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**Computer Law
&
Security Review**



Asia-Pacific news

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ABSTRACT

Keywords:

Asia-Pacific
IT/Information technology
Communications
Internet
Media
Law

This column provides a country by country analysis of the latest legal developments, cases and issues relevant to the IT, media and telecommunications' industries in key jurisdictions across the Asia Pacific region. The articles appearing in this column are intended to serve as 'alerts' and are not submitted as detailed analyses of cases or legal developments.

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1. Hong Kong

1.1. Social media forums "innocent" of defamation?

With the booming popularity of social media, more and more people have taken to the Internet to voice their opinions and criticisms on everything from restaurants to politics. The question is what happens when the statements published are defamatory? Are the operators of the sites liable in Hong Kong for defamatory statements posted on their sites? The recent Hong Kong case of *Oriental Press Group Ltd v Fevaworks Solutions Ltd*² suggests that in certain circumstances the answer is no.

1.1.1. The case

The defendants operated a popular Internet discussion forum in Hong Kong. In March 2007, October 2008 and January 2009, a number of defamatory statements were posted on the forum by different users. The statements implied that the plaintiffs were involved, amongst other things, in illegal and immoral activities. The plaintiffs sued the defendants for libel based on these defamatory statements posted on the defendants' forum.

In the first instance, the court determined that:

- (a) the statements were defamatory;
- (b) the defence of innocent dissemination applied in respect of the October 2008 and January 2009 posts, as they were respectively removed by the defendants within hours of receiving a complaint from the plaintiffs and immediately upon being discovered by the defendants; and
- (c) the defendants failed to establish the defence of innocent dissemination in respect of the March 2007 posts, as there had been undue delay on the part of the defendants in removing the posts (it only removed the posts 8 months after the plaintiffs had sent a notice to the defendants). The plaintiffs were awarded damages of HK\$100,000 (about US\$ 13,000) for the March 2007 posts.

The plaintiffs filed an appeal against the court's decision in respect of the October 2008 and January 2009 posts. The plaintiff's appeal was dismissed, and the decision upheld by the Court of Appeal. No appeal was filed by the defendants against the decision made in respect of the March 2007 posts.

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² [2013] HKEC 1025.

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<http://dx.doi.org/10.1016/j.clsr.2013.12.008>

On the basis that the following question of great general or public importance had arisen, the Court of Appeal granted the plaintiff further leave to appeal:

*In respect of statements defamatory of a third party posted on a commercial website which may be and were accessed by another party, whether the defence of innocent dissemination or any other defence is available to a commercial website host, and if so, under what circumstances may such defence be established or defeated?*³

1.1.2. The final appeal

In the appeal, whether or not the statements were defamatory was not at issue. What the Court of Final Appeal (“CFA”) ultimately had to determine was to what extent an operator of an Internet discussion forum could be held liable for defamatory statements posted by its users. To make this determination, the CFA had to answer the following questions:

- (i) whether or not the defendants were first publishers or secondary publishers; and
- (ii) if they were secondary publishers, whether the defence of innocent dissemination applied to the defendants.

1.1.2.1. *First or secondary publishers?* The plaintiffs challenged the decision on the basis that the defendants were the first or main publishers of the defamatory posts, and therefore could not rely on the defence of innocent dissemination (discussed further below), which is only available to secondary publishers.

The plaintiffs alleged that the defendants were a first or main publisher as the defendants encouraged people to post on its forum, and must therefore be taken to have authorised each posting, including the defamatory statements. This argument was rejected by the CFA. The defendants had established policies for use of the forum, which prohibited, amongst other things, posting defamatory content. The defendants also employed two administrators to delete objectionable content and respond to complaints. The CFA found that this thereby showed that the defendants were not authorising the publication of any and all postings on its forum – “it is one thing to encourage heavy traffic to make the site attractive to advertisers, but another to conclude that such encouragement involved authorised defamatory postings such as those complained of”.⁴

The plaintiff’s second argument was that the defendants must have acted as the first or main publisher of the defamatory statements, as there was no one else involved in the publishing that could fulfil that role. This argument was also rejected by the CFA. The CFA found that the defendants could not be regarded as the only possible first or main publisher, as the role of the originator of the posting could not be ignored.

The CFA went on to set out the following criteria for a person to constitute a first or main publisher:

- (i) the person must have known, or could easily acquire knowledge of, the content of the material being published (i.e. it must have known the gist of the content, not necessarily every single word or even the fact that the content was defamatory); and
- (ii) the person had a realistic ability to control the publication of the content, which must involve the ability and opportunity to prevent publication of it.

The CFA held that the defendants did not meet the above criteria. It rejected the plaintiff’s argument that the defendants (as a discussion forum provider) should be treated as having knowledge of the content of every posting. The CFA also found that the defendants did not have the ability or opportunity to prevent the defamatory posts from being published on its forum, taking into account the large volume of postings being made each day. The defendants were therefore not first or main publishers, but were in fact secondary publishers of the defamatory posts.

1.1.2.2. *Innocent dissemination?* The second question for the CFA to address was whether the defendants, as secondary publishers, could rely on the common law defence of innocent dissemination. The defence of innocent dissemination relieves secondary publishers from liability for publishing libellous material, if they can show that they did not know the offending material which they helped to publish was libellous, and such lack of knowledge was not due to a lack of reasonable care or negligence on their part.

Taking into account the sheer volume of postings on the forum (i.e. 5000 postings per hour), it was found that the defendants were not negligent in failing to take heed of the existence of the defamatory posts, and had no realistic means of obtaining such knowledge or having editorial control before they were posted. There was also nothing that could have alerted the defendants to the possibility of the defamatory posts being posted. Further, the defendants’ prompt action in taking down the postings (i.e. within hours of becoming aware of them), aided in the CFA’s finding that the defendants exercised reasonable care.

The CFA concluded that the defendants satisfied the defence of innocent dissemination, and the appeal was dismissed.

1.1.2.3. *What can be learned from the decision?* This case gives comfort to social media operators, as it indicates that they may generally be able to avoid liability for defamatory statements posted by users on their site.

Although the appeal was dismissed, some of the comments made by the CFA in this case also indicate that there are circumstances when social media operators may not be able to rely on the defence of innocent dissemination and could be found liable.

The CFA stated in its decision that in an Internet context, the standard of reasonable care may require operators to monitor postings by certain users or on a particular discussion topic, if past experience demonstrates a tendency or risk of defamatory postings. This therefore implies that operators of forums should keep a close eye on any users who have previously been found to be in breach of its forum policies or

³ *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKEC 1025.

⁴ *Ibid* 2.

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