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VPN Breaks Borders, What About the Law?



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Now more than ever before, the Internet has become an essential means of communication and source of entertainment. This update seeks to explore the legality of using Virtual Private Networks (**VPNs**) to access online content in the context of the obligations of Internet service providers (**ISPs**) in Malaysia.

Briefly, a VPN is a service that provides a secure and private environment for users to surf the web. It routes the connection through a server provided by the relevant VPN service provider and, through an encryption process, conceals the user's online activities entirely. A user may therefore utilise VPN servers hosted across the globe in order to mask his location and enable access to restricted content online by routing the user's traffic through an encrypted tunnel.

ISPs offer a range of services including access to the Internet, Internet hosting services and network services.

Regulatory framework

In so far as the usage of VPNs is concerned, the most relevant provisions are those found in the Communications and Multimedia Act 1998 (**CMA**) and other guidelines issued by the Malaysian Communications and Multimedia Commission (**MCMC**) which regulate the functions provided by applications service providers such as ISPs.

According to s 3(3) of the CMA, nothing in the CMA shall be construed as permitting the censorship of the Internet. However, s 233(2) of the CMA provides, among others, that a person commits an offence if he knowingly, by means of an applications service, provides any obscene communication for commercial purposes to any person, or permits an applications service under his control to be used for such an activity. The penalties imposed for such contravention are a fine not exceeding RM50,000, imprisonment not exceeding one year, or both.

Section 233(2) of the CMA must in turn be read together with the Malaysian Communications and Multimedia Content Code (**Content Code**) published by the Communications and Multimedia Content Forum of Malaysia, which advances definitions for indecent, obscene, false, menacing or offensive content (**Prohibited Content**).¹ "Obscene" content, in particular, is defined as "content which gives rise to a feeling of disgust by reason of its lewd portrayal and is essentially offensive to one's prevailing notion of decency and modesty".²



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¹ The Malaysian Communications and Multimedia Content Code (**Content Code**), Part 2
² Content Code, Part 2, cl 3

The Content Code also provides, among others, that ISPs shall not knowingly provide Prohibited Content³ and shall comply with and incorporate the following terms and conditions regarding terms of use in their contracts with subscribers:⁴

- (a) Subscribers will comply with the requirements of Malaysian law including, but not limited to, the Content Code and shall not provide any Prohibited Content nor any Content in contravention of Malaysian law;
- (b) The ISP will have the right to withdraw access where a subscriber contravenes the above; and
- (c) The ISP shall have the right to block access to or remove Prohibited Content provided such blocking or removal is carried out in accordance with the complaints procedure contained in the Content Code.

Further, clause 11 of the Content Code⁵ provides that ISPs shall not be required to undertake any of the following, including:

- (a) provide rating systems for online content;
- (b) block access by their users or subscribers to any material unless directed to do so by the Complaints Bureau acting in accordance with the complaints procedure set out in the Content Code; or
- (c) monitor the activities of users and subscribers.

Liability of the ISP

This begs the question: Would ISPs be implicated if any of their subscribers were to employ a VPN to access Prohibited Content? To date, this question has yet to be definitively decided by the Malaysian courts. However, certain key points ought to be noted.

Firstly, as s 233 of the CMA expressly requires the applications service provider to possess knowledge of the provision of the obscene communication, it stands to reason that an ISP would not fall foul of this provision if its services were being used by subscribers to access, via a VPN, obscene content.

Similarly, the Content Code also provides that the ISP shall not *knowingly* provide Prohibited Content. More significantly, the Content Code expressly

³ Content Code Part 5, cl 5
⁴ Content Code Part 5, cl 7
⁵ Content Code Part 5, cl 11

recognises that it is “*impractical, difficult and ineffective to monitor or control a user’s access to Content available Online*” and therefore leaves it primarily to the users themselves “*to decide on the nature of Online Content to be consumed*”.⁶ This approach premised on self-regulation is echoed in the other relevant provisions of the Content Code as set out above. For instance, according to the mandatory terms of use to be imposed by the ISP, while ISPs *shall have the right* to block access to or remove Prohibited Content,⁷ they are not obliged to do so unless otherwise directed by the Complaints Bureau in accordance with clause 11 of the Content Code. In view of this and the fact that ISPs are ultimately not obliged to monitor the activities of their users and subscribers, there is hence also a cogent argument to be made that an ISP will not be in contravention of any of the provisions of the Content Code should their subscribers use a VPN to access any Prohibited Content.

Conclusion

The usage of VPNs to access Prohibited Content has yet to be comprehensively addressed by the present regulatory framework. However, with the proliferation of online content and novel technologies specifically designed to conceal a user’s online activities, it appears imperative that the law keep pace with such developments. ISPs ought to be aware of their obligations under the existing framework to refrain from knowingly providing or permitting access to Prohibited Content.

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⁶ Content Code Part 5, cl 6.1
⁷ Content Code Part 5, cl 7