

**Frequently Asked Questions on
Section 114A of the Evidence Act 1950, “Presumption of Fact in Publication”**

Prepared by the Centre for Independent Journalism (CIJ)

1. What is Section 114A?

Section 114A, entitled “Presumption of Fact in Publication,” is a new amendment to the Evidence Act 1950. The amendment was tabled and passed in Dewan Rakyat without substantial debate in April 2012 and was passed through Dewan Negara on 9 May 2012. It has been gazetted and the Minister has chosen 31 July 2012 to be the coming-into-operation date for the amendment.

Applying to both civil and criminal cases in which allegedly illicit content is published on a webpage, Section 114A presumes that the following groups or individuals are guilty of publishing the content in question:

(1) those who own, administrate, or edit websites open to public contributors, such as online forums or blogs;

(2) those who provide webhosting or Internet services to the webpage in question; and

(3) those own the computer or mobile device on which the content in question was published.

2. What are the proposed justifications for the amendment?

The stated purpose of Section 114A is to identify persons accountable for allegedly illicit (i.e., defamatory, seditious, or libelous) content published on the Internet.

The realities of the Internet make it challenging for law enforcement officials to identify and hold individuals accountable for criminal activities committed online. First, a considerable number of Internet users assume anonymous identities in online environments. While online anonymity may be abused for criminal purposes, it also protects law-abiding Internet users who wish to legitimately exercise their right to freedom of expression on the Internet without fear of unwarranted reprisal in the workplace, from their peers, or from the state. Second, given the ease with which existing content can be re-published on the Internet, it is difficult to identify the original publisher in a decentralized, digital network.

Members of the government claim that Section 114A will enable law enforcement officials to efficiently and swiftly identify the persons responsible for publishing allegedly illicit content online. In other words, the amendment assures that someone will be arrested in spite of the challenges posed by anonymity and decentralization on the Internet.

3. What are the flaws in Section 114A?

This amendment wrongfully considers a person or group to be liable for content published by anyone assuming their identity online, using their computer or mobile device, or contributing to a website they administer or host.

This presumption, which rests primarily on circumstantial evidence, fails to hold the original publishers of allegedly illicit content accountable for their crimes. Under Section 114A, victims of hacking or identity theft would be considered guilty of publishing content produced by cybercriminals. Similarly, a blogger would be liable for defamatory comments posted by their readers.

This amendment could lead to the arbitrary detainment or prosecution of innocent individuals and undercuts a key principle of a fair legal system: the presumption that the accused is innocent until proven guilty by the prosecution. In other words, Section 114A threatens core principles of justice, democracy, and fundamental human rights.

Furthermore, Section 114A will not deter cybercrime. It gives hackers and cybercriminals impunity by making the victim of their activities liable for any content/data that might have been changed by the perpetrators. Under Section 114A, for example, a hacker who posts defamatory statements using another individual's Twitter account will not be held responsible for the crime. Consequently, the amendment encourages cybercriminals, hackers, and identity-thieves to further exploit online anonymity and deflect the presumption of guilt onto law-abiding citizens.

4. How will Section 114A affect individuals?

Section 114A disproportionately burdens average individuals who, if wrongfully accused of publishing illicit content online, may not possess the resources to prove their innocence in court. Those brought to court under Section 114A must have, in addition to adequate legal representation, more than a basic understanding of how the Internet operates to prove that they did not publish illicit content. Knowledge of IP addresses, servers, and complex networks is necessary to provide evidence of one's innocence in cases covered by Section 114A. This information, however, is not known by, or available to, average Internet users. Section 114A, therefore, burdens innocent individuals presumed guilty on the basis of circumstantial evidence.

Section 114A also threatens the individual right to freedom of expression. Internet users may undertake measures to avoid false accusations of their guilt. A blogger, for example, may unduly censor any comments made by readers that could be considered defamatory, seditious, or libelous. This would defeat the participatory purpose of blogs, which provide a platform for the open dialogue among individuals. Likewise, the blogger may also err on the side of caution and refrain from publishing defamatory, seditious, or libelous content and/or invite defamatory, seditious, or libelous comments. As a result, Section 114A inadvertently stifles public discussion about pertinent political or social issues and protects public authorities, such as the State, from public scrutiny.

5. How will Section 114A affect Malaysia's economy?

Section 114A holds Internet intermediaries—parties providing webhosting space or Internet access—liable for content that is published through its services or on its network. Eateries that provide free wireless Internet access to their customers, for example, are accountable for illicit images, tweets, Facebook posts, or blog updates published on its network. To avoid being held responsible under Section 114A of the Evidence Act, restaurants providing free Wifi may unwarrantedly monitor its customers' Internet activities or stop providing access to the Internet altogether, which would be detrimental to their business and profitability.

The amendment would also make a negative impact on Malaysia's Internet sector. In 2010, the Internet sector contributed to 4.1% (RM30 billion) of Malaysia's GDP—*well above* developed countries, whose Internet sectors accounted for 3.4% of their GDP.¹ The driving force behind Malaysia's growing Internet economy is a thriving network of Internet users who can exercise their right to free expression. The success of the Malaysia's Internet startups, for example,

¹ Joseph Chin, "McKinsey, Google: Internet contributed RM30 bn of Malaysia's GDP in 2010", The Edge Malaysia, 01 February 2012, online at: http://www.theedgemaalaysia.com/index.php?option=com_content&task=view&id=200283&Itemid=88

depends on users who can create, find, and share content online. The popularity of social networking sites also encourages enterprises to develop innovative and lucrative marketing strategies that promote economic activity. Sites such as Facebook and Twitter effectively extend the reach and popularity of the goods offered by Malaysian businesses, which can also improve their goods by using these sites to generate feedback from consumers. The country's continued economic growth, therefore, depends on initiatives that encourage rather than discourage participation on the Internet.

Section 114A deters user-driven production and consumption of Internet content. Since the amendment wrongfully places the burden of proof on the owner of a webpage or device, it fosters a climate of self-censorship that hinders the creation and distribution of information online. As a result, the amendment threatens the business model of both emerging and established businesses in Malaysia whose success depends on participatory Internet communities.

6. Why is it important to protect freedom of expression online?

The open and free exchange of information is a foundational component of a robust democracy. It ensures the existence of an informed and active citizenry that can participate in their country's political development. The Internet, which accelerates the flow of information and provides new opportunities to participate in public dialogue, has the potential to facilitate the democratization process. As such, citizens must exercise their right to free expression in both offline and online environments. Our opinions – as citizens and as netizens – matter. If the new Evidence Act were gazetted, Section 114A would seriously undermine not only the democratic right to freedom of expression on the Internet but also the democratic integrity of Malaysia.

7. Who opposes Section 114A?

On 31 May 2012, CIJ launched an e-petition to mobilize support for a campaign to stop the Section 114A from being gazetted. Within a month, over 3,300 people signed the petition to express their opposition to the amendment. Among those who signed were such prominent Malaysians as Segambut MP Lim Lip Eng, film producer Pete Teo, writer and radio personality Patrick Teoh, social activists Marina Mahathir and Dr. Irene Fernandez, and notable academics Dr. Azmi Sharom and Dr. Mustafa K. Anuar.

Some Members of Parliament from Barisan Nasional have also expressed their disagreement with the amendment. Khairy Jamaluddin said, "The burden of proof must always be with the accuser, not the accused"². Besides, Saifuddin Abdullah who is also concerned about the reversed burden of prove believes that the amendment should be revoked³.

On 28 June 2012, Pakatan Rakyat issued a public statement recommending the government table a proposal to repeal Section 114A of the Evidence Act. The statement was signed by Subang MP R Sivarasa, Batu Gajah MP Fong Po Kuan, and Kuala Selangor MP Dr. Dzulkefly Ahmad.⁴

² Leven Woon, "Youth chief wants Evidence Act changes revoked", Malaysiakini, 16 June 2012, online at: <http://www.malaysiakini.com/news/201025>

³ "Saifuddin: Move should be revoked", The Malay Mail, 4 July 2012, print.

⁴ Teoh El Sen, "Pakatan seeks to halt new Evidence Act", Free Malaysia Today, 28 June 2012, online at: <http://www.freemalaysiatoday.com/category/nation/2012/06/28/pakatan-seeks-to-halt-new-evidence-act/>