ARTICLE 19

CENTRE FOR INDEPENDENT JOURNALISM
Advocating Media Freedom and Access to Information

Social Media Licensing: What do you need to know?

The Malaysian government's recent announcement that social media companies will be required to obtain licences under the Communications and Multimedia Act (CMA) 1998. The new regulatory framework will be introduced on 1 August 2024, with enforcement effective 1 January 2025. This development is seen as a direct attempt to exert control over social media platforms, which could have far-reaching implications for the right to freedom of expression, as guaranteed in the Federal Constitution of Malaysia. According to the government this will implore social media companies to be more responsible in their moderation of harmful content on their platforms.

Isn’t it a good thing that governments are addressing problematic content on social media?

- It’s certainly encouraging that governments want to tackle online abuse, hate speech, and other problematic content. But while their intentions might be understandable, the current approach could do more harm than good.

- This is because, while the government claims the changes are about regulating platforms, but it is more about regulating content on social media as the government indicated itself, expressing its intention to regulate harmful content on social media.

- Protecting the public against online harms should not come at the expense of the public’s right to express themselves freely, which will be jeopardised under this new licensing regime.

- Both these rights can be protected by upholding international standards and democratic principles, as well as through education and expanding the knowledge base of all in Malaysia, so that together the issue of problematic content can be handled without putting freedom of expression at risk.

Why does ARTICLE 19, CIJ and other non-governmental organisations disagree with the current planned regulations?

- We disagree with both the process and the application of current regulations.

- The process has been rushed without proper and meaningful consultations with civil society, human rights and technology experts, and other relevant stakeholders.

- Such regulatory measures could pose a significant threat to the fundamental democratic values that underpin the nation's governance and the underlying principle of CMA Section 3(3), which states that *"nothing in the CMA shall be construed as permitting the censorship of the internet"*.

- We believe that addressing harmful content goes beyond just content moderation; the government must address the root causes of issues such as hate speech, cyberbullying, and gender-based violence.

- Also, companies alone cannot be tasked with addressing the root causes of these problems. They do have human rights responsibilities to observe and uphold. However, imposing liability for harmful content will only promote over-removal of content, including protected speech.

Shouldn’t social media companies be held accountable for moderating harmful content?

- Social media networks are a vital space for us to connect, share, and access information.
- We agree that companies must be accountable for their lack of transparency, due diligence and other problems caused for repeatedly failing to address online abuse, hate speech, and other problematic content, and which drive many users away.
- Because the business models of large social media platforms rely on capturing our attention and selling it to advertisers, their algorithms are designed to keep us engaged for as long as possible – including by amplifying problematic content like hate speech and disinformation.
- Rather than tackling these flawed business models, many governments' solutions focus on what kinds of content people should and shouldn’t be allowed to post or access on social media, putting the burden on users and enabling companies to moderate and curate content in a way that prevents any liability, resulting in over-removal of content.
- Any attempts to hold platforms accountable must ensure that there is meaningful protection of the rights of the public, including not infringing on users’ freedom of expression. This can work hand in hand with protecting the public from online harms on social media, keeping those platforms accountable through methods that uphold democratic principles transparently and in consultation with stakeholders and the public, which will create a sustainable system that supports the co-existence of these rights.

Is it true that imposing licensing on social media will help to change the users' behaviour?

- The introduction of regulations does not guarantee that online users will change their behaviour. People are able to create new profiles and continue their activities as before.

- This showcases that regulation would not necessarily be effective in addressing the issues of hate speech, harassment and abuse, especially when compared to methods involving the public and relevant stakeholders and making them aware of hate speech, misinformation, disinformation and other problematic content.

- In response to these regulations, non-governmental organisations are urging the government to address the root causes of issues such as hate speech, online harassment, cyberbullying, and gender-based violence .

- By doing addressing the root causes directly, the behaviour of users can be more effectively and sustainably changed for the better.

- The current method of suppression could actually incite more problematic behaviour as people look for different outlets for these issues.

How do content moderation and licensing regimes fail to comply with international freedom of expression standards?

Content Moderation:

- ARTICLE 19, in a legal analysis of the CMA, repeatedly warned that some of the provisions under the CMA are problematic and not in line with international human rights standards.

- We have repeatedly raised the problem of using Sections 211 and 233 of the CMA to define harmful content. At the same time, the provisions have been abused over the years to restrict freedom of expression.

- In principle, we reiterate that Sections 211 and 233 of the CMA should be repealed, as these Sections are expansive in scope and vaguely interpreted.

- The provisions also do not meet international freedom of expression standards, especially the three-part test: legitimate aim, provided by law, proportionate, and necessary.

How do content moderation and licensing regimes fail to comply with international freedom of expression standards?

Licensing regime:

The Act does not set up clear criteria for eligibility, and permits the relevant Minister to impose additional requirements for, or conditions on, licences (Sections 13, 16(b), 30, 127).

We are also concerned about the excessive power that has been given to the Minister in charge to decide and reject any individual's or company's application for a licence. The Act does not provide for any checks and balances to these elaborate powers. For example:

- The Minister has the power to draw up lists of persons or classes of persons who are ineligible to apply (Section 27(2)).

- No further grounds for the basis on which the Minister can bar certain individuals or companies from applying are provided in the Act.

- The Minister may also cancel existing licences under a highly permissive "public interest" test (Section 38 and 37(e)) or if the licensee has failed to comply with "any instrument issued, made or given by the Minister or the Commission" (Section 38 and 37(d)).

- The Commission may do the same for persons registered to a class licence (Section 47(d) and (e)).

How do content moderation and licensing regimes fail to comply with international freedom of expression standards?

Licensing regime:

- The only requirement the Minister appears to need to adhere to is that of giving prior notice and stating reasons for any action taken (Section 13).

- The licensing system therefore amounts to a broad and largely unconditional power to restrict the operation and use of practically all media operations in the country.

- An overarching shortcoming is the complete lack of independence of those tasked with overseeing the licensing system: the Minister and the Commission.

Is it true that licensing of social media companies will restrict freedom of expression?

- These platforms must meet specific regulatory requirements and adhere to standards set by regulatory authorities as part of the licence renewal process. If the regulatory bodies lack independence and the government interferes with the functions of the regulatory bodies, there is a high risk of authorities directly requesting companies to remove content or impose restrictions on users. This has the potential to occur without proper oversight, transparency, and accountability.

- The lack of transparency in the compliance process could give large platforms even more power to police what we see, say, and share online—with disastrous consequences for public debate, the free flow of information, and democracy.

How should content moderation of harmful content on social media be conducted?

Making distinctions between protected speech and harmful content is key to determining the best approaches governments and social media companies can take to both protect those targeted for specific reasons and the right to freedom of expression.

The Government:

- It's crucial for the government to clearly distinguish between protected expression, which includes criticism of politicians, public officials, and other public figures, and harmful content that meets the international human rights threshold to be acted upon.

- International laws clearly state that any restrictions on the right to freedom of expression must adhere to the three-part test of international law, which requires that the restrictions be provided by law, serve a legitimate aim (respect of the rights or reputation of others, national security or public order, or public health and morals), and be necessary and proportionate.

- The Rabat Plan of Action provides guidance for State and law enforcement officials to understand and apply the six-part test (context; speaker; intent; content or form; extent of the speech; and likelihood of harm occurring, including imminence) in order to determine whether the threshold of incitement to hatred is met or not.

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The Government:

- Uses the Manila Principles on Intermediary Liability, which provide further useful guidance on how 'notice and action' procedures should work. We believe that this is the most proportionate and rights-respecting way in which 'notice and action' procedures can be operated.

- Establishes a social media council that promotes a multi-stakeholder independent regulatory framework.

- We recommend the government consult policy papers Watching the Watchmen and Taming Big Tech, which outline how governments can regulate platforms' content moderation and content curation in a way that protects users' rights, and how to tackle the excessive market power of the social media giants.

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Social media companies:

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In our view, transparency should be a basic requirement that pervades everything that companies do to moderate harmful content on social media. In particular, it should apply to:

- **Distribution of content:** Social media platforms and digital companies should provide essential information and explain to the public how their algorithms are used to present, rank, promote, or demote content.

- **Companies' terms of service and community standards:** Companies must make sure their community guidelines are in line with international human rights standards and should publish community standards/terms of service that are easy to understand, and give 'case law' examples of how they are applied. They should publish information about the methods and internal processes for the elaboration of community rules, which should continue to include consultations with a broad range of actors, including civil society.

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Social media companies:

- **Decision-making:** Companies should notify affected parties of their decisions and give sufficiently detailed reasons for the actions they take against particular content or accounts. They should also provide clear information about any internal complaints mechanisms.

- **Human and technological resources used to ensure compliance:** Companies should include detailed information about trusted-flagger schemes, including the names of the individuals listed on the roster of trusted flaggers, how they have been selected, and any 'privileges' attached to that status. They should also publish information about how their algorithms operate to detect illegal or allegedly "harmful" content under their community standards.

- **Transparency reports:** Companies should publish detailed information consistent with the Santa Clara Principles. We note that it is particularly important not to limit statistical information to the removal of content but to also include data about the number of appeals processed and their outcomes.

- **Internal redress mechanisms** to deal with complaints about restrictions on the exercise of the right to freedom of expression, such as the wrongful removal of content or the wrongful application of labels that would suggest that a news source is untrustworthy.

What are the best ways the government to respond to harmful content online?

- We believe that solutions based on transparency, data protection and sound competition policies, including the unbundling of hosting from content curation and interoperability of large platforms, would be far more effective in making the internet safer for children and adults in Malaysia.

- The government must set up an independent committee to review the root causes of hate speech, harassment, abuse and cyberbullying, and relatedly develop a comprehensive plan of action, using the Rabat Plan of Action as the framework, and;

- Enhances education and awareness programmes aimed at building a resilient society guided by ethical and responsible content-creating standards, and with adequate digital literacy to combat the dangers of harmful content.

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