

Criminal Litigation

Injunction against violent online messages: Will online platform administrators be held liable?

Background

Since the citywide protest movement that began in June this year, internet-based practice of disseminating and broadcasting materials and information with a malicious intent to incite violence had become increasingly common, especially on certain internet messaging platforms and smartphone apps. On 31 October 2019, the High Court of Hong Kong granted an interim injunction, in response to an application filed by the Secretary for Justice of Hong Kong, to ban anyone from posting or spreading messages online inciting the use or threat of violence that would cause “bodily injury to any person unlawfully” as well as “damage to any property unlawfully” (the “**Injunction**”).

Recently, the Injunction was challenged by the Internet Society of Hong Kong Limited (“**ISOC**”) (HCA 2007 / 2019), which has over 1,890 members who work in the development, operation and use of internet connected and internet-based applications, platforms and media, seeking the discharge of the Injunction or variation of its terms. Hon Coleman J of the Court of First Instance of the High Court ruled that the Injunction shall not be discharged. Nonetheless, the terms of Injunction were slightly amended to protect the innocent internet providers and online platform administrators.

Applications by the ISOC

ISOC’s application sought to discharge the Injunction or vary its terms. The main submissions made by the ISOC were:-

1. On its face, the Injunction is over-broad, catching all acts of dissemination, publication, re-publication etc., regardless of knowledge of the information and material or the context or purpose of that act, where the effect is to put all internet intermediaries and innocent users in breach or possible breach; and
2. On constitutional grounds, the evidence before the Court does not justify the restrictions in the Injunction on the correct four-stage proportionality analysis.

Court’s Decision

The ambit of the Injunction

ISOC submitted that knowledge is a required element for both the criminal offence of incitement and for the tort of public nuisance. If the specific requirements of knowledge of both the quality of the material and that the publication is intended to cause bodily injury or damage are not included, the Injunction would catch unwitting and unintended bona fide posters and those who post for a legitimate purpose, e.g. the online platform operators. ISOC suggested that the wording of the Injunction shall be crafted in simple ways to include the requisite knowledge elements.

The Plaintiff, i.e., the Secretary for Justice, relying on the settled principle found in *Kao, Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830, submitted that a person would be caught by the Injunction only if (a) he **wilfully** publishes on an internet-based platform any material that promotes, encourages or incites the use or threat of violence, and (b) that such publication is **intended or likely** to cause bodily injury or damage to property unlawfully within Hong Kong. Therefore, such qualifications protect those “innocent” individuals who did not intend to publish to incite violence or did not know that their publication would have the likely effect of inciting violence.

The Court, after hearing the submissions by both sides, suggested that the wording of the Injunction can be tweaked to make plainer the above points by adopting wording linking publication to its purpose. As a result, the Injunction has been slightly amended as set out hereinbelow.

The four-stage proportionality test

The four-stage proportionality test which determines justification of a particular intrusion into fundamental rights is set out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. The four stages are:

1. whether the intrusive measure pursues a legitimate aim;
2. if so, whether it is rationally connected with advancing that aim;
3. whether the measure is no more than necessary for that purpose; and
4. whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

ISOC submitted that innocent disseminators such as forum operations and news organisations may not be authors of the materials but burdens might be imposed on them upon the Court’s Injunction. Such burdens included the need to self-censor to ensure information or material transferred does not include any incitement of violence. This was an unacceptably harsh burden on the innocent disseminators.

The Court analysed the first two stages of the proportionality test set out above and acknowledged that (i) the legitimate aim is to remove or reduce the publication of material on the internet which promotes, encourages or incites the use or threat of violence intending bodily injury or property damage; and (ii) there is a rational connection with such legitimate aim when the Injunction is sought to safeguard various rights of the wider public and to restrain offences against the person and offences of criminal damage.

As to the third stage, while the Court is concerned to consider whether some less onerous alternative is available without unreasonably impairing the objective, the Court held that the Injunction would meet the requirement that the intrusion is minimal or no more than necessary if the Injunction is properly drafted. The focus of the Injunction is more than the ability of the police to detect crime but the wider purpose of seeking to curtail a public nuisance and to assist with the curtailment or deterrence of criminal activity the manner and extent of which threatens society as a whole.

Concerning the fourth stage of the proportionality test, while the Court acknowledged the right of free speech, which is constitutionally guaranteed, has been rightly greatly valued in our society and are the organs of the media as the public watchdog, the Court was not convinced of the flow of information which may incite violence or is intended to or likely to cause injury to a person or property damage. The Court held that there was no problem in requiring publishers of material to exercise some self-censorship which the Court suggested it is not necessarily a bad thing, and did not think the Injunction imposed an unacceptably harsh burden on any person to be asked to exercise their rights and freedoms with a degree of responsibility.

As a result, after considering the above matters, the Court decided to continue the interim Injunction but in slightly amended or tweaked terms as follows:

1. *The Defendants and each of them, whether acting by themselves, their servants or agents, or otherwise howsoever, be restrained from doing any of the following acts:*
 - a. *Wilfully disseminating, circulating, publishing or re-publishing on any Internet-based platform or medium (including but not limited to LIHKG and Telegram) any material or information **for the purpose of promoting, encouraging or inciting the use or threat of violence, intended or likely to cause:***
 - i. *bodily injury to any person unlawfully within Hong Kong, or*
 - ii. *damage to any property unlawfully within Hong Kong.*

- b. **Wilfully** assisting, causing, counselling, procuring, instigating, inciting, aiding, or abetting others to commit any of the aforesaid acts and participate in any of the aforesaid acts.

Conclusion

It is the Court's view that the right to freedom of speech is not an absolute right despite its importance in a free society and a constitutional right. Insofar as the Court is satisfied that certain restriction on such freedom can overcome the four-stage proportionality test set out in Hysan Development Co Ltd v Town Planning Board, the Court will not refrain from giving an order to enable such restrictions. This may also explain why the Court in the current case decided that the restrictions on dissemination of the information which could incite use or threat of violence shall not be unconstitutional.

Nevertheless, online platform administrators shall be relieved that with such slight amendment to the Injunction order, even if they allow posts to be made on their platforms, without knowing the fact of the publication or the contents of the publication, they cannot be said to be in breach of the Injunction. The Court has made clear that the Injunction would only ban online materials published "for the purpose of" promoting, encouraging or inciting the use or threat of violence and could only restrain people who "wilfully" assist others to commit such acts. This will be particularly crucial for online platform administrators involving dissemination of materials from the sending of private messages on the platforms or concern arising from an inability to know how any particular receiver of the message will understand the content of the message.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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