

# The view online

## The dangerous presumptions of Section 114A for brand owners

**Critics of new Malaysian legislation suggest it will restrict the ability of brands to interact with customers online. However, there are strategies that rights holders can employ to minimise risk**

The Malaysian Evidence (Amendment) (No 2) Act 2012, which came into force on July 31 2012, introduces a new Section 114A to the Evidence Act 1950 which, in essence, allows a court to presume the source of publications appearing on the Internet.

### Presumptions and potential impact

The amendment creates three presumptions:

- If a person's name, photograph or pseudonym appears as the owner, host, administrator, editor or sub-editor, or if he or she in any way facilitates the publication or republication of a publication, he or she is presumed to have published or republished that publication.
- If a person is registered with a network service provider as a subscriber to a service in which a publication originates, he or she is presumed to be the person who published or republished that publication.
- If a person has custody of or controls any computer on which a publication originated, he or she is presumed to be the person who published or republished that content.

'Publication' is defined broadly to include a statement or a representation displayed on the screen of a computer, whether in written, printed, pictorial, film, graphical, acoustic or other form. Essentially, any publication appearing on the screen of a computer is captured by the amendment.

According to the Explanatory Statement in the amendment bill, the presumptions are intended to facilitate the identification of anonymous persons involved in publications over the Internet.

Strictly speaking, a person may be found guilty for publishing anything deemed offensive even if it was posted by someone else. The amendment has been heavily criticised for being absurd, unfair and oppressive; critics have cited extreme but theoretically possible examples such as

victims of hackers being put behind bars; Facebook users being found guilty for posts by third parties on their Facebook wall; and operators of cafes offering free WiFi being held liable for content published by patrons using that WiFi. Such criticism is not baseless as the wording of Section 114A is certainly broad enough to cover these hypothetical scenarios. The presumptions may also translate into potential liability for brand owners that interact with members of the public via their websites, Facebook pages and other online applications. Third-party content posted by users of these sites and applications could expose brand owners to legal action if the content is in any way offensive under applicable laws and the new presumptions are applied.

Brand owners are wary of the presumptions as they have no control over the content that users post on their sites. Such sites often host interactive forums that afford brand owners no opportunity to edit or vet user content before it is posted, although the brand owner may reserve the right to delete or edit such content under the terms and conditions of the site. In general, users do not identify themselves and, in such cases, the presumptions may be applied to hold the brand owner responsible for the user's unlawful or offensive content.

### Strategic action

In *Stemlife Bhd v Bristol Myers Squibb (M) Sdn Bhd* (2009) the plaintiff claimed against the defendant for libel based on numerous messages, including a hyperlink to an external blog, created and posted by users of the forum on the defendant's website. The plaintiff alleged that as the publisher, author and/or editor of the website, the defendant was liable for the defamatory statements posted by users of the forum. The High Court struck out the plaintiff's claim. The court indicated that to constitute publication (for the purposes of proving defamation), two elements must be present:

- There must have been a positive, overt act on the part of the defendant in disseminating the alleged defamatory remarks or statement; and
- The defendant must have control over the circulation of the words complained of.

Neither element was proven in this case. Although *Stemlife* was decided in the context of defamation and before the amendment was introduced, the principle that liability for offensive or unlawful content should attach only to publishers with active control over its publication should arguably be applied in all cases where the publisher plays a passive role by merely facilitating the posting of content on its site (as is the case in sites operated by brand owners).

To be able to rely on *Stemlife*, brand owners must demonstrate that they had no knowledge of the unlawful or offensive nature of the content posted; and that as soon as they became aware of it, they took steps to remove it. Further, a brand owner may wish to state clearly on its site that it does not monitor content posted; nor does it edit or vet content before it is posted. All such content should also be clearly attributed to the users, with the brand owner expressly disassociating itself from the content. Another more prudent measure would be to require all users to register and provide legitimate identification details before being permitted to post content, so that the brand owner can rebut the presumptions by providing the authorities with the identity of the individual actually responsible for the content.

Brand owners should also protect themselves from enemies in cyberspace by adopting best practices in terms of security and ensuring that they have effective safety measures in place. The use of appropriate passwords, anti-virus and anti-spam programs may also mitigate the risk of unlawful or offensive content being posted by third parties that access brand owners' systems without authorisation.

The amendment merely imposes presumptions, which may of course be rebutted. For this purpose, it is vital to keep accurate logs of all usage and activities on sites or pages that can be used by brand owners to rebut the presumptions and to prove that they did not publish or republish the unlawful or offensive content.

Brand owners should also be aware of the safe harbours introduced by the Copyright (Amendment) Act 2012, which came into force on March 1 2012; these exempt service providers from liability for copyright infringement provided that the prescribed notice and takedown procedures are complied with. [WTF](#)

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