

Regulating Online Broadcast Media in Malaysia: Legal Study of Compliance and Regulatory Enforcement in Relation to Hate Speech and Offensive Materials

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ABSTRACT--Online Broadcasting services are increasing dramatically without any proper regulatory framework and affecting local traditional broadcaster. Nowadays, online broadcasting services are popular to the customer for online movie sites like Netflix, Iflix Pandora, Amazon Prime Video, Hotstar, Hulu. These types of online video sites broadcasting original video content without any censorship which makes film censorship board useless. This purpose of this study was to analyse the effectiveness and enforceability of the Malaysian Communications and Multimedia Act (1998) on complying online media broadcast services to the laws and regulations of the country. The paper analyses the two major online media broadcast services in the country and looks in to their terms and conditions of service agreement between their customers and the controversial content made available through their services. The paper also identifies the inadequacies of legal action by the legally mandated enforcement agency, the Malaysian Communications and Multimedia Commission (MCMC). This study will use a legal and doctrinal research methodology. Data collection will be based on content analysis from the primary and secondary legal sources. This study found that the content provided by the service providers did not comply with the laws and regulations of Malaysia and in some instance they were not only uncompliant but have designed their service agreements with their customers in a manner to avoid legal responsibility for the nature of the content they provided.

Keywords--Online; Broadcast; MCMC; Netflix; Astro; Malaysia;

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I. INTRODUCTION

The advent of internet and the near impossibility of abstaining from its usage for even the most basic daily tasks has exponentially increased its usage among all walks of life within the past few decades. This drive is further fueled by the affordability of consumer electronics on one side of the spectrum, and the flood of data and content created for its users on the other side. Today the usage of internet and its connected devices are completely and inalienably dependent on the deluge of content designed to hook its users. Previously known only within the domain of television sets and video rental stores; the broadcast media has now begun to stream directly to electronic devices in any corner of the world without any restriction or censorship (M. . & A. R. Islam, 2019). The difficulty in monitoring all the content broadcasted online as well as the tools used to circumvent different firewalls kept in place under the laws and regulations, regulating online broadcast media has become a fight with no end in sight.

Historically, different governments have put up laws and regulations to contain the broadcast media within the scope of the laws. This allowed for media products created in different regions of the world to be made compliant to the laws of the targeted countries for broadcasting purposes. Films and other forms of media including news were censored accordingly for different regions of world. Whilst some countries have laws which monitors the broadcasts and are heavily censored, other countries were more relaxed in their censorship. Yet the common factor among all these countries were, that they all had some form of regulation in place regarding the broadcast media (Islam, M. Z., & Rahman, 2019).

Along comes the internet with broadcast media websites, allowing content created in one place to be broadcasted to anywhere in the world without any restrictions. The content created for these cyber-broadcasters often are not vetted despite having internal policies within most of these platforms. It can be said as the opportunity to have content broadcasted to a worldwide audience and the opportunity for monetizing the content has led to independent content creators to churn millions of broadcast material every single day. Contents which are universally considered antithetical to modern societies, such as fake-news, racist materials, conspiracy theories, specially targeted to a demographic of a place to affect the minds and behaviors of individuals are being funded and created independently and are distributed freely on these online broadcast platforms.

Malaysia, seen as a beacon of religious and social harmony and one of the most prosperous nations in South-Asia is at peril having being bombarded with unwanted internet broadcasted misinformation and offensive materials counter-productive and detrimental to its society. Hate content, islamophobia, extremist content, explicit imagery unsuitable and foreign to the culture of Malaysia are broadcasted and made available through government licensed online operators within Malaysia (M. Z. Islam, 2019).

II. METHODOLOGY & MATERIAL SAMPLING

This study will use a legal and doctrinal research methodology. Data collection will be based on content analysis from the primary and secondary legal sources. As this paper into the approach by the two main online broadcast service providers otherwise known as cord-cutters available in Malaysia; in regards to their policies of censorship and abidance to laws of individual countries where their services are provided, an analysis was conducted to choose the most widely subscribed services. We found that out of hundreds of options both available online and a number of options available through television set-top boxes, the Malaysian market opted for Astro

services more than any other subscription based service available in the country. Malaysia has allowed for the television broadcast for Astro, Unifi TV, Njoi and Digital Terrestrial. Also, IPTV broadcasters in the country were Astro, Unifi TV and Telekom Malaysia. Mobile TV broadcasters were Astro Mobile TV, Maxis, Digi and U Mobile. It has to be noted that unlike Astro, all the other mobile tv broadcasters are internet services providers in their core business model. When analyzing the spectrum of reach by all the broadcasters we found that Astro had one common factor which is its availability in all forms of broadcast media in the country. As a result we have chosen Astro as the first candidate for this study.

On the other hand when it comes to Streaming services related to online broadcast, we found that there were hundreds of options since the services are mostly internet based and the regulatory bodies would have a nearly impossible task in monitoring the internet in its entirety for content made available on it. Unregulated and unlicensed media broadcasts as well as illegal subscription services as well as free streaming services had a way of reaching the viewers despite having it blocked in any region. Anyone with the know-how of the internet would be able to bypass the regional website firewalls put in place by authorities, with VPN's and other such software. Therefore, we decided to set a formula for choosing a candidate for this study among the streaming services which were available in Malaysia.

The formula is that the streaming service should be registered in a country recognized by Malaysia. If so the streaming service should have terms and conditions and consideration to adhere to the laws of the streaming availability. Also, the streaming service should have the capacity to restrict media to comply with regional laws. The business model of the streaming services should be a subscription based model which accepts payment in local currency. The streaming services should be listed in the stock market in Malaysia or a country of its origin. This criteria set allowed us to identify and analyze responsible candidates whom can be made accountable to law.

After the eliminating the unqualified candidates, we found 10 candidates which fulfilled the requirements. They are Astro, Netflix, Google Play, Unifi TV, iFlix, VIU, Dimsum, HBO Go!, Amazon Prime. Out of these candidates we found that most of the Malaysian subscribers were using Netflix when it came to subscription based streaming services. So we chose Netflix as a second candidate for our study.

As the study involved in the analysis of both content and its regulatory compliance to Malaysian broadcast laws, we analyzed the Terms and Conditions and the regulatory rules of both candidates as well as the content made available on their services. For the second part of the study we compared the regulatory laws of broadcast media in Malaysia to get a general overview of the content and the reach of the law in suppressing illegal content broadcast in the country. As a result, Malaysian laws and regulations regarding the censorship of online broadcast content were listed and analyzed for the regulatory effectiveness on the one hand and the compatibility with Malaysian regulatory laws and the most viewed content by the main cyber-broadcasting platforms was checked as the other.

The methodology aims to identify and find answers to the questions regarding the relevant laws and regulations related to online broadcasting in Malaysia, and the adherence by online media broadcasters in regards to the implementation and enforceability of these regulations related to online broadcasting media.

III. ANALYSIS AND DISCUSSION

Legal framework in Malaysia regarding the broadcast media is of dual nature where Ministry of Home Affairs deals with Free to Air broadcast channels whilst Malaysia Communications and Multimedia Commission has the mandate for regulating satellite television (Kee, C. P., Nie, K. S., Korff, R., & Helbardt, 2015). MCMC is conducted in accordance to the Content Code and under the Malaysian Communications and Multimedia Commission Act (1998). The film censorship board or LPF in Malaysia is under the mandate of the Ministry of Home Affairs under the virtue of the Film Censorship Act (Kee, C. P., Nie, K. S., Korff, R., & Helbardt, 2015).

The procedure of conduct by the two different regulatory bodies differ. All film distributors are required to get the approval from LPF and all broadcasters are required to get approval from MCMC on the content prior to broadcasting. The MCMC monitors any breach based on public complaints. The most important aspect is that all the regulators in Malaysia follows a complaints based approach. However the divergence takes place in regulation when the broadcasters in the scope of Ministry of Home Affairs breaches the regulation, the cases are sent for prosecutor general for further investigation and to bring charges. On the other hand MCMC upon receiving a public complaint, could unilaterally take action against the broadcaster without having to involve any other entity (Kee, C. P., Nie, K. S., Korff, R., & Helbardt, 2015).

The Communications and Multimedia Conduct Forum of Malaysia, established under the Communications and Multimedia Act 1998 under the purview of SKMM, with the objective of promoting media content that is conducive to civil society whilst avoiding content of indecent, obscene, menacing, abusing, threatening false and harassing in nature. Its general principles also includes the prohibition of any form of indecent obscene, or material that is discriminatory in terms of race, religion, gender, civil status etc. The content code is set to be the authoritative code of content creation for all mediums of broadcast in Malaysia. Namely all the Applications service providers who provides voice services, data services, e-commers and other transmission services (Lee, 2002). The code further goes on to interpret the meaning of ‘content’ by defining it as ‘any sound, text, still picture, moving 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.’ The code mentions that the subjects of the Code shall not provide any prohibited content knowingly. The internet access services provider or the IASP is also bound to follow the laws and regulations of Malaysia, and is bound to block any content and material in contravention to Malaysian Law (Daud & Jalil, 2017).

When it comes to enforcement of the laws, we have to see the effectiveness and the compliance by the service providers, as such when we look at Astro Malaysia Holdings Berhad or “Astro” is the main broadcast content provider in Malaysia. With a subscription base of over 23 million or in other terms about 77% of households in the country, Astro provides thousands of hours of content live and on demand for its customers. The content provided from Astro services comes from all over the world and has main attraction from the subscribers for Hollywood and other Asian content. To put this behemoth of a company in perspective we could see that according to data available in January 2020 the market capitalization of Astro is at 6.6 billion ringgits. The question we should ask now is how much of the content provided by the largest online broadcaster in Malaysia compliant to the laws and regulations of the country.

The General Terms and Conditions for Astro services is designed in a way to have the customer to take full responsibility for any and all arrears of the services they have subscribed while at the same time the contract binds the customer to indemnify Astro against all claims. Astro is also seen to recuse itself from its legal obligation to

have the content provided through their services compliant to Malaysian law, by having the customer acknowledge that Astro is not liable for the material they broadcast through their platform (*General Terms and Conditions for Astro Services*, n.d.). This stance of Astro can be construed as disingenuous at best and illegal at worst. One of the most controversial content available on Astro includes, on Astro Channel 411, a series on HBO network named *Euphoria*, which is described as one of the most controversial programs as it has outraged a lot of viewers over its depiction of sex and drugs. According to *esquire.com*, one episode of *Euphoria* showed '30 penises in a single scene (Zittrain & Palfrey, 2007). *Esquire.com* mentioned that the Parents Television Council condemned the HBO's program and reminded that they had a responsibility (Miller, 2019). Furthermore, Astro has broadcasted controversial and racist contents which has directly targeted individuals in the Malaysian society. In one instance where MCMC has stepped in and issued a serious warning to Astro to not air content as such (Stone, 2018). Astro was reminded by the MCMC to comply with the Special License Terms and Malaysian Communications and Multimedia Content Code. The controversial program targeted people of darker skin complexion and ridiculed them and made racist joke on a Malaysian singer. Previously Astro had to take down racist content depicting 'black face' (Alhamzah, 2016). The station later issued an apology.

The other online media broadcaster chosen for this study is Netflix, with a subscriber base of over 158 million in 190 countries, has made available all of their media content without any restrictions to Malaysia. It has to be noted that some of the content broadcasted are controversial and extreme in some circumstances. For instance, the Netflix show named "The First Temptations of Christ" sparked controversy for its portrayal of Jesus Christ as a homosexual. Over 2 million signatures were collected asking for a ban of the broadcast in Brazil. It has to be noted that this show despite its contravening depictions against to the teachings of all mainstream religions including Islam, is available for viewing on Netflix Malaysian application.

Another such program readily available for viewing in Malaysia is the series "Messiah". This show portrays Jesus Christ as the anti-Christ. Also shows such as "Sex Therapy" promoting promiscuity and incestuous relations among adolescents are broadcasted for anyone on the Netflix platform in Malaysia. On the website of Netflix Malaysia, it is written about the show that the show is 'Raunchy, Heartfelt, Irreverent.'" Netflix has gone even further by including subtitles in English as well as in Chinese for Malaysian viewers for these broadcasts. This proves that the inclusion of these programs are intentional by Netflix. It has to be noted that broadcast of such materials is against the laws of Malaysia (*Netflix Terms of Use*, 2019)

Looking at the terms of use agreement by Netflix, it can be seen that Netflix has the control to select the programs which could be made available based on geographic location. Yet it goes on to establish that the customers using Netflix are the ones to use their services 'in accordance with all applicable laws, rules and regulations or other restrictions on use of the service or content therein..' The terms of use agreement further eliminates the possibility of claiming damages by the customer as well as having the customers going for class action. According to the terms of use agreement of Netflix, it mentions that it will be governed by the laws of Netherlands (Sadho, 2016).

Previously the government of Malaysia has held the stance that Netflix would also have to comply to the regulations of Malaysia and MCMC can take action against any incompliances (Sadho, 2016). However, Netflix has issued a statement that there would not be any censorship on their content and they would prefer to have some content unavailable based on region (Anand, 2016). It has been seen from previous government action that they have

blocked other websites and online servers deemed unlawful in Malaysia, yet an action against the content provided on Netflix by the MCMC is to be seen.

It cannot be said that the regulatory laws of Malaysia are not applied at all. It was reported efforts were being made on strengthening the effectiveness of the Malaysian Communications and Multimedia Act 1998 by the Malaysian Communications and Multimedia Commission in 2015 (Abdullah, 2015). The effectiveness of these studies were found to be effective as during the preceding years we have seen the MCMC acting to take action against illegal content posted and made available online. In the same year a former minister in the Prime Minister's Department was charged under Section 233(1)(a) of the Communications and Multimedia Act 1998, for posting an offensive statement for the resignation of the then prime minister (*Zaid Ibrahim charged under Communications and Multimedia Act*, 2015). In the same year additional 14 cases were sent for prosecution under Section 211 and Section 233 of the Malaysian Communications and Multimedia Act 1998. The nature of the cases involved in sending offensive content and use of pornographic materials on social media.

As we can see from previous cases such as the case of Fahmi Reza, who posted a photo of the former prime minister of Malaysia in a derogatory manner on her Facebook page was charged under the Communications and Multimedia Act 1998 and was convicted and was given a one month imprisonment and a 30,000 ringgit fine. In the previous years it has been seen that the Malaysian Communications and Multimedia Commission taking a harsh stance on the abusers of media and has been seen to take strict legal action against perpetrators. According to statistics in the year 2017, in a period of 19 months there were 227 cases of online abuse investigated and 8 cases were sent for prosecution and were convicted (Jun, 2017). These actions were taken under the Section 233 of the CMA 1998, the very act where we can see the major broadcasters are seen to be in violation of in their own volition. Despite concerns by the Malaysia Bar on the use of Communications and Multimedia Act for prosecution of particular online activities, and the call of it as a 'political weapon' (*Communications and Multimedia Act being abused like Sedition Act, says Malaysian Bar*, 2017), we find that in an Islamic and a multi-cultural country like Malaysia it is extremely important to have laws as such, to mitigate potential frustrations stemming from online media misuse.

IV. CONCLUSION

It has been found from this study that the major online media broadcast service providers do not comply to the full extent of the Malaysian regulatory laws and the regulatory body, Malaysian Communications and Multimedia Commission is seen in particular controversial instances, to be ineffective in enforcement of the laws and regulations it is legally mandated to uphold.

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