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The Legal Framework of E-Commerce in Malaysia

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ABSTRACT

This article examines the efficiency of the current legal framework on E-Commerce. E-Commerce is a new business model that is being adopted by the public and rapidly replacing the traditional concept of physical stores. Malaysia has not yet taken enough aggressive measures to change our commercial laws, despite the fact that doing so will help ensure that our legal system can control the new corporate norms of the digital era. In this article, the distinctions between offline and online business models are compared, along with the additional problems brought on by this shift. This article suggests new laws and rules that our legislators should enact in order to safeguard vendors, customers, and even the government.

Keywords: E-commerce; Contract; Advertisement; Quality control

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1. Introduction

Electronic commerce (hereinafter referred to as E-Commerce) has experienced remarkable growth in recent years, a momentum notably accelerated by the onset of the COVID-19 pandemic. The constraints imposed by lockdowns compelled consumers to forego traditional retail shopping, prompting businesses to pivot towards digital services as a means of adapting to the prevailing circumstances. The result was a significant surge in E-Commerce's share of global retail trade, escalating from 14% in 2019 to 17% in 2020.[1] This transformative shift underscores the resilience and adaptability of E-Commerce in a world

[1] 'How COVID-19 Triggered the Digital and E-commerce Turning Point' (*United Nations Conference on Trade and Development*, 15 March 2021) <https://unctad.org/news/how-covid-19-triggered-digital-and-e-commerce-turning-point>.

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reshaped by unprecedented challenges, solidifying its status as a pivotal force in the contemporary retail landscape.

Undoubtedly, the exponential growth of E-Commerce stands as a formidable contributor to Malaysia's economic prosperity. In the year 2021 alone, the E-Commerce sector generated an impressive revenue of RM1.09 trillion, marking a substantial increase of 21.8% compared to the RM896 billion recorded in 2020. This remarkable surge in revenue underscores the profound economic impact of E-Commerce, affirming its pivotal role in driving financial gains and fostering sustained economic growth for the nation.[2]

Nevertheless, the very tide that propels the boat forward is also the force that can engulf it, and the swift evolution of E-Commerce has inadvertently unleashed a surge in cybercrime, particularly in the form of E-Commerce fraud. According to data revealed by the Bukit Aman Commercial Crime Investigation Department, in 2018, there were 3,318 reported cases of E-Commerce fraud, resulting in losses amounting to RM22.39 million. Fast-forward to October 31, 2021, and the numbers tell a more alarming tale, with 8,162 reported cases of E-Commerce fraud and losses skyrocketing to RM57.73 million. This escalating trend underscores the imperative for heightened vigilance and effective countermeasures to secure the integrity of the digital marketplace.[3]

In addition to grappling with criminal activities in the realm of E-Commerce, Malaysia has yet to enact dedicated legislation specifically designed to regulate and safeguard the interests of consumers in this digital landscape. Presently, the primary legal framework providing protection for consumers remains the Consumer Protection Act 1999. Despite an amendment in 2007 aimed at enhancing safeguards against malicious practices by online sellers, the adequacy of this amendment is widely regarded as insufficient. Consequently, there exists a pressing need for comprehensive legislation tailored to the unique challenges and dynamics of E-Commerce, ensuring a more robust and nuanced protection for consumer rights.

2. Definition of E-Commerce

In Malaysia, E-Commerce is defined as 'Electronic business transactions, commerce or internet trade. May be conducted between companies (B2B) or between companies and customers (B2C) that are wholly or partially conducted over the internet or similar public or private computer networks'[4] by the Ministry Of Investment, Trade and Industry. Besides, Turban in his book *Electronic Commerce 2004: A Managerial Perspective* describes E-Commerce

[2] 'E-Commerce: The Digital Heart of Malaysia's Economy' (*Malaysian Investment Development Authority*, 30 June 2022) <https://www.mida.gov.my/mida-news/e-commerce-the-digital-heart-of-malaysias-economy/>.

[3] Bernama, 'Significant Increase in Reported Cases of E-commerce Fraud' *New Straits Times* (11 November 2021) <https://www.nst.com.my/news/crime-courts/2021/11/744498/significant-increase-reported-cases-e-commerce-fraud>.

[4] 'E-Commerce' (*Ministry of Investment, Trade and Industry*) <https://www.miti.gov.my/index.php/glossary/term/228>.

as 'the process of buying, selling, or exchanging products, services, and information via a computer network.'[5]

When first mentioned E-Commerce, quite often the discussion would be limited to several mainstream platforms such as Shopee, Lazada, or Mudah. my which have been well-developed in the past few years.

Over time, there has been a significant shift in the landscape of E-Commerce, with the emergence of a new trend – live streaming selling on popular social media platforms like Facebook, Instagram, and TikTok. This phenomenon has gained such momentum that even industry giants such as Shopee and Lazada have integrated live-streaming functions into their websites and apps. In 2018, Lazada reported a staggering $4 billion generated through live-streaming shopping, marking a remarkable 32% increase in China.[6] In Malaysia, we may see a drastic growth of 53% in live-streaming shopping from 2020 to 2021.[7]

Hence, the discourse on E-Commerce needs to progress beyond a focus solely on primary online shopping platforms to encompass the integration of social media platforms, where live-streaming shopping experiences are increasingly prevalent.

3. E-Commerce and formation of a valid contract

The law is settled that a legally binding contract requires the elements of capacity, offer, acceptance, consideration, and intention.[8] Nevertheless, challenges arise in defining what constitutes an offer and acceptance in online transactions. The absence of face-to-face communication and written agreements between sellers and consumers can contribute to misunderstandings.

3.1 Usage of Emoji in electronic communication

The Canadian court case *South West Terminal Ltd v Achter Land & Cattle,*[9] which was recently decided, is significant because it establishes a precedent for the use of emoji in contemporary communication. The King's Bench for Saskatchewan in Canada concurred that using the 'Thumbs-up' emoji can be interpreted as accepting a contract's terms. In this case, one party interpreted the emoji as an acceptance of the terms of the contract, while the opposing party claimed that it only indicated that the contract had been received and was not an acceptance.

The issue that arose was whether there was a meeting of minds which is the basis of a contractual obligation. The Court discovered that both parties had a number of uncontested

[5] Efraim Turban, *Electronic Commerce 2004: A Managerial Perspective* (Pearson 2003).

[6] Nurul Jannah Kamaruddin, 'Live Streaming Shopping Trending up in Malaysia' *Bernama* (30 December 2018) <https://www.bernama.com/en/business/news.php?id=1679916>.

[7] 'Livestream Shopping: The Future of E-commerce?' (*Oppotus*, 31 August 2021) <https://www.oppotus.com/livestream-shopping-the-future-of-e-commerce/>.

[8] *Spring Energy Sdn Bhd v Maju Holdings Sdn Bhd* [2021] 8 Malayan Law Journal 193 (Sessions Ct).

[9] *South West Terminal Ltd v Achter Land and Cattle Ltd* [2023] Saskatchewan Judgements No 215 (SKKB).

prior delivery purchase contracts. Each time the vendor asked the buyer to confirm the order by texting 'Please confirm flax contract' the buyer would respond in a very basic manner, such as by texting 'looks good' 'ok' or 'Yup'. Therefore, the Court determined that there was *consensus ad idem* and that a binding contract had been made between them because the 'Thumbs-up' emoji usage is substantially similar to the buyer's often-used language.

However, it is still to be determined if this case may be applied in Malaysia because another crucial factor that was taken into account in this Canadian case was not present in Malaysia. The Canadian law, namely section 18(1)(b) of The Electronic Information and Documents Act 2000 was referred to in that case. This section read as follows:

> 18(1). Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed:
>
> (a) by means of information or a document in an electronic form; or
>
> (b) by *an action in an electronic form*, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

The Canadian Court recognised the usage of emoji in this case falls within the ambit of 'an action in electronic form' under section 18(1)(b) of The Electronic Information and Documents Act 2000 which can be used to allow to express acceptance.

3.2 Conclusion of Contract in E-Commerce from Malaysia's Perspective

Returning to Malaysia, perhaps a closer examination of the Electronic Commerce Act 2006 and Contracts Act 1950 is a good starting point to determine when a contract between the parties in E-Commerce has been concluded. In most cases, a signature equates to acceptance of the offer. The first legal query that arose as a result was: What constitutes 'signature' in Malaysia?

In comparison with the Canadian's section 18(1)(b) of The Electronic Information and Documents Act 2000 mentioned in the *South West Terminal Ltd's case*, our section 9(1) of Electronic Commerce Act 2006 recognised an electronic signature if it fulfilled three requirements. Section 9 (1) of Electronic Commerce Act 2006 provides that:

> Where any law requires a signature of a person on a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by an electronic signature which:
>
> (a) is attached to or is logically associated with the electronic message;
>
> (b) adequately identifies the person and adequately indicates the person's approval of the information to which the signature relates; and

> (c) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.

Plainly reading from this section, there are no specific criteria as to why a signature must be in writing. In *Yam Kong Seng v Yee Weng Kai*,[10] the plaintiffs enlisted the services of the first defendant through the second defendant to construct a factory, depositing RM1,310,000 for progressive payments in the company's account. Upon the completion of the factory in December 1999, the company confirmed an outstanding refund of RM589,055.61 to the plaintiffs. Despite demands via SMS and a message from the second defendant acknowledging the debt, the outstanding sum remained unpaid. The second defendant argued that the cause of action arose in 1999, asserting the action was time-barred. The plaintiffs contended that the defendants' SMS message constituted a clear acknowledgement of the debt, forming the basis for their claim. Our Federal Court held that:

> [35] From the above mundane approach of alluding to authoritative books and cases it has been satisfactorily established that signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of a mark or by some distinguishing feature peculiar only to that person, then the acknowledgment has been signed. Analogically we hold the view that the conventional paper is substituted by the mobile phone, which holds features that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. In fact it is the norm nowadays to substitute the number of an identified person with his name to assist instant recognition. The fact that the respondent admitted sending the SMS sealed his liability.

Clarifying what constitutes a signature in E-Commerce is crucial since in traditional contractual relationships, a signature is frequently a symbol of acceptance. For instance, it is debatable whether the 'Thumbs-up' emoji functions as an acceptance and is regarded as an electronic signature if the *South West Terminal Ltd* case took place in Malaysia.

From one perspective, a signature is adequate even if it is a mark given by the customer, such as an emoji, as long as it makes sense in the context of an electronic message and signifies acceptance of the proposal.

On the flip side, individuals often attribute varied interpretations to the same emoji. For instance, the 'Smile Face' emoji can be perceived by one party as an expression of satisfaction with the presented terms, yet it might not necessarily convey complete agreement with the proposal. In the contemporary landscape of E-Commerce, the scope extends beyond conventional platforms like Shopee or Lazada; transactions can now transpire seamlessly through channels such as Facebook Messenger or WhatsApp.

[10] *Yam Kong Seng v Yee Weng Kai* [2014] 4 Malayan Law Journal 478 (FC).

In scenarios involving extensive communication and negotiations regarding the terms of a proposal, relying solely on a simple Emoji may prove insufficient. The ambiguity arises as these symbols might not distinctly communicate whether acceptance pertains to a specific term within the proposal or encompasses the entirety of the terms discussed. As a result, the nuanced nature of business dealings in the digital realm demands a more precise and explicit means of expressing agreement or approval.

In summary, the use of emojis can potentially signify acceptance, but this determination should be made on a case-by-case basis, considering the context of the overall communication between the parties. It is recommended that each party seeks clarification from the other when emojis introduce ambiguity regarding whether they constitute acceptance of the terms or offer. Clear communication is key in interpreting the intent behind the use of emojis in a contractual context.

3.3 Acceptance in E-Commerce

Given that signing a document is never the only way to accept it, perhaps the discussion of the importance of signatures in E-Commerce is too constrained. Section 7 of Electronic Commerce Act 2006 never mentioned a requirement for signature in the formation of a contract by electronic message. In *Dato' Vijay Kumar Natarajan v Malaysia Airlines Bhd*,[11] the High Court in view that:

> It is not in dispute that a contract for commercial transactions can be formed electronically and this includes any sale that is performed online. (See section 7 of the Electronic Commerce Act 2006). The terms of the contract of carriage between Plaintiffs and D[efendant] in relation to the Flight Tickets were presented online via D[efendant]'s website. Plaintiffs had agreed to them by clicking on a 7 understand and accept the Terms and Conditions of Carriage and Fare Conditions' button to indicate their acceptance when completing the purchase of the Flight Ticket.

While it is common practice that clicking 'I Agree' amounts to acceptance, this only applies to larger E-Commerce platforms that have the technical means to set up such an option. What about small business owners who conduct E-Commerce using electronic means like phone calls, social media posts, or online orders?

It is not a novel practice for customers to get in touch with a merchant by phone or WhatsApp message to place an order or for more information after being drawn in by an advertisement or promotion on social media. Some of the users might even directly place their order and pay the amount via an online transaction or Electronic Wallet ('E-Wallet') as instructed in the advertisement or social media post.

This raises a legal question: Does this conduct constitute acceptance if buyers pay the money via online transaction after seeing the advertisement posted on social media?

[11] *Dato' Vijay Kumar Natarajan v Malaysia Airlines Berhad* [2021] Malayan Law Journal Unreported 407 (HC).

If we refer to section 8 of Contracts Act 1950, payment by the consumers can be argued as performed as the condition of a contract and amount to acceptance. However, there is an issue with this proposition because the general rule of advertisement is that it merely constitutes an invitation to treat and not an offer. Thus, the payment after consumers saw the post of products should not be regarded as an acceptance.

To resolve this question, we can refer to the case of *Eckhardt Marine Gmbh v Sheriff, High Court of Malaya, Seremban*,[12] where the sheriff of the Seremban High Court arrested a motor vessel and advertised it for sale. The appellant submitted an offer to purchase the vessel below the advertised price, contingent on conditions related to port authority requirements and seaworthiness certification. Despite the offer being below the advertised price, the sheriff accepted it, and the judge approved the sale after verifying compliance with the specified conditions. However, the appellant failed to pay the balance within the stipulated time, leading to the forfeiture of their deposit. The appellant sought the release of the deposit, arguing that no binding contract had been established.

The Court of Appeal utilise this opportunity to set out the propositions of law as follows:

> First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other ...
>
> Second, there are a number of guidelines—we emphasise that these are only guidelines—that have been formulated by courts to ascertain whether there was an offer in a given case and by whom it was made. Thus, as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers ...
>
> Third, an offer may be made unconditionally or upon stated conditions. In the latter case, an acceptance to be valid must accord with the terms of the offer...
>
> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* [1877] 2 App Cas 666 is a case of acceptance by conduct ...

The Court of Appeal held that the advertisement amounted to an invitation to treat but there was a letter issued by the purchaser side to the sheriff which amounted to an offer which later accepted by words and conduct.

In the realm of E-Commerce, the presentation of products accompanied by their respective prices, whether showcased on social media platforms or within an online store, can be viewed as an invitation to treat from the e-seller. The act of making a purchase offer is

[12] *Eckhardt Marine GmbH v Sheriff, High Court of Malaya, Seremban* [2001] 4 Malayan Law Journal 49 (CA).

initiated by the potential buyer who places an order and proceeds with the payment process. Consequently, it holds significant importance for e-sellers to actively consider implementing a disclaimer that explicitly characterises their product displays as mere invitations to treat. This precautionary measure helps in establishing a clear understanding that the presentation of goods with prices is not tantamount to a binding contract but rather an opportunity for customers to express their intent to purchase. By incorporating such disclaimers, e-sellers can foster transparency and mitigate potential misunderstandings, ultimately fostering a more secure and reliable online shopping experience.

This raises an interesting issue as to when the acceptance by the e-seller happened. A Singapore case of *Chwee Kin Keong and Others v Digilandmall.Com Pte Ltd*[13] provides that an automated reply from the system which stated 'Successful Purchase Confirmation from HP online' amounted to an acceptance by the seller.

The Federal Court of Australia discussed various stages involved in online purchase transactions in the case of *eBay International AG v Creative Festival Entertainment Pty Ltd.*[14]The Federal Court decided that a condition which only imposed and printed on the ticket that would be received by the purchasers but not mentioned when purchasing the ticket on the online website is unenforceable.

Perhaps it can be inferred from these two cases that the advertisement or display of goods on the website or social media is merely an invitation to treat by the e-seller.[15] Purchasers make an offer to the e-seller when they place an order and pay the buying price.[16] As a result, the e-seller's acceptance must be unqualified and unconditional, and it cannot impose or alter the offer's terms in any way.[17]

To safeguard against premature entanglement in a contractual relationship, it is advisable for the e-seller to explicitly define what constitutes acceptance within the framework of their Terms and conditions. By clearly outlining the criteria for acceptance, both parties gain clarity on when the contractual obligations become binding. Nevertheless, treating product advertisements or displays on online marketplaces as invitations to treat introduces a strategic advantage for e-sellers. This approach provides them with the flexibility to either accept or reject proposals made by customers, aligning with the principles of contractual freedom. While this flexibility empowers e-sellers, it does pose a potential contradiction to the core value of online shopping convenience. Striking a balance between safeguarding against premature commitments and maintaining the ease of online transactions becomes crucial in optimising the digital shopping experience. Moreover, it would be deemed unjust and prejudicial to the buyers if e-sellers were to unilaterally opt not

[13] *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] 2 Singapore Law Reports 594 (SGHC).

[14] *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] 170 Federal Court Reports 450 (FCA).

[15] United Nations Convention on Contracts for the International Sale of Goods, art 14 (2).

[16] Simon P Haigh, *Contract Law in an E-Commerce Age* (Round Hall 2000) 13.

[17] Contracts Act 1950, s 7(a).

to accept an order, especially when the buyers rely on this transaction for their daily activities or business engagements.

Regrettably, Malaysia's current legal stance tends to categorise advertisements as invitations to treat rather than explicit offers, as underscored in the recent Court of Appeal case of *Bounty Dynamics Sdn Bhd (formerly known as Media Development Sdn Bhd) v Chow Tat Ming*.[18]

It is strongly recommended to enforce mandatory requirements for a Confirmation Email or Confirmation Message, as exemplified in the *Chwee Kin Keong* case. This serves the crucial purpose of striking a delicate balance between protecting the interests of e-sellers from premature contractual obligations and ensuring customers are not left in undue uncertainty regarding their orders. In fact, the necessity for an acknowledgement of an order is legally mandated in the United Kingdom. Regulation 11 of the Electronic Commerce (EC Directive) Regulations 2002 in the UK stipulates the obligation to provide an acknowledgement receipt for an order without undue delay. To align with international best practices and bolster consumer protection, it is proposed that section 24 of the Electronic Commerce Act 2006 be amended to incorporate a mandatory requirement for order acknowledgement when a customer initiates a purchase.

3.4 The Man Behind the Screen

Generally, in Malaysia, only a person who is above 18 years old is qualified as a competent person to enter into a contract.[19] This might not be able to be scrutinised effectively when the purchase is through E-Commerce where the buyers are behind the screen.

Certainly, though E-Commerce platforms commonly provide identification verification during user account creation, this safeguard alone falls short of ensuring comprehensive security. An illustrative incident involving a minor using their parent's account for an online transaction prompts consideration of whether such an action equates to a legally binding contract. This situation raises nuanced legal considerations because the transaction was executed through a valid account, yet it was orchestrated by a minor lacking the legal capacity to enter into contracts. This scenario underscores the necessity for E-Commerce platforms to not only authenticate users but also incorporate mechanisms that consider and address issues related to competence, particularly when transactions involve individuals who may not possess the legal capacity to engage in contractual agreements. As the digital landscape evolves, grappling with such legal intricacies becomes imperative for fostering a secure and ethically sound E-Commerce environment.

In-app purchases by children especially in online video games are one example. This can be illustrated by Apple Inc. agreeing to a settlement in a complaint by the Federal Trade

[18] *Bounty Dynamics Sdn Bhd (Formerly Known As Media Development Sdn Bhd) v Chow Tat Ming* [2016] 1 Malayan Law Journal 507 (CA).

[19] Contracts Act 1950, s 10, s 11; Age of Majority Act 1971, s 2.

Commission to fully refund their users by paying at least $32.5 million for charges incurred by the children's mobile app without parents' authorisation.[20]

Nevertheless, it's essential to note that not all unauthorised in-app purchases made by children are eligible for refunds. In a specific case, Apple declined to reimburse the $16,000 incurred by a 6-year-old on a mobile game in 2020. This decision was based on the mother's failure to contact and cancel the transaction within the stipulated 60-day timeframe, highlighting the importance of timely communication to address such incidents.[21]

Referring to section 69 of Contracts Act 1950, it should be noted that this provision makes an exemption to the general rule that a minor is incapable of entering into a contract unless it is necessary. The person who supplied the necessaries is entitled to be reimbursed from the property of the minor.

Justice Chang Min Tat in the case of *Government of Malaysia v Gurcharan Singh*,[22] had clarified what amounts to 'necessaries' for minors as follows:

> In my view, the word 'necessaries' must be construed broadly, and in any decision involving whether what is supplied are or are not necessaries, it is incumbent to have regard to the facts of the case, the conditions and circumstances in which the supply was made and the purpose which is served.

His Lordship also referred to *Mohori Bibi & Anor v Dhurmodas Ghose*,[23] which held that the combination effect of Sections 10 and 11 of the Indian Contract Act (which are the same as our Contracts Act 1950) carry an effect that the contract entered by the minor is void. Hence, his Lordship decided that the contract entered by the defendant when he was a minor was void but since it was for necessity, the defendant was still liable to repay a reasonable amount which had been spent on him previously.

The aforementioned information appears to show that a contract should be void as long as the purchase was made by the minor who is incompetent. However, when such a purchase is for necessities, even if the contract is void, the party who had delivered the necessaries is still eligible to claim reimbursement.

It can be contended that this perspective is equally applicable to an E-Commerce transaction facilitated through a legitimate account belonging to the purchaser's parents.

[20] 'Apple Inc Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent' (*Federal Trade Commission*, 15 January 2014) <https://www.ftc.gov/news-events/news/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million-settle-ftc-complaint-it-charged-kids>.

[21] Alex Galbraith, 'Apple Reportedly Won't Refund Parent Whose Child Racked Up $16,000 Worth of Sonic Forces In-App Purchases' (*Complex*, 16 December 2020) <https://www.complex.com/life/a/alexwgalbraith/apple-refusing-refund-16000-sonic-forces-in-app-purchases>.

[22] *Government of Malaysia v Gurcharan Singh* [1971] 1 Malayan Law Journal 211 (HC).

[23] *Mohori Bibee v Dharmodas Ghose* (1902–3) 30 Interlocutory Appeal 114 (PC).

Unlike conventional transactions, where buyers and sellers have the opportunity to negotiate and communicate face-to-face, E-Commerce introduces a unique dynamic. In this digital realm, sellers find themselves in a scenario where they are essentially blind to the identity of the person behind the screen. Sellers place their trust exclusively in the information furnished within the buyer's account or profile, operating under the assumption that they are conducting business with the individual accurately represented in these digital credentials. The absence of direct interaction heightens the reliance on the integrity of the provided details, emphasising the need for robust mechanisms to establish and verify user identities in the virtual marketplace.

4. False and Misleading Advertisement in E-Commerce

Over the course of time, the landscape of advertising has undergone a significant transformation, with a pronounced shift towards digital platforms, particularly social media. In the year 2022, an impressive 63% of all advertising activities were channelled through various social media platforms.[24] Notably, a prominent trend within this digital realm is the strategic collaboration with Key Opinion Leaders (KOLs), which has swiftly become a favoured approach for E-Commerce merchants.

In this dynamic paradigm, E-Commerce sellers frequently engage in partnerships with influencers, leveraging their social media presence across platforms like Instagram, Snapchat, and TikTok. This tactic proves especially valuable for sellers who lack a physical retail space to showcase their products. Consequently, enlisting the services of influencers or KOLs for social media advertising has emerged as a pivotal strategy, playing a crucial role in enhancing the visibility and exposure of their products to the broader public.

It is crucial to bear in mind that E-Commerce extends beyond mere transactions between consumers and online merchants; it encompasses a broader spectrum, incorporating influencer marketing on social media. Influencer marketing constitutes a significant business practice wherein influencers are remunerated to endorse and promote a product or service. Understanding this broader perspective is essential for navigating the multifaceted landscape of contemporary E-Commerce.

Nevertheless, a critical concern arises in social media advertising involving influencers or Key Opinion Leaders (KOLs): the potential for inaccuracies or deceptive information about a product due to a lack of understanding. The competitive landscape among influencers may drive some to exaggerate or even fabricate details about products, especially when substantial compensation is involved. This highlights the importance of ensuring not only transparency in influencer marketing but also a comprehensive comprehension of the promoted products to maintain the integrity and authenticity of the information being disseminated.

[24] Daljit Dhesi, 'Media Owners' Advertising Revenues Seen to Surge' *The Star* (27 June 2022) <https://www.thestar.com.my/business/business-news/2022/06/27/media-owners-advertising-revenues-seen-to-surge>.

A noteworthy incident occurred earlier this year when an influencer boasting 12 million TikTok followers made a striking claim, asserting that everything on social media is merely a facade for profit-driven advertising.[25] This statement underscores a growing scepticism and awareness among both influencers and their audiences regarding the authenticity of the content on social platforms. It prompts a critical examination of the motives behind online content creation, raising questions about transparency, trustworthiness, and the blurred lines between genuine expression and promotional endeavours in the realm of social media.

5. Quality Control in E-Commerce

Distinguishing itself from in-store purchases, where customers can physically inspect and interact with goods prior to buying, E-Commerce predominantly relies on a pay-and-deliver model. This, however, introduces a potential drawback— the likelihood of receiving a product of subpar quality upon delivery. In 2018, the National Consumer Complaints Centre recorded a substantial 10,615 complaints against E-Commerce, surpassing the 5,159 cases reported against retail services.[26] This stark contrast in complaint figures emphasises the heightened challenges and concerns associated with product quality in the online retail landscape, urging a closer examination of consumer protection measures within the E-Commerce sphere.

The E-Commerce industry faces a significant challenge with the proliferation of counterfeit goods, exacerbating an already complex situation. It's important to note, however, that placing complete responsibility on E-Commerce platforms might oversimplify the issue. Consumer demand plays a substantial role in driving the availability of counterfeit products. Illustratively, the prevalence of online searches for terms like 'fake Rolex,' with over 225,000 annual queries, underscores the consumer interest in such products.[27]

6. Regulation of Business Ethics in E-Commerce

The realms of false and misleading advertising and quality control in E-Commerce are intricately connected. It is imperative that sellers refrain from disseminating inaccurate or deceptive information about their products. Maintaining integrity in product descriptions and representations is not only an ethical obligation but also a critical aspect of quality control. Customers rely on accurate information to make informed decisions, and any deviation from the truth can erode trust in the E-Commerce ecosystem. Thus, a commitment

[25] 'TikTok Influencer Implies She's Willing to Lie to Promote Products if Price Is Right' *Fox Business* (28 January 2023) <https://www.foxbusiness.com/lifestyle/tiktok-influencer-implies-shes-willing-lie-promote-products-price-is-right>.

[26] Bernama, 'Consumers Lost RM360m Due to Faulty Products, Poor Services' *Malaysiakini* (3 October 2019) <https://malaysiakini.com/news/494242>.

[27] 'Fakes and Fake Fakes: Counterfeit Goods Still in High Demand' *Free Malaysia Today* (28 July 2021) <https://www.freemalaysiatoday.com/category/leisure/2021/07/28/fakes-and-fake-fakes-counterfeit-goods-still-in-high-demand/>.

to transparency and truthfulness in advertising is fundamental for ensuring the overall quality and credibility of products in the online marketplace.

Trade Descriptions Act 2011 is one of the main legislations that governs advertisement. False and misleading statements in advertisements are expressly forbidden by section 18 of Trade Descriptions Act 2011. If a vendor is charged under this section, it is their responsibility to demonstrate that the claim made in the advertisement is accurate. It would be an offence for false and misleading advertising under section 21 of Trade Descriptions Act 2011 which upon conviction liable to fines or imprisonment.

It shall be aware that Trade Descriptions Act 2011 has incorporated the word 'including through electronic means' into the definition of advertisement in section 2 compared to the previous Trade Descriptions Act 1972. Therefore, this is a forward-thinking move that should be supported in order to accommodate current advertising.

As discussed earlier, live-streaming or promotion videos by influencers or KOL has become one of the publication methods in the modern day. These promotion methods should also fall within the definition of advertisement because section 2 of Trade Descriptions Act 2011 defines 'advertisement' as every form of advertising including way of films, pictures, or electronic means.

Influencers who receive payment for promoting products or services run the risk of introducing bias into their comments or reviews, potentially skewing opinions in favour of positive aspects. Therefore, it is crucial that they reveal that they are receiving payment for this promotion. For instance, Kim Kardashian was fined $1.26 million by the Securities and Exchange Commission of the United States for promoting cryptocurrency without disclosing that she was being paid for the promotion.[28]

Given that influencers' promotional videos effectively function as advertisements, it is imperative for them to adhere to the guidelines set forth by Trade Descriptions Act 2011 and abstain from disseminating false or misleading statements in their content. Furthermore, it is essential for influencers to transparently disclose any financial interests they may have in the promoted goods or the sellers, particularly if they are receiving remuneration for their marketing efforts. This commitment to truthfulness and disclosure not only aligns with regulatory standards but also fosters trust and transparency in influencer marketing.

Malaysian Communication and Multimedia Commission (MCMC) released the latest *Malaysian Communications and Multimedia Content Code* on 30 May 2022 (hereinafter referred to as 'Content Code 2022'). It is delightful to see that Part 1 Paragraph 5.0 of Content Code 2022 has defined influencer as:

> Influencer is defined as person(s) or group(s) who either on a personal capacity share their own independent opinions or are engaged and paid by Advertisers (either in cash or other consideration) to advertise products or

[28] 'Ben Westcott, 'Australia Investigates Online Influencers Over False Advertising' *Time Magazine* (26 January 2023) <https://time.com/6250684/australia-investigates-online-influencers-over-false-advertising/>.

> services on their own social media channels because of their social media influence on Consumers.

Furthermore, influencers must adhere to the advertising guidelines established for advertisements, as stated explicitly in Part 3 of the Content Code 2022. Part 3 Paragraph 6.3 of Content Code 2022 is noteworthy because it mandates that marketing communications, which include social media platforms, clearly disclose that product or service reviews are underpaid by using labels like 'Advertisement' and 'Sponsored' in the video. Consequently, product marketing or review videos produced by influencers must align with this criterion. To ensure awareness among viewers who may only watch segments of a live stream, such disclosures must be reiterated consistently during the live-streaming session.

Even though online advertisement which includes influencers seems to be properly governed under the Content Code 2022, it is still insufficient. Part 1 paragraph 6.2 of the Content Code 2022 also states that compliance with this Code is only voluntary and such compliance can be a defence against prosecution. However, a reference should be made to *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd* where the Federal Court clarified compliance with the Code as a defence:[29]

> The scope of the Content Code must be interpreted in the light of its general principles as provided in section 2.0. The Code declares that there are sets of general principles that must apply to all that is displayed on or communicated and which is subject to the Act… The overriding general principles and the underlying purpose of the Content Code should be viewed holistically. Far from complying with the Content Code, Malaysiakini may have breached the real objective of the Content Code. Viewed in this way, we are unable to accept that this Code can act as an armour to protect the respondents or any publisher being an ICH from any liability in the event where contemptuous comments were made by a third party subscribers that were published by the said ICH.

Deprived of this case, compliance with the Content Code 2022 may still not amount to defence if the advertisement of the products or service is against the objective of the Content Code 2022.

Malaysia can consider adopting a mandatory requirement for influencers to disclose material interests in their videos, taking inspiration from India's proactive approach. In India, if there are misleading advertisements, it can even attract a penalty of up to Rupees 10 lakh[30] and for subsequent offences up to Rupees 50 lakh.[31]

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[29] *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd* [2021] Malayan Law Journal Unreported 241 (FC).

[30] One lakh equals to one hundred thousand.

[31] 'Paid Promotion Must Be Disclosed to Consumers: Centre on New Guidelines for Social Media Influencers' *The Times of India* (20 January 2023) <https://timesofindia.indiatimes.com/business/india-business/paid-promotion-must-be-disclosed-to-consumers-centre-on-new-guidelines-for-social-media-influencers/articleshow/97177390.cms>.

The accountability of E-Commerce platforms for counterfeit items available on their platforms remains a subject of ongoing debate. There is yet to be a final decision on this issue however, the case of *A & M Beauty Wellness Sdn Bhd v Shopee Mobile Malaysia Sdn Bhd (berniaga sebagai Shopee Malaysia)*[32] which concerns an Interim Interlocutory Injunction against Shopee to prohibit sale of similar products and bearing the Plaintiff's trademark worth a study.

The Plaintiff's application was denied by the High Court in this case for a number several Firstly, Justice Ahmad Kamal Md Shahid held that the Plaintiff had not offered any proof that the goods were counterfeit. Since Plaintiff alleged that those are counterfeit products, Plaintiff should take the steps expressly stated in the Shopee's terms and conditions to remove the offending products. There would be a breach by Shopee only if Shopee refused to comply with taking down the offending products after the Plaintiff availed of the remedy.

The Court further concluded that Shopee prevails on the balance of convenience since part of the relief sought by the Plaintiff is impracticable to implement. The court agreed that Shopee cannot stop, prevent, or disallow other users to sell the Plaintiff's conduct on its platform. Additionally, Shopee lacks the technical capacity to pre-screen each good posted by platform users.

While acknowledging that the recent decision is an interlocutory injunction ruling, it signifies the court's stance that E-Commerce platforms bear no liability for counterfeit products sold by e-sellers on their platforms. With due respect, it is imperative to reconsider this position, anticipating a future decision that delineates the accountability of E-Commerce platforms concerning counterfeit products. This becomes especially crucial as intellectual property owners encounter formidable challenges in protecting their legal interests when E-Commerce platforms fail to collaborate in combating counterfeit goods—especially when the e-seller operates beyond Malaysian jurisdiction. In the interim, intellectual property owners must recognise the importance of amassing substantial evidence demonstrating the infringement of their intellectual property rights before pursuing interlocutory injunctions.

E-commerce platforms operating in Malaysia must assume responsibility for addressing the issue of counterfeit products and adopting a resolute stance, demonstrating zero tolerance towards sellers who violate intellectual property rights. It is crucial for major E-Commerce entities such as Shopee and Lazada to serve as exemplars in guaranteeing the quality of products available on their platforms, ensuring they meet merchantable standards. Failure to do so should not result in complete exemption from legal accountability if a defective product is sold through their platforms. Upholding stringent standards across the E-Commerce landscape is imperative for consumer protection and the overall integrity of the marketplace.

[32] *A & M Beauty Wellness Sdn Bhd v Shopee Mobile Malaysia Sdn Bhd (Berniaga Sebagai Shopee Malaysia)* [2021] Malayan Law Journal Unreported 65 (HC).

In 2020, the California Court of Appeal decided that Amazon has strict liability for the products offered on their site, and as a result, Amazon should be held accountable if the products turn out to be defective.[33] Consequently, it is advocated that Malaysia adopts a similar stance to ensure that E-Commerce platforms within the country implement stringent measures to regulate the quality of the goods they offer for sale.

7. Conclusion

In summary, the trajectory of Malaysia's economy in the digital age is significantly shaped by the dynamics of E-Commerce. While our legislators have implemented innovative measures to safeguard the E-Commerce landscape and uphold corporate ethics, there remains an imperative for continuous enhancement. The ongoing evolution of technology and business practices necessitates a proactive approach to keep our legislative framework abreast of these changes, as progress doesn't pause for the refinement of laws. Therefore, a commitment to maintaining up-to-date legislation is paramount to ensuring the efficacy and relevance of our regulatory environment in the ever-evolving digital era.

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[33] Annie Palmer, 'California Court Rules Amazon Can Be Liable for Defective Goods Sold on Its Marketplace' *CNBC* (13 August 2020) <https://www.cnbc.com/2020/08/13/amazon-can-be-held-liable-for-faulty-goods-court-rules.html>.