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The limitation of freedom of expression by online media in Malaysia: Analysis of legal precedents

Suzarika Sahak[1*], Ramalinggam Rajamanickam[2], Muhamad Sayuti Hassan[3]
[1]Legal Officer, Attorney General's Chambers of Malaysia; erikasahak@gmail.com (S.S.).
[2,3]Faculty of Law, Universiti Kebangsaan Malaysia (UKM), Malaysia; rama@ukm.edu.my (R.R.) sayutihassan@ukm.edu.my (M.S.H.).

Abstract: Media freedom is a cornerstone of democratic societies, yet it is often shaped by legal precedents and regulatory frameworks. This article examines the relationship between Malaysian laws and online media freedom of expression, based on the 2021 landmark decision in the Malaysiakini case. The objective of this article is to explore the indistinct line between immunity and liability of internet intermediaries that assume the role of content publishers and to scrutinize how legal frameworks and judicial interpretations shape the landscape of online media freedom in Malaysia. This article also examines statutory provisions such as the Communications and Multimedia Act 1998, the Communications and Multimedia Content Code, and the newly enacted Online Safety Act 2025. In addition, the study offers a comparative analysis with European Court of Human Rights rulings, as well as insights from the United Kingdom and India on intermediaries. The analysis demonstrates that the Malaysiakini ruling expanded the scope of liability for online platforms by applying Section 114A of the Evidence Act 1950, raising the standard of editorial responsibility. While the decision partly aligns with international approaches, gaps remain in providing coherent protections for media freedom. This article proposes that clear guidelines should be developed to find appropriate measures to protect and balance internet freedom and online media's freedom of expression.

Keywords: *Freedom of expression, Intermediary's liability, Internet intermediary, Malaysiakini case, Online media.*

1. Introduction

Freedom of expression is a fundamental right and a crucial aspect of democratic societies and it serves as a foundation for open discourse, political participation and exchange of ideas. However, this freedom is not absolute and frequently encounters limitations, particularly in cases where legal precedents strongly influenced the limitations of speech. In Malaysia, the *Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Anor* (*Malaysiakini*) have brought forward the delicate balance between freedom of expression of online media and the regulation of online media content. *Malaysiakini* is the first case where the Federal Court examined the responsibility of an online news portal for contemptuous comments from third parties. The impacts of *Malaysiakini's* decisions are discussed comprehensively to highlight the limitations that set in on online media's freedom of expression. Therefore, the main objective of this paper is to analyse critically legal precedents on the limitation of online media's freedom of expression and how it shapes the landscape of online media freedom in Malaysia.

The legal responsibility of internet intermediaries for third-party content and its impact on freedom of expression has been extensively examined in various contexts. The European Court of Human Rights (ECtHR) decision in *Delfi AS v. Estonia (Delfi)* marked a shift in intermediary responsibility, requiring platforms to actively monitor content thereby affecting their traditional role as neutral platforms. Similarly, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (MTE)*, has significant

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* Correspondence: erikasahak@gmail.com

implications for European legal frameworks regarding intermediary liability and free speech. In Malaysia, the *Malaysiakini* decision has significantly impacted Malaysia's legal landscape, reshaping the definitions of liability for internet intermediaries and content publishers. Traditionally, internet intermediaries enjoy immunity from liability for user-generated content, however, *Malaysiakini* ruling signifies a shift, as Malaysian courts now allow intermediaries to assume liability akin to publishers if they fail to meet certain standards, including a heightened duty of editorial regarding potentially unlawful content. *Malaysiakini's* decision illustrates challenges faced by Malaysian internet platforms when treated as publishers of third-party content.

Malaysia's section 114A of the Evidence Act 1950 also heightens scrutiny on intermediaries to monitor content attentively, impacting freedom of expression online. In *Malaysiakini*, critics argue against section 114A which presumes intermediaries' liability, advocating for a more nuanced approach. This underscores the need for clearer legal frameworks to balance responsibility and freedom of speech. Comparative analyses provide insights into global approaches to intermediary responsibility such as the EU's e-Commerce Directive (2000/31) which provides a foundational framework for intermediary liability, emphasizing the need to balance liability with fundamental rights such as freedom of expression and India's safe harbor protection under the India Information Technology Act 2001.

2. Methodology

This article aims to discuss the limitation of freedom of expression in Malaysia particularly in online media and to analyse legal precedents in ECtHR for comparative purposes. The methodology adopted by this paper was a doctrinal legal methodology. The methods of doctrinal research are characterised by the study of legal texts. The doctrinal methodology, being thorough, evaluative and critical is capable of achieving the objectives of this paper to investigate the relationship that exists between Malaysian laws and online media freedom of expression based on the landmark decision in *Malaysiakini* case as well as to examine the limitation of freedom of expression by online media based on local and international legal precedents. Primary data from relevant statutes, such as the CMA and the Content Code as well as case laws from ECtHR and Malaysia are examined and analysed. Secondary sources, including textbooks, academic journals and law reports and newspaper reports, are also used throughout the discussions. The methodology applied herein was the doctrinal legal analysis focusing on an in-depth understanding of the described case, explaining the impacts from the cases cited, observing any developing issue derived from the case findings and offering ideas for a way forward.

Table 1.
Categories of Online Intermediaries.

Categories of Intermediaries	**Examples of Service Providers**
Internet access and service providers (ISPs)	Telekom Malaysia, Biznet Network, PT Mora Telematika Indonesia, MyRepublic ID
Data processing and web hosting providers, including domain name registrars	Exabytes.com
Internet search engines and portals	Google
E-commerce intermediaries, where these platforms do not take title to the goods being sold; Internet payment systems	Ebay, Lazada, Shopee
Participative networking platforms, which include Internet publishing and broadcasting platforms that do not themselves create or own the content being published or broadcast.	YouTube, Facebook

Note: Adapted from "Online Intermediary Liability and the Role of Artificial Intelligence in Malaysia," by Daud, et al. [2].

3. Definition and Characteristic of Internet Intermediary

The laws governing print publications are well established but the legal position remains unclear for internet intermediaries. Determining the legal protections that internet intermediaries may be entitled to is another important aspect of their classification and definition. Internet intermediaries are

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defined in a 2010 study published by the Organization for Economic Co-operation and Development (OECD) [1]. According to the report, internet intermediaries act to consolidate or facilitate transactions between third parties on the internet. These internet intermediaries provide access, administer, transmit and index content, products and services from third parties or provide internet-based services to third parties. Categorisation of internet intermediaries as illustrated by OECD are as follows [2]:

Since the definitions of intermediaries set by OECD are mere references and hence not legally binding on all countries, there has been little assistance for the courts to determine when a publisher becomes intermediaries that qualify them for the protection under the law. In Malaysia, laws on internet intermediaries' responsibilities for third-party content are primarily governed by the CMA and the Content Code. The definition and the categorisation of internet intermediaries are vital as to determine the various types of liability and immunity that accrue to the internet intermediaries. In general, internet intermediaries enjoy a safe harbor from civil or criminal liability if they host illegal and harmful third-party online content [3]. In 1998, a safe harbor was created by the U.S. Digital Millennium Copyright Act (DMCA) that provides protection to internet intermediaries that comply with the obligation to remove content that violates the copyrights rules as soon as they receive a notice of a takedown request. The purpose of the DMCA was to balance the rights of users and copyright owners while fostering internet growth. In addition to addressing copyright infringement, it established a safe harbor to shield online intermediaries from damage or loss [4].

In 2000, the European Union (EU) legislator adopted the e-Commerce Directive 2000/31 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market (e-Commerce Directive) in Articles 12-15 that introduces protection for internet intermediaries that covers three types of activities; mere conduit, caching and hosting and includes two types of protection; against liability and monitoring obligations [5]. However, this protection applies only if the service providers did not modify the information transmitted. Contrary to the DMCA, the e-Commerce Directive shields intermediaries from civil and criminal liability for all types of illegal content or activities such as infringements on copyright, defamation, content harmful to minors, unfair commercial practices and not only copyright violations.

This safe harbor principle has been followed around the world including Malaysia. A comparable provision for Malaysia would be section 98 of the CMA, whereby upon compliance with an internet self-regulation code i.e., the Content Code, internet intermediaries can expect to be shielded against any prosecution or legal actions for hosting third party content on its platforms. However, it does not suggest that internet intermediaries are immune from liability. This protection is no longer available based on the *Malaysiakini's* decision as it affects and differentiates liability between an internet intermediary and a content publisher. The *Malaysiakini* decision established a precedent for holding online platforms accountable for third parties' content. This decision has significantly impacted Malaysia's legal landscape by shifting the regulatory framework for internet intermediaries. It also highlights the evolving judicial approach in balancing freedom of expression and online content regulations.

4. How Legal Framework and Judicial Interpretation Shape Malaysia Legal Landscape: The *Malaysiakini* Impact

The *Malaysiakini* case is about comments by a third-party who is a registered user on the news portal Mkini Dotcom Sdn Bhd (Mkini). The comments were published under an article titled *CJ orders all courts to be fully operational from July 1* [6]. On the same day, Mkini also published another article related to the corruption case of a politician titled *Musa Aman acquitted after prosecution applies to drop all charges* [7]. The Attorney General has initiated contempt of court proceedings against the news portal Mkini as the first respondent and its editor-in-chief, Steven Gan, as the second respondent over the comments made by a third party who is a registered user on the news portal.

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The Attorney General filed the contempt of court proceeding in the Federal Court, focusing on whether MKini is responsible for the offensive comments written by a third party. MKini admitted to the comments being offensive but denied any role in publishing them. The Attorney General requested the Federal Court to apply the presumption of fact in publication under section 114A (1) of the Evidence Act 1950 to MKini as the publisher of the comments based on Mkini's administratorship of the comment space and facilitation of the comment's publication. MKini denied liability and raised these defenses; firstly, MKini had no knowledge of the existence of those comments before being informed by the police and they did not create the comments. On the second point, MKini argued that section 98 (2) of the CMA protects them from liability because MKini has complied with the flag and takedown approach stipulated in the Content Code. Mkini also claimed that they have taken measures by putting warnings in the terms and conditions of the MKini portal to warns subscribers, a filter system that prevents the publication of prohibited words and automatically flags suspected words for further review by the administrator and a peer reporting system whereby upon receipt of complaints from any user, the system shall trigger the editor for content moderation process.

However, the Federal Court determined that none of the aforementioned arguments sufficiently refute the presumption as stipulated in section 114A of the Evidence Act 1950. MKini was held liable for contempt by facilitating the publication of the impugned comments by the third party. No liability for the second defendant. Accordingly, MKini was sentenced to a fine of RM500,000.The judgment of this case has attracted great publicity from both local and international media agencies and human rights bodies due to its potential to significantly alter the legal landscape of contempt of court and the liability of internet intermediaries. The legal position in Malaysia after the *Malaysiakini* case can be understand through several points and discussed below:

4.1. Liability as an Internet Intermediary and Content Publisher

The difference between internet intermediaries and content publishers is explained in the majority judgment of *Malaysiakini*, in which the Federal Court has distinguished the MKini news portal from social media platforms such as Facebook and Twitter. The Federal Court ruled that these social media platforms are considered as an internet intermediary and does not have control over the content posted by users on its platform. Meanwhile, Mkini has the authority to approve comments and use filters to restrict specific comments. Therefore, it has control over content published on its platform. The distinction between immunity and liability becomes vague when an internet intermediary assumes the responsibilities of a content publisher, leading them to be seen as a publisher. The approach taken by *Malaysiakini* is the latest position align with the development of technology as many online platforms are expanding beyond their role as internet intermediaries to become content publishers. Content publishers value interaction and provide specific sections for users to provide comments and reviews. The interaction between online platforms and users creates a bond between them and it is the main attraction for users to stay with the platform [8].

The majority in *Malaysiakini* admitted that each country has distinct guidelines regarding the responsibility of internet intermediaries compared to that of content publishers. Since there is no international standard principle on who is categorised as an internet intermediary, there are different responsibilities according to the jurisdiction, law and interpretation of the respective domestic courts. Hence, the Federal Court concluded that MKini is not categorised as an internet intermediary that can enjoy a safe harbor from liability. This is because Mkini has provided a comment section at the bottom of the article for users to leave comments and Mkini has control over those comments. MKini's role is changing from an internet intermediary that provides an online news platform to a content publisher that facilitates the publication of third-party comments.

4.2. Level of Knowledge: Constructive or Actual Knowledge

The *Malaysiakini* case involves the application of section 114A of the Evidence Act 1950 against MKini as the publisher of contemptuous comments. The Federal Court found that MKini is liable for

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such comments, even if the comments were from third parties. MKini argued that it had no knowledge of the comments until it was informed by the police. The majority decision ruled that it was sufficient for constructive knowledge and that such knowledge could be inferred from the facts and circumstances surrounding the case. In determining the existence of knowledge based on the facts surrounding the case, the majority lay down the 'should have known' test.

The court found that MKini had knowledge, as the contemptuous comments were based and related on an article published by MKini about a politician acquitted of corruption charges. The court also found that Mkini had an impressive reporting structure and with such structure, it is impossible for such contemptuous comments to escape the editor's attention. The court also found that no explanation was given by any editorial team and none of the 10 editors denied knowledge. The majority in Federal Court concluded that at least one of the 65 members of the editorial team had knowledge of the contemptuous comments and Mkini cannot relied on mere denials to defend their lack of knowledge.

The minority judgment, on the other hand, stated that actual knowledge is required and intention to publish is essential in contempt of court proceeding. The minority also rejected the application of constructive knowledge or should have known test and held that MKini is only liable as a publisher of a content when it has knowledge or is aware of the existence of such defamatory content and fails to remove within a reasonable time. Mkini removed the contemptuous comments within 12 minutes of being informed by the police. The minority also discussed the principle of constructive knowledge against an internet intermediary in the case of *Murray v. Wishart* where the New Zealand Court of Appeal has criticised the 'should have known test' and raised concern that if the test is placed against an online media portal, the portal cannot avoid liability even if it deletes any comment because it has been caught immediately under the test. The court argued that the test is only tenable when the online portal should anticipate unlawful material, making it liable for not taking steps to prevent unlawful comments. In addition, according to the minority, constructive knowledge is insufficient to establish liability of MKini and actual knowledge is necessary as the intention to publish is the key in establishing contempt of scandalising the court.

4.3. Higher Standard of Editorial

Most international laws adopt notice and takedown principle that does not mandate automatic content censorship and only imposes a requirement to delete content after notice by a third party. In Malaysia, the principle of notice and takedown is provided under the Content Code. However, the Federal Court's majority decision has placed a high standard on internet intermediaries exercising editorial control over third party content. The previous approach of notice and takedown operates only after the content has been flagged as offensive, inappropriate, disrespectful and contemptuous by users or authorities is no longer sufficient [9].

According to Mkini, it has taken appropriate measures by implementing three safeguards by placing warning in their terms and conditions, filtering system that prevents the publication of prohibited words and automatically flags those words for further review and peer reporting system that allows users and other readers to report offensive comments. However, the majority judgment held, to avoid liability, MKini must have editorial controls and systems capable of detecting and removing such offensive and contemptuous comments promptly. MKini cannot just wait to be informed because no guarantee that a warning or notice will be given. In addition, the three safeguards placed by Mkini failed to prevent the contemptuous comments from being published. It is not sufficient for MKini to relied on their arguments that the terms and conditions had been set out to the client or it cannot monitor every comment that is published due to its sheer numbers.

MKini gave users a platform to write and to post comments and this comes with responsibility. MKini has the control and power to prevent the publication of those comments by closing the comment section, providing a more efficient filtering system and having a large editorial team structure that can check and supervise the comment section. The majority also refer to the case of *Bunt v. Tilley* that propose to established a legal responsibility, there must be awareness or an assumption of responsibility

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to show knowledge of involvement. Applying that principle to *Malayskini*, the majority held that it cannot be said that the Mkini not aware of the publication and only played a passive role in the publication process.

Accordingly, the latest legal position according to the decision of the *Malaysiakini* case is that internet intermediaries such as online news portals that incapsulate comment spaces and a supervisory system for the comment sections, cannot rely on such protection alone. This is because when they choose to open the comment section, choose the design and setup, the inference from that fact is that they have full control over what can be published and what cannot be published. Due to the Federal Court's decision, online intermediaries that exercise control over content belonging to third parties are now held to an extremely high standard of care. The old approach of initiating removal of third-party content only after the content is flagged by users or authorities appears to be no longer sufficient.

4.4. Comparative Analysis of the Cases of Delfi and Mte

Delfi is the first case that has subtly replaced the practice that was previously followed in many countries where intermediaries are not liable for comments made by third parties. In *Delfi*, ECtHR narrowed the scope when it held that liability could be imposed on an online news portal for comments posted to its site by third parties and then continue to establish the standards of liability for internet intermediaries for unlawful publication.

In 2006, Estonian news portal www.delfi.ee published an article titled *SLK Destroyed Planned Ice Road*, describing how SLK destroyed some ice roads to keep Estonian citizens dependent on its pay-to-use ferries. The article attracted 185 comments, 20 of which contained personal threats and offensive language directed against a member of the supervisory board of SLK. The board member, L notified Delfi and requested damages. Delfi removed the offensive comments but refused to pay any damages. Three weeks later, the state of Estonia brought a civil suit against Delfi. The first instance court shielded Delfi from liability, applying the hosting safe harbour of Article 14 of the e-Commerce Directive. The second instance court sided with the Estonia, stating that the safe harbour did not apply because the news portal was not a passive internet intermediary. The Supreme Court of Estonia confirmed the decision, stressing that *Delfi* had integrated the comment environment into its news portal and invited users to post comments. *Delfi* filed a complaint against the Supreme Court decision in 2009, claiming it violated its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The First Section of the ECtHR disagreed and ruled that the facts did not constitute a violation of the ECHR. The Grand Chamber then confirmed the decision.

The judgment in *Delfi* has been criticised for its impact on online freedom of expression and its inconsistency with international instruments and European Union law [10]. The ECtHR upheld the Estonian Supreme Court's ruling that *Delfi* was liable for third-party comments and the comments did not violate Article 10 of the ECHR. The ECtHR agreed with the Estonian Supreme Court, stating that although *Delfi* was not the actual author of the comments, it had control over the comments section and was not just a passive service provider. This level of moderation allowed the ECtHR to conclude that *Delfi* owed a duty to the victim of the article, which had to be balanced against freedom of expression under Article 10. ECtHR also established that the comments were hate speech and the nature of the comments was vulgar and defamatory and had impaired L's honor and reputation.

These comments went beyond justified criticism and not protected by freedom of expression. According to ECtHR, *Delfi* should have foreseen the negative reactions and exercised caution to avoid liability for damaging others' reputations. They had control over readers' comments and could have predicted the nature of the comments. ECtHR also established in its ruling certain parameters that should be taken into consideration when evaluating an online intermediary's liability for illegal content posted on its website. These parameters include the context of the comments, the measures applied by the intermediary to prevent or remove defamatory comments and the liability of the actual authors of the comments as an alternative to the intermediary's liability [11].

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However, in February 2016, the ECtHR delivered a new judgment in the case of *MTE* on the liability of online internet intermediaries for unlawful comments of third party. The decision reached the opposite conclusion in *Delfi* and found a violation of freedom of expression under Article 10 of ECHR. MTE & Index.hu Zrt, a Hungarian online news portal, were found to be liable for the dissemination of defamatory third-party comment in a case involving an article on unethical practices of a Hungarian real estate company. The Hungarian courts refused to apply the safe harbour provisions of the EU's e-Commerce Directive. The first instance court partially supported the claim and the Budapest Court of Appeal upheld the decision. In 2013, MTE & Index appealed to the ECtHR, claiming that domestic courts have violated Article 10 of ECHR in applying liability for third-party actions.

In the case of *Delfi*, for the first time, criteria for online news portal's liability were established and in the case of *MTE*, ECtHR identified two additional criteria for such liability which includes; the consequences of the comments to the injured party and the consequences for the applicants [12]. In contrast to what had been in the case of *Delfi*, it was established that the comments in *MTE* constituted neither hate speech nor incitement to violence. The court further noted that the comments constitutes part of an expression and is therefore protected. ECtHR also found that the Hungarian's courts demands for filtering system would be excessive and impracticable, which potentially undermining the freedom to impart information on the internet. In contrast to *Delfi*, where the use of a stricter standard was seen as reasonable due to the severe nature of the comments, a softening stance of ECtHR was seen in *MTE*. *MTE* also departed from *Delfi* in highlighting advocated journalistic activity and maintained that punishment for assisting in the dissemination of information by third-party would hinder journalism contribution to public interest discussions and should only be considered if there are strong reasons for doing it.

The cases of *Delfi* and *MTE* share similar factual backgrounds, including both news portals publishing articles on social topics and allowing readers to participate in commenting without moderation. However, the cases differ in their legal status and economic interests. MTE & Index are non-commercial internet portals, while Delfi AS is a commercial platform. The opportunity for commenting was different; Delfi AS allowed anonymous commenting without registration, while in MTE & Index, only registered users could post comments. *Delfi* considered only four criteria, while *MTE* increased these to six, considering the comments to the injured party and the consequences for the applicants. The two judgements demonstrate how the law for internet intermediary's responsibility differs according to the nature of the content published, with hate speech and incitement for violence receiving severe penalties than offensive comments. However, *MTE* upholds *Delfi's* finding that notice and takedown policies be deemed insufficient [13].

The majority decision in *Malaysiakini* acknowledge that *Delfi* has been criticised as stifling freedom of expression. Even though *Delfi* dealt with defamation and not contempt, according to the majority in *Malaysiakini*, the same principles should apply as both are looking at the responsibility of an online news portal. MKini, like Delfi AS, generates revenue from subscription fees and advertising, with 70% coming from advertising and 30% from user subscription fees. According to *Delfi*, this principle does not apply to platforms like Facebook, Twitter or Instagram, which allow users to publish content without input from the portal administrators. Unlike Twitter, Mkini has control over who can post comments and has installed filters on certain prohibitive comments hence it cannot be said that anything published on its portal is beyond its control. Therefore, the case is distinguishable on its facts.

Meanwhile, majority decision in *Malaysiakini* noted that ECtHR differentiated between *Delfi* and *MTE* on the ground that *Delfi's* involves a commercial news site with unlawful hate speech and incitement to violence and while the comments in *MTE* were vulgar and offensive, they were not hate speech or unlawful. Furthermore, in *MTE*, the applicant was a non-profit and had no financial interest's as online news provider. *MTE* also established an assessment of online intermediary liability by considering a few factors, which include the moral and financial ramifications as well as the impacts on a democracy that depends on free speech and unrestricted access to the media [11]. According to ECtHR

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in *MTE*, online intermediary's responsibility should only be enforced in exceptional circumstances such as when a court ruling would impair the right to free speech and to fulfil the needs of a democratic society.

However, the majority judgment in *Malaysiakini* primarily relied on the principles established in *Delfi*, rather than the more recent legal precedent set by *MTE*. The majority briefly referenced the *MTE* decision but did not explore the criteria for assessing an online intermediary's liability or the reasoning of the ECtHR in categorizing news portals with third-party comment platforms as journalistic activities. The *MTE* decision illustrates how freedom of expression is weighed by considering factors such as the nature of the comments (whether they constitute hate speech), the commercial status of the intermediary and the connection to journalistic activities. If the *Malaysiakini* decision had incorporated the ECtHR's approach and the additional criteria from *MTE*, it could potentially alter the outcome and address criticisms that the *Malaysiakini* ruling limits online freedom of expression.

4.5. The Effect of Section 114A Evidence Act 1950 on Online Media Freedom of Expression

The majority in *Malaysiakini* emphasised that the legal position of other jurisdictions on internet intermediary varies, with courts using different approaches to determine liability. The Federal Court is also mindful of applying decisions from other jurisdictions due to differences in legal backgrounds, rules and regulations. The Attorney's General application for contempt of court against MKini was based on the presumption under section 114A (1) of the Evidence Act 1950, which provides for the presumption of fact in publication. The majority noted that there are no provisions similar to section 114A in other jurisdictions and held that Malaysian Parliament had resolved this issue by presuming who is a publisher and assisting in identifying and proving the identity of an anonymous person online by enacting section 114A.

The amendment of inclusion section 114A to the Evidence Act 1950 in 2012 has raised concerns that there may be difficulties for a lay person to rebut this presumption by navigating through the maze of technology and other legal hindrances [14]. This provision also criticised as to potentially restrict online media freedom of expression. The amendment was opposed by various parties, including media organisations, non-governmental organisations, media practitioners, legal practitioners and interested parties. The Center for Independent Journalism (CIJ) launched a campaign titled #stop114A in May 2012, calling for the repeal of Section 114A and declaring August 14, 2012 as Internet Blackout day. The Malaysian Bar Council, political parties and media platforms closed their portals to support the campaign [15]. The CIJ argues that Parliament's intention to insert section 114A into the Evidence Act 1950 is to facilitate identification and proof of identity in dealing with cybercrime involving anonymity. However, the impact of section 114A extends to freedom of expression online. From fighting cybercrime, the presumption of fact in publication under section 114A was later applied to cases involving internet intermediaries who posted third-party comments and *Malaysiakini* is the first case to focus on an online news portal.

Among the criticisms of section 114A in the *Malaysiakini* case includes fear of restriction for open dialouge and discussion, as among the functions of media is to generate discussion. It will simultaneously affect the role of the media in providing space for public discourse to provide ideas and exchange opinions on matters of public interest. *Malaysiakini* also critised when it requires online news portals to monitor and review their controls and mechanisms to ensure they are adequate. Failure to monitor could lead to legal risks, causing self-censorship to prevent illegal content publication [16]. This has led to internet intermediaries closing comment spaces to avoid legal implications, potentially causing loss of readers and customers and putting their commercial value at risk. To avoid liability, online media must delete inappropriate comments without justification from readers or third parties. Hence, the best option is to close the comment sections [9]. Given that the *Malaysiakini* case is the first in Malaysia to apply section 114A to online news portals, there is a pressing need to improve guidelines, conditions and policies to clearly define the responsibilities and limits for internet intermediaries.

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Without well-formulated guidelines that consider the *Malaysiakini* decision, online media may struggle to fulfill their roles effectively, leading to concerns about potential liabilities. This uncertainty could result in measures such as closing comment sections, self-censorship or unjustified comment deletions which gradually eroding freedom of expression.

4.6. Relevancy of Protection Under the Communications and Multimedia Act & Malaysian Content Code

Mkini argue that it does not need to monitor news portal activities until notified or receives a complaint. As an Internet Content Host Provider (ICH) illustrated in section 10.1 Division 5 of the Content Code, MKini said that they had complied with the flag and takedown approach, protecting it from liability under section 98 (2) of the CMA. MKini also cited section 1.1 Division 5 of the Content Code 2020 and section 3 (3) of the CMA and argued that they are not allowed to censor the internet because it inhibits freedom of expression. The Federal Court majority decision has questioned the flag and takedown methodology in the Content Code, raising questions about internet intermediary's ability to use this as a defense against prosecution, action or proceeding as per section 98 (2) of the CMA. MKini has been criticised as it misinterpreted the law in both the CMA and the Content Code and it may have breached the real objective of the Content Code. The majority decision held that the Content Code cannot act as an armour to protect MKini or any publisher from liability for contemptuous comments authored by third-party.

However, the minority decision held that MKini was appropriately governed by the current provisions under the CMA and Content Code, which impose liability on online intermediaries only if they respond to a flag and takedown process. Based on the decision of the Federal Court and referring to the different views taken by the majority and the minority, there is a question whether the flag and takedown approach set out in the Content Code can still be used by internet intermediaries as a defense against prosecution, actions or proceedings of any kind, such as which is provided in Section 98 (2) of the CMA. The Federal Court also determined that protection against liability under section 98 of CMA is granted to parties who have taken all necessary steps. This include removing unlawful content expediently but any action taken in this regard must be in line with the goals of the Content Code. The implicit message also goes in line with the equitable principles of 'who comes into equity must come with clean hands'. The three monitoring steps taken by Mkini were deemed insufficient and as a result, not deserving of protection under section 98. But one may ponder to what extent a publisher must go to ensure that the counter measures taken are in line with the objectives of the Content Code to qualify for Section 98 protection?

According to the majority, section 98 cannot be interpreted in a vacuum and anybody wishing to use it must demonstrate to the court that they have taken all appropriate precautions against third party unlawful comments. However, the majority did not completely address the degree and level of compliance with the CMA and the Content Code. Accordingly, internet intermediaries' reliance on the protection of no internet censorship and media freedom under laws such as the CMA and also the Content Code is said to be hindered by the decision of *Malaysiakini* case and since it is unclear what measures expected to be sufficient, internet intermediaries have to reassess their current controls and mechanisms to legally shield them from third parties' unlawful comments.

5. Legal Framework Regulating Online Media in Malaysia

Since the *Malaysiakini* decision in 2021, there have been slow policy changes or revisions made to remedy the toothless protection under the CMA and Content Code. The judgement on the Content Code and section 98(2) of the CMA are varied prompting a review and proposal of additional amendments. Recently, the Malaysian Parliament has passed the amendments to the CMA. This amendment is seen as part of efforts to enhance the regulation of online media in Malaysia. These amendments introduced several significant changes to the legal framework governing online content regulation in Malaysia. Among the most impactful changes regarding online media regulation are amendments under sections 211 and 233. Sections 211 and 233 of the CMA have long prohibited the

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dissemination of anything that is considered indecent, obscene, false, or menacing. The most recent changes maintains the restrictions but broaden the scope with heavier penalties and explanatory notes. A major criticism of the amendments is their continuous dependence on too broad and vague phrases like 'indecent content" or 'menacing', which allow for subjective interpretation by authorities. Amendments were also made to section 233 introducing stricter controls on the misuse of communication facilities, particularly with regard to the transmission of spam messages or fraudulent content. The amendment to section 233 also includes detailed explanations of the terms used, aimed at providing greater clarity. However, there are concerns regarding the introduction of terms that are considered overly broad and vague. The absence of clear legal definitions for these terms raises the risk of abuse of power and arbitrary enforcement [17].

In addition, these amendments do not reflect the principles laid down in the *Malaysiakini* decision. The recent amendments impose broader and more punitive restrictions without incorporating the safeguards contemplated in *Malaysiakini*. The use of vague and undefined terms allows for the risk of arbitrary censorship. Instead of introducing a clear notice and takedown mechanism or structured liability based on knowledge and control, the amendments shift towards blanket prohibitions and heavier penalties. This approach moves away from the standard of constructive responsibility set by the Federal Court and instead reinforces a censorship oriented model that does not address the core legal reasoning in *Malaysiakini*.

Meanwhile, the Content Code, established in 2004, outlines ethical standards for content creation by the Communications and Multimedia Content Forum under the Malaysian Communications and Multimedia Commission (MCMC). In 2021, the Content Forum revamped the code to align with global best practices, involving a nationwide public consultation [18]. A third edition of the Content Code was officially released in May 2022, with significant amendments to the second edition, primarily focusing on electronic content standards and advertising practices and broader implications for various societal segments, including women, children, consumers and persons with disabilities [19]. The 2022 Content Code, which follows the 2021 draft, failed to address the issues raised by the *Malaysiakini* decision. Stakeholders in the Malaysian online content industry should discuss the Federal Court's decision on the content regulatory framework, particularly regarding the Content Code. The Content Code, created 20 years ago, needs updates and supplements. Hence, this is the appropriate time for stakeholders to discuss the impact of the *Malaysiakini* decision on the law and regulatory framework of online content, particularly in terms of internet censorship and flagging policies. A new Content Code should maintain adequate social rules in digital media, in line with the majority's decision in *Malaysiakini* to maintain acceptable cyberspace behavior and worth the protection of CMA and Content Code.

The newest legislature enacted is the Online Safety Act 2025. The Online Safety Act 2025 (OSA) marks a significant legislative development in Malaysia's regulatory framework for online content governance. Tabled by the Minister in the Prime Minister's Department (Law and Institutional Reform), the Act was passed by Parliament in December 2024. It is designed to complement the CMA by introducing a more structured and proactive regulatory regime, particularly in addressing harmful content online and safeguarding users' safety [20]. The Act shifts the regulatory focus from reactive moderation to proactive content management, anchored on the duty to identify and mitigate the risks posed by harmful or illegal content. From a legal standpoint, this approach appears consistent with the Federal Court's reasoning in the *Malaysiakini* case. In that judgment, the Federal Court recognised constructive knowledge as a basis for liability and holding that a platform may be liable if it should have known about the existence of unlawful third-party content, even in the absence of a direct notification. By formalising a regime of immediate and proactive content moderation, the OSA can be seen as an extension of this principle. It places an affirmative duty on platforms to identify and respond to risks before harm occurs, thereby reinforcing their role in maintaining lawful digital spaces.

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6. Comparative Insights from India and the United Kingdom on Regulating Third-Party Content on Online Media

Insights from jurisdictions like India and the United Kingdom can also be drawn to refine their measures in preventing the publication of offensive or illegal content by third-party users. Malaysia's OSA reflects the Online Safety Act 2023 of the United Kingdom in terms of its proactive approach, though there are notable differences between the two. The United Kingdom's Act incorporates clear guidelines emphasising a balance between the protection of online media and their responsibility over content. In comparative, the United Kingdom's Online Safety Act 2023 emphasizes a duty of care, placing responsibility on online platforms to proactively identify, mitigate and manage harmful content.

Meanwhile, India's experience offers a valuable reference where general liability provisions for online media platforms are established under the Basu and Jones [21] but it is reinforced through the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 [22]. These Rules provide specific guidance on platform obligations, timelines for action on unlawful content, the appointment of compliance officers and user grievance mechanisms. In addition, a key comparative aspect is the provision of safe harbor protections. In India, section 79 of the ITA provides safe harbor protection to online platforms shielding them from liability for third-party content provided they complied with certain due diligence requirements as stipulated in the ITA Rules 2021. Under this provision, online media platforms are not liable for third party generated content unless they fail to act upon receiving a takedown notice. This approach balances the protection of online media with the need to address harmful and unlawful online content [23]. India also incorporated the utilisation of artificial intelligence (AI) algorithms for monitoring third-party content publication which minimise liability risks for internet intermediaries.

7. The Way Forward

Malaysia is currently in a crucial phase of online legal development with the enactment of the Online Safety Act 2025. While the implementation of this Act is an important initiative to structure online content regulation, it still requires refinement, particularly in terms of clear and practical implementation guidelines. Without detailed guidelines, the risk of overly broad interpretation or inconsistent enforcement will continue to create uncertainty for both online media and users. Compared to the United Kingdom's proactive monitoring regime and India's safe harbor protections, Malaysia remains relatively underdeveloped in terms of providing legal safeguards for online media. As a way forward, there is also a proposal to utilize artificial intelligence (AI) algorithms for monitoring third-party content publication. By implementing AI systems capable of swiftly identifying and removing offensive comments, content creators could mitigate potential legal challenges especially concerning third-party content on online platforms and could significantly reduce legal liabilities for intermediaries involved in content creation or publishing [2].

Thus, in enhancing Malaysia's legal framework for online regulation, it is necessary to draw from the best elements of both models. This model should include five key pillars:

i. Conditional safe harbor protection for online media platforms that act appropriately upon official notice;
ii. Proactive reporting and monitoring systems based on periodic risk assessments with the assistance of AI system;
iii. Classification of online media platforms as intermediaries or publishers based on technical control over content;
iv. Implementation of notice and takedown procedures; and
v. Protection of journalistic content.

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8. Conclusion

The *Malaysiakini* case has significantly impacted the freedom of expression of online media, particularly in the context of the liability of internet intermediaries for third-party content. Section 114A was enacted to address this issue, providing new legal principles for determining internet intermediaries' liability. It emphasises higher responsibility for editorial control, filtering, moderation and the system adopted to filter offensive, contemptuous and illegal comments. The case also distinguishes liability between internet intermediaries and content publishers, allowing the law to protect the former but not the latter when it comes to the publication of third-party content. The *Malaysiakini* case removes reliance on protection under the CMA and the Content Code by considering the objectives and intentions of parliament. The 2022 Third Edition of the Content Code also failed to address *Malaysiakini's* concerns.

In light of these developments, Malaysia would benefit from developing clearer and more practical guidelines that take into account the experiences of the United Kingdom and India. Both countries have introduced more defined responsibilities for online platforms including mechanisms for content moderation, user complaints and conditional protections from liability. Drawing on these examples, Malaysia could establish a more precise and workable set of rules that outlines the limits of intermediary responsibility, the steps required to deal with unlawful content and the circumstances in which protection from liability applies. These guidelines should not only provide clarity for platforms and users but also reflect the constitutional guarantee of freedom of expression. Without such direction, the legal uncertainty following the *Malaysiakini* decision may continue to place undue pressure on intermediaries and weaken efforts to support a more independent and responsible online media landscape.

Transparency:

The authors confirm that the manuscript is an honest, accurate, and transparent account of the study; that no vital features of the study have been omitted; and that any discrepancies from the study as planned have been explained. This study followed all ethical practices during writing.

Copyright:

References

[1] K. Perset, "The economic and social role of internet intermediaries," OECD Digital Economy Papers, No. 171. OECD Publishing, 2010. https://doi.org/10.1787/5kmh79zzs8vb-en

[2] M. Daud, I. M. A. G. Azmi, and F. N. A. Ramli, "Online intermediary liability and the role of artificial intelligence in Malaysia," in *Proceedings of the 10th International Conference on Cyber IT Service Management (CITSM), 2022, pp. 1–6*, 2022.

[3] I. S. M. Kamil and I. M. A. G. Azmi, "Gatekeepers liability for internet intermediaries in Malaysia: Way forward," *International Journal of Business, Economics and Law*, vol. 21, no. 4, pp. 23–31, 2020.

[4] S. F. B. Ismail, I. M. A. G. Azmi, and M. Daud, "Transplanting the United States' style of safe harbour provisions on internet service providers via multilateral agreements: Can one size fit all?," *IIUMLJ*, vol. 26, pp. 369-400, 2018.

[5] European Union, "Directive 2000/31/EC of the European parliament and of the council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')," European Union, 2000. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031

[6] Malaysiakini, "CJ orders all courts to be fully operational from July 1," Malaysiakini, 2020. https://www.malaysiakini.com/news/529385

[7] H. R. A. Rashid, "Musa Aman acquitted after prosecution applies to drop all charges," Malaysiakini, 2020. https://www.malaysiakini.com/news/529369

[8] P. Weber, "Discussions in the comments section: Factors influencing participation and interactivity in online newspapers' reader comments," *New Media & Society*, vol. 16, no. 6, pp. 941-957, 2014.

[9] D. Pillai, I. H. M. Zulkifli, A. M. Anis, and Y. S. Han, "The Malaysiakini decision: Liability of online intermediary platforms for third-party content," Christopher & Lee Ong, 2021. https://www.rajahtannasia.com/viewpoints/the-malaysiakini-case-liability-of-online-intermediary-platforms-as-the-presumed-publisher-for-third-party-content-a-further-analysis/

[10] L. Brunner, "The liability of an online intermediary for third party content: The watchdog becomes the monitor: Intermediary liability after Delfi v Estonia," *Human Rights Law Review*, vol. 16, no. 1, pp. 163-174, 2016.

[11] J. Sidlauskiene and V. Jurkevicius, "Website operators' liability for offensive comments: A comparative analysis of delfi AS v. Estonia and MTE & Index v. Hungary," *Baltic JL & Pol*, vol. 10, p. 46, 2017. https://doi.org/10.1515/bjlp-2017-0012

[12] D. Voorhoof, "Blog symposium 'strasbourg observers turns ten' (2): The court's subtle approach of online media platforms' liability for user-generated content since the 'Delfi Oracle," Strasbourg Observers, 2020. https://strasbourgobservers.com/2020/04/10/the-courts-subtle-approach-of-online-media-platforms-liability-for-user-generated-content-since-the-delfi-oracle

[13] C. Angelopoulos, "MTE v Hungary: A new ECtHR judgment on intermediary liability and freedom of expression," *Journal of Intellectual Property Law & Practice*, vol. 11, no. 8, pp. 582-584, 2016.

[14] M. Peters, "Section 114A… a presumption of guilt," *Malayan Law Journal*, vol. 6, pp. 1-12, 2012.

[15] Centre for Independent Journalism, "CIJ to launch internet blackout day on 14 august," Centre for Independent Journalism, 2012. https://cijmalaysia.net/press-release-petition-to-stop-controversial-amendment-handed-to-deputy-minister/

[16] D. Tan, "The aftermath of the Malaysiakini decision," Int. Comm, 2025. https://www.icj.org/the-aftermath-of-the-malaysiakini-decision/

[17] N. Elumalai, "The passing of the CMA Amendments is another step backwards for freedom of expression," Amnesty Int. Malaysia, 2014. https://www.amnesty.my/2024/12/10/cma-amendments-2024/

[18] Christopher & Lee Ong, "Content code 2022 | Part 1: The content forum publishes the revamped communications and multimedia content code," Christopher & Lee Ong, 2022. https://www.christopherleeong.com/viewpoints/content-code-2022-part-1-the-content-forum-publishes-the-revamped-communications-and-multimedia-content-code/

[19] CMCF, "Malaysian communications and multimedia content forum, content code," Content Forum Malaysia, 2025. https://contentforum.my/content-code/

[20] Parliament of Malaysia, "Official report of the house of representatives: Fifteenth parliament, third session, third meeting," Parliament of Malaysia, 2024. https://www.parlimen.gov.my/files/hindex/pdf/DR-11122024.pdf

[21] S. Basu and R. Jones, "Indian information and technology Act 2000: Review of the regulatory powers under the act," *International Review of Law, Computers & Technology*, vol. 19, no. 2, pp. 209-230, 2005.

[22] H. Wasserman and S. Rao, "The glocalization of journalism ethics," *Journalism*, vol. 9, no. 2, pp. 163-181, 2008.

[23] Khaitan & Co, "Intermediaries and digital media rules," Mondaq, 2021. https://www.mondaq.com/india/social-media/1044060/intermediaries-and-digital-media-rules-2021

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