

LIABILITY OF INTERNET SERVICE PROVIDER IN CYBER DEFAMATION: AN ANALYSIS ON COMMUNICATION AND MULTIMEDIA ACT 1998

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Abstract: *The purpose of this paper is to examine the liability of Internet Service Provider for cyber defamation under Communications and Multimedia Act 1998 in Malaysia. The enactment of the Communications and Multimedia Act 1998 creates confusion on what law should be applied in cyber defamation cases. Furthermore, the law regarding the liability of online intermediaries is still uncertain in Malaysia as there is no decided case law to determine whether online service providers are liable for unwittingly transmitting or hosting illegal, offensive or objectionable content generated by the customer. The data are gathered from existence provisions, journals, and electronic references. The findings of the study found out that Communications and Multimedia Act 1998 should be revised and amend, added the provisions specifically on liability of internet service provider in Malaysia.*

Keywords: *Cyber Defamation, Internet Service Provider, Communication and Multimedia Act 1998*

Introduction

Cyber Defamation, also known as Internet Defamation or Online Defamation, is defamation that occurs in the world of Internet and its users. Cyber defamation is one of the various Cyber Crimes that can take place. Hence, the anonymous identity provided by the Internet encourages

people to express their expression freely and sometime giving them excessive freedom where they are committing defamation. There are numerous opportunities for cyber defamation for examples, Internet user sent messages to all members of a particular Internet group or posted on a web site, postings on a bulletin or in a chat session, or specific e-mail messages sent and forwarded to one or many recipients. Moreover, cyber defamation may not only occur in words written, it may also be portrayed by images or symbols (Masum, A. (2009). In order to understand more on the theory of cyber defamation, one must be aware of the concept of defamation.

The Concept Of Defamation

According to W.V.H Rogers (2010) in his book, defines defamation as a false statement made about someone or an organization that is damaging to their reputation. While, Jan Samoriski (2002) in his book, suggests that definition for defamation is where someone has intentionally published or said something that has harmed another person's reputation. Defamation is where a person intentionally states or spreads information about another person to cause others to think less of that person.

Then, according to Talib, N. (2011) in her book, she states that there are two types of defamation. First is libel that is the publication in permanent form of a defamatory statement such as writing or printing. Second is libel that is transitory form such spoken word or gestures. She also contended that as to prove defamation, the plaintiff must establish three elements which are the words are defamatory, the words refer to the plaintiff and the words have been published.

Cyber defamation is still a developing area of cyber law, clear precedents have not yet been set. The most authoritative book that defines cyber defamation is according to Akdeniz and Rogers (2001) which states that cyber defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. While, Masum (2009) in his article also suggest the similar definition for cyber defamation as mentioned by Akdeniz and Rogers (2001). Then, according to Blakeslee (2010) in her book, she mentions that statement posted on blog or in a chat room are considered to be written, false statement posted online constitutes libel.

When a defamatory statement has been posted online, the issue is regarding who will bear the liability of the defamatory statement. Thus, in this paper we wish to examine the liability of Internet Service Provider (ISP) for cyber defamation in Malaysia under Communications and Multimedia Act 1998. Concept on defamation was discussed in First Section. In Second Section, we will examine how ISP can be regarded as a third party in cases where its subscribers commit cyber defamation. The third section will present the weaknesses of Communications and Multimedia Act 1998, bringing to the light the a few drwabacks pertaing to cyber defamation cases. In Fourth Section, we will provide an analysis on the provisions in the Communications and Multimedia Act 1998 and in Fifth Section, comparison will be made with United Kingdom and United State to examine the ISP liability for cyber defamation in other Countries. The data are gathered from secondary data; existing provisions, journals, and electronic references.

Liability of ISP For Cyber Defamation in Malaysia

The law provides that besides having the author of the defamatory words to be the party sued, in a situation where there is more than one person involved in publication of the defamatory words all of them may be sued. These would include the publisher, editor, journalist and printer (Talib, N., 2011). In cyber context, this would also include the Internet Service Provider (herein after known as ISP) as a publisher.

According to David Lindsay (2000) in his article, he suggests that ISP is a company that provide access to the Internet. An individual user will usually have an agreement with an ISP to provide Internet access. He also mentions that universities and large corporation commonly lease telecommunications capacity from telecommunications carriers, which it will use to provide access to end-users.

Blakeslee (2010) in her book, states that ISP provides end users with a means to access the Internet. According to Yen (2009), he mentions that ISP is to signify a person or entity that provides customers basic access to the Internet. Such service generally consists of email, hosting of a web page, and the ability to surf the Internet. According to Tehrani and Amoozegar (2012) in their article, a body that protects a website is a service provider, as well as anyone who provides online search services, except for the entrepreneur who makes the content available, because they do not provide internet specific services.

ISP possess a huge amount of data about end users, including account information, where account holder visits on the Internet, amount of data distributed, amount of traffic a hosted web sites receives, and IP address linked with certain postings or account on a web site (Blakeslee, M., (2010). All the information is through an Internet Service Provider. Examples of ISP's in Malaysia are Jaring, TMNet, Arcnet, Celcom.net and Maxis.net, Digi.

When disputes arise, the ISP tends to be in the middle whether the receiving end involves an informal complaint, a formal legal complaint, or a subpoena for information. Sometimes an ISP might be liable for a direct claim. In many other instances, ISP will be immune from any claims, but still prove to be very helpful because of their duties imposed by law on it to maintain its immunity. In rare instances, an ISP might have immunity from a claim, but because of failure to comply with the statutory provisions of the safe harbor, the ISP might slip into direct liability (Blakeslee, M., 2010). Since the ISP provides Internet services for its subscribers, the ISP can be regarded as a third party in cases where its subscribers commit cyber defamation.

Weaknesses of Communications and Multimedia Act 1998

In Malaysia, a regulatory regime was introduced in November 1998 to govern the telecommunications, broadcasting and internet industries. Communications and Multimedia Act 1998 “the Act” was enacted to address the convergence of the traditional communication, broadcasting and internet industries and to promote greater transparency and clarity as well as industry self regulation (Muneeza, Aishath., 2010). Hence, the ISPs liabilities are handled by this Act.

However, there are a few drawbacks pertaining to the Act:

First, the enactment of the Act creates confusion on what law should be applied in cyber defamation cases. People are still using the Defamation Act 1957 rather than the Communications and Multimedia Act 1998 which provide direct liability to the person who

make the statement online and to the ISP. The law regarding the liability of online intermediaries is still uncertain in Malaysia. There is no decided case law to determine whether online service providers are liable for unwittingly transmitting or hosting illegal, offensive or objectionable content generated by the customer.

Second, the application of this Act is still unclear, because most of the cases in Malaysia shows that the aggrieved party only sue the party who posted that defamatory words without taking any action against the ISPs who provides the subscribers to access that server (Masum, A., 2009).

An Analysis on The Provisions in The Communications and Multimedia Act 1998

In Malaysia, section 112 and section 223 of the Communications and Multimedia Act 1998 (“CMA”) are used to make bloggers liable (Muneeza, A., 2010). However, it does not mention about the liability of Internet Service Provider (“ISP”) for cyber defamation under this Act. Furthermore, some well-known Malaysian bloggers such as, Raja Petra, Jeff Ooi, Ahirudin Attan, etc have been filed for defamation suits for making defamatory statement in their blogs: The law doesn't differentiate between online and offline world. Hence the Malaysian Defamation Act 1957 and as well as other laws could be used to deal with the issue of cyber defamation. This points out that for cyber defamation cases, action is preferably taken under the traditional defamation law rather than the CMA and the ISP liability is disregard for publishing the defamatory statement.

It has been suggested that on issue of defamation, the law is complex where there is a need to distinguish whether a defamatory statement is libel or slander. In a case of libel, if it is determined that the statement is defamatory then, there are presumptions against the author or the publisher. However, it must always be borne in mind that the publication in a web site or online is to the general public (Masum, A., 2009). Eventhough the author does touch on the publication of defamatory statement online, he does not state that the involvement of ISP in publishing defamatory statement online.

The main provisions prohibiting illegal content are provided under sections 211 and 233 of the CMA. Both sections prescribed the limit impose upon the service provider, and the usage of any network facilities or services (Abdul Aziz, N., & Ibrahim, I., 2012). This indicates that the existence of the liability of ISP under the CMA, however, since the author's literature is on the legal risk of the employer, the author did not elaborate more on the ISP liability for defamatory content.

The ISP Liability in United Kingdom

In United Kingdom, the Defamation Act 1996 was enacted in an attempt to update the law relating to defamation where a study conducted by the Law Commission which recommended the introduction of a new defence of “innocent dissemination”. This defence of innocent dissemination was introduced in an attempt to update the law to take account of changes in technology (Ian, Llyod.,2000). It indicates that the liability for publication requires the defendant to be the publisher of a defamatory statement. Once publication was established the publisher was guilty of publishing the libel unless he could establish, and the onus was upon him, that he was an innocent disseminator (Vamialis, A. 2013).

Godfrey v Demon Internet Ltd (2001) is an example of significant English case, where decided on the liability of Internet intermediaries for publishing defamatory material. This case took

place after the enactment of a legislative defence, which modifies the common law defence of innocent dissemination. Nevertheless, it shows that the case also dealt with the threshold question of whether, under English common law, an ISP is liable for publishing defamatory material by means of the Internet (Lindsay, D. 2000).

Moreover, in that similar case also establish a strong line of authority, meant good news to defamation victims who would then be able to seek damages from intermediaries, who failed to remove the defamatory material after being notified, irrespective of their passive instrumental role (Vamialis, A. 2013).

In *Bunt v Tilley (2006)*, *Metropolitan International Schools Ltd v Design technical Corp (2010)* and in recent case *Payam Tamiz v Google (2017)*, Justice Eady delivered a groundbreaking decision in relation to internet access provider's liability. This case decision is a great departure from pre-existing case law where up to that point, the distinction was usually made between primary content providers and genuine distributors (Vamialis, A. 2013). Eady J went a step further by distinguishing distributors from 'mere conduits'. The importance of this distinction lies into the fact that it reverses the burden of proof from the defendant to the claimant, if the defendant 'mere conduit' was considered as a publisher at common law, then the burden was on him to prove that he was an innocent disseminator (Lindsay, D., 2000). Based on the explanation on above cases, it can be concluded that UK decision cases, put a liability on internet service provider which can be considered as partly a party involved in cyber defamation case

Conclusion

Based on the discussion above, it is proposing that there is a need for Communications and Multimedia Act 1998 to be amended in order to give clear guideline on who will be liable for cyber defamation. The amendment must able to answer the extent of liability of Internet Service Provider for cyber defamation in Malaysia. The provisions in the existed law on the liability of Internet Service Provider for cyber defamation under Defamation Act 1996 in United Kingdom as a benchmark, for comparative purposes and for lesson to be learnt should be taken into account. Besides, there is a lack of literature in Malaysia regarding ISP liability in CMA. So far there have not been any reported cases on the liability of an ISP in Malaysia as a conduit that who allowed for the transmission of data. Previous researches had been done on the blogger's liability for making a defamatory statement online disregarding the ISP liability for online defamation.

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