

WATCHING NETFLIX ACROSS BORDERS – LEGAL ISSUES INVOLVING CROSS-BORDER VPN

Smarter Way to Cross
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As an engineer-turned-attorney, it's unsurprising that I rely on various gizmos and gadgets for news and communication. And recently, with services like Netflix, I get my entertainment fix through online streaming—so do a third of Anglophone Canadians, according to a recent Media Technology Monitor study. But not all streaming media experiences are made equal.

Like many of us, I often travel between the United States and Canada. And like many of you, I noticed that Netflix's offerings change based on my location. Netflix performs this technological feat based on my device's IP address. IP addresses are the electronic code that lets a server know which device on the Internet is which. It just so happens that IP addresses are assigned geographically.

When it comes to Netflix, location makes a big difference. It turns out that a U.S. viewer can select from over 10,000 titles in comparison to a Canadian viewer's 4,000. This disparity is a result of the prevailing content owners' business model—windowing.

Content owners intentionally license media in “windows” to increase sales and maximize profit. For example, in order to boost repeat sales, movies start in theatres and then sequentially release on other platforms like DVD, TV, iTunes, and Netflix. Through licensing, content owners also enforce geographical windows. Windowing is a profitable model for content owners, but limiting access to content is inconvenient for consumers. For Netflix, that inconvenience helps explain why 35% of Canadian users mask their location to access the U.S. Netflix library.

Masking your location online has become user-friendly through the proliferation of inexpensive virtual private networks (VPNs). A VPN creates a secure “tunnel” between your device and a server, which may reside in a different country. All requests to the Internet flow through the server, and the server brings the results back to your device. Generally, VPNs are legal in Canada and the United States. However, the legality of using a VPN to make Netflix think your device is elsewhere remains a gray area.

Using a VPN to trick Netflix clearly violates [Netflix's Terms of Use](#). For Canadians and Americans, the Netflix Terms of Use is governed under U.S. law, including the much-maligned—and outdated—Computer Fraud and Abuse Act (CFAA).

Previously, some U.S. website owners invoked the CFAA to enforce website Terms of Use, arguing that a website user “exceeds authorized access” by accessing a site in violation of its Terms of Use. However, the Northern District of California held that a defendant was not liable under the CFAA for simply violating the Terms of Use. Instead, a defendant could only face CFAA liability if they circumvented “technical barriers” such that the access itself was not authorized.

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But does a VPN circumvent technical barriers? In August 2013, a U.S. District Court Judge ruled that using a VPN to circumvent a blocked IP address breaches the CFAA. However, in this case, the perpetrator’s IP address was previously blocked due to his previous intrusions to access private data. The perpetrator used a VPN to mask his location through a new IP address. Consequently, this case is distinguishable from a Netflix VPN because Netflix is available to the user without use of the VPN.

In Canada, the Copyright Act and the Digital Privacy Act govern how users access copyrighted media content. Changes to both acts may require that internet service providers (ISPs) share customer data with any organization (private or public) that investigates a contractual breach. In other words, a VPN or an ISP could be forced to provide a customer list of VPN users. These users might run the risk of prosecution under the Copyright Act if the VPN is used to access unlicensed content in Canada. At present, however, since the content is not licensed for use in their actual locale. At present, however, Netflix and the content providers seem unwilling to interfere with VPN-armed users.

In fact, Netflix is aware of VPN usage. Netflix Spokesperson Jenny McCabe said “We know it goes on. We don’t condone it.” But so far, Netflix has not banned subscribers for using VPNs, (but Netflix’s chief competitor, Hulu, has). Unless Netflix begins enforcing its Terms of Use, or content providers begin to pressure Netflix to do so, the use of VPNs to access geographically limited content will likely continue.

Netflix seems content to apply pressure on traditional licensing models by producing original content and releasing it the way we like it: all at once and everywhere. “We believe that when you provide great content to people and you make it available they choose the legal route,” says Netflix spokesperson Jenny McCabe. “What prevents people from being able to watch what they want are the classic windowing systems that exist in the content world.” Until windowing becomes obsolete, users will have to navigate the legal gray area or otherwise miss out on geographically limited content.