

## Netflix Rises Against the Use of VPN and Proxies, Further Blurring the Legal Lines Behind These Tools

Internet is mainly considered as a world without borders. But when intellectual property is involved some measures are created to protect right holders. VOD companies such as Netflix do not have the same distribution rights in every country and both licenses and national legislations have to be respected. This is made possible by the existence of geoblocking (or geographic filtering). But evolution of technologies always leads to new ways of getting around viewing restrictions on the Internet. Thus, virtual private network (VPN), proxies and other unblocking tools appeared, allowing only authenticated remote access using tunneling protocols and encryption techniques. These cryptology means give the possibility to change the IP address of a computer so that it can be tracked as from another country.

At first, these tools were created to overcome censorship (in China for example) and to ensure safe storage or transmission of data. In France, article 30 of the LCEN of June, 21st, 2004 states that “the use of cryptology means is free”. But even though the use of VPN and proxies is perfectly legal, it can be sanctioned when it aims to bypass geographic filtering to get access to more copyrighted content. This practice has become fairly popular among technical users, and exploded with the creation of Smartflix, an app that offers an access to the entire Netflix’s catalog worldwide through the “Optimized use of proxies”. Since March, Netflix started blocking tunneled access to its content, which led to a wide contestation of subscribers.

Is the use of VPN and proxies an infringement of Intellectual Property?

Geographic filtering could be seen as a technical protection measure, intended to prevent or restrict uses unauthorized by holders of copyright. Nevertheless in the United States, the DMCA (October 28, 1998) states that “no person shall circumvent a technological measure that effectively controls access to a work protected under this title”. Therefore, bypassing a geofilter without the copyright owner’s consent is illegal, not because it infringes intellectual property, but because it circumvents a technical measure that protects it. The same approach is followed by article L335-3-1 of the French intellectual property code. Still, an important part of the legal community in the United States, including the Copyright Council, advocates that geoblocking is not technically a “Technological Protection Measure” and is therefore not covered by the DMCA. As there has been no High Court ruling on this matter, the issue isn’t settled yet.

Another difficulty is that Netflix subscribers must respect the company’s Terms of Use. Indeed §6.c. of these Terms states that “you may view a movie or TV show through the Netflix service only in geographic locations where we offer our service and have licensed such movie or TV show. The content that may be available to watch will vary by geographic location. Netflix will use technologies to verify your geographic location”. Therefore, a VPN user could be considered in breach of the license agreement he signed with the content provider. But it’s not likely that Netflix will find an interest in suing its paying customers. Besides, if the VPN provider used by the subscriber is clearly promoted as

a filtering circumvention tool (ex : NordVPN), it’s his responsibility which could be held. Users can only be held responsible when the VPN service they use is neutral.

Issues caused by the blocking and alternative solutions

By blocking VPNs, Netflix could end up blocking people watching content they should have legitimate access to. Indeed, VPNs and Proxy can be used to ensure security and privacy and are not always meant to bypass geoblocking. American subscribers will then have to choose between protecting their privacy via a VPN or accessing the full Netflix catalog. A lot of petitions against Netflix’s new blocking policy were signed. Not only could this cause the company to lose clients but it may promote the use of torrent sites and other illegal platforms. Besides, Neil Hunt, Netflix’s chief product officer stated that it is very unlikely that Netflix would be able to block all known VPN providers. Some even think that Netflix’s latest VPN crackdown is just a token gesture to appease Hollywood studios, by showing them that it respects its regional licensing agreements.

Considering all that, for Reed Hastings, Netflix’s CEO, “the simplest solution for Netflix is to become global”. But this solution seems difficult to implement. Indeed, the film industry in Hollywood does not seem very open to the idea of creating a worldwide license, and national legislations have to be respected. Some specific licenses also have to be taken into account. For instance in France, media chronology is an obstacle and some series’ broadcasting rights (such as House of Cards) are currently held by French channels like ‘Canal +’ over the French territory. There is still a long way to go before Netflix can offer people the same films and TV series everywhere. In the meantime, they say they will continue to respect and enforce content licensing by geographic location.



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