
Technology, Media and Telecommunications & Data Protection

The Malaysiakini Decision: Liability of Online Intermediary Platforms for Third-Party Content

Introduction

On 19 February 2021, the Federal Court in the case of *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Another* (Case No. 08(L)-4-06/2020) held in a 6-1 decision that Mkini Dot Com Sdn Bhd, the owner and operator of the Malaysian online news portal ‘Malaysiakini’ (“**Malaysiakini**”), was liable for contempt of court in relation to third-party comments that were posted on Malaysiakini’s website.

The majority decision found Malaysiakini responsible for the third-party comments on its website based on section 114A(1) 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 editor of Malaysiakini, however, was found not guilty of publication of the comments.

The Federal Court’s decision may have serious ramifications on the liability of online intermediary platforms for third party content moving forward. This Update therefore seeks to provide a brief analysis on the summary grounds of decision for both the [majority](#) and [minority](#) decisions, pending the issuance of the full grounds of judgment by the Federal Court.

Case Background

The Malaysiakini case arises from several offending comments which were posted with respect to an article on Malaysiakini’s website entitled “CJ orders all courts to be fully operational from July 1” that was republished by Malaysiakini from the Bernama news online portal on 9 June 2020.

Excerpts of the offending comments can be found in the majority decision of the Federal Court.

On 12 June 2020, Malaysiakini was informed by the police that they were investigating certain comments posted under the said article on Malaysiakini’s website. This prompted Malaysiakini’s editorial team to immediately review the comments, and within 12 minutes after being informed by the police of this investigation, the comments were removed.

Notwithstanding that, on 15 June 2020, the Attorney General initiated committal proceedings against Malaysiakini and its editor, Steven Gan, for contempt of court. The Attorney General’s case centres

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around section 114A(1) of the EA 1950 which presumes Malaysiakini as the publisher of the comments and that the alleged act of contempt is thus committed by Malaysiakini, unless the contrary is shown.

Based on the summary grounds of the majority and minority decisions, there were three main issues before the court, namely: (1) whether Malaysiakini rebutted the presumption of publication under section 114A of the EA 1950, (2) whether the publication must be done with knowledge of the publisher (in this case, Malaysiakini), and for that purpose, whether such knowledge has to be actual or can be inferred, and (3) whether the elements for contempt of court have been established.

At the outset, Malaysiakini contended that knowledge is a key element (1) in establishing publication, and (2) in establishing the element of intention to publish which is necessary to impute liability for contempt.

Presumption of Publication under Section 114A of the EA 1950 and the Question of Knowledge

Section 114A(1) of the EA 1950 presumes any person who facilitates the publication or republication of a publication to be the publisher of the same, unless the contrary is proven. With respect to the element of publication, it was contended by Malaysiakini that they could not be held liable as a publisher as they had no knowledge of the offending comments prior to being alerted by the police.

In this regard, both the majority and minority decisions are in agreement that “knowledge” is a necessary element of publication. The minority decision went further to state that an online content service provider such as Malaysiakini can only be considered as a “publisher” if it does have knowledge of the existence and content of the comments posted by third parties. If Malaysiakini does not have the requisite knowledge, it cannot then be said to have published those comments.

The diverging point between the majority and minority decisions is in relation to the quality of knowledge required to establish publication in the context of contempt. The majority decision 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.

The majority opined that knowledge can be inferred from surrounding facts, and to determine knowledge, the court is concerned with reasonable inferences to be drawn from a situation as disclosed in evidence and how it affects the particular person whose knowledge is in question. In the present case, this refers to the knowledge of the person who has been entrusted with the exercise of the powers and duties of Malaysiakini, i.e. the editorial team of Malaysiakini.

In this regard, the majority found that knowledge was established based on the following:

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- (1) Malaysiakini as the owner of the website has full control of what is publishable and what is not;
- (2) it is inconceivable that Malaysiakini had no notice of the impugned comments, given that it has a structured, coordinated and well-organised and impressive editorial team and reporting structure;
- (3) the persons who had responsibility (and therefore knowledge) over the publication of the impugned comments, namely the 10 editors of Malaysiakini, did not come forward to court to deny knowledge over the said publication; and
- (4) members of the editorial team must be aware of the nature of the article and should have been able to foresee the sort of comments that it would attract, given their experience in running Malaysiakini for over 20 years.

The majority also further held that Malaysiakini cannot rely on (1) the huge volume of web traffic on its portal, (2) the 'failed' filter system that was put in place by Malaysiakini, and (3) compliance with the Malaysian Communications and Multimedia Content Code ("**Content Code**"), as a defence to deny knowledge of the existence of the offending comments.

Based on the above, the majority concluded that Malaysiakini failed to cast reasonable doubt on the absence of knowledge of the impugned comments, and therefore failed to rebut the presumption of publication under section 114A(1) of the EA 1950.

Conversely, the minority decision rejected the constructive knowledge test adopted by the majority and held that knowledge or liability can only be affixed on the publisher from the point in time when it becomes actually aware of the existence of the third-party comments, based on the provisions of the Communications and Multimedia Act 1998 ("**CMA**") and the Content Code.

The constructive knowledge test was also rejected in the minority decision because the test imposes liability on the online intermediary platform (i.e. Malaysiakini) as soon as the infringing content appears on the platform, and the platform will be unable to avoid liability even if it removes the impugned content, as it will be caught by the constructive knowledge test that it ought to have known and anticipated the content before it could be posted.

The Contempt of Scandalising the Court

The species of contempt alleged in this case is the contempt of scandalising the court, i.e. publication of scandalous matter of the court itself. The Federal Court in an earlier but recent case of *PCP*

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Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener) [2019] 4 MLJ 747 (referred to as the Arun Kasi case in the minority decision) held that for this species of contempt, it must be proved beyond a reasonable doubt that:

- (1) the publication of the comments was an intentional act on the part of Malaysiakini; and
- (2) Malaysiakini intended to publish the comments.

In relation to the second element, i.e. intention to publish, the majority would appear to have relied on the constructive knowledge test to adjudge that the intention to publish be similarly inferred from surrounding circumstances and is successfully established in the present case.

On the other hand, the minority decision again rejected the use of the constructive knowledge test to establish an intention to publish as it effectively requires an online intermediary platform to undertake an untenable proposition, namely to supervise throughout the day and night to prevent the publication of unlawful comments. It was opined that this is contrary to the objective of the CMA, which provides that the CMA should not be construed to permit censorship of the internet (section 3(3) of the CMA).

Compliance with the Content Code

Further to the above, an important point to note from the decision is the majority decision's rejection of Malaysiakini's reliance on compliance with the Content Code to shield itself from liability. The Content Code is a voluntary industry code established pursuant to section 95 of the CMA which provides guidelines on good practices and standards for content dissemination in line with the requirements under the CMA. While it is a voluntary code, Section 98(2) of the CMA provides that compliance with the Content Code is a defence to any legal action, prosecution or proceedings regarding matters that are dealt with in the Content Code.

The minority decision held that section 98(2) of the CMA provides a defence against liability, and one that was relied on by Malaysiakini in the present case by adhering to the "flag and take down" approach. However, the majority decision disagreed and held that the Content Code does not provide Malaysiakini with any shield of defence.

Potential Ramifications of the Decision on Content Regulation

It remains to be seen what the full impact of this decision will be for content regulation in Malaysia, in particular whether the Federal Court decision may extend beyond the realm of criminal contempt actions and inevitably impose a strict obligation on intermediary platforms to actively anticipate, prevent and censor any third party content deemed offensive (including content deemed 'offensive' by the standards

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of the CMA or the Content Code), before such content is even posted. This point will remain open to interpretation until such time where the Federal Court is invited again to consider and decide on the same issue. Be that as it may, the Federal Court decision (being a decision of the apex court in the country) remains authoritative until and unless clarified and/or overruled by a subsequent Federal Court panel. All operators of online intermediary platforms should therefore bear in mind the possible legal effects of this Federal Court decision in their current operations especially with regards to publication of third party content on their platforms.

As a matter of practicality, online intermediary platforms are unlikely to be able to moderate all third party content published on their platforms on real-time basis, especially in the case of innocent carriers who are merely providing access to the third party content but have neither control over the composition of such content nor any knowledge of such content. As pointed out in the minority decision, the heightened policing of content by online intermediary platforms may be construed as permitting censorship of the Internet (whereas section 3(3) of the CMA expressly states that nothing in the CMA should be construed as permitting censorship of the Internet).

Another potential consequence of this decision is that it is no longer a clear position that an online intermediary would be able to rely on compliance with the Content Code as a defence against dealing with any legal action, prosecution or proceedings regarding matters that are dealt with in the Content Code (pursuant to section 98(2) of the CMA). On this note, it must be highlighted that notwithstanding express stipulation in the Content Code that internet access service providers, internet content hosts and content aggregators shall not be required to monitor the activities of its users and subscribers (Paragraph 11.1, Part 5 of the Content Code), this decision inevitably requires online intermediary platforms to review their current mechanisms and standards that are in place and assess if these are still sufficient in light of the Federal Court decision.

Notwithstanding the above, the full grounds of judgment of the Federal Court (which has not been released as of the date of this Update) must be perused in order to fully appreciate the full impact of the Federal Court's decision in this case.

We trust the above provides you with a quick analysis on 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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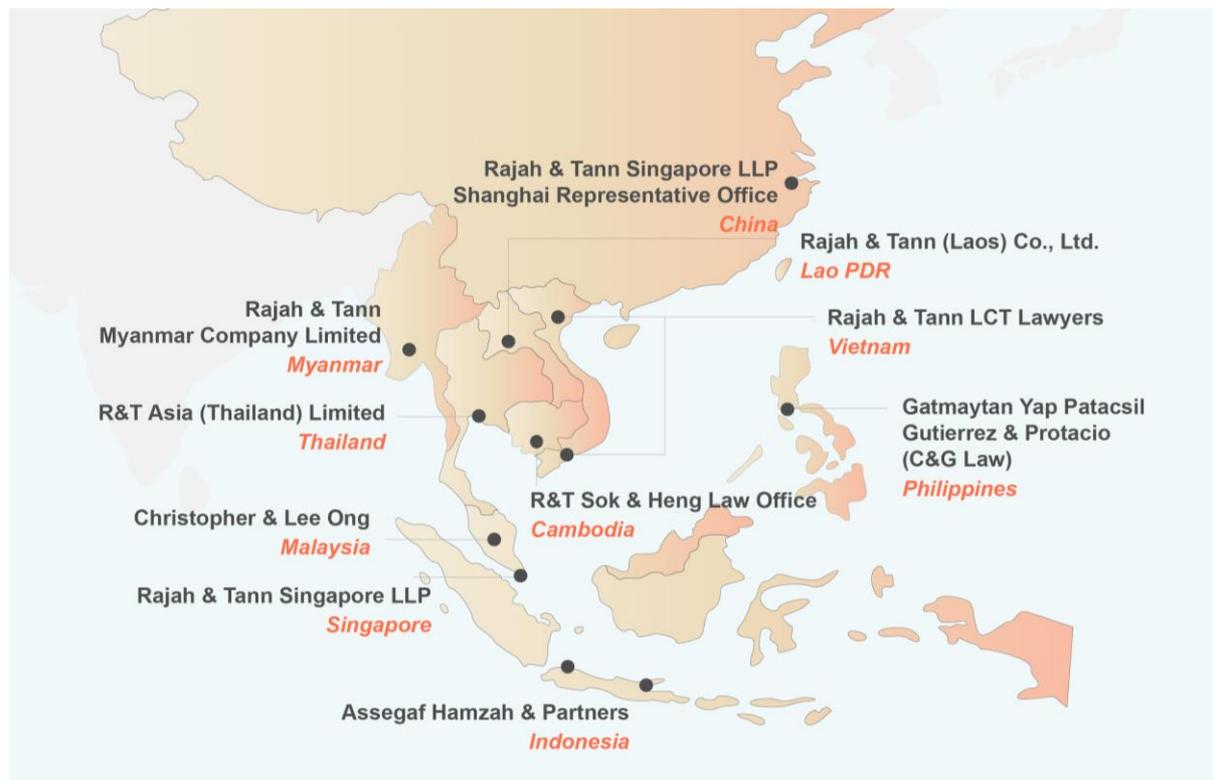
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