under section 114A of the EA 1950 is of general application and may be similarly applied in other forms of legal action, such as defamation proceedings.

Nevertheless, the majority judgment appears to have limited the application of its decision to online intermediary platforms that exercise editorial control over third-party content posted on their platform.

In the present case, the Federal Court concluded that Malaysiakini had control over the third-party comments based on the fact that Malaysiakini had installed filters on certain prohibited words and it also determined who was able to post comments. The majority judgment also distinguished Malaysiakini from a completely uncontrolled platform such as Twitter which has no control over third-party user content posted on its platform as it does not mediate user content.

Further, it is important to note that the majority judgment heavily relied on the principles set out in the European Court of Human Rights' case of *Delfi AS v Estonia* (Application No. 64569/09) ("**Delfi**") to arrive at its decision in Malaysiakini's case. The majority in applying the principles in Delfi to the present case emphasised that Delfi was not concerned with (1) intermediary platforms where third-party content can be freely disseminated without the content being channelled by any input from the platform provider; (2) a social media platform where the platform does not offer any content; and (3) intermediary platforms where the platform is operated by non-commercial entities such as where it is a private person running the website or blog as a hobby.

Based on the above, it can be construed that the Federal Court's decision in the Malaysiakini case does not apply to the three categories of online intermediary platforms identified above. In any event, it would appear that this is on the whole not a crystal clear position and is subject to further interpretation and confirmation by subsequent cases.

Moving Forward

Higher Standard of Care

The Federal Court's decision has placed a very high standard of care on online intermediary platforms that exercise control over third-party content. The old approach of initiating removal of third-party content only after the content is flagged by users or authorities appears to be no longer sufficient in the wake of the Federal Court's decision in this case. Such platforms are now required to be proactive and implement systems that are capable of identifying and rapidly removing content, at the outset. This in turn could lead to online intermediary platforms, especially news portals, deciding to disable comments sections to avoid facing the risk of legal implications over third-party content, and potentially denying its users an avenue for debate. This may inevitably lead to a situation where online intermediary platforms would take very restrictive measures in order to protect themselves legally, at the expense or commercial risk of losing readers and subscribers.

Applicability to Certain Categories of Online Intermediary Platforms

As highlighted above, there may be limitations as to the applicability of the decision to certain categories of online intermediary platforms. Be that as it may, the exclusion of such online intermediary platforms is still open to interpretation and confirmation by subsequent cases and therefore as a matter of

prudence, all operators of online intermediary platforms should review and assess whether their current controls and mechanisms are still sufficient in light of the Federal Court's decision.

The CMA and the Content Code – Legislative Changes?

Additionally, the Federal Court's decision and, specifically, the different views taken by the majority and the minority judgments, have also brought into question the *"flag and take down"* methodology prescribed in the Content Code and raised the issue of whether online intermediary platforms are still able to rely on compliance with this methodology as a defence against *"prosecution, action or proceeding of any nature"*, as provided for in section 98(2) of the CMA.

The majority decision held that Malaysiakini had *"misconstrued"* the law found in both the CMA and the Content Code, and it may have breached the real objective of the Content Code. Taken in this context, the majority could not accept that the Content Code *"can act as an armour"* to protect Malaysiakini or any publisher being an ICH from liability for contemptuous comments authored by third-party users that were published by the said ICH.

Based on the majority's decision, it is not entirely clear as to what measures would be sufficient in order for online intermediary platforms to legally insulate themselves against third party comments, as the majority panel did not go to the extent of stipulating the specific measures expected of an online intermediary platform (such as Malaysiakini or any publisher who is an ICH), nor did the Federal Court provide a test to determine the quality of knowledge required in order to establish publication under Section 114A of the EA.

On the other hand, the minority decision expressed the view that the current provisions under the CMA and the Content Code *"evinces the intention of Parliament that liability will only be imposed on an online intermediary if it fails to respond to a flag and takedown process, rather than any form of pre-censorship or pre-monitoring basis"*, and that Malaysiakini had acted accordingly by relying on these provisions.

Bearing in mind the differing views between the majority and minority of the Federal Court on the application of the Content Code and section 98(2) of the CMA, this would definitely be an opportune moment for the stakeholders in the Malaysian content industry to collectively discuss and look into the ramifications of the Federal Court's decision on the current content regulatory framework, particularly with a view to reviewing and proposing further amendments to the Content Code.

It needs to be borne in mind that the Content Code is nearly two decades old, and the methodologies identified within the Content Code (e.g. *"flag and take down"*) are in fact due to be reviewed, supplemented and updated. If and when such a review is in fact conducted, it is suggested that the methodologies identified or proposed to be incorporated within the Content Code are re-examined through the spectacles of the Federal Court and measured against the *"overarching intent"* of the Content Code, as referenced in the Malaysiakini decision.

From a legislative perspective, the content industry would most definitely benefit from further clarity in terms of the laws as discussed in this Update (i.e. the CMA and section 114A of the EA). Representatives of the content industry should therefore consider reaching out to regulators and lawmakers with a view to pushing for a comprehensive review and legislative reform to the existing laws. Any amendments to the laws must clearly acknowledge that there should be no censorship of the Internet (as currently guaranteed under section 3(3) of the CMA), but at the same time the laws must equally be able to maintain adequate social regulation in the digital media world. This would be in line with the majority's decision to preserve acceptable social behaviours even in the virtual world.

Conclusion

We trust the above provides you with an analysis on the potential impact of the Federal Court's decision in the Malaysiakini case. Should you require any assistance or clarification regarding the above or about any other aspect of content regulation and media law, please feel free to get in touch with us at your convenience.

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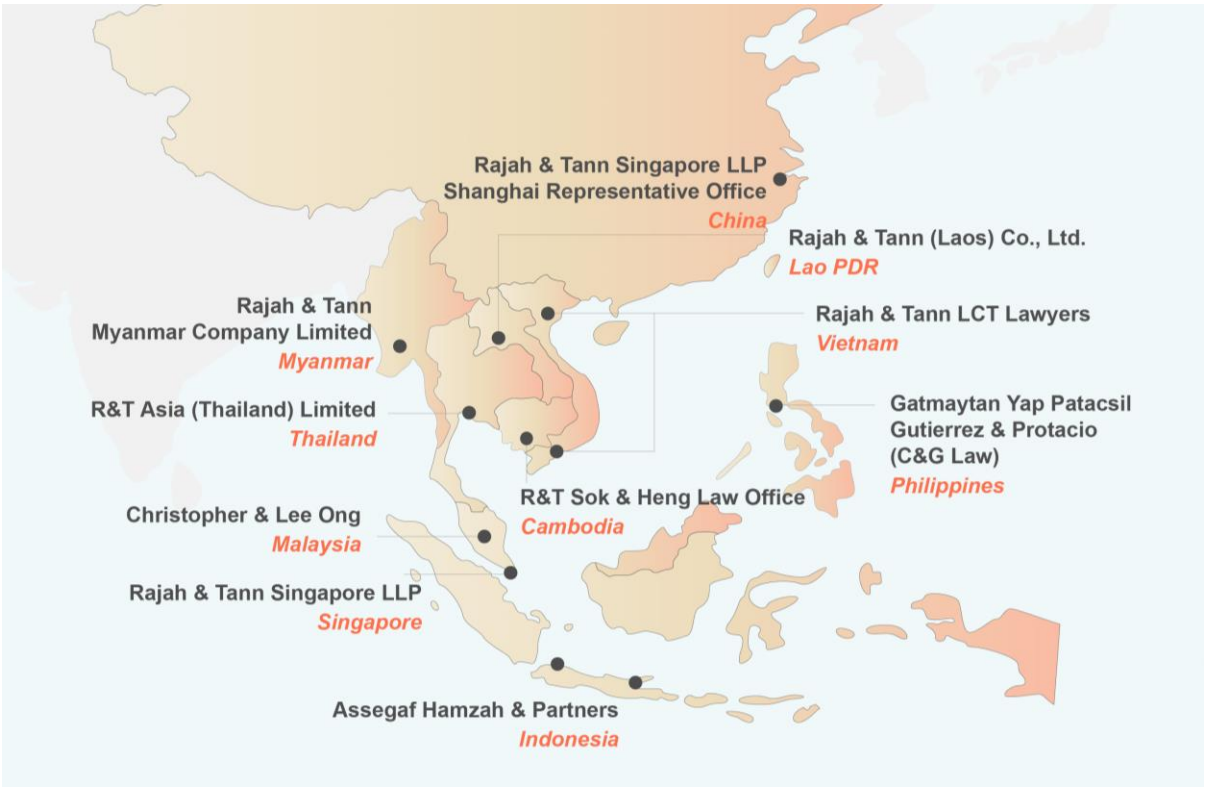

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