AUSTRALIA: CIRCUMVENTION GOES MAINSTREAM

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18% proportion of Australians who use VPNs or proxies to access the internet

200,000 estimated number of unauthorised Netflix subscribers in Australia, in late 2014

$25-$134 Monthly cost of a Foxtel pay-TV subscription, in A$

$15-$20 Monthly cost of a US Netflix subscription and VPN, in A$

‘You’ve all got VPNs anyway. All of you appear to be somewhere in Iowa when you go online I know that anyway, I won’t go on.’ – Australia’s former Minister for Communications (and current Prime Minister), Malcolm Turnbull, in 2014

Over the last decade Australia has become an unlikely hotspot of circumvention activity. Frustrated by the high cost and slow delivery of first-release TV and movies from the United States – and by their own self-perceived status as ‘second-class’ media citizens – Australians have taken to offshore streaming with a singular enthusiasm, signing up for VPNs and proxy services and using them to access US Netflix, Hulu, HBO Now, and BBC iPlayer. Unlike many nations in the Asia-Pacific region, where circumvention has an overtly political dimension, the conversation in Australia has revolved substantially around access to entertainment rather than privacy, surveillance or censorship. Many Australians have acquired a working knowledge of circumvention tools simply because they were unable to watch episodes of their favourite television shows quickly and legally.

Take for example Game of Thrones and House of Cards, which have become massively popular in Australia thanks to unauthorised streaming and torrenting. When these shows first aired here they were only available as part of expensive packages with the pay-TV provider Foxtel. In the case of Game of Thrones, episodes were initially screened up to a week after their U.S. premiere (only later did they screen simultaneously, after a subscriber backlash). House of Cards was likewise locked to a pay-TV bundle, as Netflix was unavailable in Australia until 2015 and had sold the rights to Foxtel in the interim. Relatively few Australians watched these shows through the authorised channels, yet everyone seemed to have seen
the latest episodes. How? The answer is directly related to the boom in popular circumvention, along with a longstanding national fondness for Bit Torrent. During the last few years Australian tech websites have been abuzz with tips and tricks on how to evade geoblocks; DNS routing services like Getflix and UnblockUS have attracted many Australian subscribers; and VPN brands like HideMyAss and Witopia have almost become household names. A complex informal apparatus for accessing digital content has become normalised among the early adopters and TV junkies that drive consumer technology adoption in Australia. In these circles, VPN- and proxy-enabled streaming has become a mainstream pastime – the polite alternative to Bit Torrent.

These early adopters are brazen about their circumvention. Most argue that they have a right to access content if it is not available legally and in a timely fashion, or if they feel they have to pay too much for it. The Australian conversation on circumvention has been firmly grounded in this discourse of audience rights. But there is more to the story, as in recent years the geoblocking and access questions have become inextricably linked to a wider set of policy debates concerning Australia’s economic future and national self-image. As we will see, geoblocking and circumvention are evolving into first-order political issues, attracting the attention of parliamentarians, competition regulators, consumer groups and rights-holders, and overlapping with discussions around copyright protection, global governance, and tax evasion. In other words, they are trigger points for a wider conversation about Australia’s place in the world.

**Australian screen culture and the politics of distance**

To understand the effects of geoblocking in Australia, we must first consider the national broadcast system and how it has evolved over time. There are three commercial free-to-air stations in Australia – Seven, Nine and Ten – and two public-service broadcasters – the ABC (Australian Broadcasting Corporation) and SBS (the Special Broadcasting Service, a multicultural broadcaster). Each of these free-to-air stations has additional digital multi-channels (ABC2, ABC3 and so on). Government-mandated quotas on commercial channels require at least 55% of prime-time programming to be locally produced, with the rest mostly imported from the US and UK.

As noted, Australia does not have a strong tradition of cable and satellite TV. There is only one pay-TV provider, Foxtel, which reaches around a third of Australian households and has long been struggling to grow its market share. Accustomed to free-to-air broadcasting, Australians are generally uncomfortable with the idea of direct payments for TV content.

Australian screen culture has also been strongly influenced by the nation’s geography and politics. Australia is a huge and mostly uninhabited island, almost as big as Europe, but with a much smaller population (23 million). Its nearest neighbour is Papua New Guinea; New Zealand is over a thousand kilometres away. There is no tradition of cross-border satellite television here, as in Europe or the Middle East. A colonial broadcast model endures in the development of the national public-service broadcaster, the ABC (it was modelled on the BBC template, with news presenters trained to speak in the Queen’s English, and BBC
content featuring prominently on this station well into the twenty-first century). Australia’s post-war turn towards the United States was reflected in our status as a high-margin English-language export market for American content.

Imported movies and TV shows are subject to long delays. As Jock Given, Rosemary Curtis and Marion McCutcheon note, ‘it was common for Australians to wait 3-5 months to see US blockbusters in their cinemas’. ¹ Television programs were just as slow to arrive, due to the U.S. premiere season occurring at the same time as the Australian summer holiday season. Local networks preferred to hold over this imported content until the official local ratings season started after the summer break. Consequently, delays of several months – and sometimes years – were common.

In the past this time-lag was not a huge problem. Australians had few other alternatives and were generally content to wait. But the internet has changed all that. Local audiences are hooked into global TV fandom in real-time through Twitter, internet forums and fan websites. They know what is happening in the US and refuse to wait for the latest episodes. Broadcasters have tried to reduce these delays where possible, with many shows now fast-tracked from the US. But these are the exceptions that prove the rule. In the current licensing and advertising environment Australian broadcasters simply cannot get content to air quickly enough to satisfy audiences, who turn to Bit Torrent and VPNs as a way around the time lag.

Making matters worse is the problem of pricing. Digital content is invariably more expensive in Australia than overseas when purchased through iTunes and other online services. According to the consumer group Choice, Australian viewers of The Walking Dead, ‘will be paying up to 376% more than people watching the same show in the United Kingdom’. ² This discrepancy, known colloquially as the ‘Australia tax’ has been a major topic of public discussion. Dissatisfaction about digital pricing has become a rallying cry for Australian early adopters who increasingly see themselves as ‘second-class’ media citizens, who are “fed on a diet of geo-blocking, slow content delivery and price gouging”. ³ This adds fuel to the fire of consumer resentment, and provides a rhetorical justification for piracy and geo-hacking.

Geoblocking and Cultural Nationalism

By 2012 geoblocking had become a political issue. Sensing the mood of the public, Australian regulators were questioning the price-discrimination policies of U.S. tech companies and asking why our media and software products were more expensive than they needed to be. Opportunistic politicians started to see geoblocking as a popular issue, one that enabled

1 Jock Given, Rosemary Curtis and Marion McCutcheon, Cinema in Australia: An Industry Profile, Melbourne: The Swinburne Institute, 2012, p. 3.
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a nationalist narrative (US-based multinationals ripping off Australians) to be fused with a free-market narrative (geoblocking as anti-competitive). In other words, it was a vote-winner. As Labor MP Ed Husic put it:

For too long, businesses and consumers have asked: why does it sometimes cost up to 80 per cent more to simply download software in Australia compared to overseas... No one doubts that IT firms should be able to recover legitimate costs but the Australian consumer shouldn’t shoulder an unfair share of the pricing load.⁴

The level of disquiet was such that the government announced a Parliamentary Inquiry into the ‘Australia tax’ in 2012. Its final report included some remarkable recommendations, including abolishing all parallel-import restrictions, amending the 1968 Copyright Act to allow lawful circumvention of geoblocking, and educating consumers about how to use VPNs effectively.⁵ The report even floated the possibility, as an ‘option of last resort’, of a government ban on geoblocking. Although none of these recommendations have been actioned, the report was widely seen as tantamount to an official endorsement of circumvention. As a Choice representative said during the hearings, ‘Look, if businesses want to set up virtual walls to make Australians pay higher prices, then we think Australians have every right to use legitimate means to climb those walls, to knock them down, to get around them’.⁶

At this point, it is worth noting that this strong political push for equitable pricing did not come out of nowhere. Australians have had to pay a higher price for cultural goods for much of the twentieth century. The country’s geographic isolation means higher shipping costs, lower levels of competition, and, in many cases, price gouging by media companies and publishers. Many incumbents have also been protected by legislative bans on parallel-importing cheaper goods from overseas, keeping prices artificially high. While these parallel import bans have been partly dismantled since the 1990s – imports of CDs are now permitted, reducing what were previously ‘exceptionally high’ prices for recorded music – protectionist measures remain in other sectors. There is still no broad provision to allow for the parallel importation of books into Australia, which means that in addition to being charged higher prices Australians have had to deal with the late publication of new releases and shops regularly running out of stock.⁷ This history of geographic price discrimination is one reason why the practice of geoblocking carries such cultural resonance for Australian consumers.

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⁸ Books can be legally parallel imported in specific circumstances to fill market gaps. For example, if an order for a book is not filled within ninety days by the copyright holder or licensee.
Indeed, it is partly due to the historical weight of these debates around parallel importation that the issue of digital content availability has such traction in Australia. With government officials and consumer advocates singing from the same songbook, circumvention of geoblocking has become a quasi-sanctioned practice. This state of affairs arguably reflects the inequities of digital media geography, with Australian consumers often facing significant pricing differentials for the same products and companies regularly providing little or no justification in response to complaints about the practice. But over time these pricing issues have unfortunately become intertwined with other discourses about foreign services and offshore ‘competition’, leading to a situation where many Australians now see themselves as victims of cultural globalization. A politics of resentment has taken hold, tinged with nationalist overtones. Its central figure: the ripped-off Aussie consumer.

The VPN Explosion

Renewed attention to the parallel-import issue has naturally drawn attention to geoblocking. Taking a cue from their elected representatives, Australians have recently begun to sign up for offshore streaming services in ever-greater numbers, using fake IDs and location-masking tools. In part this was due to more people using streaming services generally: internet speeds were rising, catch-up TV was catching on, and everyone was used to watching TV in their browsers. From here it was just a small step to hacking into BBC iPlayer, Netflix and Hulu.

One of the first indicators of a shift came in August 2011 when a national electronics retailer, Harvey Norman, caused a stir by selling a product package designed explicitly for geo-circumvention. The product in question was a set-top box – the McTivia – which came bundled with a VPN subscription. ‘Stream direct from the USA!’, promised the marketing material. ‘[T]ailor your home entertainment system to meet your lifestyle and gain access to a global library of previously geographically restricted media direct to your TV.’ A minor scandal followed after the national newspaper The Australian picked up the story, and Harvey Norman insisted that it did not mean to promote geo-hacking.9

Detailed how-to guides also began to appear on Australia tech websites. Forums overflowed with tips about which VPN had the best download speeds or customer service. National newspapers buzzed with reports of 200,000 unauthorised Netflix subscribers in Australia. Tech journalists openly instructed their readers on the finer points of VPN and proxy use, proclaiming the benefits of browser plugins like MediaHint and Hola. On tech websites, such as Gizmodo, Whirlpool and ITNews, the discussion about circumvention was even more ubiquitous, and unapologetic.

This was the tip of the iceberg. By now, thousands of Australian households had taken up personal VPNs and proxies. In research we conducted during 2013 with Swinburne University’s World Internet Project, a biannual telephone survey of 1000 Australian users,

it emerged that 18% of Australian internet users use VPNs or proxies – a much higher figure than expected.\(^\text{10}\) While some of this usage was business-related, it still represents a remarkably high level of familiarity with what were formerly obscure networking tools. A follow-up study by Essential Research in 2015 produced similar findings, suggesting that 16% of Australians have used VPNs or Tor.\(^\text{11}\)

Australia’s then-Communications Minister and current Prime Minister Malcolm Turnbull – a former internet entrepreneur known for his early-adopter habits – summed up the general mood when he addressed a crowd at a Govhack event in 2014. ‘You’ve all got VPNs anyway,’ he laughed. ‘All of you appear to be somewhere in Iowa when you go online I know that anyway, I won’t go on.’ For a Minister to joke about mass-scale internet circumvention in this way would in other circumstances appear unusual. In Australia, it is now par for the course.

**Governing Circumvention**

Running through this debate about geoblocking are several unresolved legal and policy issues. One of these is the uncertain legal status of VPNs as circumvention tools.

There is no clear consensus as to whether or not using VPNs to access offshore content infringes Australian copyright law. When he was Communications Minister, Turnbull stated that circumventing geoblocking in order to access content was not illegal under the Australian Copyright Act – but rights-holder groups such as the Australian Copyright Council disagree.\(^\text{12}\) Some media producers have even called for the government to legislate against unauthorized VPN use.\(^\text{13}\) Legal scholar Nic Suzor has examined the issue, and concluded that VPN-enabled geo-circumvention is primarily a contractual issue between users and platforms, but that it ‘might technically be an infringement of copyright under Australian law, and there is a small possibility that it might be a crime under Australian law as well’.\(^\text{14}\) In other words, this is a grey area of the law.

This legal uncertainty is an issue because it is clouding the Australian public’s understanding of VPNs, which can of course be used for many purposes unrelated to geo-evasion. In the

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\(^{11}\) These usage levels are broadly in line with other early-adopter countries. In Sweden, for example, VPNs are used by 18% of the population. See Stefan Larsson et al, ‘Law, Norms, Piracy and Online Anonymity: Practices of De-identification in the Global File Sharing Community’, *Journal of Research in Interactive Marketing* 6.4 (2012): 260-280.

\(^{12}\) See information sheet G127v01, ‘Geo-blocking, VPNs & Copyright’, Australian Copyright Council, July 2015.

\(^{13}\) Nick Murray, the managing director of TV producer Cornell Jigsaw Zapruder argues that these tools inhibit the ability of these companies to sell the same content to different regions, which is how ‘they make [their] money’. See http://mumbrella.com.au/cjz-boss-calls-for-a-clampdown-on-australians-using-vpns-to-access-content-287634

wake of hacking scandals and daily reports of cybercrime, VPN use is being promoted by consumer and technology advocates as a way to stay safe online – an act of responsible cyber-citizenship. VPN use is also being recommended as an antidote to Australia’s controversial metadata retention law, the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015, which has just come into effect. This law requires ISPs and telcos to retain logs of customer activity, NSA-style, for two years. Unsurprisingly there has been massive public backlash against this data retention regime, and VPN services are an appealing counter-measure. Savvy VPN companies such as PureVPN and IBVPN, now promote themselves to Australian users on this basis (see Figure 1).

Figure 1. Australia-specific VPN marketing. Source: http://www.ibvpn.com/australia-vpn-service/

Recent developments in copyright law also bear directly on VPNs. In June 2015 federal legislation was passed that gives judges the power to block access to pirate websites such as The Pirate Bay. While the law is expected to mostly target file-sharing and streaming sites, the initial wording of the law was vague and many consumer groups feared that websites for VPN services could be blocked too. In the end the government was forced to add an Explanatory Memorandum specifying that the blocking should not apply to VPNs ‘that are promoted and used for legitimate purposes, or merely used to access legitimate copyright material distributed in a foreign geographic market’. But given that the marketing practices adopted by many VPNs are not always legitimate, there is still some ambiguity here. All this is happening at the same time that the Government is trying to introduce a new internet industry Code of Practice – a three-strikes graduated response scheme in which repeat offenders receive infringement notices. Like the metadata law, the three-strikes Code is likely to further increase demand for VPNs as an identity-masking tool for P2P users. In this complex game of whack-a-mole, public awareness of VPNs, proxies and other circumvention tools is always on the rise.

The Coming of Netflix

Another recent development is the launch in March 2015 of Netflix’s Australian service. For the first time Australians can now access an authorised, local version of the service, which should in theory reduce the appeal of geo-hacking. However, due to existing licensing
agreements and limited investment in local content acquisition, the local Netflix has a much smaller library. Only 1116 streaming titles were available at launch, compared to 7000 in the United States. This is a sore point for Australian consumers, and it has attracted a lot of media attention.

What does the arrival of Netflix mean for geoblocking and circumvention? There are two contrasting implications here. On the one hand, there is broad agreement that Netflix Australia has been a success: subscriber numbers have been strong and Australians for the first time seem happy to pay for TV. So in theory this should reduce both piracy and circumvention. On the other hand, widespread awareness of the catalogue disparity has stirred resentment and is fuelling a different kind of circumvention – a kind of transnational ‘shopfront-hopping’ by paid-up Netflix subscribers, which is considered to be a much more unthreatening act of middle-class consumer rebellion. So, just as one driver for VPN use disappears, another appears in its place. Consequently, it seems reasonable to assume that geo-circumvention activity will be a feature of Australian digital media consumption for some time to come.

The geoblocking issue has also become entwined with a sometimes heated debate about taxation. In May 2015 the former Australian treasurer, Joe Hockey, announced a ‘Netflix tax’ – a tax on offshore digital services operating in Australia, designed to bring foreign over-the-top services into line with local services that must by law charge a 10% Goods and Services Tax. This policy was designed to boost the national coffers while mollifying nervous Australian media moguls who have been clamouring for government protection against foreign streaming services (for example, Presto, owned by Foxtel and Seven West Media, and Stan, owned by Fairfax Media and FTA broadcaster Nine, already argue that Netflix’s GST-free status constitutes an unfair commercial advantage). But the Netflix Tax had another political advantage for the government. It played neatly into the narrative that both sides of Australian politics have been pushing – that tax-dodging multinationals are ripping off Australian consumers and citizens.

Looking ahead, one issue to watch is the relationship between internet privacy and consumer advocacy. Historically, Australia does not have a strong tradition of constitutional privacy protections unlike Europe and the United States, and public discussion of surveillance and privacy is somewhat muted by comparison. Yet the rise of VPNs seems to constitute something of a turning point where privacy, anonymity and media consumption are now fused together as a public controversy for the first time. Many Australians already have a strong familiarity with the use of VPNs to torrent safely and avoid geoblocking, so it is likely that there will be some spill over into other privacy-related uses.

As we have seen in this chapter, in the wake of the Snowden revelations these practices now appear to be spreading beyond early adopters and geeks to include a certain subset of more mainstream users – exactly the same community who are the biggest fans of streaming and download media. Know-how relating to DIY internet privacy and anonymity circulates widely among these users. Here again, a link between consumption and citizenship is evident, as Australian consumers’ impatient desire for the latest thing feeds directly into an understanding of digital citizenship. The end result is something quite unexpected: the
mainstreaming of DIY privacy protection and anonymization as everyday practices among a substantial minority of the population.

References


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