

Defamation Suit: Internet Service Provider (ISP) at Risk!

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ABSTRACT

World has become smaller, communication and transportation have been expedite, discharging bills and payment have become much easier with the assistance of an impressive technology. Unfortunately, as many have enjoyed advantage of the new technology, there are more of them who have misused the technology. The nature of convergence technology requires a new regulatory framework to guide future development. Policing a global operation like the Internet involves policing citizens from countries with widely differing domestic laws, cultures and social mores. An overwhelming usage of the Internet has contributed to uncontrollable activities which exposed harms to once private life and one of it is dissemination of defamatory words. This study will critically examine the adequacy of the Malaysian legal framework in governing the rights and liabilities of the internet service provider i.e The Multimedia and Telecommunication Act 1998 and The Defamation Act 1957. The objectives underlying this study is to examine the Malaysian legal standing on the rights and liabilities of the Internet Service Provider in Malaysia under the defamation claims and looking into the approach taken by the advanced jurisdiction of United Kingdom and European Union into solving the inadequacy of the said laws with the intention of recommending the most relevant amendment to the existing Malaysian legal framework on the liabilities and protection for the ISP under a Defamation claim.

Keywords: *Internet Service Provider, Cyber, Defamation, Law, communication*

INTRODUCTION

The Internet had its origins in 1969 as an experimental project of the Advanced Research Project Agency (ARPA) and was called ARPANET. It started with linking computers and computer networks owned by the military, defense contractors and universities laboratories. It was extended later allowing researches across the country to access directly and to use extremely powerful super computer (Girasa, 2002).

The development of information communication technology (ICT) and convergence technology in the form of satellite and digital has brought a significant change to the legal development of media and communication in Malaysia. Massive development of technology has contributed both positive and negative impact to the world. World has become smaller, communication and transportation have been expedite, discharging bills and payment have become much easier with the assistance of an impressive technology. Unfortunately, as many have enjoyed advantage of the new technology, there are more of them who have misused the technology. Globalization renders conventional and territorial legislation less applicable. The nature of convergence technology requires a new regulatory framework to guide future development. Policing a global operation like the Internet involves policing citizens from countries with widely differing domestic laws, cultures and social mores. An overwhelming usage of the Internet has contributed to uncontrollable activities which exposed harms to once private life and one of it is dissemination of defamatory words. The statement or publication which is the subject of a defamation action will consist of words, be they written, spoken, broadcast or transmitted electronically.

Internet Service Provider is created to sell bandwidth or network access by providing direct backbone access to the internet and usually access to its network access points. The nature of its function has exposed the ISP to claims of the misconduct done by the third party. Licensed Internet service provider has bloomed widely. As the character of Internet is also known as friendly user, anyone with interest from different part of the world may anticipate in communication forum within the web. Among the most common claim is the defamation claim.

From the development of other advanced countries, it can be said that the primary consideration will once again be the practicability of controlling what is published and predicting the risk. The use of the Internet also increases the ways and extent in which defamatory statements or materials can be published. ISP is generally in a worse position than the printers and distributors as regards to keeping an eye on what is published. The sort of policing contemplated in relation to distributors of printed material is simply not practical when there are thousands of subscribers. The reach of the Internet far surpasses any media known to date.

To date many advanced countries such as United Kingdom, European Union, United States of America and Australia has make attempt to define the scope of liability of the ISP in Civil and Criminal suit. These countries currently have advanced sets of law that governs this matter. The litigation in these countries had determined legal responsibility for the online hosting, publishing and possession of unlawful and illegal content. The Malaysian Defamation Act 1957 attaches liability both to the author of a defamatory statement and the publisher thereof. However, the statute does not specifically address the dissemination of defamatory statements by way of their publication over the Internet. Malaysian laws have not defined clearly on the extent of liabilities of the ISP. Neither is there many claims being submitted under the Malaysian court on the same matters. There is lack of authority defining the ISP's liability in Malaysia.

There is a need to determine the scope and limitation of liabilities of the ISP. Balancing the functions of the ISP in promoting freedom of speech and laying down the limitation to this right should be the main concern. This study will try to address this concern by looking into the development in other advanced jurisdiction of United Kingdom and European Union with the objectives of recommending the appropriate reformation to the Malaysian legal framework.

RESEARCH OBJECTIVES

The project was undertaken with the following objectives in mind:

1. To examine the current legal framework that governs the rights and liabilities of the Internet Service Provider (ISP in Malaysia.)

2. To examine the experience of the laws in other jurisdiction such as United Kingdom and European Union for comparative analysis and lessons to be learned.
3. To propose the amendment to the current relevant laws to adequately govern the rights and liabilities of ISP in Malaysia.

RESEARCH METHODOLOGY

This research adopts the qualitative methodology as it provides a deeper understanding of social phenomena, particularly on the extent of liabilities of the Internet Service Provider for disseminating defamatory statements. The research will anticipate into two stages, which will draw upon primary and secondary sources. The first part is the library-based research on searching information through primary sources which consist of laws of Malaysia, policies of the government, the state and the judiciary, the rulings of the Malaysian Bar Council, the state bars while the secondary sources are consist of online databases including CLJ Law, LexisNexis, Ebscohost, Science Direct, Springerlink, Proquest and Emerald, documentary evidence such as statistics, relevant reports, acceptable usage policies of the ISP company and proceedings which may be collected from the respective respondents from the semi-structured interviews. The aim of the first part is to get a better understanding of this part of the area of law.

The second part of the research involves the fieldwork which will be conducted with the aim of collecting the primary sources from the face to face semi-structured interviews alongside with the secondary sources. The primary sources will be generated from case studies which will involves ISP companies, regulators, ministries, Commission of Multimedia Communication Act officers, legal practitioner and academicians whom are expert on this area. This instrument is chosen as it gives the researcher the opportunity to explore the respondent's opinion of an issue in depth, rather than to test knowledge or simply categories. This will provide mix information on the experience that closely reflects the appropriate suggestion to reform the existing regulation. The selection of the respondent will be made using the purposive approach. The case studies were exploratory in nature as the research sought to investigate how the respondents perceived the extent of liabilities of the ISP under a defamation claim and the reasons for limitation and extension of those liabilities.

The collected data will be analyzed using the taxonomy theory, logical analysis, content analysis and phenomenological theory.

FINDINGS

Internet Service Provider

The owner of facilities such as satellite earth stations, broadcasting transmission towers and equipment, mobile communications base stations, telecommunication lines and exchange, radio communication transmissions equipment and broadband fiber optic cables are categorized as network facilities provider (Girasa, 2002). Sharma (2006) in his book defined a network service provider as an interactive network service. Depending upon its functional attributes a network service provider may act as an 'information carrier' or 'information publisher'. He elaborated further that an Internet Service Provider (ISP) to have the system similar to a virtual post office. It receives, stores and transmits electronic messages through its mail servers on behalf of another person (originator and/ or addressee) (Price, 2001).

He further discusses the need to differentiate between an ISP and a Search Engine. A search engine is a facilitator of information between two parties, that neither knows the content of the information nor the identity of the user (Price, 2001). However, an Internet Service Provider only acted as an intermediary that link between an originator and an addressee. Looking into the scope of service provided by the search engine, both can be categorized as a service provider. However it does not mean that all intermediaries are network service providers.

In India, The Information Technology Act 2000 defines intermediary as any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message (Information Technology Act, 2007). This definition does not directly states that intermediary as to include Internet Service Providers. However, Sharma (2006) emphasize further that this definition is intended to cover both professional and non professional intermediaries who performs any of the functions of an intermediary (Girasa, 2002). As such an Internet Service Provider falls under this definition.

Vakul Sharma (2006) again commented that the India Information Technology Act is absent in defining Network Service Provider which is any person who provides a communication service by means of guided or unguided electromagnetic waves and includes such other services as may be prescribed. It is also silent as to the meaning of transmission which means circulation or distribution of electronic record /message.

Another definition that relates to ISP is provided in the United States of America Communications Decency Act 1996 (CDA) (Rowland & MacDonald, 1997) which elaborate the term “ interactive computer service” to mean any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.

In summary it can be said that the primary function of a network service provider is to provide access to the network. This could be in the form of dial-up, broadband, satellite, microwave or any other communication media. Network service providers may consist of telecommunication companies, data carriers, wireless communications providers, Internet Service Providers, and cable television operators offering high-speed Internet access. Communication across the globe has spawned discussion group which have been organized into news group, electronic bulletin boards and electronic mailing lists for the exchange of views and experiences and the dissemination of information. Although the way in which they are set up and operated varies, they provide similar scope for the promulgation of defamatory material (Girasa, 2002).

Defamation and ISP

To highlight a defamation case, the fundamental elements that would invoke a cause of action are the making of a defamatory statement, the defamatory words must refer to the claimant and the defamatory statement has been circulated to another third party. The frame that would suit the picture of is the third element which is material to proof that the defamatory statement has been circulated or distributed. The question is, under what circumstances, would a network service provider be held liable? Vakul Sharma (2006) in his book has listed the following circumstances to answer the question:

1. The ISP knows, or has reason to believe, that the information content it is transmitting, is unlawful
2. Regardless of ISP's knowledge, it benefits directly from the transmission(it receives benefits beyond the indirect benefit that it receives from internet access fees)
3. The ISP fails to take reasonable steps to determine if the information content that it transmits is unlawful.

Literature (Anil, 2010) has stated that from the above statements, the potential of an ISP to be challenged under a civil or criminal suit depends on the knowledge, technical acts of avoiding any extra benefit forbidden by the law and exercising reasonable care in filtering all the information posted using its facilities.

From the literature (Anil, 2010) made on the question of why ISPs are made to be the prime party to a defamation claim, the followings reasons can be referred to:

1. The main reason contributing to the act of the plaintiff in failing claims against a publisher or broadcaster rather than the individual is due to the higher possibility that the prior will be more likely to have resources to satisfy an award for damages.
2. Network service providers may be more amenable to pay the claimants to settle the case rather than be embroiled in a long drawn court battle.
3. In a situation where the network service provider is located in the claimant's home jurisdiction whilst the intermediary is located in a foreign jurisdiction, the tendency would be for a claimant to first exhaust all of his potential remedies against the network service provider before initiating suit against the originator of the offending information (Smith, 2007).
4. The possibility for a user's identity to be impersonated and the use of anonymous re mailing services. Such a technique makes it impossible to identify the author without the co-operation of the operator of the re mailing service.

Legal Development in United States

The rights and liabilities of the Internet Service Provider under a defamation suit have been discussed (Samoriski, 2002) in many countries

around the world. The possibility of being sued for unknowingly defaming the character of another person or company now makes the ISP accountable for violating laws that previously applied only to journalist and music producers (Communication Decency Act, 1996). This issue has alarmed the government to enact statutes to govern the matter (Samoriski, 2002). In United States the Communication Decency Act 1996(CDA) has answered the call to legislate on the rights and liabilities of ISP under a defamation claim. The purpose of this Act specifically through Article 230 of the Act, is to promote good conduct of the ISP (Girasa, 2002). The US Congress enacted Communications Decency Act in 1996, not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others (Lloyd, 2000). Through this act, the ISP is said not to be liable for their failure to edit, withhold or restrict access to offensive material distribute through their channel. The prohibition is specifically provided under section 230 of the said act.

Roy J. Girasa (2002) in his book has highlighted that the legislative and judicial attempts to establish rules for overseeing and protecting legitimate concerns of national inhabitants have been frustrated by the incredible pace of technological advances. Claims have been brought to court against the ISP for the wrong action of distributing or publishing the defamatory words. The general rule of the defamation law is that the publisher of a defamation faces liability where an institution maintains control over what its users publish, it is likely to be considered a ‘publisher’ of this material for the purposes of defamation. Common controversial issue under the claim of defamation is as to whether an ISP can be considered as a publisher or a distributor or both.

On action base on vicarious liability in respect of the use or misuse made of communications network, few writers (Brolin, 2008) have made reviews on the pioneer cases of *Cubby v CompuServe 776F Supp 135(1991)* (Brolin, 2008) and *Stratton Oakmount v Prodigy (1995)195 NY Misc LEXIS 229* stating that under a defamation claim the ISP will be made liable as a publisher if they knew the content of the communications posted in their network. In determining whether Prodigy was liable for the defaming statements of its customer in this case, a New York state judge was left to determine whether Prodigy was a „distributor” of information, such as a bookstore or library, or whether Prodigy was a „publisher” of information,

such as a newspaper. As a mere distributor, Prodigy would not be liable for the statement. In contrast, if Prodigy was considered a publisher (with greater control over the information's content), Prodigy would be liable (Brolin, 2008). In a decision that shocked most on-line service providers, the judge held that, as a result of Prodigy's well-publicized policies of monitoring and censoring its forums, Prodigy was a publisher and was potentially liable for the defaming statement. Although the case was settled by the parties and Prodigy moved for a withdrawal of the judge's decision, the judge refused.

Most literatures (Hagiwara, 2010) noted the irony that Prodigy was more likely to be liable for defamation because of the additional steps it took to control the content of its discussion groups. It can be said that any attempts to regulate the content of uploads from subscribers are likely to subject the service provider to liability. CompuServe did not attempt to monitor and control its discussion groups to the extent done by Prodigy, which made it easier for the CompuServe judge to find that CompuServe was merely a distributor of information. However they will be excluded from liabilities if they merely carry out the duty of a distributor and they were of absent mind over the defamatory content (Okamura, 2008). The literatures (Okamura, 2008) seem to be unanimous on commenting this case where it can be summarized that the ISP must take a hands-off approach if they are to escape liability for defamation.

Later section 230 of the CDA has been quoted under the case of *Zeran v. America Online Inc.* 129 F.3d 327, 330-31(4th Cir.1997) and *Doe v. America Online, Inc.* 783 So. 2d 1010(Fla. 2001) where literatures (Klett, 1997) has summarized that this section has create immunity to any cause of action that would make service providers liable for information originating with a third party user of the service. It is said (Lloyd, 2000) that there is still loopholes under the current act as it does not elaborate the liability of the ISP as distributor. Shnyder and Shaw (2003) summarized that the broad usage of section 230 can be asserted that ISPs in US are immune from liability for content carried on their service. Hoboken (2008) commented that the United States legislature has done much more to give legal space for new intermediaries to act and provide value to the Internet.

Development in UK and EU

Chris and John (2002) contended that the debate on this particular issue has started in UK since 1999 during the trial of the case of *Godfrey v*

Demon. In the context of Internet, Chris and John (2002) categorized an act of 'publication' includes 'distribution' also. However the development in UK[37] states that ISP will not be categorized as author, editor or publisher if it only involved as the operator of or it has no effective control (Kelly, 2007). Anil (2010) agrees that the UK law of Defamation is in line with the provision under the Electronic Commerce (EC Directive) Regulations 2002 which has laid down the principle that the intermediaries will not be held either strictly liable or for their negligence for transmissions provided they do not commence the transmission, do not select the receiver of the transmission or do not select or modify the contents of the transmission (Bernstein, A. & Ramchandani, 2003).

Another view made by Smith (2007) stating that the EU regulation which has been adopted by UK's regulation did not include the selective intermediaries under the current definition of ISP. It was commented that the United Kingdom has swapped the Directive on Electronic Commerce into national law in 2002 with the Electronic Commerce Regulations 2002 and did not insert additional exemptions for providers of hyperlinks and information location tools. In the end of 2006, the U.K. government's Department of Trade and Industry (DTI) (Smith, 2007), now called the Department of Business Enterprise and Regulatory Reform, conducted a review of the intermediary liability regime specifically addressing the question whether the existing safe harbors should be extended to providers of hyperlinks, location tools and content aggregation services. The EU directives Regulation (UK Defamation Act, 1996) has limit the liability of ISP who unwittingly transmit or store unlawful content provided by others for ISP that involves or exercising the functions of a mere conduits, those who are engage in 'caching' information and those who are engaged in 'hosting' information. The terms 'qualified immunity' has emerge from this EU directives where the ISP is only entitle to used the immunity upon fulfillment of certain conditions as follows:

1. Has no actual knowledge of the defamatory words
2. Removing the defamatory statement immediately upon receipt of notice to remove

The case of *Bunt v Tilley* (2006) 3 All ER 336, has been quoted by the literature (Smith, 2007) to describe that ISP exercising passive role do not have actual knowledge. This is the first case that has utilized the provision

under the EU Directives. It was also commented (Smith, 2007) that this case has provide a better protection to the ISP as compared to the rulings under the Godfrey's case which upheld section 1 of the Defamation Act 1996.

Anil (2002) has commented that EU law only contains 'safe harbors' for the providers of strictly delineated 'mere conduit' (Girasa, 2002), 'caching' (Charlesworth & Reed, 2000), and 'hosting' (Anil, 2010) services and the ISP generally do not profit from the provided legal certainty. For each of these categories it contains a conditional liability exemption. The result is a patchwork of degrees of liability across the EU. It was argue that currently EU law takes insufficiently into account the added value selection intermediaries provide to the online environment and their contribution to the free flow of information (Anil, 2010). Vakul Sharma (2006) again commented that it really makes sense for an ISP to enjoy unqualified immunity from liability based on material created by third parties, and made available through its service. But this 'unqualified immunity' is lost if it either provides proprietary content or knowingly distributes the unlawful content.

Development in Australia

In Australia, Heitman (2005) agreed that the rights to Freedom of Speech has become stifed due to the failure of the government to protect the internet content from third party censorship. From various writings showed that there is less litigation brought to court against the ISP on defamation claim (Heitman, 2005). The worrying development states that unlike in US, Australia's ISP are pressured to comply the demand of threat as to avoid consequences of embarking into lengthy and costly court proceedings. It has been a common practice that the ISP had to respond to the threat from the claimant by shutting down their web. On the principle of laws in Australia, Heitman (2005) agreed that there is a similar protection given to the ISP both in Australia and UK however some contended that the protection given to the ISP is wider in Australia as compared to UK laws. There is no test of taking reasonable care before any publication is required under the Australia regulations. The amendment to the Broadcasting Service Act 1999 significantly has a new defamation defense for the ISP. The ISP has no longer need to update the role of an active monitoring the content; they are only required to remove content following formal notification by the Australia Broadcasting Authority.

Singapore

The development of this matter in Singapore begin in 1996 where Singapore took an initial step by indicating that she would make no legal distinction between the Internet and other types of media by shifting the responsibility for regulating the Internet from the Telecommunication Authority of Singapore to the Singapore Broadcasting Authority (SBA) (Samoriski, 2002). The SBA later introduce the Internet Code of Practice in the same year which the essence of the code is as a set of guidelines on acceptable internet content with which Internet Service Providers and Internet Content Providers are required to comply (Ismail & Aziz, 2008). In relation to governing communication made through internet the code impose duty on the SBA to ensure that nothing is included in any broadcasting service which is against public interest or order, national harmony or which offends against good taste or decency. While making statement on an appropriate regulations to govern the internet activities this article quoted the words of the Prime Minister, Goh Chok Tong saying “ a balance must be struck between free access to information and the need to maintain the values of society” (Ismail & Aziz, 2008). Madieha (2007) suggested that to impose the liability of deleting every defamatory statement on the ISPs would contravene the right to Freedom of Speech.

Malaysia

In Malaysia, civil defamation is provided under the Defamation Act 1957. While the Internet provides the arena in which defaming statement can be made or published, there is no specific legislation that deals with defamation on the Internet in Malaysia. The Defamation Act 1957 applies to publications in printed materials and broadcasting through radio or television. Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects and no computer network or services. However, the said Act provide for publications in printed materials and broadcasting through radio or television. The Malaysian Defamation act is silent on defining the word internet service provider neither do it provided the extent of liability of the internet service provider in Malaysia (Jalil, 2002). It was stated that since the law applies to published or broadcast materials, hence in principle it applies to materials such as blogs and websites published on the Internet (Jalil, 2002).

The Communications and Multimedia Act 1998 outlines guidelines for voluntary self-regulation of ISP's. The Communications and Multimedia Act of 1998 ("CMA") and the Communications and Multimedia Commission Act of 1998 ("CMCA") together directly govern Malaysia's telecommunications, broadcasting, and Internet sectors, including related facilities, services, and content (Madieha, 2007). The CMCA establishes the Malaysian Communications and Multimedia Commission, which is empowered to regulate the information technology and communications industries. The commission takes the position that Internet content must be regulated and controlled for "reasons of access, privacy and security and protection of individual rights (Openet, 2010).

The CMA empowers the commission with broad authority to regulate online speech, providing that "no content applications service provider or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person." (Malaysia Communication and Multimedia Act, 1998). The CMA also establishes the Content Forum, which formulates and implements the Content Code-voluntary guidelines for content providers concerning the handling of content deemed offensive and indecent. Comment have been made on the possibility of the commission to define scope of liability under an internet defamation, the questions that were tossed are how would the Commission decide as to what should be regulated; should it just be materials that are defamatory and slanderous to the government or to an individual's, ethnic background or gender, for example. Then it is a question of degree and standard to be applied when regulating. There is also the issue of whether the act of regulating is a form of censorship, which the Act has clearly stated it will not permit.

CONCLUSION

Looking at the development in various countries above it can be summarized that Malaysia is currently at a drawback on the legal framework that governs this matter. In this instance, the notice and take down procedure has not been adopted in any of these Malaysian laws stated above, leaving the types of remedies available to the aggrieved party limited to the traditional remedies specified under their specific legislation.

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