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# UPDATES ON MALAYSIAN CYBER CASE LAW

By **Foong Cheng Leong**

**In July 2012, the Malaysian government introduced section 114A of the Evidence Act 1950 (114A). The new law provides for the presumption of fact in publication in order to facilitate the identification and prove of the identity of an anonymous person involved in publication through the internet:**

> Presumption of fact in publication
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> 114A. (1) A person whose name, photograph or pseudonym appears on 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.
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> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.
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> (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

This new law sparked a massive on-line protest, dubbed the 'Malaysia Internet Black Out Day' and also 'Stop114A' campaign. Protesters replaced their Facebook and Twitter profile picture with the Stop114A banner, and web site operators displayed the Stop114A banner on their web sites. Within two days, the Stop114A Facebook web site (https://www.facebook.com/evidenceamendmentact) gained 43,000 members from 400 members. It is probably one of Malaysia's most successful on-line campaigns.

## Section 114A

Prior to the introduction of section 114A, the prosecution faced a difficult task to prove that an accused is the publisher of certain content. This can be seen in the cases of *PP v Muslim bin Ahmad* [2013] 1 AMR 436 and *PP v Rutinin Bin Suhaimin* [2013] 2 CLJ 427, where both accused had been charged under section 233 of the Malaysia Communications and Multimedia Act 1998 for allegedly posting offensive comments on the Sultan of Perak's web site. Both men alleged that they did not post the comments, notwithstanding that their internet protocol addresses pointed to them.

In Rutinin's case, the investigators detected the Media Access Control (MAC) address of the computer that was used for the internet session in question when the offensive remark was posted. The MAC address is the unique address that is given to a hardware device by the manufacturer. The particular MAC address matched the MAC address that was captured by the internet service provider's servers during the internet session in question when the offensive remark was posted. The prosecution allegation was based on the circumstantial evidence that the computer with the MAC address that was used to make the posting in question was found in the shop of the accused, and the fact that the internet account belonged to the accused himself. Given this evidence, the prosecution submitted that the accused must have posted the offensive remark in question.

In Muslim bin Ahmad's case, one of the accused's witnesses, claiming to be an expert witness, testified that e-mail spoofing had taken place. However, he did not carry out an analysis of the exhibits or the server in this instance, and apart from merely stating that e-mail spoofing is possible and showing how it is done, no proof was adduced by the witness to show that any e-mail spoofing had in fact taken place.

The Sessions Court acquitted Muslim bin Ahmad, and Rutinin bin Suhaimin was discharged by the Sessions Court without his defence being called. The prosecution had apparently failed to show that the persons who posted the offensive comments were the accused. However, the High Court subsequently overturned the Sessions Court decisions. Rutinin Bin Suhaimin's defence was called, but the judge held that section 114A is not

 

applicable because the postings were made before the enforcement date of section 114A (31 July 2012). However, the circumstantial evidence was sufficiently strong to conclude that the accused had used the internet account that was registered in his name at the material time. Muslim Bin Ahmad was handed a fine of RM10,000 for each charge and six months' imprisonment. He requested a 'binding over order' (released on probation). However, the learned judge dismissed the request and warned that a binding over order '*would send the wrong message to would be offenders and the public at large that offensively uncontrolled and virulent comments can be indiscriminately posted on the Internet without any or serious repercussions. And that is not a message that this court would like to send out.*'

## Software licence

In another case, *Avnet Azure Sdn Bhd v EACT Technologies Sdn Bhd; Sapura Research Sdn Bhd (Third Party)* (Kuala Lumpur High Court Civil Suit No.D-22NCC-439-2011) (Unreported), the High Court dealt with a case regarding the delivery of a software licence, and in particular the admissibility and evidential weight of e-mail messages. The plaintiff sued the defendant for outstanding fees for the sale and delivery of software and licences. The defendant alleged that the software and licences were purchased for the third party.

The mode of delivery of the licence is based on electronic evidence, namely a 'server-generated' e-mail message with an attachment which is a document described as a 'Proof of Entitlement' (POE). There is no requirement of any physical delivery in the form of any media kit or a box containing a CD. All that is required is for the end-user to visit a dedicated web site to obtain the 'licence key' with which it can then download the software from the web site.

The plaintiff sought to rely on the server generated e-mail message with the attachment (the POE) to show that the POE had been delivered to the third party. The plaintiff tendered in the course of the trial a certificate under section 90A(2) of the Evidence Act 1950 in an attempt to persuade the court that once this computer evidence is admitted upon production of the certificate, the truth of the contents must be held proven. The High Court held that reliance on an e-mail without the maker being called is highly undesirable and is hearsay. However, there could be circumstances when its authenticity and veracity can be established by other direct and circumstantial evidence.

## Facebook and tweets

Recently, the High Court has dealt with two cases relating to tweets and Facebook postings. In *National Union of Bank Employees v Noorzeela Binti Lamin* (Kuala Lumpur High Court Suit No. S-23-NCVC-14-2011) (Unreported), the plaintiff initiated an action against the defendant for posting alleged defamatory comments on her Facebook page.

The plaintiff's witness, however, did not personally ascertain the identity of the Facebook account's owner: a representative in his office did so. A representative from his office had compiled the Facebook pages, and the witness claimed to have knowledge of who owned the account, because it was shown to him. A Facebook page was shown to him and it had the name of the first defendant and that of several other people. He knew who operated that Facebook account because members had confirmed to him that it was the first defendant's account. He admitted that he had not called these members as witnesses, thinking that what evidence he had was enough. The plaintiff also did not call the person who provided the documents containing the Facebook comments.

The defendant denied making such comments on Facebook, and that his sister operated the Facebook account. His sister also testified that 'maybe someone hack[ed] my Facebook [account]'. The defendant further contended that the plaintiff had failed to take any steps to check the details of the owner of the Facebook account or the internet address with the Facebook administrator to confirm that the account belonged to the first defendant. Notwithstanding this evidence, the defendant admitted in her Statement of Defence that she had published the comments. As a result, the court held that she was bound by her pleadings and therefore could not dispute that she did not post the comments.

The High Court was also of the view that the comments on the Facebook would point to the defendant being the author of them, and the person who published the comments. The court found it unbelievable that the defendant's sister would be interested in posting comments on the plaintiff.

In *Dato Seri Mohammad Nizar Bin Jamaluddin v Sistem Televisyen Malaysia & Anor* (Kuala Lumpur High Court Suit No: 23 NCvC-84-07/2012) (Unreported), the plaintiff, a well-known politician, filed an action against the defendants for defaming him through the first defendant's television news report of materials regarding the plaintiff's tweets on in his Twitter account.

The plaintiff alleged that the news report wrongly accused him of making the allegation that the Sultan of Johor had used public funds to bid for car plate number WWW1. The defendants contended that the plaintiff did, in his tweet messages, launch the criticism against the Sultan of Johor for having indulged in the extravagance of bidding RM520,000.00 for the number plate.
The High Court held that plaintiff's tweet messages, read and understood by any reasonable man, clearly insinuated that the Sultan of Johore had used public funds for the WWW1 bid. Thus, the court held that the defendants succeeded in their defence based on justification. However, the court held that the defendants did not practise responsible journalism, because they failed to verify the truth of his tweet messages with the plaintiff, or to obtain his comments on the matter. The defendants' publication was lop-sided, leaning towards giving a negative impression about the plaintiff, even before the police completed their investigations. The court also stated that there should be freedom on the part of the plaintiff to tweet his personal messages in his own Twitter account for as long as the laws on defamation and sedition and other laws of the land are not breached.

## Closing

In early 2013 alone, numerous netizens were investigated or arrested for their alleged unlawful postings. Two bloggers were arrested for allegedly inciting hatred and causing chaos on their blogs, and the police questioned a lady and her friends for posting Facebook comments that allegedly insulted the Malaysian King. The authorities have also arrested the operator of a media piracy site, which hosted links to illegal copies of music, TV shows and movies. Police reports have also been made against two Facebook users who had allegedly insulted the Prophet Muhammad. It will be interesting to see how the courts deal with evidence obtained from the internet in the future.



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