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## Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing

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# Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing

by JASMINE A. BRAXTON\*

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## I. Introduction

On January 18, 2012, the Supreme Court upheld the constitutionality of Section 514 of the Uruguay Round Agreements Act (the “URAA”), which retroactively restored copyright protection to foreign works in the public domain.<sup>1</sup> Despite its effect on the status of the public domain in the Copyright Clause and the First Amendment rights of those using the works, the Court held that the Act brought the United States into compliance with international copyright measures.<sup>2</sup> That same day, the global blackout against the Stop Online Piracy Act (“SOPA”) and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act

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1. *Golan v. Holder*, 132 S. Ct. 873, 894 (2012).

2. *Id.* at 893–94.

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(PROTECT IP Act, also known as “PIPA”) occurred. To protest the SOPA and PIPA Acts sitting in Congress, the largest search engines and social media sites in the world shut down for twenty-four hours.<sup>3</sup> Doing so sent a clear message to Congress: legislation that stifles free speech and harms the exchange of information among both domestic and foreign channels will not be tolerated.

How do we reconcile the needs of content creators and content users, both domestically and abroad? On the one hand, we have the Supreme Court creating barriers around information previously enjoyed by the public.<sup>4</sup> On the other, we have the public participating in protests against legislation that could block the flow of future information. The contradiction between judicial action and public outcry against proposed legislation exemplified in these events makes it clear that current copyright law has not been able to accommodate growing concern over reciprocal protection of copyrighted works among countries. Copyright law requires a global scope now more than ever.

What current copyright law fails to accurately take into account is the power of “prosumers,” professional consumers that customize and create new content to fit their needs.<sup>5</sup> A handful of streaming services—Pandora, Spotify, Netflix, and Hulu—recognize this trait by offering prosumers content based on their interests and providing a platform to customize such content. As pioneers in their respective fields, each of these services has been bombarded with legal issues from their royalty compensation systems to whether such royalties should be entitled to special treatment.<sup>6</sup> However, keeping these services running efficiently reduces potential infringement. If prosumers aren’t given a platform to enjoy content, they will create one, by either developing systems that infringe on copyrights or exchanging information on illegal downloading sites. When streaming stops at a country’s IP address, prosumers will find a way.

Currently, streaming services are offered piecemeal to several countries depending on federal copyright schemes. Despite its hundreds of millions of listeners, music streaming service Pandora has only just recently expanded to Australia because of its issues paying noninteractive webcast

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3. Gregory Alan Barnes, *SOPA, PIPA: Pause and Reset*, THE HILL’S CONGRESS BLOG (Jan. 20, 2012), <http://thehill.com/blogs/congress-blog/technology/205459-sopa-pipa-pause-and-reset>.

4. Elizabeth Townsend Gard, *Copyright Law v. Trade Policy: Understanding the Golan Battle Within the Tenth Circuit*, 34 Colum. J.L. & Arts 131, 198–99 (2011).

5. Peter Suci, *The Rise of the Prosumer*, TECHCRUNCH (June 15, 2007), <http://techcrunch.com/2007/06/15/the-rise-of-the-prosumer/>.

6. *Infra* Part II.

royalties.<sup>7</sup> Meanwhile, interactive webcaster Spotify quickly expanded to several territories after initially being blocked by copyright laws in each country.<sup>8</sup> Comparatively, video-streaming service Hulu has yet to expand into territories where similar service Netflix has proliferated and thrived, offering a variety of content to match the compensation system in each country it serves.<sup>9</sup> This lack of a unified system for streaming services contributes to the very infringement that content creators seek to avoid. Studies show that territories see a drop in illegal downloading activity when they offer legal streaming services, a platform through which creators get paid even if the user does not buy their end product—the album or DVD.<sup>10</sup> A global system will not only adhere to the URAA as part of the Berne Convention, it will also rejuvenate the process of licensing revenue for content creators.

This note explores the possibility of creating a standardized licensing and royalty computation process for digital content, with an emphasis on music, film, and television streaming services. Part II provides a brief overview of copyright law for media and the current royalty collection system for streaming services. Part III analyzes previous approaches to a multinational licensing system and addresses how copyright acts as a barrier to entry for legitimate web-based services. Finally, Part IV proposes an international market for licensing as well as computing, collecting, and distributing royalties for online streaming performances. Part V considers the likelihood of reaching a consensus on the international market and meeting the end goal of providing protection to content creators while respecting the rights of prosumers.

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7. See Darrell Etherington, *Pandora Internet Radio Launches Fully in Australia and New Zealand with Mobile Apps For iOS and Android*, TECHCRUNCH (Dec. 10, 2012), <http://techcrunch.com/2012/12/10/pandora-internet-radio-launches-fully-in-australia-and-new-zealand-with-mobile-apps-for-ios-and-android/>.

8. *Full List of Territories Where Spotify is Available*, SPOTIFY, [support.spotify.com/uk/learn-more/faq/#/article/Availability-in-overseas-territories](http://support.spotify.com/uk/learn-more/faq/#/article/Availability-in-overseas-territories) (last visited Feb. 11, 2013).

9. See Julianne Pepitone, *Netflix Expands to 43 New Countries*, CNN MONEY (July 5, 2011), [http://money.cnn.com/2011/07/05/technology/netflix\\_international/index.htm](http://money.cnn.com/2011/07/05/technology/netflix_international/index.htm); and Shane McGlaun, *Netflix Now Available in Sweden, Denmark, Norway, and Finland*, SLASH GEAR (Oct. 19, 2012), <http://www.slashgear.com/netflix-now-available-in-sweden-denmark-norway-and-finland-19252816/>; see also Richard Lawler, *Hulu Launches Streaming in Japan for About \$20 US Monthly*, ENGADGET BLOG (Sept. 1, 2011), <http://www.engadget.com/2011/09/01/hulu-launches-streaming-in-japan-for-about-20-us-monthly/>.

10. Rebecca Guerrero, *Internet Radio Decreases Amount of Illegal Music Downloads*, THE PROSPECTOR, Nov. 20, 2012, <http://www.utepprospector.com/news/internet-radio-decreases-amount-of-illegal-music-downloads-1.2957417#.URnZY1pU4wk>.

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## II. Background: The Current State of Copyright Law for Streaming Services

### A. The Emergence of Online Systems

Streaming is the digital distribution of audio or video content online.<sup>11</sup> Distributing music via internet radio format is known as “webcasting.”<sup>12</sup> The handful of early twenty-four hour internet radio stations include Virgin Radio in London and Sonicwave.com, which was supported by webcasting licenses from the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”).<sup>13</sup> Like terrestrial radio, webcasters were required to compensate music composers via publishing royalties paid to ASCAP, BMI, and (when necessary) the smaller PRO “SESAC,” originally known as the Society of European Stage Authors and Composers.<sup>14</sup>

Pursuant to the Sound Recording Act of 1971, holders of sound recording copyrights “had no right to extract licensing fees from radio stations and other broadcasters.”<sup>15</sup> The recording industry recognized a mutual benefit in radio broadcasts; their music would receive free advertising and lead consumers to purchase music, while radio broadcasters would gain a listening audience.<sup>16</sup> Therefore while two copyrights are inherent in every song—the sound recording and the underlying composition—both satellite and terrestrial radio providers were only obligated to pay for the underlying composition via royalties to publishers and composers.<sup>17</sup>

“With the inception and public use of the internet in the early 1990s, the recording industry became concerned that existing copyright law was insufficient to protect the industry from music piracy.”<sup>18</sup> The Recording Industry Association of America (“RIAA”) was primarily concerned that if internet users could listen to broadcast music on the internet for free, they would stop purchasing music.<sup>19</sup> This led to the amendment of the exclusive

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11. WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 17 (2004).

12. *Id.* at 4.

13. Ozzki.com, *History of Online Radio*, <http://www.phats.co.uk/History%20of%20online%20radio.html> (last visited Jan. 10, 2012).

14. *The Music Royalty Breakdown*, INDIE AND UNSIGNED (Apr. 3, 2012), <http://www.indieandunsigned.com/the-music-royalty-breakdown/>.

15. *Arista Records LLC v. Launch Media, Inc.*, 578 F. 3d 148, 152 (2d Cir. 2009).

16. *Id.*

17. *The Music Royalty Breakdown*, *supra* note 14.

18. *Arista Records*, 578 F. 3d 148, at 153.

19. *Id.*

rights provision in the Copyright Act. Codified as part of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 114 created a statutory basis for performance royalties to be paid for satellite and internet radio broadcasts in addition to publishing royalties.<sup>20</sup> Unlike terrestrial radio providers that only paid composers, webcasters were faced with the initial obligation of paying the owners of the sound recording—the record company.<sup>21</sup>

The distinction between interactive and non-interactive webcasts further modified the royalty fee. Interactive webcasts are entitled to individual licensing fees under the DMCA while noncustomizable or noninteractive services pay to statutory licenses.<sup>22</sup> The Second Circuit Court of Appeals scrutinized the applicability of interactive and noninteractive website distinctions to internet radio in *Arista Records, LLC v. Launch Media, Inc.*<sup>23</sup>

Arista Records and a collection of similarly situated record companies brought suit against Launch Media, Inc. for its webcasting service LAUNCHcast.<sup>24</sup> LAUNCHcast allowed users to create stations that were customizable by genre, artist, or song.<sup>25</sup> Arista argued that the customizable service violated its exclusive right to the sound recordings played because Launch had failed to pay an individual licensing fee for its service.<sup>26</sup> Launch rebutted that the service was noninteractive, thus subject to the statutory fee set by the Copyright Royalty Board (“CRB”).<sup>27</sup>

The Second Circuit looked to the statutory definition of “interactive” and “noninteractive” to categorize the LAUNCHcast program and establish any liability. According to 17 U.S.C. § 114(j)(7), an interactive service is a service that “enables a member of the public to receive a transmission of a program specially created for the recipient, or on request.”<sup>28</sup> Otherwise, if a digital audio transmission is not interactive, its primary purpose is to “provide to the public such audio or other entertainment programming,” subject to a compulsory or statutory licensing fee.<sup>29</sup> Thus, the court had to determine if a webcasting service such as LAUNCHcast was interactive

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20. *Id.* at 152.

21. *Id.*; see generally *The Music Royalty Breakdown*, *supra* note 14.

22. *Id.* at 154.

23. 578 F.3d 148 (2d Cir. 2009).

24. *Id.* at 150.

25. *Id.* at 157–58.

26. *Id.* at 151.

27. *Id.*

28. 578 F.3d 148, 150 (2d Cir. 2009).

29. *Id.* at 151.

based on whether the user could receive a transmission specially created for him or her.<sup>30</sup>

Assessing the format of the LAUNCHcast song selection process, the court declared that the system was noninteractive according to the statute.<sup>31</sup> Although users could input various factors to determine the type of song that would play, they never had the ability to choose certain songs.<sup>32</sup> Instead, LAUNCHcast had algorithms in place that would select which songs to play from its finite set, based on user ratings of similar songs.<sup>33</sup> The user was not allowed to restart any song that was playing, nor repeat any of the previously played songs in the playlist.<sup>34</sup> LAUNCHcast also limited the number of songs played from one artist in order to increase variety beyond the user's initial preferences.<sup>35</sup> Therefore, since LAUNCHcast users could not expect to hear songs on demand, nor specially craft each song on the playlist, the court held that the system did not meet the interactive definition.<sup>36</sup>

Since the *Arista* decision, several internet radio and music subscription services have been developed and categorized as either interactive or noninteractive. Services such as Rhapsody and Spotify allow users to select specific songs to add to playlists and play on demand, thus they are interactive services subject to royalties for each song.<sup>37</sup> Meanwhile, noninteractive services such as Pandora do not allow users to select specific songs and therefore pay a performance royalty based on the statutory rate.<sup>38</sup>

When songs are streamed in the United States, the royalties are “deducted by the digital store and held” until the songwriter or publisher informs the service where to send the royalties.<sup>39</sup> Any streams outside of the United States are processed by local collection societies, like the Performing Rights Society for Music in the United Kingdom (“PRS for Music”), the Japanese Society for Rights, Authors, Composers, and Publishers (“JASRAC”), or the German Society for Musical Performing

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30. *Id.* at 152.

31. *Id.* at 164.

32. *Id.* at 159.

33. *Arista Records*, 578 F.3d 148, 160 (2d Cir. 2009).

34. *Id.* at 158.

35. *Id.* at 160.

36. *Id.* at 160–61.

37. Doug Freeman, *Pennies From Heaven: The New Streaming Economy is Here, with or Without Royalties*, AUSTIN CHRONICLE, May 18, 2012, <http://www.austin-chronicle.com/music/2012-05-18/pennies-from-heaven/>.

38. *Id.*; see also 17 U.S.C. § 114(d), (j)(7) (2012).

39. Jamie Purpora, *How We're Getting Your Mechanicals from Streams*, TUNECORE BLOG (Nov. 8, 2012), <http://blog.tunecore.com/2012/11/how-were-getting-your-mechanicals-from-streams.html/>.

and Production Rights (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte or “GEMA”).<sup>40</sup> Both interactive and non-interactive services pay performance royalties to composers and music publishers through performing rights organizations (“PROs”).<sup>41</sup> In addition interactive services pay performance royalties for sound recordings through negotiations with each label, while noninteractive services pay the compulsory rate through the nonprofit digital collection agency SoundExchange.<sup>42</sup>

## B. Current Models and Problems

While the latest internet radios sites have fallen into their respective webcast designations, they are not free from all royalty issues. Pandora, one of the most successful internet radio platforms to date, has recently lost favor in the artistic community. Pandora launched in 2005 as a personalized radio experience.<sup>43</sup> Taking the LAUNCHcast concept a step further, Pandora uses the Music Genome Project to break down a song’s “DNA”—rhythm, genre, vocal stylization, and instrumentation—to suggest songs for users.<sup>44</sup> Once a new song appears on the user’s playlist, he/she can like it, skip it, or merely listen.<sup>45</sup> By allowing users to customize their playlists after one song based on liking or adding additional songs and elements, Pandora has garnered an audience of over two hundred million users.<sup>46</sup>

As a noninteractive webcaster, Pandora pays two types of performance royalties: statutory performance royalties for the sound recording and performance royalties for the underlying composition.<sup>47</sup> As stated earlier, statutory performance royalties for digital music are paid to the nonprofit organization SoundExchange, which collects the royalties and disperses them back out to artists and record companies.<sup>48</sup> Writers’ royalties are paid

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Press Room: About Pandora*, PANDORA, <http://pandora.com/press> (last visited Jan. 20, 2013).

44. *Id.*

45. *Company Overview*, PANDORA BLOG, <http://blog.pandora.com/press/pandora-company-overview.html> (last visited Jan. 20, 2013).

46. Jordan Crook, *Pandora Surpasses 200 Million Registered Users, 140 Million Access Via Mobile*, TECHCRUNCH (Apr. 9, 2013), <http://techcrunch.com/2013/04/09/pandora-surpasses-200-million-registered-users-140-million-access-via-mobile/>.

47. Joey Flores, *The Downfall of Pandora, Consumer Choice and Emerging Music*, HYPEBOT (Nov. 7, 2012), <http://www.hypebot.com/hypebot/2012/11/the-downfall-of-pandora-consumer-choice-and-emerging-music.html>.

48. *Id.*



out to the PROs ASCAP, BMI, and SESAC.<sup>49</sup> Unlike satellite radio providers like Sirius, which pay a percentage of its revenue as performance royalties, Pandora pays a per-stream fee every time a song is played.<sup>50</sup> This “willing buyer, willing seller” model is still based on the statutory rate, but does not account for the internal performance of the company.<sup>51</sup> As a result, Pandora paid out royalties of sixty percent, fifty percent, and fifty-four percent of its revenue in fiscal years 2010, 2011, and 2012 respectively.<sup>52</sup> Unfortunately, while Pandora is one of the first radio systems to fairly pay record companies and artists, the payments are essentially killing the company.

Pandora and a handful of other internet radio providers are looking to alter the “willing buyer, willing seller” model with the Internet Radio Fairness Act.<sup>53</sup> Introduced in the House of Representatives in September 2012, the bill would shift noninteractive webcast services to the satellite radio model.<sup>54</sup> Instead of paying half of its revenue to SoundExchange, Pandora could adopt Sirius’s eight percent rate.<sup>55</sup> Not surprisingly, artists and record companies condemn the bill as Pandora’s attempt to “pad [its] pockets” instead of generating more revenue through advertising.<sup>56</sup>

What the labels and artists fail to realize is the service offered by Pandora essentially democratizes the digital marketplace. Unlike broadcast radio, which offers a static set of music, Pandora’s customizability offers an array of music to users from obscure ska for hardcore reggae lovers to Top 40 for teens.<sup>57</sup> Doing so recognizes niches of users and in turn pays artists that would otherwise not be discovered. Without a way to protect this customizability while also paying a feasible amount of royalties, Pandora and services like it will bulk up their playlists with advertisements or focus more on mainstream artists until they become as homogenized as their predecessors.<sup>54</sup>

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49. See generally *The Music Royalty Breakdown*, *supra* note 14.

50. Geoff Morris, *Pandora Versus Musicians – Internet Radio Fairness Act*, ASU SPORTS AND ENTERTAINMENT LAW JOURNAL BLOG (Oct. 15, 2012), <http://www.sportsandentertainmentlawblog.com/2012/10/pandora-musicians-internet-radio-fairness-act/>.

51. *Id.*

52. *Id.*

53. *Id.*

54. Ben Sisario, *Proposed Bill Could Change Royalty Rates for Internet Radio*, N.Y. TIMES, Sept. 23, 2012, [http://www.nytimes.com/2012/09/24/business/media/proposed-bill-could-change-royalty-rates-for-internet-radio.html?\\_r=0](http://www.nytimes.com/2012/09/24/business/media/proposed-bill-could-change-royalty-rates-for-internet-radio.html?_r=0).

55. See Flores, *supra* note 47.

56. See Flores, *supra* note 47.

57. See Flores, *supra* note 47.

Despite not turning an annual profit in its seven-year history, Pandora continues to survive by increasing its user base across multiple platforms. Since 2010, it has launched on over two hundred consumer electronic devices including Blu-Ray players, smartphones, and cars.<sup>58</sup> In 2011, Pandora was the number two all-time downloaded free iPhone app and the number one all-time downloaded free iPad app.<sup>59</sup> Now, mobile use contributes to seventy-five percent of Pandora's 3.3 billion annual total listener hours.<sup>60</sup> In addition, Pandora expanded internationally in December 2012 by launching online and on mobile devices in Australia and New Zealand.<sup>61</sup> The company has transplanted its customization to Oceania by offering playlists based on local hits or featuring local artists in addition to its ten thousands songs already recognized through the Music Genome Project.<sup>62</sup> Slowly but surely, Pandora is contributing to the global fight against online piracy by offering users customizable platforms and providing a potentially viable revenue stream for artists.

Record labels and their artists are fighting the Internet Radio Fairness Act with so much vigor because online music has become their main source of revenue. In 2011, digital music sales surpassed physical sales for the first time in history.<sup>63</sup> Digital music took 50.3% of the market share, an increase of 8.4% from 2010, while physical sales dropped by five percent.<sup>64</sup> Just nine years ago the bestselling physical album of the year would have sold ten million copies, but last year it was Adele's *21* selling just 5.8 million records.<sup>65</sup> Compare that to Nicki Minaj's single "Super Bass," which was the most streamed song and music video in 2011 with 84.9 million audio streams and 71 million video streams.<sup>66</sup> Record companies desperately need to support legitimate music platforms online in order to stay profitable.

Since the implementation of the DMCA, the RIAA and the Motion Picture Association of America ("MPAA") have put more energy into shutting down illegal digital services than supporting legitimate

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58. *Company Overview*, PANDORA BLOG, <http://blog.pandora.com/press/pandora-company-overview.html> (last visited Jan. 20, 2013).

59. *Id.*

60. *Pandora Refreshes its Mobile Apps*, USA TODAY, Oct. 30, 2012, <http://www.usatoday.com/story/tech/personal/2012/10/29/pandora-refreshes-its-mobile-apps/1667745/>.

61. Etherington, *supra* note 7.

62. *Id.*

63. Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, TIME, Jan. 6, 2012, <http://business.time.com/2012/01/06/digital-music-sales-finally-surpassed-physical-sales-in-2011/>.

64. *Id.*

65. *Id.*

66. *Id.*

alternatives. In *MGM Studios v. Grokster, Ltd.*, this coalition of content owners brought suit against Grokster, which allowed computer users to share copyrighted files through peer-to-peer networks.<sup>67</sup> The group of movie studios and labels argued that Grokster “knowingly and intentionally distributed their software to enable users to infringe copyrighted works.”<sup>68</sup>

Billions of files had been shared across the network, ninety percent of which were considered illegal copies.<sup>69</sup> The Court imposed liability on Grokster for its contributory infringement because it facilitated files that it knew to be infringing material in order to profit from advertising revenue.<sup>70</sup> In short, the Court held that a company that “distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties.”<sup>71</sup> After successfully shutting down Grokster in this Supreme Court case and similar company LimeWire in 2010, the entertainment industry slowly began countering the effects of digital media.<sup>72</sup>

Like music sales, the film industry’s physical sales are losing ground against digital distribution. Last year purchases of Blu-ray and DVD movies were expected to fall for the second year in a row to 2.4 billion, while legally downloaded movies were expected to outperform those disc sales.<sup>73</sup> The year 2012 became the tipping point as “U.S. consumers [made] a historic switch to internet-based consumption.”<sup>74</sup> Indeed, the film industry’s crown jewel has been Netflix, which makes up a bulk of subscription, non-physical viewing.<sup>75</sup> With nearly twenty-three million subscribers, Netflix offers flat rate DVD-by-mail services and streaming of over 100,000 titles.<sup>76</sup> The latter service has surpassed physical sales; in

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67. 545 U.S. 913, 919–20 (2005).

68. *Id.* at 920–21.

69. *Id.* at 933.

70. *Id.* at 914.

71. *Id.* at 918.

72. See generally *Arista Records LLC v. LimeWire LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011), in which the district court granted plaintiffs their motion for permanent injunction against LimeWire for inducement of copyright infringement, common law infringement, and unfair competition.

73. Justin Massoud, *U.S. Online Movies to Top Physical Media in 2012*, MYCE (Mar. 23, 2012), <http://www.myce.com/news/u-s-online-movies-to-top-physical-media-in-2012-60581/>.

74. *Id.*

75. *Id.*

76. Dan Sabbagh, *Hollywood in Turmoil as DVD Sales Drop and Downloads Steal the Show*, THE GUARDIAN, May 3, 2011, <http://www.guardian.co.uk/business/2011/may/03/film-industry-turmoil-as-dvd-sales-drop>.

2011 the total digital revenue for Netflix reached \$1.5 billion.<sup>77</sup> In turn, Netflix paid film companies \$192 million for its streaming rights and another \$377 million to rightsholders from its subscription service.<sup>78</sup>

In addition to offering a wide array of titles, Netflix gauges consumer interests and offers customized suggestions for new films based on those interests.<sup>79</sup> Like Pandora, Netflix has become an industry leader because it has created a user-friendly interface that assesses the interests of its participants rather than dictates what is displayed or heard. Instead of facilitating piracy like Grokster and digital media platforms before them, these two companies have contracted extensively with rightsholders to legitimize their content.

Granting performance rights for audiovisual works such as film and television programs is not nearly as contentious as obtaining similar rights for music. The exclusive right of a copyright holder to perform and reproduce its audiovisual work is granted by 17 U.S.C. § 106.<sup>80</sup> As owners of these works studios negotiate licenses directly with potential service providers, and, like record labels, prefer to charge high licensing fees upfront to compensate for lackluster physical sales.<sup>81</sup> As a result Netflix may offer television series and film collections from a certain group of studios while growing competitor Amazon may host content from another handful of producers.<sup>82</sup>

For Netflix, country-by-country negotiations have appeared to work seamlessly, and the company has since expanded to over forty countries, including Brazil, Denmark, Finland, Norway, and Sweden.<sup>83</sup> On the other hand, Pandora has been stalled in its expansion because of varying royalty rates for terrestrial, satellite, and internet radio. Regardless, both platforms have helped shift the entertainment industry from lackluster physical sales and infringement litigation to thriving digital economies. “Only by

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77. Letter from Netflix to Shareholders (Jan. 25, 2012), *available at* [http://files.shareholder.com/downloads/NFLX/2316572145x0x536469/7d1a24b7-c8cc-4f19-a1dd-225a335dabc4/Inv-est or%20Letter%20Q4%202011.pdf](http://files.shareholder.com/downloads/NFLX/2316572145x0x536469/7d1a24b7-c8cc-4f19-a1dd-225a335dabc4/Inv-est%20Letter%20Q4%202011.pdf).

78. Glenn Peoples, *What the Music Business Can Learn from Netflix's Success*, BILLBOARD MAGAZINE, Apr. 26, 2011, <http://www.billboard.com/biz/articles/news/1178198/what-the-music-business-can-learn-from-netflixs-success>.

79. *How Netflix Works*, NETFLIX, <https://signup.netflix.com/MediaCenter/HowNetflixWorks> (last visited Feb. 11, 2013).

80. *Id.*

81. Dan Rayburn, *Stream This!: Netflix's Streaming Costs*, STREAMINGMEDIA.COM (June/July 2009), <http://www.streamingmedia.com/Articles/Editorial/Featured-Articles/Stream-This!-Netflix-Streaming-Costs-65503.aspx>.

82. Brian Stelter, *A CBS Deal Bolsters Amazon's Challenge to Netflix*, N.Y. TIMES (Feb. 11, 2013), <http://mediadecoder.blogs.nytimes.com/2013/02/11/amazon-and-cbs-announce-deal-on-rights-to-under-the-dome/>.

83. See Pepitone, *supra* note 9; see also McGlaun, *supra* note 9.

offering consumers easy-to-access digital streaming services that have total selection and competitive pricing will the industry keep honest consumers from resorting to piracy.”<sup>84</sup> Nonetheless, when countries with prohibitive copyright systems inhibit digital streaming, piracy will continue to be a prevailing issue.

### III. Analysis: Multinational Copyright Systems

#### A. The Effects of the Berne Convention

Online streaming services would expand more rapidly if the copyright system were unified among countries. Currently, the closest that countries have come to a universal copyright system are the protection standards implemented through international treaties. Copyright protection standards were first ratified in the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).<sup>85</sup> The Berne Convention promulgated minimum standards for copyright protection and required its signatories to provide the same level of protection to foreign creations as their own domestic works.<sup>86</sup> The United International Bureau for the Protection of Intellectual Property (known by its French acronym “BIRPI”) was established in 1893 to administer the convention.<sup>87</sup>

In 1960, BIRPI became the World Intellectual Property Organization (“WIPO”) when the organization underwent structural changes and moved from Berne to Geneva.<sup>88</sup> WIPO administered the Berne Convention agreement in addition to other agreements on intellectual property rights, but failed to standardize intellectual property law as a whole.<sup>89</sup> Key to WIPO’s weakness was its inability to provide an “adequate dispute settlement mechanism,” and countries such as the US began to take matters into their own hands by enforcing intellectual property rights within trade regulation.<sup>90</sup> The matter was resolved when the Berne Convention was synthesized into the agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) in 1996.<sup>91</sup> As part of the new World Trade

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84. Sage Vanden Heuvel, *Fighting the First Sale Doctrine: Strategies for a Struggling Film Industry*, 18 MICH. TELECOMM. & TECH. L. REV. 661, 687 (2012).

85. SIMON LESTER ET AL., *WORLD TRADE LAW: TEXT, MATERIALS, AND COMMENTARY* 705 (1st ed. 2008).

86. *Id.* at 704-05.

87. *WIPO Treaties—General Information*, WIPO, <http://www.wipo.int/treaties/en/general/> (last visited Jan. 7, 2013).

88. *Id.*

89. *Id.*

90. LESTER, *supra* note 85, at 706.

91. *Id.*

Organization (“WTO”), intellectual property rights in TRIPS now had the minimum standards of the Berne Convention reinforced by the dispute settlement mechanisms of the General Agreements on Tariffs and Trade (“GATT”).<sup>92</sup> Now, 159 countries adhere to minimum copyright protection standards in exchange for free trade among member nations.<sup>93</sup>

The threat of trade concessions as enabled by the WTO has forced countries to comply with TRIPS even amidst domestic contention. Specifically, *Golan v. Holder* exemplifies how international trade law can be exercised over domestic preferences for using copyrighted works.<sup>94</sup> In 2001, a collection of composers, publishers, videographers, and audio/video retailers challenged the constitutionality of Section 514 of the URAA, as implemented in 17 U.S.C. § 104A.<sup>95</sup> The complainants argued that the measure violated the limited times provision of the Copyright Clause and infringed upon the freedom of expression principles of the First Amendment by pulling works out of the public domain.<sup>96</sup> The Court struck down both constitutional challenges to the measure, holding that restoration as a means of complying with the Berne Convention was not retroactive in that it recognized the rules promulgated in 1989 when the Berne Convention was first implemented.<sup>97</sup>

Most of the works involved—*Peter and the Wolf*, *Metropolis*, and the string quartets of Russian composer Dmitri Shostakovich’s—were accessible in the United States only through low-cost sheet music and recording compilations made possible because they were not subject to copyright royalties.<sup>98</sup> Now, the composers, publishers, and videographers that acted as a medium to deliver these works to another generation of consumers have been unnecessarily hindered by a copyright regime that does more to stifle creativity than incentivize creators.<sup>99</sup> By retroactively restoring copyright protection to foreign works, the effect of TRIPS on the United States’s legislative scheme has been to stifle expression of older works.<sup>100</sup> The result of *Golan* demonstrates the influence that international copyright law exerts over minimum standards of protection. If the WTO can be

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92. *Id.*

93. See generally *Understanding the WTO: The Organization*, [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Sept. 4, 2013). As of March 2, 2013, there are 159 members of the WTO. *Id.*

94. 132 S. Ct. 873 (2012).

95. *Id.* at 874, 883.

96. *Id.* at 883.

97. *Id.* at 894.

98. *Id.* at 883.

99. Gard, *supra* note 4, at 153.

100. *Id.*

harnessed to impose protection standards, it can also be used to generate minimum standards of royalty computation for digital distribution systems among member nations.

## B. Previous Approaches to Multinational Licensing

### 1. Country-by-Country Negotiations

In the absence of minimum standards for royalty computation, current market leaders for streaming services have painstakingly acquired separate licenses for each country in which they stream. Based in Sweden, Spotify is a digital music service that offers a “freemium” model for listening—users have either free ad-supported access to music or can pay for an advertisement-free premium service.<sup>101</sup> Unlike Pandora, Spotify is an interactive streaming service that must negotiate performance royalties with each label to obtain the rights to perform the sound recordings.<sup>102</sup> The payoff though is a truly on-demand music service that allows users to fully customize playlists and avoid the song-skipping limitations of services like Pandora.

Spotify launched in 2008 as a “good quality, legal” alternative for users craving a massive music selection online.<sup>103</sup> It has been appropriately labeled a “piracy killer,” as a 2011 survey showed that illegal downloading in Sweden had decreased by more than twenty-five percent since the service started.<sup>104</sup> Twenty-three percent of users polled admitted that they still pirated music, but Spotify’s quality and track availability have helped drastically lower these numbers since 2009.<sup>105</sup> By 2009, Spotify had rapidly made its way through most of Europe—including the UK, Finland, Sweden, Norway, France, Italy, and Spain—“cutting down the interest towards illegal music downloads.”<sup>106</sup> However the company met the most difficulty when trying to permeate the world’s largest music market—the United States.

By 2010 Spotify had attempted to launch in the United States twice. The company struggled to secure licensing rights from the four (now three)

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101. Ben Sisario, *Spotify Loss Widens Despite Higher Revenue*, N.Y. TIMES (Oct. 10, 2011), <http://mediadecoder.blogs.nytimes.com/2011/10/10/spotify-loss-widens-despite-higher-revenue/>.

102. *Id.*

103. Petteri Pyyny, *Spotify, ‘the Music Piracy Killer,’ is Expanding to U.S.*, AFTERDAWN (July 20, 2009), [http://www.afterdawn.com/news/article.cfm/2009/07/20/spotify\\_the\\_music\\_piracykiller\\_is\\_expanding\\_to\\_u\\_s](http://www.afterdawn.com/news/article.cfm/2009/07/20/spotify_the_music_piracykiller_is_expanding_to_u_s).

104. *Id.*

105. Sean F., *Swedish Survey Shows Legal Streaming Services, Like Spotify, Is a Piracy Killer*, DIGITAL DIGEST (Sept. 29, 2011), <http://www.digital-digest.com/news-63151-Swedish-Survey-Shows-Legal-Streaming-Services-Like-Spotify-Is-A-Piracy-Killer.html>

106. Pyyny, *supra* note 103.

major record labels: Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI Music.<sup>107</sup> The labels were unsure about Spotify's ability to adequately pay for music; Apple also quipped that the free service would undercut its download sales.<sup>108</sup> Therefore, the labels initially required prohibitively high licensing fees upfront to mitigate the risk of losing downloading users.<sup>109</sup> Moreover, by the time Spotify attempted to launch streaming services Imeem, Spiral Frog, and MySpace Music had all failed.<sup>110</sup> Record labels had simply lost faith in freemium models.

Understandably, labels balked at the idea of a streaming service that brought in lower royalties per song than downloads. Yet with "a large enough listener base" Spotify and services like it would bring in substantial revenue.<sup>111</sup> After finally reaching the United States in July 2011, Spotify jumped from 750,000 paying subscribers and millions of free listeners to 1.6 million subscribers.<sup>112</sup> Now, the company is "believed to have more than 10 million total users."<sup>113</sup> Although royalties are still only pennies on the dollar, due to the large volume of streaming traffic Spotify is able to bring in \$71 million from its subscribers and \$28 million in advertising to pay out to artists.<sup>114</sup> The Spotify model is now heralded as the leading digital music service, with the average band's revenue increasing steadily over the past year and a half.<sup>115</sup>

The subscription service model with ad-supported streaming has also expanded into the film and television industry. Hulu launched in 2007 as a joint venture between NBC Universal, NewsCorp, and Disney-ABC Television Group.<sup>116</sup> The service offers video-on-demand trailers, clips, behind-the-scenes footage, full films, and full television shows.<sup>117</sup> The ad-supported model streams videos with brief interruptions modeled after broadcast television, while the premium model eliminates ad interruption

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107. Greg Sandoval, *Spotify Crashes into Apple on the Way to U.S.*, CNET NEWS (Oct. 7, 2010), [http://news.cnet.com/8301-31001\\_3-20018971-261.html](http://news.cnet.com/8301-31001_3-20018971-261.html).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Sisario, *supra* note 101.

114. *Id.*

115. Glenn Peoples, *Business Matters: A Brief History of Spotify Royalties*, BILLBOARD MAGAZINE, Aug. 30, 2012, [www.billboard.com/biz/articles/news/1083980/business-matters-a-brief-history-of-spotify-royalties](http://www.billboard.com/biz/articles/news/1083980/business-matters-a-brief-history-of-spotify-royalties).

116. Janet Morrissey, *Hulu's Network Drama*, CNN MONEY (Aug. 20, 2012), <http://tech.fortune.cnn.com/2012/08/20/hulu-problems-kilar/>.

117. *Id.*



and offers more content, such as the whole current season of a listed show instead of the latest episode.<sup>118</sup>

Hulu has managed to license content from over 380 content providers and streams video for major cable companies and web portals such as AOL, MSN, and Yahoo.<sup>119</sup> With its licensing and distribution deals Hulu accumulated \$420 million in revenue in 2011 and had more than two million paying subscribers as of 2012.<sup>120</sup> Nevertheless, its owners consistently hinder the streaming of its core product, recently aired programming. A 2010 IPO never launched because the three leading owners—NBC, NewsCorp (which owns the Fox networks), and ABC—refused to relinquish control of their content.<sup>121</sup> The three even had difficulty acquiring the licensing rights from the fourth major broadcaster CBS, which finally offered up over 2,600 episodes starting January 2013.<sup>122</sup>

Domestic contention over licensing rights has stymied the growth of Hulu in other territories. Hulu has tried to expand to England and Ireland for over three years but has yet to do so because of content disputes among American broadcasters and U.K. distributors.<sup>123</sup> In contrast, Netflix just launched in these two territories in early 2012.<sup>124</sup> Part of the reason Netflix has been such a success where Hulu has failed is because Netflix streams full past seasons of current or library shows, while Hulu contracts for current-season programming.<sup>125</sup>

Like the major record labels just a few years ago, content proliferators in film and television do not want to give up initial airings on traditional media platforms in exchange for digital platforms. As a result, Hulu is currently available outside the United States only in Japan, where it launched in 2011.<sup>126</sup> The Japanese subscription service offers access to popular shows such as *Grey's Anatomy* and films such as *Pirates of the Caribbean* along with local content.<sup>127</sup> Meanwhile the music industry has

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Chris Welch, *CBS Finally Embraces Hulu, Signs Licensing Agreement for Over 2,600 Episodes*, THE VERGE (Nov. 5, 2012), <http://www.theverge.com/2012/11/5/3605526/cbs-hulu-plus-licensing-agreement>.

123. Robert Andrews, *Netflix Cleared for UK & Ireland Take-Off Early in 2012: TV and Movies*, PAID CONTENT (Oct. 24, 2011), <http://paidcontent.org/2011/10/24/419-netflix-cleared-for-uk-ireland-take-off-early-in-2012-tv-and-movies/>.

124. *Id.*

125. *Id.*

126. See Lawler, *supra* note 9.

127. *Id.*

all but abandoned the physical market for album sales and instead is more willing to license to digital media platforms.

Upon analysis of current country-by-country licensing efforts, it is clear that countries prefer to keep their autonomy when providing copyright protection within their territories. Absent any international agreements to the contrary, digital media service providers can continue to anticipate cumbersome negotiation efforts with rightsholders in various territories. Only when countries can agree on basic standards for licensing and fee structures can companies avoid costly barriers to entry into the digital market.

## 2. Regional Negotiations

In November 2012 the EU issued a Directive on “the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.”<sup>128</sup> The EU noted that collection societies such as PRS for Music and GEMA are essential cogs in the process of licensing digital media through streaming services.<sup>129</sup> Since most online users are not aware of territorial boundaries, collection societies are “increasingly requested to grant licenses that cover several or all Member states.”<sup>130</sup> Current copyright directives do not offer any guidelines for managing rights involving several countries, and as a result online service providers must combine a cumbersome number of multi-territory licenses with territorial licenses to legally distribute their services.<sup>131</sup> Overall the EU Directive argues that the current process is time consuming and potentially cost prohibitive for smaller distributors that do not have the capacity and technical resources to keep up with such extensive licensing.<sup>132</sup>

The EU insists that the grant of multi-territory licenses for musical works be facilitated through transparent accounting by collection societies. Its optimal proposed approach is a “governance and transparency

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128. *Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Music Works for Online Uses in the Internal Market*, EUROPEAN COMMISSION, (July 11, 2012), [http://ec.europa.eu/internal\\_market/copyright/docs/management/com-2012-3722\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf) (hereinafter referred to as “*Directive*”).

129. *Id.* at 2.

130. *Commission Staff Working Document: Executive Summary of the Impact Assessment*, EUROPEAN COMMISSION 2 (July 17, 2012), [http://ec.europa.eu/research/science-society/document\\_library/pdf\\_06/impact-assessment-executive-summary\\_en.pdf](http://ec.europa.eu/research/science-society/document_library/pdf_06/impact-assessment-executive-summary_en.pdf) (hereinafter referred to as “*Executive Summary*”).

131. *Id.*

132. *Id.* at 3–4.

framework” combined with the “European Licensing Passport.”<sup>133</sup> Governance and Transparency (“G&T”) would involve creating “principle-based rules” which would improve current financial management and increase rightsholders’ control over collection societies.<sup>134</sup> All rules governing rights management would be set out in one instrument providing for their visibility, understanding and enforceability.<sup>135</sup> Existing EU rules on collective rights management as well as nonbinding recommendations would be codified and exercised among all Member States.<sup>136</sup> Further, under this option a Member State is required to impose sanctions for breaches of G&T obligations.<sup>137</sup>

The European Licensing Passport will complement the G&T by encouraging rightsholders to aggregate their repertoires for online use.<sup>138</sup> The Passport will act as a vehicle for licenses by encouraging rightsholders to license their rights through effective multi-territorial licensing infrastructures.<sup>139</sup> The infrastructures they use will be preselected with set conditions to “ensure sufficient data handling and invoicing capabilities.”<sup>140</sup> The EU believes that market forces will force the Passport to become just one aggregate market that will simplify transactions, require fewer licenses to be negotiated, and improve the quality of these services with more efficient accounting.<sup>141</sup>

The availability of a less cumbersome and more cost efficient licensing system among Member States will entice not only more digital music services to enter the marketplace but also offer more variety to users in niche markets.<sup>142</sup> Efficient collection societies with streamlined multinational licenses eliminate the need to negotiate each agreement by country, which allows even the “smallest and less popular repertoires to access the market.”<sup>143</sup> Furthermore, transparent rules governing licensing across national borders will strengthen current services, creating more transparent collection societies to maximize revenue for rightsholders and foster diversity for consumers.<sup>144</sup> When passed, the Directive will be

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133. *Id.* at 6–7.

134. *Id.* at 5.

135. *Directive*, *supra* note 128, at 35.

136. *Id.* at 151.

137. *Id.* at 135.

138. *Executive Summary*, *supra* note 130, at 5.

139. *Id.*

140. *Id.*

141. *Directive*, *supra* note 128, at 163.

142. *Executive Summary*, *supra* note 130, at 4.

143. *Id.* at 6.

144. *Id.* at 2.

implemented through workshops within each Member State to facilitate the exchange of necessary information.<sup>145</sup>

#### **IV. Proposal: The International Market for Music and Film Performance**

##### **A. The Impact of PTAs on the Global Marketplace**

Depending upon the success of the Directive, multi-territorial licensing could be adopted by North American countries and Asian partners as well, reducing the number of tedious steps for digital service providers. Within the WTO, plurilateral trade agreements (“PTAs”) are able to address regional concerns that would otherwise be overlooked in multilateral agreements such as TRIPS.<sup>146</sup> PTAs create an exception to the national treatment provision of the WTO by allowing signatories to create optimal trading relationships with their geographical neighbors beyond general GATT provisions.<sup>147</sup> PTAs can establish prototypes for liberalization in a variety of regional trading areas, and persuade other Members to comply in order to compete on a global scale.<sup>148</sup>

Specifically for licensing services, adopting the Directive as a PTA, would enable EU member countries to generate measures for collection societies that protect copyright beyond the basic provisions of TRIPS. PTAs also have the potential to alter market forces outside of their signatories, which could lead trading partners in North America and throughout Asia to adopt similar standards.<sup>149</sup> Film and television companies as well as PROs already include the U.S. territories of the Caribbean and Puerto Rico within licensing agreements as standard language. Generating a PTA recognizing a single licensing process throughout the Americas is not a stretch.

A homogenized digital licensing system between the United States and the EU is also aided by the EU’s history of recognizing a performance right for both the musical composition and the sound recording.<sup>150</sup> For example, the United Kingdom manages performance royalties through PRS for Music and Phonographic Performance Limited (“PPL”).<sup>151</sup> PRS for Music

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145. *Id.* at 7.

146. LESTER, *supra* note 85, at 346.

147. *Id.* at 352.

148. *Id.* at 347.

149. *Id.*

150. *European Copyright Code*, THE WITTEM PROJECT (April 2010), available at [http://www.copyrightcode.eu/Wittem\\_European\\_copyright\\_code\\_21%20april%202010.pdf](http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf).

151. *What We Do*, PPL: STANDING UP FOR MUSIC RIGHTS, <http://www.ppluk.com/About-Us/What-We-Do/> (last visited Mar. 8, 2013).

acts as a traditional PRO by paying publishers and composers, while PPL pays record companies as the sound recording owners.<sup>152</sup> Unlike in the United States, most European nations have always recognized a performance right for sound recordings, whether in terrestrial radio or online streaming.<sup>153</sup> Therefore, an international collection agency modeled after the EU Directive and coupled with the function of traditional PROs and digital rights managers, like SoundExchange and PPL, is a feasible vehicle for online streaming services.

### B. Cultural Protectionism as a Barrier to Entry

A potential barrier to the development of a global market for media licensing is culture. Certain WTO members are notorious for objecting to international measures that compromise the development of domestic culture. Canada has practiced cultural protectionism for decades, imposing substantial tariffs on American literature and limiting the amount of foreign media that enters the country.<sup>154</sup> China has also limited the amount of foreign media through content reviews and a cap on the number of foreign films available for theatrical distribution.<sup>155</sup> However as mentioned earlier, consumers always find a way to access restricted content, and without legitimate services in place their demand will “be filled only by pirat[ing].”<sup>156</sup>

Member countries like China often comply with international copyright measures when national interests are at stake. For example, China “strongly enforced copyrights relating to online broadcasts of the Beijing

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152. *Id.*

153. *The Law*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/the-law/> (last visited Mar. 8, 2013).

154. *See generally Imaginary to the Death? Free Trade, National Identity, and Canada’s Cultural Preoccupation*, 15 ARIZ. J. INT’L & COMP. L. 203 (1998); *see also* Panel Report, *Canada—Periodicals*, WT/DS31/R (Mar. 14, 1997); *and* Appellate Body Report, *Canada—Periodicals*, WT/DS31/R (June 30, 1997) in which the United States successfully challenged Canada’s ban on its special edition *Sports Illustrated* which targeted advertisements to Canada. The Appellate Body held that Canada’s tax on foreign publications discriminatory in violation of the national treatment provision in the GATT.

155. Charlotte R. Lane et. al., *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, U.S. INTERN. TRADE COM’N 1, 45 (2010 WL 5474164). As a result of extensive content reviews on video games and music consumers seek pirated copies and weaken legitimate sales. Further China limits the number of foreign films for theatrical distribution to twenty. *See also* Appellate Body Report, *China—Publications and Audiovisual Products*, WT/DS363/AB/R (Dec. 21, 2009), in which the Appellate Body held that China denied national treatment to the United States for imported reading materials, sound recordings, and films. As of May 24, 2012, China reported that it complied with the Dispute Settlement Body recommendations.

156. *See* Lane, *supra* note 153, at 45.

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Olympics.”<sup>157</sup> In 2008, China Central Television, NBC, and the International Olympic Committee shut down or blocked over a hundred sites infringing network broadcasts.<sup>158</sup> Meanwhile, NBC made coverage “globally available through legal outlets” including television, mobile phones, and online at NBColympics.com.<sup>159</sup> Through collective enforcement, China made a crucial finding: “the widespread availability of legal broadcasts . . . likely reduced demand for unauthorized videos.”<sup>160</sup>

Dispute settlement procedures against countries like Canada and China are unnecessary when online services allow users to customize content based on location and preferences. Although it is not yet a breakthrough hit with consumers, Hulu in Japan exemplifies what film and television streaming can become in the future.<sup>161</sup> The legal, subscription-based service couples local programming with international blockbusters to satisfy its audience country to country.<sup>162</sup> The same is evident for Pandora, whose Australia and New Zealand platforms host local musicians as well as international hits.<sup>163</sup> The accessibility and customizability of digital streaming services can combat the global plague of piracy and protect the cultural concerns of participating countries.

### C. Creating the Global Marketplace

The EU Directive on promoting transparency and streamlined registration with collection agencies throughout territories can be a model for digital distribution systems in music, film, and television. In regards to music, existing collection agencies can form a syndicate with emerging digital collection societies. Territories that recognize performance rights for sound recordings could also pool their collection societies into the syndicate. Admission into the syndicate and thus the advantage of global streaming services will hinge upon the existence of collection societies for both sound recordings and musical compositions. Since the United States is one of only a few countries that does not recognize the right of performance for broadcasted sound recordings yet has modified its laws for digital sound recordings, it follows that other WTO member countries that

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Sam Byford, *Japan's Digital Content Struggles, the Country of the Future Remains Stuck in the Past*, THE VERGE (Nov. 15, 2012), <http://www.theverge.com/2012/11/15/3628376/japan-digital-content-ecosystem-hulu-country-future>.

162. *Id.*

163. See Etherington, *supra* note 5.

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have already recognized such broadcast right have likely already modified their laws to encompass digital transmissions.

The syndicate of collection societies would be set up through WIPO and run by a standing committee made up of representatives from each member country. The syndicate would mitigate country-by-country negotiations by regulating royalty payments by service providers to rightsholders. Further, initial licensing negotiations will require a consideration of local culture, ensuring that member nations such as Canada and China would be able to control to a limited degree the foreign content that is streamed. As a result, the streaming service will maintain its customizability to consumers while reinforcing local culture.

The syndicate will work on a reciprocal basis—countries could still couple their own content with that of foreign competitors as long as they pay the same royalty rate for foreign competitors as their own domestic providers. This promotes the national treatment standard of the GATT that has previously been a point of contention for entertainment products. Current streaming services, like Pandora, could expand into other countries and negotiate licensing agreements with foreign collection societies with similar parameters as its domestic licenses.

The lack of an existing collection agency for commercial audiovisual streaming is an advantage to the creation of a global market. A unified collection agency can be created through WIPO with the sole purpose of facilitating licensing transactions for online content. In exchange for the ease of having licenses executed and fees collected for them, participating studios will be required to license content at a limited rate. Instead of fixing a rate for which content can be licensed, like for musical compositions and sound recordings, studios will be subject to a ceiling price at which to license their content.

Implementing a standard license for film and television studios will reduce the need for consumers to jump to one streaming service for Universal and Twentieth Century Fox films while maintaining another service to watch Disney films. Instead, service providers can proliferate content knowing that the fee won't be cost prohibitive, and studios will increase reliance on streaming as the primary platform for their content. Although more compliance will be required on behalf of audiovisual rightsholders than music rightsholders, the former can take a lesson from the music industry. As evident after the *MGM v. Grokster* litigation, content providers that do not stay abreast of new technology will find their consumers turning elsewhere.<sup>164</sup> To keep the interest of their audience,

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164. Although content holders prevailed in their injunction against Grokster on the grounds of contributory infringement, consumers have since turned to other P2P sites to find potentially

studios must eventually comply with online streaming as the new primary source of broadcast television, newly released films, and classic content.

## V. Conclusion

In February 2013 the International Federation of the Phonographic Industry (“IFPI”) reported that global sales of music rose last year for the first time since 1999.<sup>165</sup> Although the increase was a meager 0.3%, the IFPI is encouraged that this marks the beginning of a “digital revolution.”<sup>166</sup> Record label executives such as Edgar Berger of Sony Music Entertainment praise digital for “saving music,” while just a decade ago digital was thought to be killing the industry.<sup>167</sup> Yet the growth is not due to the efforts of record labels; it is through online streaming services. Last year the number of subscribers to services like Spotify grew forty-four percent to twenty million prosumers, and in the US where Spotify was initially rejected revenue is expected to rise another thirty million dollars.<sup>168</sup> Film and television studios should take note: “the earlier you can embrace new business models and services, the better.”<sup>169</sup> While physical sales and theater attendance are still falling, video on demand, streaming and film sales through services like iTunes rose fifty-one percent last year.<sup>170</sup>

A healthy global streaming marketplace is key to facilitating the growth of digital media services. With the advent of a licensing syndicate services like Spotify will not take three years to reach one country due to extensive negotiations. Statutory fees would still be in place for noninteractive services like Pandora, but with the increased accessibility to multiple territories across various platforms these licensing pitfalls can be overcome by sheer user volume.

Film and television services can also become streamlined through collection agencies. A WIPO syndicate modeled after the EU Directive would simplify licensing negotiations while also imposing a cap on the

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infringing content for download or streaming. See generally Glyn Moody *Why the Supreme Court’s Grokster Decision Led to More, Not Less, P2P Filesharing*, TECHDIRT (Nov. 22, 2011), <http://www.techdirt.com/articles/20111122/06353116873/why-supreme-courts-grokster-decision-led-to-more-not-less-p2p-filesharing.shtml>.

165. Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES, Feb. 26, 2013, <http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Dorothy Pomerantz, *Rise in Digital Film Sales Doesn’t Help Home Video Market*, FORBES, Jan. 10, 2012, <http://www.forbes.com/sites/dorothypomerantz/2012/01/10/rise-in-digital-film-sales-doesnt-help-home-video-market/>.



licensing fees promulgated by content holders. This will ensure that a wide array of content is secured for the next Netflix or Amazon service. Also, cultural concerns would be addressed by both music services, as well as, film and television platforms by the prosumers themselves; these streaming services will be obligated to provide local content alongside international media, thereby promoting a healthy domestic base while treating foreign works equally. Prosumers will continue to find the content they desire, and rightsholders ready to deliver that content on a global scale will reap the benefits of digital streaming revenue.