



Offensive Content on The Internet: The Malaysian Legal Approach

Ammar Abdullah Saeed Mohammed^a, Nazli Ismail Nawang^b, ^{a,b}Faculty of Law and International Relations, Universiti Sultan Zainal Abidin,

Recently, there has been a lot of offensive contents available on the internet. Therefore, new legal challenges have arisen, and many legislators have updated the existing laws to criminalise offensive content on the internet. In Malaysia, s.211 and 233 of the Communications and Multimedia Act 1998 regulates offensive content on the internet. However, these two provisions have been criticized as they can be used to silence the critics and comments on political issues, as well as a breach of freedom of expression. This paper aims to discuss the offensive content on the internet, under s.211 and s.233 of the CMA 1998, by analysing legal texts and cases and legal opinion. To sum up, no comprehensive definition for offensive content exists, and it is submitted that s.211, and 233 CMA is very broad to describe the offensive content on the internet, but it's subject to the court's assessment whether the content falls under the types of offensive content on the internet in s.211 and s. 233 of CMA. After All, there is no breach to freedom of expression under s 211 and 233 of CMA, because freedom of expression is not absolute and must be limited within the law, and nobody can insult others under the guise of freedom of expression. Finally, s. 211 and 233 CMA protects people's rights and the broad interpretation will help to stop any offensive content on the Internet in the future as it will be in the end evaluated by the court whether the content is offensive or not.

Key words: *Offensive Content, Internet, Malaysia, Communications and Multimedia Act.*



Introduction

Nowadays, the Internet has opened up a new world of content; this has created a new set of challenges for legislators to update the existing laws and to include such legal issues. Malaysia has introduced the Communications and Multimedia Act of 1998 (CMA) to regulate the telecommunications and multimedia industry. (Annotated Statutes of Malaysia [ASM] (1998) The CMA covers communications over communications networks including electronic media. The jurisdiction of the CMA is restricted to networked services and activities. However, the CMA does not encroach on the scope of other existing laws regulating traditional media and content services. Also, The Communications and Multimedia Content Forum of Malaysia (CMCF) was established in February 2001 as an independent body committed to maintaining and promoting industry self-regulation as well as to supervise the content dissemination and related issues enforced by the CMA. The CMCF, comprising members from six categories; Content Creators/Distributors, Broadcasters, Audiotext Hosting Services Providers, Advertisers, Civic Groups and Internet Service Providers, have come together to draft this Code. Therefore, the CMCF established a voluntary Code called the Multimedia “Content Code” as guidelines and procedures for good practice and standards of content disseminated for public consumption by service providers in the communications and multimedia industry. The Content Code was registered with the MCMC on the 1st of September 2004 (Azmi, 2004). This paper will discuss the offensive content on the Internet as a cybercrime offence under s.211 and s.233 of the CMA.

The Malaysian Legal Context of Prohibiting the Internet’s Offensive Content

Offensive content is defined as “any published or broadcast content (such as articles, photographs, films, or websites) that is likely to be upsetting, insulting, or objectionable to some or most people” (Offensive Material Definition and Meaning, 2017).

In Malaysia, as far as offensive content on the Internet is concerned, section 211 and section 233 of the CMA are the main provisions that enable legal action to be taken against providers of offensive content on the Internet. Section 211 CMA provides that:

“(1) 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.

(2) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day or part of a day during which the offence is continued after conviction.”

Regarding the term “offensive content”, the CMA does not provide a specific definition. Nonetheless, the term ‘content’ is defined in section 6 of the CMA as:

"any sound, text, still picture, moving a picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically."

Accordingly, S 211 of the CMA sets out five categories for the internet content to be offence which are; indecent content, obscene content, false content, menacing content and offensive in character, also no definitions for these types of offensive content on the internet is provided under s 211. However, the Malaysian Communications and Multimedia Content Code has classified the offensive content into nine categories; they are; Indecent Content, Obscene Content, Violence, Menacing Content, Bad language, False Content, Children’s Content, Family Values, People with Disabilities (The content code, 2001).

Indecent content is defined as “a material which is offensive, morally improper and against current standards of acceptable behaviour. This includes nudity and sex.” (Malaysian, n.d) While the second category of offensive content on the internet under s 211 CMA is obscene content; no definition is provided for the term “obscene” in the CMA.

Similarly, the term “obscene” is not defined in the Malaysian PC as what may be obscene at present may not be in the future. It also differs and varies from age to age, region to region, from culture to culture and perhaps religion to religion (ASM, n.d). In *Pandurangan v State*, the court stated that the word ‘obscene’ means ‘offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed; impure, as obscene language, obscene pictures anything ‘expressing or suggesting unchaste and lustful ideas, impure, indecent, lewd (ASM, n.d). In 2013, Fila Syahida Zulkipli was charged under section 292 of the Penal Code by the Mukah Magistrates Court. She pleaded guilty to recording an obscene video of a 15-year-old girl using her mobile phone and was fined for producing the obscene video (Malaysia, n.d).

In this context, obscene content has been described as “content that gives rise to a feeling of disgust because of its lewd portrayal and is essentially offensive to one’s prevailing notion of decency and modesty, such as content may have a negative influence and corrupting the mind



of those easily influenced” (Multimedia, n.d). In this respect, the case of *Miller v. California 1973* (Miller, 1972) has established three standards that must be shown for content to be determined as an obscenity:

“(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”

Given this orientation, the three obscenity standards in *Miller v. California* has been based on what is offensive in a particular community and not all over the world. For example, what's offensive to someone in a specific society may not be in another society, this could create legal challenges on the applicable law that governs the obscene, also different cultures may have different standers of obscenity. Moreover, nowadays, the Internet has made the obscenity much more complicated. Today obscenity materials can be sent from a computer in a specific country to someone else in another country by the click of a button. As a result, the three obscenity standards in *Miller v. California*, may not be adequate to describe obscene content (Eze, 2018).

The second offence of offensive content under s211 CMA is menacing content which is described by the Malaysian communications and multimedia content Code as, the content that annoys, threatens harm or evil, encourages or incites crime, or leads to public disorder. Also, hate propaganda and information which may be a threat to national security or public health and safety are considered as a menacing content, and it shall not be presented (Communications, n.d).

Creating a false or misleading impression on the internet is also an offence under s 211 CMA. False content has been described as content that contains dishonest material which may mislead; this might be because of incomplete information. However, there are two exceptions for false content which are; satire and parody; and where it is clear to an ordinary user that the content is fiction. Nevertheless, it is evident that s 211 CMA required *mens rea* for the offensive content offences, which is the intent to annoy, abuse, threaten or harass any person.

Improper use of network facilities or network service under CMA

In Malaysia, the second provision that prohibits offensive content on the Internet is section 233 of the CMA, that provides:

“Improper use of network facilities or network service, etc.

(1) A person who

(a) By means of any network facilities or network service or applications service knowingly

(i) Makes, creates or solicits; and

(ii) Initiates the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or

(b) initiates communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

(2) A person who knowingly

(a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or

(b) permits a network service or applications service under the person’s control to be used for an activity described in paragraph (a), commits an offence.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of RM1,000 for every day during which the offence is continued after conviction.”

Some would argue that illegal and harmful content seems different in a sense; the first is criminalized by national laws, while the second could be considered as disgusting or offensive by some people and not criminalized by national laws. This means that harmful content on the Internet is legal content, but it may offend some Internet users or could be thought to the harm of others, for example, access to sexually explicit content by children, sexually explicit content, religious beliefs, political opinions, views on racial matters and sexuality; but child pornography is the most common example of illegal content on the Internet (Yaman, 2001).

In *PP v Rutinin Bin Suhaimin 2015* (Rutinin, 2015) the respondent was convicted for an offence under section 233 of the CMA for posting an offensive remark against the Sultan of Perak in the online visitor book of His Royal Highness. The accused denied posting those remarks and he appealed against his conviction. His justification was that although the



computer and the Internet account belonged to him but was accessible by the third party. The court held that the cross-appeal by the prosecution was dismissed because the prosecution failed to prove the case beyond a reasonable doubt.

PP v Rutinin Bin Suhaimin 2015 established three ingredients that must be proven to be an offence under s. 233 CMA 1998 (Rutinin, 2015):

- I. The accused person-initiated communication in question.
- II. The communication in question is either indecent, obscene, false, menacing, or offensive in character; and
- III. The accused had the intention to annoy, abuse, threaten or harass any person.

In *PP v Muslim bin Ahmad 2013* (Muslim, 2013) The accused was charged under s 233(1) of the CMA for three offences of posting offensive comments, on the Perak State Government's official portal. He denied the charges and claimed that he had been at work when the offensive comments were posted, this was proven by two witnesses. He also called one Krishnan a/l Raja Gopal ("DW4") as his expert witness to show that IP spoofing was done, but his conclusions were without a real examination of any exhibits or the server. The accused was fined of RM10,000 in respect of each charge, and in default of each fine, to six months' imprisonment.

It is clear that a person who posts any offensive materials on the Internet may be prosecuted under section 233 of the CMA, but the prosecutor must prove that the post has been disseminated with an intent to annoy, abuse, threaten or harass others.

The Balance between Freedom of Expression and S 211, 233 CMA 1998

Freedom of expression refers to “the right of individuals and communities to express their opinions or ideas without fear of reprisals or censorship or sanctions”. Mendel (2010). The right of freedom of expression has been generated by article 19 of the Universal Declaration of Human Rights (UDHR) which provides that " Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" (The Universal Declaration of Human Rights, n.d). Similarly, article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) affirmed the right of freedom of expression (ICCPR, n.d).

The UNHRC noted that the exercise of the right to freedom of expression on the Internet is "increasing interest and importance as the rapid pace of technological development enables



individuals all over the world to use new information and communications technologies." However, the UNHRC affirmed that article 19 could be applied to the freedom of expression on the Internet (Acharya, 2015). In this regard, s 233(1) of the CMA has been criticised as a serious encroachment on freedom of expression, as it is broad in scope, with vague and ambiguous terms that can easily be misused to stifle speech and expression (Steven, n.d) However, it has been argued that s 211 and s233 of the CMA intend to protect individuals who have been hurt by any negative remarks, photos, signs on the internet or derogatory materials. This would be a deterrent measure that is necessary to prevent offensive content on the internet. However, the only problem is related to the interpretation and how to use these sections, for example "what constitutes indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass"? Therefore, s 211 and 233 can be used to silence the critics and comments on political issues (Shahrin, 1998).

The freedom of expression right is not absolute, this is can be seen in the international law, whereby Article 19(3) of the ICCPR provides two limitations on the rights recognised in article 19(2), which are: the rights must be provided by law and must respect the right of reputations, national security, public order, or public health or morals. (ICCPR, n.d) Furthermore, Article 20 of the ICCPR restricts freedom of expression to protect the other rights, for instance, propaganda for war, advocacy of national, racial or religious hates that could lead to discrimination, hostility or violence (Prohibited, n.d). In addition to this, Article 17 of ICCPR protects any acts against arbitrary or unlawful interference and unlawful attacks on reputation (Subjected, n.d).

Consequently, according to the above illustration, it could be submitted that, firstly, it cannot be said that s 211 and s233 of the CMA violates freedom of expression, because freedom of expression is not an absolute right, it has limits and as determined by the constitution and the law. In addition, freedom of expression mustn't offend others, it must be within the law. Secondly, due to the seriousness of cybercrime, which has no geographical limits with broad effects that may not be remedied, s 211 and s 233 CMA are suitable to deter people who have criminal tendencies. Thirdly, offensive content cannot be limited to specific acts, since the offensive content may be different from one community to another. Further, the Malaysian Communications and Multimedia Content Code describes the offensive content into categories. Fourthly, s 211 and s 233 of the CMA is designed to protect the rights with broad interpretation to consist of any offensive content on the Internet (Elad, Ngan & Bongbee, 2017).



Conclusion

In conclusion, s.211 of the CMA describes that content on the internet is offensive if the content is: indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person. The content could be sound, text, or picture. In fact, it's really difficult to draw out a comprehensive definition, because what shall be deemed offensive content in a specific country, custom, or peoples may not be for others. It also differs and varies from age to age, region to region, from culture to culture and perhaps religion to religion. Also, it seems that the offensive content on the internet under s.211 and 233 of the CMA is very broad but, in the end, it's subject to the court's assessment whether the content falls under the types of offensive content described in s.211 and s. 233 of the CMA.

Finally, it could be submitted that s 211 and 233 of the CMA does not breach the right to freedom of expression, as there is a limitation on freedom of speech and this principle is not an absolute right; freedom of speech does not mean a right to offend others. Additionally, s 211 and s 233 of the CMA is designed to protect people's rights with a broad interpretation to consist of any offensive content on the Internet in the future, as evaluated by the court.



REFERENCES

Annotated Statutes of Malaysia [ASM] Communications and Multimedia Act 1998 (Act 588)
LexisNexis Malaysia.

Azmi, Ida Madieha. "Content regulation in Malaysia: unleashing missiles on dangerous websites." *Journal of Information, Law and Technology* 3 (2004).

"Offensive Material Definition And Meaning, Collins English Dictionary",
Collinsdictionary.Com accessed March 1, 2017, Retrieved from
<https://www.collinsdictionary.com/dictionary/english/offensive-material>.

The content code 2001, part 2, p. 12

S 2.2 of The Malaysian Communications and Multimedia Content Code 2001.

Annotated Statutes of Malaysia [ASM] Penal Code (Act 574) LexisNexis Malaysia.
Ibid.

Malaysia, Sarawak Daily News, "Fined For Producing Obscene Video", Borneopost Online
Borneo, accessed February 22, 2017, Retrieved from
<http://www.theborneopost.com/2013/10/12/fined-for-producing-obscene-video/>.

S 3 of The Malaysian Communications and Multimedia Content Code 2001.

Miller v. California, 413 U.S. 15, 24 (1972).

S 5.1,2,3 of The Malaysian Communications and Multimedia Content Code 2001.

S 7.1,2,3,4 of The Malaysian Communications and Multimedia Content Code 2001.

Yaman Akdeniz, "Internet Content Regulation", *Computer Law & Security Review* 17, no. 5
(2001): 303-317.

PP v Rutinin Bin Suhaimin [2015] 3 CLJ 838

PP v Rutinin Bin Suhaimin [2015] 3 CLJ 838

PP v Muslim bin Ahmad [2013] 1 AMR



Mendel, Toby. "Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression." Centre for Law and Democracy Paper (2010). p.1-2

The Universal Declaration of Human Rights (UDHR) accessed on 17/04/18 available at <http://www.un.org/en/universal-declaration-human-rights/>

Article 19 (2) of ICCPR provides that: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice" .

Acharya, Ujjwal, and Binod Bhattarai. "Freedom of Expression on the Internet." (2015). P3 Accessed on 17/04/18 available at http://www.onlinejournalists.org/wp-content/uploads/2015/10/paper_ujjwal_binod.pdf.

Steven Thiru (The Malaysian Bar), Press Release / Section 233(1)(a) of the Communications and Multimedia Act 1998 Creates a Chilling Effect on Freedom of Speech and Expression and Should be Repealed, available at http://www.malaysianbar.org.my/press_statements/press_release_%7C_section_2331a_of_the_communications

[communications_and_multimedia_act_1998_creates_a_chilling_effect_on_freedom_of_speech_and_expression_and_should_be_repealed.htm](http://www.malaysianbar.org.my/press_statements/press_release_%7C_section_2331a_of_the_communications). Accessed on 17/04/18.

Shahrin Hashim, Section 211 And 233 Of The Communication And Multimedia Act 1998: A Double Edges Sword. July 11, 2016, Available At [Http://Shahrinhashim.Blogspot.My/2016/07/Section-211-And-233-Of-Communication.Html](http://Shahrinhashim.Blogspot.My/2016/07/Section-211-And-233-Of-Communication.Html) Accessed On 16/04/18

Article 19 (3) of ICCPR provides that; The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or public order (order public), or of public health or morals.



Article 20 of the ICCPR states: (1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 17 of the ICCPR provides (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.

Eze, P. (2018). An Analytical Model of Demand for Hospital Inpatient Care. *International Journal of Social Sciences Perspectives*, 2(1), 80-86.

Elad, F., Ngan, W., & Bongbee, N. (2017). The Role of board characteristics in effective corporate governance: The case of Airbus Group.