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## **WILD SPECULATIONS ON THE MISSING FLIGHT MH370: BALANCING ONLINE EXPRESSION AND CONTENT REGULATION IN MALAYSIA**

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### **ABSTRACT:**

A recent incident on disappearance of Malaysia Airlines (MAS) flight MH370 has broken billion hearts of people around the world. Joint international investigations have confirmed that the flight has ended in the middle of South Indian Ocean. However, till the day this work is written, no sign of wreckage, dead bodies or any shred of evidence could be found to provide an answer thus inviting wild speculations to the incident. Wild speculations on plane hijacking, suicide, terrorism acts and more can easily be found online despite threats by the authorities not to speculate. In this regard, the author recalls the right to freedom of expression (FOE) - which has been long recognised by international treaties. Accordingly, FOE has been expanded to include online expressions. New technology allows Internet content to be created without the need for approval from an editor – like in print media. This could invite creation of problematic content (such as speculations on MH370) and often led to intermediary liability of webmasters and service providers. Therefore, this paper seeks to address on 3 significant points. Firstly, a brief problem statement on MH370 incident and surrounding legal risks caused by wild speculations shall be addressed. Secondly, the author will discuss current legal positions on digital right to FOE vis-a-vis Internet content regulation in Malaysia focusing on online speculations. Finally, the author will provide suggestions to balance between rights to digital expression and Internet content regulation with the view on minimising online risks to netizens.

**KEYWORDS:** *constitutional law, cyber law, freedom of expression, digital expression, freedom of speech, internet content regulation, online risks.*

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### **INTRODUCTION**

This age of information technology has witnessed great dependency on the Internet. In appreciating its huge benefits to our life, Internet users must not neglect one important insight which is its nature. The nature of the Internet, as reported by the Fifth Report of the UK Select Committee on Information Society, is very much open and accessible to all kinds of materials – including contents offensive in nature (Select Committee on Science and Technology, 1996). In addition, the Internet swarms with enormous amount of false, incorrect and unverified information – which leads the researcher to conduct this research.

### **THE MISSING FLIGHT MH370 AND WILD SPECULATIONS ONLINE**

The recent issue on disappearance of Malaysia Airlines (MAS) flight MH370 may be used to illustrate false content on the Internet. On 8<sup>th</sup> March 2014, flight MH370 was on its route from Kuala Lumpur to Beijing carrying 239 passengers. As it reached approximately 120 nautical miles from Kota Bahru (the middle of the South China Sea), the flight disappeared from radar and lost its contact from Subang Air Traffic Control Centre (Tarmizi, Bedi, & Ahmad, 2014). After series of joint investigations, credible evidences suggest the flight to have ended its journey in the middle of South Indian Ocean. The bad news was immediately announced by the Prime Minister of Malaysia, Datuk Seri Mohd Najib Tun Razak (The Star Online, 2014b). Nevertheless, no sign of wreckage or shred of evidence could be found to provide a single light to the incident thus inviting confusion and speculations (The Star Online, 2014e).

This tragedy has swiftly invited international media reporting. Wild theories and speculations such as possibilities of plane hijack, suicide, terrorism acts and more can be easily found on the Internet (China Daily, 2014; The Star Online, 2014a, 2014c). Among the speculations found online include Datuk Seri Mohammad Nizar Jamaluddin's insensitive comments in his twitter page regarding the incident. Consequently, he was stormed by angry netizens due to such comments (The Star Online, 2014g). Also, one witch doctor (*bomoh*) by the name Ibrahim Mat Zain caught the public's attention by performing superstitious rituals to find the plane at Kuala Lumpur International Airport while investigation was ongoing. The Islamic Development Malaysia Department (JAKIM) disapproved of his act and said that his practices were not in accordance with Islamic teaching (The Star Online, 2014f). At the same time, US officials were investigating on the possibility of flight MH370 being hijacked by terrorists (China Daily, 2014). These speculations were also published online, via social media and blogosphere where Malaysian Communications and Multimedia Commission (MCMC) chairman Datuk Mohamed Sharil Tarmizi has "urged netizens to exercise caution" (Agence France Presse, 2014). The government reminded that the Royal Malaysian Police will not hesitate to take actions against those who post false speculations regarding MH370 incidents by using available laws (The Star Online, 2014d). However, no one was reported to have been arrested, despite vast amount of speculations were made online.

## THE RIGHT TO DIGITAL EXPRESSION IN MALAYSIA

One can ponder - whether making of speculation is part of our right to freedom of expression? Perhaps, some would say that online speculation is part of freedom of expression. Article 10 of Malaysian Federal Constitution provides that every citizen shall enjoy the right to speech and expression save in accordance with the law. From a general reading of Article 10, we understand that freedom of speech and expression in Malaysia is not absolute. However, Article 10 did not expressly mention such protection to include expression over the Internet or through digital technology. This brings further issue as to whether the constitution had intention to protect netizens while they exercise digital expression through computers and mobile devices. The established international treaties provides for recognition of digital expression over the Internet. The main two international treaties on this point are Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR). They made clear that its protections are extended to digital expressions. UDHR has three specific articles that deals with digital expressions, namely, Articles 19, 12 and 27 (Center for Democracy and Technology, 2011). The right to digital expression is first recognised in Article 19 of the UDHR, in which it grants freedom of expression "through any media and regardless of frontiers". Further, Article 12 of UDHR states that "No one shall be subjected to arbitrary interference with his privacy, family, home or *correspondence* [italics added]..." The language of Article 12 is wide enough to cover all communications directed to an individual or groups of individual, which includes communications via the Internet by usages of emails, chats, online forums and applications of similar nature. Article 27(1) of the UDHR provides for (*inter alia*) the freedom to share in scientific advancement and its benefits which arguably, the creation of the Internet is part and parcel of scientific advancements as the Internet allows for fast technique of sharing information between netizens. Therefore, the right to digital FOE has its strong foundations within the ambit of the UDHR. Article 19 of ICCPR extends the protection over digital expressions held in UDHR where Article 19 (2) of the ICCPR states that "this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". At present, Malaysia is a signatory to UDHR however is yet to ratify ICCPR. Malaysian Communications and Multimedia Act 1998 in its interpretative sections did not define digital expressions or online expressions. Neither did the 1998 Act attempt to define what 'false content' amounts to. However, section 6 attempted to

define 'communication' as "any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms." Therefore it could be inferred that CMA 1998 recognises digital expression through communications as defined in section 6 of CMA 1998. Based on readings of section 211 and 233 of CMA 1998, it could further be inferred that such communications may be restricted for reasons stated within the sections.

### **FALSE CONTENT ON THE INTERNET**

Section 211 CMA categorises 'false content' under a general categorization called 'offensive content'. In general, CMA prohibits communication of offensive content – including that of false content. Section 233 of the 1998 Act further criminalises improper use of network facilities or network services for the purpose of (*inter alia*) communication of false content. The CMA 1998 also noted that such prohibitions are general in nature and should be read together with the Content Code, as adopted by Communications and Multimedia Content Forum (CMCF)<sup>1</sup>. Content Code in its Article 6.0 spelt out clearly that compliance to the Code is on voluntary basis. Upon compliance to the provisions of the Code shall serve as legal defense against any prosecutions, actions or proceeding of any nature as provided in section 98 of CMA. At the same time, the Content Code demonstrates an effort towards recognizing self-regulation and self-discipline by ICT industry players. Article 7.0 of Content Code expressly deals with false content online though not in detail. The Code defines 'false content' as material "likely to mislead, due to amongst others to incomplete information<sup>2</sup>" where the Code has further advised Internet users to avoid contents which are unverified and false. Article 7.3 provides for an exception where false content is not prohibited when it is satire, parody and fictional in nature. It is submitted that online speculations should be defined similarly as false content since speculations are likely to mislead people with unverified information.

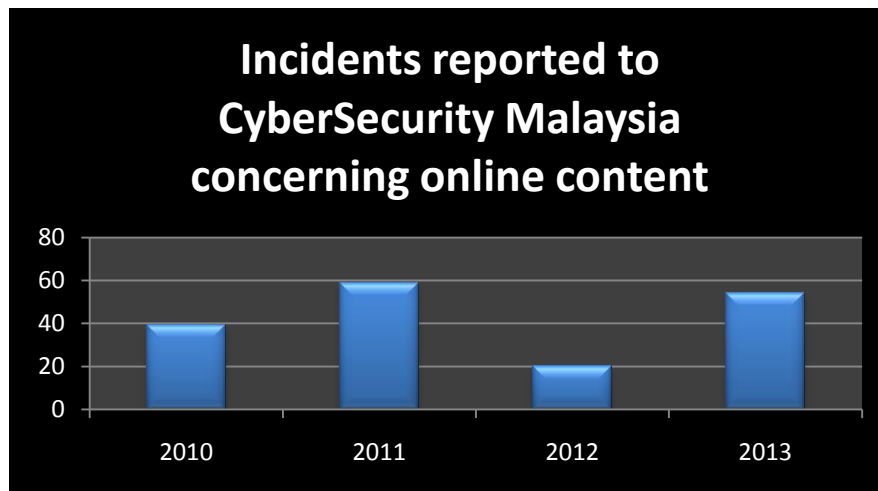
### **ONLINE RISKS AND INTERNET CONTENT REGULATION**

The existence of false content brings uninvited online risks to Internet users, hence necessitates online content regulation. When Malaysia introduced the Multimedia Super-Corridor project in 1995, a promise was made by the government of the day that the Internet will not be censored (Madiha, 2003, p. 1). This freedom has also been generally covered by Article 10(1) (a) of the Malaysian Federal Constitution which guarantees limited freedom of speech and expression to citizens. However, it was found in time that non-censorship policy cannot maintain for long due to availability of offensive materials online. Hence, some form of regulation is considered necessary. In fact, Lessig (2000) believes that rapid development of the Internet as seen today is due to Internet content regulation. Furthermore, other external factors such as maintaining political, economic stability and security made some governments took greater initiative to censor and block citizens' access to the Internet (Kettemann, 2011, p. 1). To date, the Malaysian government particularly the Malaysian Communications and Multimedia Commission (MCMC) has been taking the lead in materializing online content regulation. MCMC also works collaboratively with CyberSecurity Malaysia (an agency under Ministry of Science, Technology and Innovation) to combat offensive Internet content. Since 2010 till 2013 statistics collected from CyberSecurity Malaysia (2014) has shown a steady increase in reported incidents concerning online content, as provided in the chart below:

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<sup>1</sup> See section 213 (1) and (2) CMA 1998

<sup>2</sup> See Article 7.1 Content Code



However, the statistics produced by CyberSecurity Malaysia did not specifically inform the researcher on reports concerning false content. Judging from the criterions given by CyberSecurity Malaysia, false content should fall under the content-related category. Further, looking at the number of reports received, it could be said that most Internet users are not so keen to launch reports if they came across false content online – thus resulting in very minimal number of reports received by the authorities.

### **ONLINE CONTENT FILTERING: A THREAT TO DIGITAL EXPRESSION?**

One of the most popular methods of online content regulation applied in Malaysia is content filtering – which is considered as a treat to Internet freedom to many commentators and international human rights groups. Filtering is an activity in which access to information or online contents requested by users of the Internet are made limited or unavailable for viewing (Callanan, Gercke, Marco, & Dries-Ziekenheiner, 2009, p. 10). Noman (2013) quotes Dr. Riyad Najm, the chairman of Saudi Arabia's General Commission for Audiovisual Media to have said:

"No country in the world allows no censorship...the difference between one country and another is the extent of the terms and conditions in place; they increase in one country, but are reduced in another *depending on the traditions and norms in each society* [italics added]."

The researcher agrees with the above statement as most nations are imposing censorship at varying levels and manners depending on local circumstances. Countries from the Middle East and Asia mostly support online content regulation with the view to protect religious, moral and cultural values. Reporters without Borders (2010) noted that some nations exercise pervasive Internet filtering schemes to effectively control peoples' conduct online which arguably has transgressed over right to speech and expression. Nevertheless, the extent of online content regulation becomes a difficult and sensitive issue especially when it touches on internal administrative style of a particular nation. International organisations such as International Telecommunications Union (ITU), Internet Governance Forum (IGF), World Summit on Information Society (WSIS) and others are working for better Internet governance – however still find more challenges especially in the area of content regulation and filtering. In the 2013 World Economic Forum, 1500 council members were invited to identify some of the top trends facing the world and how to solve them. The researcher notes that 'rapid spread of misinformation online' have been listed with a 3.35 degree of significance (in other words, has invited quite significant

concerns among WEF council members)(Vis, 2014). Further, Oxford Internet Institute (2013) conducted a survey on reliability of information by Internet users which indicated that Internet users have learnt not all information found online is trustworthy. On the other hand, China has been very active in protecting their Internet content against offensive materials online. To a certain extent, China has been listed as one of the country where freedom of expression is seriously threatened. With regards to online rumors, China recently has warned its citizens not to post any false information online and has accordingly criminalise such act. Recently in 2014, a Chinese popular Internet microblogger, Qui Zhuhui was brought to trial first time in China's effort to crack down online rumors (Rajagopalan, 2014). China says that the crackdown was necessary to preserve social stability. This effort should be noted if nations are serious in combating false content online.

### **EXPOSURE TO LEGAL RISKS FOR COMMUNICATION OF FALSE CONTENT ONLINE**

The government of Malaysia does not impose any licensing requirement for Internet user to create or publish online content (Baker and Mckenzie, 2012). Nevertheless, Internet users are exposed to legal risks if online content published is against the law. The researcher opines that publishers of false content may result in lawsuits such as civil and criminal defamation, sedition, providing offensive content and improper use of network facilities or network service. Internet users may be exposed to defamation suit if online false content is defamatory in nature in Malaysia<sup>3</sup>. Defamation law is intended to protect the reputation of person(s) or organization(s) from being maliciously or falsely humiliated. Unregulated online content may cause people to impart or retrieve false information defamatory in nature. Since the Internet evolves faster than print media, it poses new challenge for law enforcement to constantly keep track to the happenings on the Internet. Despite the new challenge for law enforcement, we could see a steady move in Internet defamation suits in Malaysia. For example, after the demise of the Sultan of Johor in 2010, a blogger known as "Aduka Taruna" had grossly insulted the late Sultan in his blog using very inappropriate words. In turn, 25 police reports were lodged and he was prosecuted under Section 233 (1) (a) of Communications and Multimedia Act 1998 for improper use of network facilities or network service. However, he was acquitted and discharged by the Sessions Court for failure to establish a *prima facie* case (The Star Online, 2012).

Another recent case on Internet defamation happens recently in 2013. Melissa Gooi and her friends insulted the Yang Di-Pertuan Agong (YDPA) on Facebook regarding the Agong's remarks on the recent Malaysian 13<sup>th</sup> general election (Zolkepli, 2013). The content of the remarks was to advise the public to accept the results of the 13<sup>th</sup> general election wholeheartedly. The Agong called the people to respect democratic process in Malaysia. Acting on reports, the police and MCMC immediately arrested them for allegedly improper use of network facilities or network service under Section 233 of Communications and Multimedia Act 1998 and Section 4 of Sedition Act 1948 for uttering seditious words. After obtaining her statement, the police released her and till now there is no update whether the case will proceed to trial. MCMC recently on 9<sup>th</sup> June 2014 published a press statement on its website that a Twitter user by the name Effi Nazrel Saharudin has been charged for two counts under Section 233 (1) (a) of Communications and Multimedia Act 1998 for posting of insulting comments about the Yang Di-Pertuan Agong. However, the accused pleads not guilty and claimed for trial. He was allowed bail by the Sessions Court Judge and this case is still on-going (Suruhanjaya Komunikasi dan Multimedia Malaysia, 2014a).

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<sup>3</sup> Section 4 of Defamation Act 1957 provides provision for slander of women, Section 5 covers slander affecting official, professional, or business reputation and section 6 provides for slander of title.



## **DISCUSSIONS AND RECOMMENDATIONS**

Online content provider may be charged under sections 211 for providing offensive content and section 233 CMA for improper use of network facilities or network service. However, it is submitted that both of these sections are covering very large areas of cyber laws to the extent of making the provisions too extensive. The Police and MCMC will apply sections 211 and 233 for investigations of all kinds of cyber crimes which in the opinion of the researcher would be too broad and general. In cases such as cyber pornography, heavy reliance on Penal Code could be seen in lawsuits. Penal code is considered as the 'mother code' for all crimes regardless of the nature of such cyber crime. Since the CMA has provisions covering very wide area of cyber crime, very little efforts have been undertaken on the working conditions of these laws, hence inviting problems to law enforcement. The police has been making threats to those spreading online rumors, but hardly that we see that the case goes to court for trial. This could be so because the MCMC does not have similar enforcement powers as the police do. The Police are given wide powers under the Police Act 1967 to investigate any matters within their jurisdiction. However, the police are not an expert in ICT and undoubtedly need help from ICT experts, MCMC and CyberSecurity Malaysia. Looking at the administrative structure, the police are placed under the jurisdiction of Ministry of Home Affairs Malaysia. MCMC is under the jurisdiction of Ministry of Communications and Multimedia Malaysia whilst CyberSecurity Malaysia is put under the jurisdiction of Ministry of Science, Technology and Innovation. Certainly, a lot of cross-jurisdictional cooperation needs to be made to ensure that cyber laws are effectively regulated. At the same time, the traditional bureaucracy and unnecessary procedures must be re-examined so that intergovernmental collaboration becomes more effective. At the moment, the researcher opines that there are many regulator-agencies that are not working co-operatively under one main organisation. As a result, co-operative measures may be difficult to be undertaken and this causes slow development in cyber security policies in Malaysia hence increasing online risks to Internet users. On the other hand, the researcher opines that online content regulation is absolutely necessary to protect our religious and cultural values. It could not be denied that offensive content exists online and netizens will have to be protected against cyber threats – especially children and adolescence. However, since Article 10 of Federal Constitution provides for right to expression – which presumably also extended to digital expression (as per the earlier discussion), thus some form of recognition to online expression must be given. Otherwise, digital expression cannot become a new channel for access to knowledge – which is vital towards achieving Vision 2020 and becoming knowledge society. With that in mind, the researcher would like to suggest the following approaches to balance digital expression with online content regulation in Malaysia.

### **REMOVAL OF FALSE CONTENT ONLINE**

Under the procedural laws of Malaysia, aggrieved party may make an application to the High Court for removal of false content from being available online. Order 29 Rule 1 of Rules of the Court 2012 allows an application for an interlocutory injunction. Specifically, applicants may make application to the court for the removal of online false content. Alternatively, aggrieved parties may also make reports to MCMC where necessary investigations will ensue (Suruhanjaya Komunikasi dan Multimedia Malaysia, 2014b). CyberSecurity Malaysia through Cyber999 also provides reporting tools via web reporting, SMS, phone call and fax. Social media such as Facebook has made an effort to remove false or defamatory content from their page upon complaints received (Facebook, 2013).

### **PUSH-DOWN ONLINE FALSE CONTENT IN SEARCH ENGINES**

This method requires complainant to notify search engine operators of the availability of false content in their page. Normally, search engine operators will comply for requests especially

relating to copyright violations. This method requires the search engine operators to push the search results containing false content further down from the 1<sup>st</sup> page. It is hoped that by this method, netizens will be protected from reading false content online.

### **IDENTIFY AND TRACK DOWN THE POSTERS OF FALSE CONTENT**

Makers of false online content are hunted down where legal actions will be taken against them. This method requires collaboration with relevant agencies such as MCMC and the police. The researcher believes that MCMC has the technology to track down posters of fake and defamatory information by hunting down the IP (Internet protocol) address. This has been done in defamatory suits such as in the case of *Public Prosecutor v. Rutinin bin Suhaimin* [K42-60-2010] where MCMC tracked the IP address of the accused person and confirmed that such address belongs to the accused. South Korean cyber laws went further by requiring Internet users to register their Internet accounts via 'real-name identification' method. Through this way, the authorities will be able to track down the exact individual by their ID numbers if cybercrime is committed, hence assisting in law enforcement. However in 2012, this law was declared as unconstitutional by Korean Constitutional Court for violating free speech (Sang-Hun, 2012).

### **IMPROVING KEYWORD FILTERING SYSTEM**

The researcher notes that MCMC is currently conducting online content filtering on offensive materials and upon receiving complaints on the availability of offensive content, will exercise content blocking. However, many legitimate digital expressions often get caught and automatically blocked, hence depriving users' right to expression. It is suggested that MCMC should work collaboratively with relevant agencies in improving the 'keyword' identification system used for online content filtering. Accordingly, keywords should be regularly updated so that legitimate digital expressions don't get automatically filtered.

### **EDUCATION AND AWARENESS**

Educators (including parents and peers) play a vital role in educating the school children towards a safe Internet use. Wireless Internet connection available in school should be automatically programmed to filter offensive materials from accessible in school computer labs. The problem that is experienced at the moment is that, even in schools, pupils can have access to offensive materials, such as pornography, false content, hate speech and more. Much focus is given to access whilst ignoring on the aspect of Internet content. Whilst teachers are not aware of these online threats infiltrating into schools, children are becoming victims day by day. At the same time, educators should improve their ICT knowledge so that they may advice pupils on the dangers of offensive false content online.

### **MORE EFFORTS IN LAW ENFORCEMENT**

Law enforcement should take a positive approach in combating false content online. For example, online content providers who disseminate false content which received more than 1,000 'likes' or 'shares' must be called for investigation and be taken actions against. The researcher thinks that CMA and Content Code provide a good background to prohibit publication of false content online. However, we are yet to see its workability in the real courts thus inviting assumptions that there is not much that enforcements can do. The researcher recommends that the criterion of false content to be further scrutinized by policymakers. If we cross-refer to popular provisions in the Penal Code such as murder or rape, the law has been developed clearly and ultimately allows the provisions to be tested in court, hence generating good and sound judicial precedents. This is what we are lacking in terms of developing cyber security laws in Malaysia. China may have been criticized for being against digital expression.

However, the positive side is that they are limiting access to protect national culture which is already threatened by the waves of modernization.

## CONCLUSION

In a nutshell, the cooperative actions between state and non-state actors are very important to combat availability of false content online. Online speculation found to be true would not harm anyone. However if such speculation is false, it will surely mislead the society into believing what is wrong. The filtering technology is very advanced however requires human effort to ensure the technology serves its purpose, that is to protect the society against the harm of the Internet content.

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