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Digital business: the applicable laws in Malaysia

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**Comp. Law. 414* Introduction

The Covid-19 pandemic has immensely impacted the world in a myriad of ways. One of its major impacts is the significant shift in the way consumers buy goods and services. Online purchasing has increased tremendously, thus, substantially replacing the traditional method of physically shopping in stores. Many traditional businesses have the difficult option of either closing down or adapting to changes and some opt to embrace electronic business, also known as e-business, in the hope to continue to survive. In the somewhat chaotic muddle, a topic that keeps emerging is digital business or d-business that is widely said to be rapidly becoming a new norm or a new normal during the Covid-19 pandemic. Recognising the rising importance of digital business, this paper discusses the topic by delineating what digital business is; how different digital business is from the traditional business, or for that matter, e-business; the digital business models; and the laws that apply to digital business, albeit specifically in Malaysia.

What is digital business?

Digital business is a business that uses technologies as an advantage in its internal and external operations.[1] It is worth noting that digital business is not simply selling products or services using an electronic commerce (e-commerce) system and advertising them through social media or any online platforms, but it is a process of changing the operating system in order to create a new competitive advantage.[2] In other words, digital business creates new values in business models, uses data in defining strategies and making decisions, as well as transforming business processes by employing technologies into the whole of business operation. According to Jorge Lopez, vice president and analyst in Gartner, digital business is the creation of new business opportunities and new value chains that cannot be fulfilled by traditional business.[3]

To better grasp what digital business is, its definition by several writers is reproduced here. Schwertner[4] defines digital business as the application of technology to form business models, processes, software and systems leading to more productive sales, greater competitive advantage and better performance. To achieve all of that, the transformation of processes and business models, empowerment of workforce efficiency and innovation, and personalisation of customer experiences are to be undertaken. Meanwhile Kaufman and Horton, Hess et al and Schuchmann and Seufert[5] define digital business as the use of digital technologies to impact three organisational dimensions, namely externally, internally and holistically. In the external organisational dimension, the emphasis is on digitally maximising customer experience and transforming the entire life cycle. In the internal dimension, the focus is on impacting business processes, decision-making and organisational structures. Meanwhile in the holistic dimension, all company divisions and roles are affected, often contributing to a completely new business model. Lastly, but by no means least, McKenna[6] defines digital business as remaking the business process by using digital technologies to make it more efficient and effective. The aim is to use technology not to simply reproduce an existing business processes in a digital form, but to use technology to transform that processes into something much better. Further, according to McKenna, apart from transforming the business processes, changing the corporate culture is also very important to achieve a successful digital business. From the several definitions above, the logical premise that could be concluded is that digital business is all about the integration of digital technologies into the whole business area, resulting in rapid changes in the fundamental aspects of business.

Differences between traditional business and digital business

Traditional business has a physical presence and serves customers locally as customers need to visit the store to buy goods or to obtain services. Meanwhile in digital business, customers may obtain goods and services anywhere and anytime by choosing, ordering, and making payment through websites. Specifically, there are four major differences between traditional business and digital business, namely the focus, cost or budget, inventory, ***Comp. Law. 415*** and marketing. For the first major difference, namely the focus, it is not unknown that traditional business focuses on developing business strategy to gain revenues. On the other hand, digital business focuses on how technology helps the business to build new value and experiences that distinguish the business from other businesses and give the former a competitive advantage over its competitors.[7] As for cost or budget, traditional business requires a huge investment to develop as it needs physical assets such as building, labour, machinery, and distribution to run the business.[8] Digital business, however, may start with zero cost as it relies on digital assets such as data, information, business intelligence and digital platforms.

The third major difference between traditional and digital business is inventory. In order to enhance profit, traditional businesses usually source or buy products in bulk since the price would be cheaper. This leads to a traditional business having to acquire its own warehouse to keep the stock. Meanwhile digital businesses sources products using online supply chain management. A digital business does not need to own a physical warehouse because of the existence of a virtual warehouse to keep the stock. As for marketing, traditional business may require a huge budget but limited options for its marketing. Further, traditional business has the disadvantage of not being able to track its audience and to identify its target customers. Digital business, *au contraire*, does not require a huge budget with digital marketing being popular for its cost-efficient advantage.[9] In digital marketing strategy, social media is commonly used as it provides high traffic and increases business opportunities.

Differences between electronic business and digital business

Electronic business (e-business) and digital business (d-business) may look similar in that both are conducted online. However, digital business formulates and operates on a different business model and strategy. In e-business, it is all about transforming the existing traditional business process to online. E-business usually keeps the traditional business model unchanged and technology is used to gain efficiency and eliminate redundancies only. In other words, e-business focuses on improving and facilitating the current business process to make it more efficient and to reduce costs.

On the other hand, digital business focuses more on how technology allows the business to create new value and experiences that differentiate it and give it a competitive edge over its peers. Digital business creates new business revenue and value from the unprecedented combinations of people, business and things. In short, the digital business model is based on services that are new to the market. Digital business builds a new business model that may not even exist in the market yet. Digital business focuses on developing something that gives benefits to, for example, customers, advertisers, and sellers.

To better understand the differences between e-business and digital business, let us take Amazon, the multinational conglomerate company, as an example. Amazon’s e-business involves an e-commerce website that facilitates buying and selling processes. Customers may place their order and proceed to payment by using an online payment gateway. The process of buying and selling is quite similar to the traditional buying and selling process, but what makes Amazon’s e-business different is that it is done online, hence, it is popular with regard to efficiency. On the other hand, in Amazon’s digital business, it comes up with a digital innovation by developing a device called Kindle, which is "a line of Android-powered portable e-book reader devices that enable users to shop for, download and read electronic versions of books, newspapers, magazines, websites, blogs and more".[10] From the example given, it is obvious that e-business simply transforms the traditional business process to online but digital business creates new value and experiences.

Digital business models

A digital business model is what sets digital business apart from traditional business. There are various digital business models but the more popular ones are the freemium model and the subscription-based model.[11] In the freemium model (free + premium), businesses offer products or services for free to customers as a means to establish the foundation for future transactions. Under the freemium model, businesses provide users with basic features at no cost, and charges a premium for additional or advanced features. The freemium model is particularly common among computer software manufacturers or providers and internet-based businesses. The focus of this business model is to maintain a low customer acquisition cost but a high lifetime value. An example of a company that uses this model is Dropbox, that provides cloud storage service which users can store and sync data as well as share their data to other users. Dropbox offers 2 gigabytes of storage size for free to its basic users (Dropbox Basic) while paid users (Dropbox Plus) are ***Comp. Law. 416*** given 2 terabytes of storage size with additional features including advanced sharing controls, remote wipe, and an optional extended version history add-on.[12]

Meanwhile in the subscription-based model, businesses allow users or customers to access a product or service upon payment of a recurring fee, typically monthly or annually.[13] An annual fee is usually cheaper than monthly because businesses focus on customer retention over customer acquisition. In other words, the subscription-based model focuses on the way revenue is generated to ensure a single customer will continue to make multiple payments for a prolonged access to a product or service. The longer the subscription period, the more valuable the customer is. This type of business model is very popular and widely used among digital businesses, some of them include Netflix,[14] Spotify,[15] Muslim Pro,[16] and all Software as a Service (SaaS) products.

Regulation of digital business in Malaysia

In 2019, the Malaysian Government announced its plan to drive forward the Malaysian digital economy.[17] Since then, particularly in the 2020 Budget tabled in the Parliament, the government has been actively encouraging more local businesses to move rapidly into the technology sphere.[18] Accordingly, relevant laws are enacted or amended to safeguard the interests of all the parties involved: that may include a third party contractor such as a website developer, designer, or service provider (domain and hosting company); a payment service provider that facilitates online payments (e.g. FPX, Paypal); a content licensor who allows others to use their work for a negotiated fee; a website user (e.g. a customer or seller); a partner, client, manufacturer, technologist or product designer; and an advertiser. Various parties may be involved in various aspects of a digital business, hence, it is not surprising that there are various laws relating to digital business.

To facilitate digital business where parties to a transaction do not meet in person, thus, the conventional physical signing of a document or contract is not possible, the Malaysian Parliament had enacted the Electronic Commerce Act 2006 (ECA) which gives recognition to the validity of electronic contracts and signatures. Section 7 of the ECA specifies that contracts for commercial transactions (matters relating to the supply or exchange of goods or services) may be formed electronically.[19] Meanwhile s.9 of the ECA provides that an electronic signature or e-signature on contracts is legally recognised in Malaysia. A precursor to the ECA was the Digital Signature Act 1997 (DSA) which remains in force. The DSA recognises a digital signature, which is a specific type of e-signature that uses "an asymmetric cryptosystem", as legally binding as a handwritten signature, an affixed thumb-print or any other mark.[20] It is apparent that the DSA recognises a narrower type of e-signature than the ECA. Nevertheless, a digital signature under the DSA has tighter security and better protection from fraud than other types of e-signatures under the ECA.

In digital business, the collection of the personal data of individuals who are involved in commercial transactions is aplenty. Therefore, there is a need to regulate the collection and use of personal data to avoid misuse. Accordingly, the Personal Data Protection Act 2010 was enacted to regulate the processing of personal data in commercial transactions, thus, providing data and privacy protection as well as cybersecurity. Further, in digital business there would be the involvement of content applications service providers such as website operators that warrants regulation as well. As such, the Communications and Multimedia Act 1998 was enacted to regulate the communications and multimedia industries in Malaysia that provide networked services and activities. Other laws that apply to digital business include the Trade Descriptions Act 2011, which prohibits false trade descriptions and false or misleading statements, conduct and practices in relation to the supply of goods or services, including through electronic means, and the Consumer Protection (Electronic Trade Transactions) Regulations 2012 that was enacted under the Consumer Protection Act 1999 to regulate operators who sell, and to protect consumers who purchase, goods and services through online platforms.

Digital assets in digital business may require intellectual property rights protection such as copyright and patents. The application and implication of copyright are apparent in digital business since it relies on the internet as a content delivery mechanism where the ***Comp. Law. 417** transference of data, photos, videos and sounds commonly takes place.[21] The most well-known example of digital companies that applied copyright law are iTunes and Spotify which are global digital media service providers that fully rely on the internet to deliver content. As for patents, it is prudent for a digital business to patent its business idea or business model to ensure that the idea or model is not stolen by its competitors. Patenting a business idea is akin to buying an insurance policy to protect research and development (R&D), and to prevent others from taking advantage of what the business has developed.[22] In Malaysia, copyright is governed by the Copyright Act 1987, meanwhile patents are governed by the Patents Act 1983 and the Patents Regulations 1986. Copyright and patents are registerable with the Intellectual Property Corporation of Malaysia (MyIPO).

Another law that applies to digital business is the Service Tax Act 2018. Effective 1 January 2020, a six per cent service tax is imposed on foreign digital service providers that accrue their income in Malaysia. In other words, the digital tax is imposed on services that are offered online in Malaysia but payment is made to a company outside the country. The digital tax, which is similar to the value added tax (VAT) as practised in the European Union (EU), does not apply to Malaysian digital businesses since they are already subject to local taxes.[23]

Conclusion

Digital business or d-business is gaining prominence particularly during the COVID-19 pandemic. Digital business is viewed as the new normal or next normal that businesses should consider transforming into in order to ensure sustainability. Digital business is not merely electronic business but is more than that. Digital business involves the application of technologies from the front-end until the back-end of a business and everything in between. It offers new value chains and business opportunities that traditional businesses cannot provide. In Malaysia, the government is encouraging local businesses to embrace digital technologies and at the same time enacting or amending various laws to facilitate digital business. Among the laws as briefly discussed in this paper are the Electronic Commerce Act 2006, Digital Signature Act 1997, Personal Data Protection Act 2010, Communications and Multimedia Act 1998, Trade Descriptions Act 2011, Consumer Protection (Electronic Trade Transactions) Regulations 2012, Consumer Protection Act 1999, Copyright Act 1987, Patents Act 1983 and Service Tax Act 2018.

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