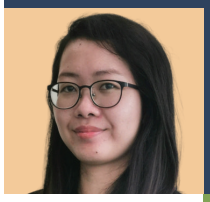
Liability of Online Intermediary Platforms for Third-Party Contents



by Lau Wai Kei

Generally, "online intermediaries" refers to a person who transmits, stores or publishes materials on behalf of users, although different countries may adopt different definitions. Examples of online intermediaries in today's setting include internet service providers, web hosting service providers, search engine service providers, social media platform providers, providers of internet-based messaging services and content aggregators.

With the advancement of technology, the role of online intermediaries has evolved in tandem, taking a greater role in promoting digital economy and providing greater access to information. Regrettably, despite the benefits that may be brought about by online intermediaries, online intermediaries have somehow unintentionally facilitated the development, dissemination and amplification of offensive, harmful and illegal contents such as fake news and hate speech. In view thereof, there is a question as to whether online intermediaries, who merely transmit such third-party contents or provide platforms for their users or subscribers to publish such third-party contents, can be held liable for such third-party contents.

This article focuses on online intermediaries who provide platforms for their users or subscribers to publish online materials (such as contents, postings or comments).

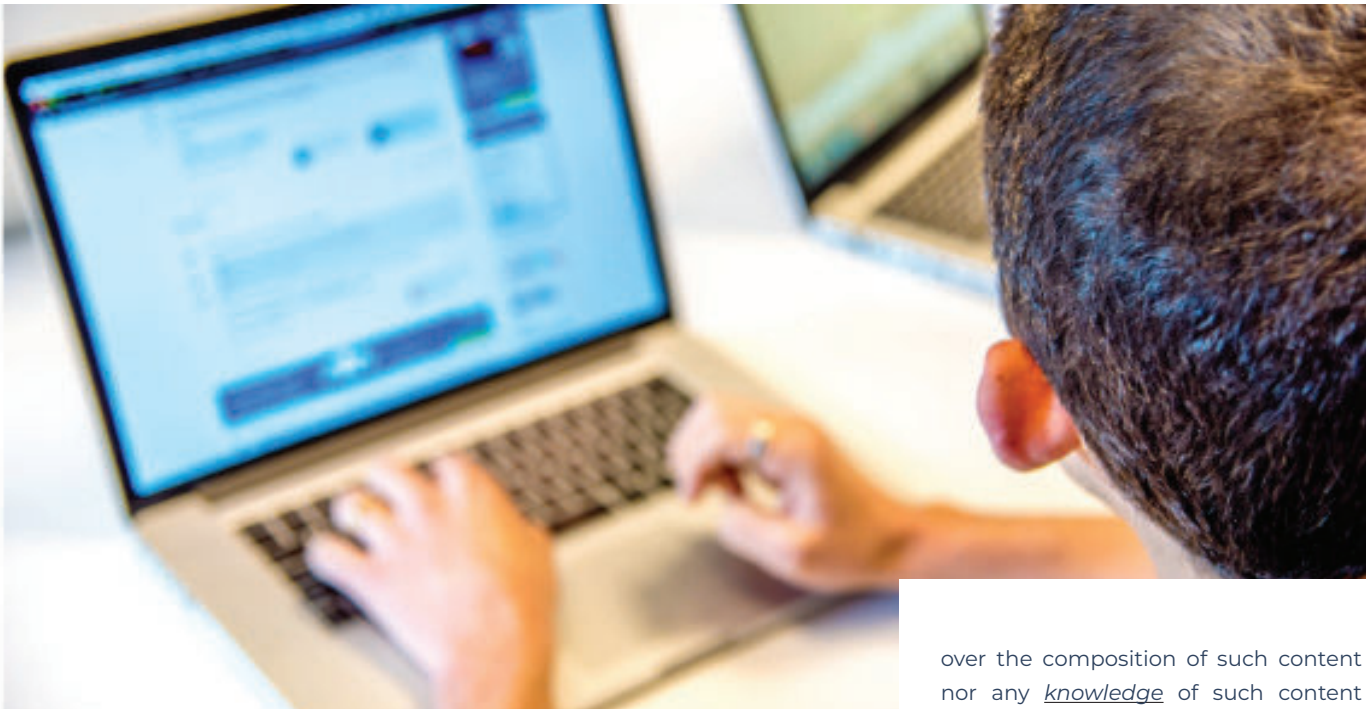
The law

In Malaysia, the laws on liabilities or responsibilities of online intermediaries for third-party contents published by their users or subscribers can mainly be found in the Communications and Multimedia Act 1998 (**CMA**), the Malaysian Communications and Multimedia Content Code (**Content Code**) and the Evidence Act 1950 (**EA**).

(a) CMA

The CMA provides for and regulates the converging communications and multimedia industries in Malaysia. Section 211 provides that it is an offence if a content applications service provider (**CASP**), or other person using a content applications service, provides content which is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. CASP refers to a person who provides an applications service which provides content. Application service is in turn defined as a service provided by means of network services.

A plain reading of this section would indicate that online intermediaries who fall within the definition of CASP under the CMA would be subjected to the prohibition under s 211 of the CMA. However, it is not immediately clear if the CASP will be liable if the prohibited content



is published by a third-party user or subscriber on its platform, and that the CASP played no role in such publication.

(b) Content Code

The Content Code provides further clarity on the responsibilities of CASPs for third-party contents.

The Content Code was created pursuant to s 213 of the CMA by the Communications and Multimedia Content Forum Malaysia (**CMCF**) and is registered with the Malaysian Communications and Multimedia Commission (**MCMC**). It provides specific online guidelines that are applicable to CASPs such as internet content hosts, online content developer and online content aggregator. It is to be noted that compliance with the Content Code is voluntary and should be adhered to as a form of self-regulation, unless: (i) a person is specifically directed to do so by the MCMC under s 99 of the CMA; (ii) a person has submitted his or her agreement to the CMCF that he or she will be bound by the Content Code; or (iii) a person is a member of the CMCF (collectively, **Code Subject**), which would entail having to mandatorily comply with the Content Code. Compliance with the Content Code could serve as a legal defence against any prosecution, action or proceeding of any nature, whether in court or otherwise.[1] Thus, CASPs that are not a Code Subject may opt to comply with the requirements in the Content Code, to the extent applicable.[2]

The Content Code adopts the concept of innocent carrier.[3] Pursuant to this concept, a person providing access to any content but has neither *control* over the composition of such content nor any *knowledge* of such content is deemed an innocent carrier. As a general rule, an innocent carrier is not responsible for the content provided, and responsibility for content provided online primarily rests with the creator of the content.

The above appears to show that as long as the Code Subject is considered an innocent carrier, it would not be liable for third-party contents. Its liabilities only arise when it is notified of the prohibited contents on its platform, and it failed to take the required steps set out in the Content Code in handling such prohibited contents.[4]

(c) EA

Section 114A of the EA is also relevant, as it provides presumptions of fact in publication of contents on the internet. Section 114A(1), in particular, states that a person whose name, photograph or pseudonym appears on

1 CMA, s 98(2)

2 In the recent Malaysiakini case, Malaysiakini failed in its argument that its compliance with the Content Code can serve as a ground of defence, as the court found that Malaysiakini had in actual fact failed to comply with the Content Code.

3 Section 2, Part 5, Content Code

4 If the Code Subject has breached the Content Code, the Complaints Bureau may impose fines and other penalties permitted such as issuing a written reprimand, imposing a fine not exceeding RM50,000 and/or requiring the removal of the content or cessation of the offending act. The Complaints Bureau may also refer the offending party to the MCMC for further appropriate action as may be required (section 8.0 Part 8, Content Code). Note that these penalties do not apply to CASPs or any other parties who are not subjected to the Content Code.

any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved. Section 114A is intended to address the mischief posed by internet anonymity. It does not impute guilt or liability on the part of the "presumed publisher", but merely shifts the burden of proof onto the presumed publisher to explain why he is not responsible for the content on the internet portal or site.

Online intermediaries may be caught under this section. In such situations, they are presumed to be the "publisher" of a publication which contains prohibited contents, even though they are not the author or editor of the publication.[5]

The *Malaysiakini* case

The abovementioned laws were put to the test in the recent case of *Mkini Dotcom*,[6] where the issue on liabilities of online news portal with regard to comments posted by its subscribers was discussed.

A contempt proceeding was commenced by the Attorney General of Malaysia against Mkini Dotcom Sdn Bhd (**Malaysiakini**) and its editor-in-chief (collectively, **Respondents**) due to comments (**Comments**) posted by Malaysiakini's subscribers below an article entitled, *"CJ orders all courts to be fully operational from July 1*". The Comments were said to have the effect of undermining the institution of the judiciary and bring chaos in the administration of justice.

The Respondents admitted that the Comments were offensive, contemptuous, inappropriate and not condoned by them. Hence, the issue before the Federal Court was whether the Respondents were liable for the Comments which were posted by third-party subscribers. The court, in a majority judgment, held Malaysiakini guilty of contempt and fined the company RM500,000, but not its editor-in-chief.

In coming to its decision, the Federal Court had to consider whether Malaysiakini could rely on two grounds to rebut the presumption of publication under s 114A(1) of the EA: (a) whether Malaysiakini was responsible for the Comments if it had no knowledge of the said Comments being posted; and (b) whether compliance with the Content Code could serve as a defence against prosecution in court.

> *(a) Whether Malaysiakini is responsible for the Comments if it has no knowledge of the Comments being posted*

The issue of lack of knowledge was central to Malaysiakini's argument that it was not a publisher under s114A(1) of the EA. Malaysiakini argued that it should not be held responsible because it had no knowledge of the Comments and the Comments were not originated and authored by the company. In any event, Malaysiakini had implemented a takedown policy, where they may remove or modify comments posted by its subscribers upon receiving a complaint.

The court, in a majority judgment, stated that knowledge is purely a matter of fact, which can be deduced or inferred from the circumstances surrounding each particular event. Therefore, in inferring knowledge, the court may approach the matter in two stages. First, where opportunities for knowledge on the part of the particular person are proved. Second, where there is nothing to indicate that there are obstacles to that person acquiring the relevant knowledge, and that there is some evidence from which the court can conclude that such person has knowledge.

Relying on the aforementioned legal principle, the court held that Malaysiakini could not deny knowledge of the existence of the Comments, notwithstanding the fact that it was only aware of the Comments a few days later upon being notified. This is on the basis that (among others) Malaysiakini failed to have in place a system that is capable of detecting and rapidly remove offensive comments — Malaysiakini cannot just wait to be alerted. Further, the Malaysiakini news portal enjoys extensive readership and receives about 2,000 comments per day, on top of the fact that it had editorial control over the contents posted in the comments section. Malaysiakini also had a structured, coordinated and well-organised editorial team, which should have taken notice and be well aware of the Comments. Malaysiakini's editorial team was expected to foresee the kind of comments attracted by the publication of the article given their experience in running the news portal for over 20 years.

In gist, the court in the majority judgment held that Malaysiakini's knowledge of the Comments can be deduced or inferred from the various facts put forward by Malaysiakini. Therefore, Malaysiakini should be held responsible for the Comments. The aforementioned position can be contrasted with the dissenting judgment in this case, in which the "actual knowledge" test was used in

5 Publication is defined widely to mean a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer.

6 *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2021] 2 MLJ 652

holding that Malaysiakini should not be held responsible for the Comments. In brief, in the "actual knowledge" test, an online content service provider like Malaysiakini that operates a news portal and provides content in various forms, including the invitation of comments from third-party subscribers, would not be liable as a publisher until and unless it has knowledge or becomes aware of both the existence and the content of the subject material that is unlawful or defamatory, and fails to take down the material concerned within a reasonable time. In other words, actual knowledge of, and consent to, such content is necessary before an online intermediary becomes liable as a publisher for such content.

(b) Whether compliance with Content Code serves as a defence against prosecution in court

As mentioned, while compliance with the Content Code is not mandatory under the law, except for a certain category of persons, it can nonetheless be raised as a defence against prosecution in court.[7] On this basis, Malaysiakini argued that as it had complied with the Content Code in running its news portal, it should be allowed to raise such compliance as a defence against prosecution in court and, as a result, should not be responsible for the Comments. Further, pursuant to the Content Code, Malaysiakini is not required to censor comments prior to their being uploaded on its portal and the responsibility for any content of a publication primarily rests with the creator of the content — Malaysiakini is not required to monitor activities, until it is prompted by complaints.

The court disagreed with Malaysiakini and held that Malaysiakini had in fact failed to comply with the Content Code, and could not therefore raise compliance with the Content Code as a ground of defence. According to the court, the provisions in the Content Code have to be read holistically, taking into consideration the overriding general principles in s 2 of the Content Code[8] and the underlying purpose of the Content Code. Malaysiakini also failed to ensure that its users or subscribers are aware of the requirement to comply with Malaysian laws including, but not limited to, the Content Code.[9]

It is noteworthy that in the dissenting judgment, Justice Nallini Pathmanathan agreed with the argument put forward by Malaysiakini. A news portal becomes a "publisher" upon becoming cognisant of any unlawful comment which needs to be taken down. 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. As Malaysiakini removed the Comments within 12 minutes upon becoming aware of the Comments, it should not be held liable for the Comments.

Recent trends across the globe

Having observed the current legal position in Malaysia on liabilities of online intermediaries for third-party contents, it is worthwhile to find out the legal trends in other jurisdictions on this similar issue.

1. United States of America

Section 230(c)(1) of the Communication Decency Act of 1995 (**CDA**) states that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. In other words, online intermediaries that host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do (with some exceptions). Further, s 230(c)(2) of the CDA allows a provider or user of an interactive computer service to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, within being held liable.

This provision has long served as a "safe harbour" for online intermediaries that rely heavily on third-party contents for revenue, and allowed them to thrive. While this law still stands to date, there have been many discussions calling for the review or revocation of s 230 of the CDA, with some requesting companies be made liable for harmful contents by third parties.[10]

2. United Kingdom

The Online Safety Bill[11] (**Bill**) was published in May 2021, which serves

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7 CMA, s 98

8 Section 2 of the Content Code provides for the general principles of contents displayed or communicated. Some of these principles are: (a) contents shall not be indecent, obscene, false, menacing or offensive; (b) content providers will bear in mind the need for a balance between the desire of viewers, listeners and users to have a wide range of content options and access to information on the one hand, and the necessity to preserve law, order and morality on the other; and (c) the Code Subject will ensure that their content contains no abusive or discriminatory material or comment on matters of, but not limited to, race, religion, culture, ethnicity, national origin, gender, age, marital status, socio economic status, political persuasion, educational background, geographic location, sexual orientation or physical or mental ability.

9 Section 10.1, Part 5 of the Content Code

10 See https://www.businessinsider.com/what-is-section-230-internet-law-communications-decency-act-explained-2020-5

11 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf

as the proposed legal framework to combat illegal and harmful practices online. Among others, the Bill imposes duties of care on providers of user-to-user services (referring to an internet service by means of which content that is generated, shared or uploaded by a user of the service may be encountered by another user of the service) and search services. While there are differences between the two sets of obligations, they broadly include risk assessment duties, safety duties (in terms of the mitigation and minimisation of harmful content), duties about rights to freedom of expression and privacy, reporting and redress duties and record-keeping and review duties. Further, a Code of Practice is expected to be issued under the Bill, which will provide greater details on the scope of duties that providers of user-to-user services and search services have to or are recommended to comply with.

3. India

Pursuant to s 79 of the Information Technology Act 2000 (**India ITA**), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him, if the intermediary merely provides access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted, and the intermediary had observed those due diligence measures set out in the India ITA and applicable guidelines.[12] However, if the intermediary, upon receiving actual knowledge or being notified by the government agencies that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary must remove or disable access to that material. Otherwise, the intermediary would be held liable for such third-party materials.[13]

Section 79 of the India ITA has to be read with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (**2021 Rules**), which was recently issued to regulate intermediaries, publishers of news and current affairs and publishers of online curated content. Among others, the 2021 Rules provides for the following:

(a) Intermediary — must conduct various due diligence measures stated in r 3 of the 2021 Rules, including (among others) publishing rules and regulations, privacy policy and user agreement which contain information provided in r 3(1)(b). It must also remove or disable access to prohibited information within 36 hours upon receiving actual knowledge in the form of an order from a court or notification from an appropriate government authority regarding the prohibited information.[14] Note that additional due diligence measures are imposed on significant social media intermediaries[15] and inter-mediaries in relation to news and current affairs content.[16]

(b) Publishers of news and current affairs and publishers of online curated content – publishers must observe and adhere to the Code of Ethics laid down in the Appendix when publishing contents.[17] Publisher must also appoint a grievance officer to address grievances received.

Positions in both the US and India are similar to a certain extent, in that as a general rule, online intermediaries are not responsible for third-party contents. However, unlike the US, India has imposed extensive obligations that online intermediaries must comply with, failure of which may result in them being liable for third-party contents. In the UK, the Bill imposes duties of care on providers of regulated services, a breach of which may entail significant fines and penalties under the Bill. Further details on the extent or scope of duties of care are expected to be set out in the Code of Practice, which is expected to be issued by the regulator of the UK telecommunications industry in due course.

As regulating online intermediaries is inevitable, it is important for countries to clearly set out the legal boundaries on the dos and don'ts for online intermediaries that provide third-party contents. This assures them that they will not be held liable as long as they have complied with the requirements under the law.

What's next for online intermediaries in Malaysia in light of the Malaysiakini case?

With the Malaysiakini case, online intermediaries caught under s 114A(1) of the EA may find it harder to rebut the presumption of publication of prohibited contents published by third parties on its platform, as it may not be sufficient to claim that they are not aware or do not have actual knowledge

12 Information Technology Act 2000, s 79(1) and (2)
13 Information Technology Act 2000, s 79(3)(b)
14 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 3
15 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 4
16 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 5
17 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 8

of the alleged prohibited contents. Online intermediaries may need to furnish stronger evidence to rebut the presumption of publication under s 114A(1) of the EA — for example, what preventive and active measures that have been taken to prevent the alleged prohibited contents being published by third-party users or subscribers on its platform, and whether there is any system in place that is capable of detecting and will rapidly remove offensive comments.

Online intermediaries should be cautioned that the following steps (as taken by Malaysiakini) may not be sufficient:

(a) providing self-serving terms and conditions as a caveat for its own self-protection, which provide warning to users or subscribers that abusive posting offending any law or which create unpleasantness would be banned.

(b) installing a filter program which disallows the use of certain foul words only, but not prohibited contents, postings or comments.

(c) implementing a peer reporting system, which allows other users or readers of the online platform to report on prohibited contents, postings or comments; and only upon the receipt of such report, will an editor of the online intermediary examine and decide on the removal of the same.

It may be useful for online intermediaries to seek guidance from other jurisdictions such as India and the UK when developing new measures or strengthening existing measures for purposes of preventing third-party users or subscribers from publishing offensive or illegal content, in order to avoid being made liable for such prohibited contents published by third parties.

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