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Intellectual Property, Technology, and Justice

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Intellectual Property, Technology, and Justice

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Copyright: Global Dissemination through the Internet and Compulsory Licensing

I. Introduction

Today, other countries never feel quite so far away. Communication between people of one nation and another can be facilitated quite easily. Trains, boats, and planes have made traveling from one country to another very manageable. The Internet can make communication instantaneous. Ironically, intellectual property cannot travel quite as easily. A close friend of mine, who is from the United States, is currently in England earning her master's degree. When she was feeling homesick, she tried to watch some American television shows through websites like Amazon Prime, Hulu and Netflix. In place of her preferred choice of programming, she received an error message informing her that the video was not available due to geographical licensing restrictions. Although being denied a certain television shows does not sound like a serious problem, it is an example of how various copyright laws are inhibiting the free flow of intellectual property between nations. The free flow of cultural works in some ways determines the financial wellbeing of cultures, and this article argues that with the current high minimum standards mandated in international treaties, the neglect in harmonizing copyright laws for the Internet, many nations cannot fairly compete in the intellectual market on a global scale. Today, the Internet connects the world, yet international copyright law have yet to address it.

This article focuses on the current state of international copyright law and how the disconnect created by different copyright policies around the world seem to disproportionately favor some distributors over others. Despite various efforts to harmonize copyright laws, there remains

uneven protection globally, which results in works being protected disproportionately on an international scale. Even when countries offer the same terms of protection, the sharing of works is difficult due to high fees. This creates problems in terms of the dissemination of different ideas around the world. Additionally, the current attempts at international copyright law do not address the Internet, exacerbating the problem. In essence, this article argues that the lack of complete harmonization, the high minimum standards of protections in international treaties, and the failure to address the Internet in international copyright law disrupts the goals and purposes of the United States Copyright Act. Article 1, Section 8, Clause 8 of the United States Constitution grants Congress the authority “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹ To achieve this goal, creations must be shared.

In order to truly promote the progress of science and useful arts, there must be a global effort. To accomplish this, harmonization of copyright laws across nations must be achieved. When there are different copyright licensing laws across borders, culture cannot flow freely. One impediment is the high cost required for licensing a protected work. A specific example used to demonstrate the difficulties with the current state of international copyright law will be programs offered on Amazon Prime, an Internet website that allows subscribers to stream television shows, some of which are permitted within the United States but not permitted in England (due to licensing restrictions). Without compulsory licenses, access to television shows around the globe becomes difficult for Internet service transmitters, such as Netflix, Hulu, and Amazon Prime.

¹ Article 1, Section 8, Clause 8 of the United States Constitution

This article first outlines the history and development of the current copyright laws existing in the United States, in section II. Next, section III outlines international copyright law as developed over time and as it exists currently. Initially bilateral agreements governed copyright laws between nations.² But, today, copyright is governed through various international agreements and treaties, such as the Berne Convention, the Universal Copyright Convention, WIPO Copyright Treaty, and the TRIPs Agreement.³ Section IV will then outline a short history of how cable broadcasters were granted the right to compulsory licensing in the United States and compares them to Internet streamers. Next, section V provides a short overview as to how the high fees associated with copyrighted works affect developing countries. Finally, section VI argues that without harmonization, the spread of culture across borders cannot be accomplished, and that this ultimately frustrates the goal of United States copyright as stated in the United States Constitution. As a specific example, this section will use the licensing restrictions preventing the sharing of culture through television shows offered via Internet streaming, and propose that compulsory licensing may alleviate some of the difficulty in this area.

II. United States Copyright; History and Development

a. The Statute of Anne

Copyright law in the United States was originally drafted after the copyright statutes in England, specifically after the Statute of Anne. The Statute of Anne is the first statute of all time to recognize the rights of authors, as opposed to only printers and booksellers.⁴ Some important provisions of the Statute of Anne are the granting to an author (1) the exclusive right, for

² Roberto Garza Barbosa, Revisiting International Copyright Law, 8 Barry L. Rev. 43, 45 (2007).

³ Id.

⁴ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, Copyright Cases and Materials, 3 (Robert C. Clark et al. eds., 9th ed. 2017).

fourteen years, to print their work; (2) and an additional fourteen years of protection if the author was still living at the conclusion of the first term of fourteen years.⁵ Additionally, the statute imposed a registration requirement that mandated that an author “register title at Stationers’ Hall, and deposit nine copies at official libraries.”⁶ Finally, the statute also included penalties for any individual found to have unlawfully copied a copyrighted work: “every such Offender or Offenders shall forfeit one Penny for Every Sheet which shall be found in his, her, or their Custody.”⁷

The Statute of Anne greatly influenced the development of United States Copyright, and therefore is an important landmark in the history of copyright law as a whole.

b. The First United States Copyright Statute: The Act of 1790

The Act of 1790, like the Statute of Anne, assured authors fourteen years of protection for works such as a map, chart, or a book.⁸ Also similar to the Statute of Anne, the author could gain protection by:

- (1) Recording the title, prior to publication, in the register book of the clerk’s office of the district court where the author or proprietor resided;
- (2) Publishing a copy of the record so made in one or more newspapers for four weeks; and
- (3) Depositing a copy of the work itself in the office of the Secretary of State within six months after publication⁹

c. Modern United States Copyright Acts; 1909 and 1976

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 7

⁹ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials*, 7 (Robert C. Clark et al. eds., 9th ed. 2017).

i. The 1909 Copyright Act

The 1909 Copyright Act was the result of multiple bills, all consisting of different viewpoints and conflicting interests.¹⁰ Due to differing viewpoints, the entire act was difficult to understand.

¹¹ However, the 1909 Copyright Act was a step towards improvement from the previous copyright laws and provided the following:

- (1) for published works, copyright was declared to begin with the publication of the work with copyright notice (rather than from the date of filing the title);
- (2) statutory copyright was made available for unpublished works designed for exhibition, performance or oral delivery;
- (3) the renewal term of protection was extended by 14 years, thus increasing the maximum possible copyright term to 56 years, and
- (4) the certificate of registration was declared to be prima facie evidence of the facts recorded therein in relation to any work.¹²

Notably, this Act placed emphasis on formalities, such as a notice requirement.¹³ If an author failed to fulfill the notice requirement, the work was forfeited to the public domain.¹⁴ On the other hand, fulfilling the requirement came with many benefits: increased protection from state to federal for 28 years, and allowed for an additional 28 year renewal, potentially totaling the protection to 56 years.¹⁵

ii. The 1976 Copyright Act

The 1976 Copyright Act provides the basis for current copyright law, and was made in an effort to update the preexisting copyright act to accommodate new technology.¹⁶ One notable provision was the imposition of copyright liability on cable television systems and jukeboxes

¹⁰ *Id.*

¹¹ *Id.* at 8

¹² *Id.*

¹³ *Id.*

¹⁴ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials*, 8 (Robert C. Clark et al. eds., 9th ed. 2017).

¹⁵ *Id.*

¹⁶ *Id.*

that use copyrighted material (subject to compulsory licenses).¹⁷ Other notable provisions include the federal system of copyright protection for both published and unpublished works, which explicitly preempts state law, and recognition of fair use limitations.¹⁸

In 1988, Congress passed the “Sonny Bono Copyright Term Extension Act,” and the following amendments to the 1976 Copyright Act were made: (1) the term of protection for copyrighted works was changed from the life of the author plus fifty years, to the life of the author plus seventy years; and (2) works authored by an anonymous or pseudonymous author, as well as works made for hire, are now protected for ninety-five years from publication, as opposed to the previous term of seventy-five years.¹⁹

III. International Copyright

a. Bilateral and Multilateral Agreements

International copyright policies and protection have developed throughout stages. The initial stage of copyright protection between different nations was the bilateral agreement, or what can also be referred to as bilateralism.²⁰ Most bilateral agreements functioned as a product of reciprocity.²¹ Reciprocity can be put into one of two categories: formal or material.²²

Formal reciprocity requires that the two nations protect each other’s citizens in the same way that they protect their own citizens.²³ Material reciprocity requires that the nation treat the

¹⁷ *Id.* at 8

¹⁸ *Id.*

¹⁹ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials*, 150 (Robert C. Clark et al. eds., 9th ed. 2017).

²⁰ Roberto Garza Barbosa, *Revisiting International Copyright Law*, 8 *Barry L. Rev.* 43, 44-45 (2007).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 45

foreigner the same way that the foreigner is treated in their nation of origin.²⁴ Most bilateral agreements were later replaced with multilateral agreements, but some are still in place today.²⁵ The United Kingdom had difficulty entering into bilateral agreements with the United States, as the United States only provided copyright protection to its nationals or residents.²⁶ It was pressure from both American and British authors that eventually led the United States to enact the International Copyright Act of 1891.²⁷

b. The International Copyright Act of 1891

The International Copyright Act of 1891 granted copyright protection rights to foreigners for the first time.²⁸ However, in order for foreigners to have protection in the United States through this act, they were required to comply with strict formality requirements such as title, deposit, and notice (all referring back to older copyright statutes, such as the Statute of Anne).²⁹ In practice it did not function as true international policy. The real result was more protection for American works, and more access to unprotected foreign works for Americans.³⁰ As a result, better international policy was called for. This ultimately led to the Berne Convention.³¹

c. The Berne Convention

i. Background

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials*, 10 (Robert C. Clark et al. eds., 9th ed. 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

The Bern Convention, ratified in 1886, is meant to be a compromise among its various member nations.³² At present, 170 nations are signatories of the Berne Convention.³³ For the most part, the Berne Convention is comprised of minimum term requirements with national treatment, which is designed to still allow each nation some autonomy over their national copyright policies.³⁴ National treatment means that foreigners get the same protection as a citizen of that country would get, instead of only getting the same protection as in their home country.³⁵ Currently, the Berne Convention has gone through six revisions, the most recent taking place in 1971, known as the Paris Act.³⁶ The Berne Convention extends protection without the rigid formalities imposed by the International Copyright Act of 1891.³⁷ However, in some ways, this international attempt to harmonize copyright impedes the very goal by relying on minimum standards:

For example, the minimum term of copyright under the Berne Convention is the life of the author plus fifty years (life plus fifty). Unlike other aspects of the treaty, countries that have a longer term of protection are not required to extend the term of protection for works whose home country maintains a shorter term. The United States amended its copyright statute to life plus seventy in response to a similar extension by the European Union. Many commentators argue this leads to a race to the bottom (or top) in the level of protection. As soon as one country increases the level of copyright protection, other nations have an incentive to "keep up" in order to enjoy full protection in the country that took the first step.³⁸

The minimum standards has created uneven protection internationally as a result.

³² Matt Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, 43 IDEA 607, 620 (2003).

³³ Id.

³⁴ Id.

³⁵ Id. at 621-622

³⁶ Id.

³⁷ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, Copyright Cases and Materials, 10 (Robert C. Clark et al. eds., 9th ed. 2017)

³⁸ Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, supra Note 32, at 622.

In 1908, the Berne Convention was revised to include a provision that rejected any formality requirement.³⁹ The United States did not initially join the Berne Convention, due to preclusion from the 1909 Copyright Act.⁴⁰ Many policies in the 1909 Copyright Act conflicted with the Berne Convention, specifically the formality requirements of the 1909 Copyright Act. It was not until the United States enacted the 1976 Copyright Act that it was possible for it to join the Berne Convention.⁴¹

Important provisions in the Berne Act were added through revisions over the years, one being the addition of moral rights, which were included in the 1928 Rome Act.⁴² Today, there is a divide on the policy of moral rights. Some nations place importance on these rights, while others, like the United States, do not:

Each nation has its own copyright laws designed to promote specific cultural values, social norms, and economic goals. Some nations, particularly France and Germany, place heavier emphasis on the "moral rights" of authors while others, such as the United States, focus more on the utilitarian goal of promoting the production of creative works.⁴³

As a result, moral rights were a topic of great debate during the Berne adherence for the United States.⁴⁴ It appears that the United States enacted the Visual Rights Act of 1990 in an attempt to grant some moral rights in accordance with the Berne Convention, while still maintaining its utilitarian approach to copyright as a whole.⁴⁵ These different approaches to copyright

³⁹ Roberto Garza Barbosa, Revisiting International Copyright Law, 8 *Barry L. Rev.* 43, 48 (2007).

⁴⁰ Matt Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, 43 *IDEA* 607, 623 (2003).

⁴¹ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials*, 11 (Robert C. Clark et al. eds., 9th ed. 2017).

⁴² Barbosa, Revisiting International Copyright Law, supra Note 39, at 48.

⁴³ Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, supra Note 40, at 608

⁴⁴ Gorman, Ginsburg & Reese, *Copyright Cases and Materials*, supra Note 41, at 781.

⁴⁵ Id.

throughout the world have determined the free flow of materials that may be in the public domain of some countries, but not others.⁴⁶

ii. Problems with the Current Berne Convention

Despite the great progress made with the Berne Convention, not all of its provisions are successful in harmonizing copyright. For example, the Berne Convention has what is referred to as the rule of the shorter term:

Under the rule of the shorter term, Country B will not apply its longer copyright term to a work whose copyright has expired in Country A, the country of the work's origin, but will instead apply the origin country's shorter term. Having omitted the rule from its limited adoption of the Berne Convention, the United States protects many works whose copyrights have expired in their countries of origin.⁴⁷

This rule then perpetuates the problem of uneven protection throughout the nations adhering to the Berne Convention. By only mandating minimum standards, there is the potential for each and every member nation to afford different terms of protection. Although the rule of shorter term may seek to alleviate this issue, it ultimately may add to it.

Additionally, the current version of the Berne Convention does not take into account the financial impediments associated with the spread of copyrighted work. The convention does not provide for a system of compulsory licenses, and some scholars argue that such a system will aid in the harmonization of copyright law.⁴⁸

iii. The Internet and the Berne Convention

Notably absent from current international treaties is a copyright regulatory scheme tailored towards the Internet. The Internet connects different nations of the world almost

⁴⁶ Robert Spoo, The Uncoordinated Public Domain, 35 *Cardozo Arts & Ent LJ* 107, 113 (2016).

⁴⁷ *Id.* 118

⁴⁸ *Id.* 146-147

seamlessly. As a result members of the Berne Convention are often faced with choice-of-law problems when an infringement occurs via the Internet.⁴⁹ Theoretically, if copyright laws were the same internationally, the choice-of-law problem would cease to exist.⁵⁰ Marketa Trimble, associate professor of law at William S. Boyd School of Law, summarized the issue as follows:

Copyright vests automatically in . . . at a minimum, all . . . countries that are parties to the Berne Convention. When a work is made available on the Internet, that act can infringe copyright in multiple or even in all of the countries in which the content can be viewed, downloaded, or streamed. Of course countries' laws differ, and there can be no infringement committed in countries where the work falls outside copyright protection . . . , or in countries in which the act is not considered infringing Regardless of whether the laws of all countries hold the work protected and the act infringing, the possibility exists that all countries' laws could apply simultaneously.⁵¹

There are a number of solutions analyzed by Professor Trimble for this problem. Unfortunately, all come with positive and negative consequences.

The first proposed solution discussed by Professor Trimble is a uniform Internet copyright regime that applies internationally.⁵² The difficulty with this solution is that it may be an onerous task to develop a regime that all the signatories of the Berne Convention would agree to.⁵³ Additionally, if and when that is accomplished, each signatory's interpretation of the laws may differ.⁵⁴

Professor Trimble then addressed solutions to conflict-of-law problems, the first being a localization approach:

The localization approach to solving the multiplicity problem seeks to identify an occurrence or fact that can be understood as the place of a tortious activity and be

⁴⁹ Marketa Trimble, The Multiplicity of Copyright Laws on the Internet, 25 Fordham Intell. Prop. Media & Ent. L.J. 339 (2015).

⁵⁰ *Id.* at 356

⁵¹ *Id.* at 356-357

⁵² *Id.* at 354

⁵³ *Id.*

⁵⁴ *Id.*

localized in a single place. One possible place is the place from which the allegedly infringing activity emanates, or "[t]he point of origin of the alleged infringement"--the place where the alleged infringer acted. . . . Another localization might be in the domicile of the copyright owner; the theory for this approach is that the place of the tortious activity is the place in which the entire harm is concentrated--the place where the harm is internalized by the copyright owner.⁵⁵

The problem with the localization approach is that an infringer can potentially choose where the infringement occurs, and the copyright owner can choose where the harm will be internalized by choosing the location to register the copyright.⁵⁶ Here, the Berne Convention's approach of minimum standards comes into play, since some nations offer longer terms of protection than others.⁵⁷

The next solution discussed is the factors approach. Here, courts "will choose a single applicable copyright law . . . based on a weighing of multiple factors."⁵⁸ Professor Trimble explained that, in theory, it would allow courts to use the factors to select the law of the country that "in a given case has the prevailing interest in having its copyright law applied"⁵⁹ The down-side to this approach, however, is the legal uncertainty in each case due to the weighing of the factors.⁶⁰

d. The Universal Copyright Convention

Many nations did not ratify the Berne Convention due to the strict minimum standards it required.⁶¹ The goal of the Universal Copyright Convention (UCC) was to create a uniform system of copyright protection for nations that had not ratified the Berne Convention.⁶² The

⁵⁵ *Id.* at 359-360

⁵⁶ *Id.* at 360

⁵⁷ *Id.* at 360

⁵⁸ *Id.* at 358

⁵⁹ *Id.* at 378

⁶⁰ *Id.*

⁶¹ Roberto Garza Barbosa, *Revisiting International Copyright Law*, 8 *Barry L. Rev.* 43, 52 (2007).

⁶² *Id.* at 52

minimum standards of the UCC were lower than that of the Berne Convention: “The minimum standards for protection were only those necessary for the achievement of ‘adequate and effective protection.’”⁶³ However, the UCC included a clause that prevented the necessity of resigning from the Berne Convention in order to join the UCC; a nation could belong to both.⁶⁴ The most recent version of the UCC state that when the terms of the UCC conflict with the terms of the Berne Convention, the Berne Convention controls.⁶⁵ Some important differences to note between the Berne Convention and the UCC are that (1) the UCC does not grant moral rights; (2) the UCC does allow nations to condition copyright protection on the author’s fulfillment of formalities; and (3) that the term of protection granted by the UCC is significantly shorter than that granted by the Berne Convention (the basic term is the life of the author plus twenty-five years, or twenty-five years from publication. 29 U.C.C. Art. IV.2(a)).⁶⁶

e. The WIPO Copyright Treaty

The WIPO Copyright Treaty of 1996 is an agreement under the Berne Convention that is designed to apply to digital works.⁶⁷ The treaty proclaims that computer programs and the selection and arrangement of compilation of data or other materials are protectable.⁶⁸ Any party contracting to the agreement will be required to comply with the substantive provisions of the 1971 (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works (1886), even if they are not a signatory to the Berne Convention.⁶⁹ In addition to the rights

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Copyright and the Public Domain § 10.01

⁶⁷ WIPO Intellectual Property Organization, <http://www.wipo.int/treaties/en/ip/wct/> (last visited March. 30, 2018).

⁶⁸ Copyright and the Public Domain § 10.01

⁶⁹ WIPO Intellectual Property Organization ; Summary of the WIPO Copyright Treaty (WCT) (1996), http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited March. 30, 2018).

granted to computer programs and compiled data that are taken from the Berne Convention, the WIPO Copyright Treaty provides that these works are also granted the right of distribution, the right of rental and the right of communication to the public.⁷⁰ In addition, the WIPO Copyright Treaty requires a minimum term of fifty years of protection for digital works.⁷¹

f. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)

The Agreement on Trade-Related Aspects of Intellectual Property Rights, or as it is more commonly known, TRIPs Agreement, was signed in 1994 by the United States alongside 106 other nations.⁷² The agreement is an international trade agreement that addresses intellectual property, such as copyright.⁷³ Like the WIPO Copyright Treaty, TRIPs adopts the substantive provisions of the Berne Convention.⁷⁴ Importantly, like the UCC, TRIPs does not grant any moral rights.⁷⁵ It does, however, provide protection to both computer programs and compiled data.⁷⁶ TRIPs grants the following protection to some digital works:

TRIPs also gives authors of computer programs, and producers of sound recordings and films control over the commercial rental of their works to the public. 47 TRIPs, Art. 11. Performers are given protection from unauthorized recording and broadcast of live performances (bootlegging) for fifty years. 48 TRIPs, Arts. 14.1., 14(5). Broadcasting organizations are given control over the use of their broadcast signals for at least twenty years, 49 TRIPs, Arts. 14.3., 14(5). and producers of sound recordings are given a minimum fifty year reproduction right. 50 TRIPs, Arts. 14.2., 14(5).⁷⁷

⁷⁰ Id.

⁷¹ Id.

⁷² Copyright and the Public Domain § 10.01

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

TRIPs differs from other copyright treaties in its enforcement of copyright protection.⁷⁸ Treaties like the Berne Convention offer protection to private parties against each other across different nations, but if a nation does not enforce the protection, there is no international redress.⁷⁹ Conversely, TRIPs is enforced by the World Trade Organization, and as a result, can be enforced on a “country-to-country basis.”⁸⁰ Enforcement can occur in the form of trade sanctions on countries that fail to adhere to the protection requirements required by TRIPs agreement.⁸¹

Additionally, TRIPs addresses compulsory licenses regarding patents in Article 31, Other Use Without Authorization of the Right Holder.⁸² Although not referred to explicitly, this Article of the agreement allows for unauthorized use of patents, primarily pharmaceutical patents. Members of the World Trade Organization have discretion in determining whether to issue compulsory licenses for medications, however less developed nations are still underserved with the current provisions in this area.⁸³ Madhavi Sunder, author of From Goods to a Good Life, argues that underdeveloped countries ultimately depend on compulsory licenses for patented medications, both for importation and exportation.⁸⁴ Ultimately, Sunder argues that developing countries need lower terms of protection in patents for financial survival.⁸⁵ This notion can be applied across the board of intellectual property rights.

IV. Television Licensing: Cable Providers versus Internet Service Transmitters

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² World Trade Organization; Part II — Standards concerning the availability, scope and use of Intellectual Property Rights, https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (last visited Apr. 25, 2018).

⁸³ Madhavi Sunder, *From Goods to a Good Life* 192 (2012).

⁸⁴ Id.

⁸⁵ Id.

a. Cable Providers

Copyright grants many different exclusive rights to an author of a work, one of which is the right to public performance and public display.⁸⁶ The statute in the present Copyright Act (1976) grants two types of public performance or display rights: (1) performance or display at a location accessible to the public, or a location accessible to a large number of people “outside of a normal circle of a family or its social acquaintances”; (2) a performance through a “a transmission, such as a radio or television broadcast or an Internet transmission.”⁸⁷ Without authorization from a copyright owner, a performance through a transmission of television broadcast or Internet would constitute an infringement on the copyright owner’s exclusive right to public performance and public display.⁸⁸

Public performance rights were added late in the history of statutory copyright development.⁸⁹ The first categories of works granted this right by Congress were dramatic works and musical compositions, in 1856 and 1897, respectively.⁹⁰ The 1909 Copyright Act was drafted with the public performance right in connection with dramatic works, and had to later be amended to include musical compositions.⁹¹ However, questions concerning the definition and scope of “performance” often arose. For this reason, the current 1976 Copyright Act includes more guidance as to the meaning of “performance”:

§ 101. Definitions

⁸⁶ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials*, 49 (Robert C. Clark et al. eds., 9th ed. 2017).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 873

⁹⁰ *Id.*

⁹¹ *Id.*

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.⁹²

As technology developed, performances were easier for lay people to conduct. For example, the invention of the VRC and VTR gave consumers the ability to record cable shows and watch them at their own convenience. In the landmark case, Sony Corp. of America v. Universal City Studios, Inc., the court was faced with the question of whether a company who supplies the technology that enables infringing activity is liable for copyright infringement.⁹³ The court determined that since the technology was primarily used for non-infringing activity, Sony, the provider, was not liable for any customers using the technology unlawfully.⁹⁴ In discussing the infringing and non-infringing uses, the court described a concept known as time-shifting: “Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch.”⁹⁵ The court explained that some copyright owners of shows available on the technology gave permission for users to copy the material, and so the time-shifting of these specific programs was authorized, and thus non-infringing.⁹⁶ With regards to the programs which copying was not authorized by the copyright owner, the court concluded that even unauthorized uses of copyrighted work can be non-infringing.⁹⁷ Here, the time-shifting use was for private and non-commercial enjoyment, and did not infringe on the copyright owner’s exclusive rights.⁹⁸

⁹²17 U.S. Code § 101 - Definitions

⁹³ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984).

⁹⁴ Id.

⁹⁵ Id. at 779

⁹⁶ Id. at 774

⁹⁷ Id. at 792

⁹⁸ Id.

Technology is constantly changing, and now consumers have the ability to view television through Internet transmissions. One method of accomplishing this is through “Sling” technology, which uses a computer chip to transcode audiovisual information from satellite or from a recorded television program, to allow a consumer to bring the television program anywhere they want.⁹⁹ Some cable providers offer this product to their consumers. The court was presented with this technology in Fox Broadcasting Co. v. DISH Network, LLC just a few years ago (in 2015). In Fox Broadcasting Co. v. DISH Network, LLC, DISH Network offered consumers a feature it called “Hopper with Sling,” which allowed subscribers to watch television programs they had previously recorded on their DVR over the Internet, which gave them more mobility.¹⁰⁰ The court addressed the scope of public performance in this case, and found that Hopper with Sling did not infringe on Fox’s right of public performance.¹⁰¹ The court reasoned that since DISH had a license from Fox that allowed for transmission of Fox’s programs to its subscribers, neither DISH nor a subscriber not infringing by accessing a program that they already possessed, even if they are accessing it from another location.¹⁰² Furthermore, although subscribers do transmit and perform the programs within the meaning of Section 101 of the Copyright Act, they do not do so publicly:

When an individual DISH subscriber transmits programming *rightfully in her possession* to another device, that transmission does not travel to “a large number of people who are unknown to each other.” The transmission travels either to the subscriber herself or to someone in her household using an authenticated device.¹⁰³

⁹⁹Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, Copyright Cases and Materials, 895-96 (Robert C. Clark et al. eds., 9th ed. 2017).

¹⁰⁰ Fox Broad. Co. v. Dish Network LLC, 160 F. Supp. 3d 1139 (C.D. Cal. 2015).

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id. at 1162

It is important to note, however, that the defendants in these cases are or are similar to cable providers, and are licensees of the television programs. The issue the court focused on in the above cases was whether the transmission of the licensed programs to transcribers beyond the scheduled program time infringed the copyright holder's right to performance. The cable providers first transmitted the program, and the consumer then recorded the program, and used Sling technology to later use it on mobile devices and computers.

Notably, under §111 of the Copyright Act, a "cable system" is eligible for a compulsory license. The compulsory license allows the cable provider to retransmit a performance that was first broadcast by someone else, without having to get authorization from the copyright holder.¹⁰⁴ In return, the cable provider simply pays a statutory fee to the Copyright Office and is thus protected from infringement liability.¹⁰⁵

This right was not always provided to cable, and was the result of a much needed compromise between cable networks and copyright holders.¹⁰⁶ Cable television debuted in the 1950s, and functioned as a result of a community antenna system, in which a community shared a large antenna and received signals from local television broadcast stations.¹⁰⁷ At this time, copyright holders would benefit from the cable broadcasters because the license fee they received factored in the profit made from advertisements.¹⁰⁸ Advertising profit varied based on viewership. However, as cable began importing distant signals, the dynamic began to change.

¹⁰⁴ Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1006 (9th Cir. 2017).

¹⁰⁵ *Id.*

¹⁰⁶ Fred H. Cate, Cable Television and the Compulsory Copyright License, 42 Fed. Comm. L.J. 191, (1990).

¹⁰⁷ *Id.* at 193

¹⁰⁸ *Id.*

Local broadcasters were now competing with national broadcasters, and as their viewership decreased, copyright owners began to lose purchasers of copyright licenses.¹⁰⁹

Overtime, various solutions were attempted, such as must-carry, nonduplication, and exclusivity rules, but with little success.¹¹⁰ This led to the “Great Compromise” of 1972, which contained four main provisions: (1) syndicated exclusivity; (2) distant signal carriage rules; broadcasters’ right to sue for copyright infringement if a cable operator violated an exclusivity agreement; and (4) cable copyright liability, to be administered through a compulsory license system.¹¹¹ The latter two provisions were then adopted by Congress as part of the Copyright Act of 1976.¹¹²

The Act’s inclusion of the latter two provisions of the compromise are found in sections 111, 501, and 510.¹¹³ The Act states:

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509. . . .¹¹⁴

Finally, in order avoid overly burdening every cable system to negotiate with every copyright holder, Congress created a compulsory license system for cable.¹¹⁵

b. Internet Service Transmitters

¹⁰⁹ *Id.* at 194-195

¹¹⁰ *Id.* at 195-199

¹¹¹ *Id.* at 199

¹¹² *Id.* at 200

¹¹³ *Id.* at 202

¹¹⁴ 17 U.S.C. §§ 111(b) (1976).

¹¹⁵ Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 Fed. Comm. L.J. 191, 202 (1990).

Internet service transmitters are viewed differently by United States courts than cable systems. It is important to note that the Copyright Act defines performance in terms of contemporaneousness; according to the House Report, the following is the meaning of “perform” under the 1976 Act:

. . . [T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted to the public. . . . thus. . . a cable television system is performing when it re-transmits the broadcast to its subscribers.¹¹⁶

Under this definition, Internet service transmissions are in the act of performing, as opposed to a DVR, which simply enables its *subscriber to perform* at a later date. Matt Jackson, an assistant professor of communications at Penn State University, argued that the “exponential worldwide growth of the Internet” is a strong incentive for harmonization in copyright.¹¹⁷ Internet service transmitters that allow streaming are a large part of what makes the Internet appealing to consumers.

Recently, the Ninth Circuit was presented with the question of whether an Internet transmission service should be treated as a cable company under §111 of the Copyright Act, and thus eligible for a compulsory license. In Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002 (9th Cir. 2017), the defendant, FilmOn, used antennas to capture cable broadcast and then used the Internet to rebroadcast the programs, many of which were copyrighted.¹¹⁸ FilmOn did not obtain consent from the owners of the copyrighted work it was transmitting to its subscribers, and a group of cable broadcast stations and copyright holders (collectively, “FOX”), brought

¹¹⁶ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64 (1976).

¹¹⁷ Matt Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, 43 IDEA 607, 611 (2003).

¹¹⁸ Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1006 (9th Cir. 2017).

suit.¹¹⁹ In response, FilmOn claimed that it was a “cable system” and thus eligible for a compulsory license.¹²⁰ Under §111 of the Copyright Act, a “cable system” is:

... [A] facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.¹²¹

Each party offered a different interpretation of the language of §111.¹²² Ultimately, the court concluded that deference to the Copyright Office’s position should control. The Copyright Office contends that Internet transmission services cannot be treated as cable systems.¹²³

In reaching this decision, the court reasoned that the Copyright Office has been charged with implementing the Copyright Act for many years, and has maintained this view consistently.¹²⁴ During this time, Congress has amended §111 in various ways, but has never altered any language that would make it clear that Internet transmission services are included under the category of “cable systems.”¹²⁵ Thus, it was reasonable to conclude that Congress did not oppose the view held by the Copyright Office (although it has never explicitly endorsed it).¹²⁶

Notably, the Ninth Circuit included interesting dicta in deciding this case that implicate copyright globally:

... [I]nterpreting § 111 so as to include Internet-based retransmission services would risk putting the United States in violation of certain of its treaty obligations. An age-old canon of construction instructs that "an act of Congress ought never to be construed to violate the law

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* quoting 17 U.S.C. § 111(f)(3)

¹²² *Id.*

¹²³ *Fox TV Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002 (9th Cir. 2017).

¹²⁴ *Id.*

¹²⁵ *Id.* at 1014

¹²⁶ *Id.*

of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118, 2 L. Ed. 208 (1804).¹²⁷

Thus, in the Ninth Circuit's view, Internet transmission services of television programs are less likely to be entitled to compulsory licenses due to current global copyright treaties.

V. Copyright and Undercapitalized Nations

In the United States, the goal of the Copyright Act is "to promote the progress of science and useful arts," and in order to do so, the Act provides certain protections and incentives to copyright holders.¹²⁸ As this is the United States Constitution, it is easily argued that the goal is to promote progress in these areas in the United States only. However, with the current connectivity of the world, the progress made in other nations helps the United States make progress as well. Unfortunately, developing countries are at a disadvantage in the realm of intellectual property. Scholars have recognized this, and agree that it is important to help promote the progress in science and other arts around the world, including in developing nations:

. . . [D]eveloping countries need to disseminate knowledge on a wide basis. The artificial scarcity created by copyright law prevents the achievement of this goal. The high prices of works published overseas hamper the implementation of public policies for the extensive use of copyrighted works to promote educational, cultural, and technical development. Public purchases and voluntary licensing have not met those needs because the fees charged are unreasonable in the context of limited economic resources in developing countries.¹²⁹

Sunder also argued the need for developing countries to compete in the intellectual property market, focusing specifically on life-saving patented medications.¹³⁰ Although dramatic works are not as necessary as life-saving medication, the arts can provide a source of income to impoverished nations, and also promote general learning for the population. Intellectual property

¹²⁷ *Fox TV Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1011 (9th Cir. 2017).

¹²⁸ Article 1, Section 8, Clause 8 of the United States Constitution

¹²⁹ Alberto J. Cerda Silva, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright*, 60 J. Copyright Soc'y 581, 584 (2013).

¹³⁰ Madhavi Sunder, *From Goods to a Good Life* (2012).

as a whole is important to any community, as it embodies and also shapes much of a nation's culture.

The Berne Convention offers some flexibility, such as allowing for developing countries to issue compulsory licenses for “translating and/or reproducing foreign works into languages of general use in their territories,”¹³¹ but these flexibilities are extremely limited in scope and are subject to a three part test in which the exceptions must be: “(1) limited to special cases, (2) do not conflict with normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author.”¹³² Furthermore, “[t]his test prevents the extensive use of works by countries because, even if the policy rationale is more altruistic and urgent than providing mere entertainment in small restaurants, the test arguably disallows massive use of copyrighted works with regards to education.”¹³³

Finally, the flexibilities and exceptions provided in the current Berne Convention are not clear in their applicability to digital works.¹³⁴ The Internet is by far the fastest means of accessing and disseminating work, and without access to materials on the Internet, developing countries are stifled. The Berne Convention's exceptions, referred to as the Appendix for purposes in this article, do not account for this:

The provisions of the Appendix expressly limit their application to the non-digital environment, as they expressly allow the translation and reproduction of a given work "in printed or analogous forms of reproduction." This clause suggests that digital forms of reproduction are excluded from the scope of the Appendix.¹³⁵

¹³¹ Alberto J. Cerda Silva, Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright, 60 J. Copyright Soc'y 581, 582 (2013).

¹³² Id. at 584-585

¹³³ Id.

¹³⁴ Id. at 608

¹³⁵ Id.

Consequently, developing countries that are slow in making progress in the useful arts and sciences experience a deficit of copyrighted material.

VI. The Need for Harmonization

a. The Flaws in Current International Treaties

Attempts at harmonizing copyright law have been made in the form of international treaties, such as the Berne Convention and the TRIPs Agreement. However, issues remain. Oftentimes a work remains protected in one nation but falls into the public domain of another.¹³⁶ This lack of copyright uniformity creates problems for both consumers and copyright holders. One obvious problem is that a copyright holder loses the ability to benefit from the market in countries in which the copying of a particular work is legal.¹³⁷ However, a copyright owner also loses the ability to benefit from a foreign country's market in a situation in which copies of their copyrighted works are transported into said country (without authorization), and copying in that country is illegal.¹³⁸ On the flip side, consumers have a difficult time accessing certain works, and this stifles the spread of culture and ideas. Robert Spoo, a professor at the University of Tulsa College of Law, asserts that harmonization provides a solution to the issues created by an uncoordinated public domain:

If copyright laws were uniform in all respects throughout the world, works would receive protection for a fixed number of years (most copyrights have limited terms) and then would enter a single, global public domain where they could be exploited by anyone anywhere without permission or risk of liability. But copyright laws are not uniform throughout the world.¹³⁹

¹³⁶ Robert Spoo, The Uncoordinated Public Domain, 35 *Cardozo Arts & Ent LJ* 107 (2016).

¹³⁷ Matt Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, 43 *IDEA* 607, 609 (2003).

¹³⁸ *Id.*

¹³⁹ Spoo, The Uncoordinated Public Domain, *supra* Note 136, at 108.

International treaties have made attempts to accomplish this, but have yet to succeed. However, as discussed above, there also exist problems in the dissemination of protected works. The Berne Convention provides for minimum standards, allowing countries to go much higher than that mandated by the treaty. This means that it will take some works much longer to fall into the public domain, and that deprives many developing countries, and even developed countries, from exploiting these works. Additionally, the Berne Convention neglects the Internet, a major component of globalization. A compulsory licensing system is a way to provide nations and their citizens with copyrighted works in a way that is more affordable.

b. Compulsory Licensing and the Market

This article has centered on the need for harmonization as a way to help disseminate ideas globally. The copyright systems works as an economic incentive for creation, and therefore is tied to the marketplace and its consumers. One critique of the ideas in this article may be that the market determines what is valuable in different regions, and if the consumers in England called for a particular foreign show, Amazon Prime would negotiate with copyright owners to get a license for the right to stream that show. This is true to an extent, but also fails when looking at the history and development of the compulsory license system for cable systems. The market failed to protect local cable providers, and that in turn lowered the return that copyright owners got from licenses purchased by those local cable providers. Ultimately, the cable broadcasting network owners got a solution to their problem through Congress' adoption of a compulsory license system in the 1976 Copyright Act. As a result, the local cable systems were able to fairly compete with large national cable providers. The same principles and logic may be applied to Internet service transmitters: if international treaties were to address the needs of these providers in international copyright treaties, they could compete on an international market. The

Internet connects the world, and yet is notably absent from the current international copyright treaties. At the present, the current copyright regime is enabling the cable distributors of copyrighted works a monopoly of sorts, not the copyright holders. Addressing Internet service transmitters and their television programming may be one small step towards harmonization and a fair competitive global market in that area. As previously mentioned, Matt Jackson argued that the “exponential worldwide growth of the Internet” is a strong incentive for harmonization in copyright.¹⁴⁰ This conclusion is reasonable. Before, physical distance was an obstacle to spreading culture. Today, with the ability for individuals around the world to connect through the Internet, physical distance is no longer a problem. Instead, intellectual property geographic limitations are an impediment to the spread of culture.

Regarding dramatic works, such as movies and television episodes, some of this uneven protection and distribution may be alleviated through compulsory licenses. However, the United States does not give Internet service transmitters the right to a compulsory license under § 111 of the Copyright Act¹⁴¹, so an example of distribution problems for Internet streaming already exists on a local, national level.

According to the Ninth Circuit in the recent Fox TV Stations, Inc. v. Aereokiller, LLC decision, Internet service transmitters are not cable systems.¹⁴² By this logic, services such as Netflix, Hulu, and Amazon Prime, each of which functions like sling technology, are not entitled to compulsory licenses in the United States. On services such as Netflix, Hulu, and Amazon Prime, the user is given the ability to both “time-shift” and “place shift.” Time-shifting,

¹⁴⁰ Matt Jackson, Harmony or Discord? The Pressure Toward Conformity in International Copyright, 43 IDEA 607, 611 (2003).

¹⁴¹ Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1006 (9th Cir. 2017).

¹⁴² Id.

according to Sony Corp. of America v. Universal City Studios, Inc. allows the user to view a specific audiovisual program at a time other than when it is originally broadcasted.¹⁴³ Place-shifting, according to Fox Broadcasting Co. v. DISH Network, LLC, allows the user to watch the program in any location they wish.¹⁴⁴ With technologies such as VCR and DVR, the consumer is doing the performance, not the service provider. This is supported by the definition in the Copyright Act, which is concerned with contemporaneousness.¹⁴⁵ However, this reasoning is inapposite to online streaming. In online streaming, the Internet service transmitter is rendering the performance directly,¹⁴⁶ but without the benefit of a compulsory license. This makes it much more expensive and much more difficult for these Internet services to legally gain access to copyrighted works, and legally provide access to copyrighted works, for their subscribers.

On Amazon Prime, a subscriber has the ability to watch select programs *whenever* they so choose. Currently, however, subscribers cannot watch them *wherever* they want. Select programs that are copyrighted in the United States, and available on Amazon Prime in the United States, for example, are not available on Amazon Prime in England. Instead of providing the program, Amazon Prime provides its subscribers with the following notice:

This video isn't available due to geographical licensing restrictions. For more details, please refer to Amazon Video Terms of Use. For further assistance, please contact Customer Service at www.amazon.com/videohelp and refer to error 4601.¹⁴⁷

One specific example of a copyrighted television show that is available for streaming on Amazon Prime in the United States, but not in England, is the television series *Psych*. The television show

¹⁴³ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 423, 104 S. Ct. 774, 779 (1984).

¹⁴⁴ Fox Broad. Co. v. Dish Network LLC, 160 F. Supp. 3d 1139 (C.D. Cal. 2015).

¹⁴⁵ 17 U.S. Code § 101 - Definitions

¹⁴⁶ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64 (1976).

¹⁴⁷ Amazon Help & Customer Service, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201376320> (last visited Apr. 20, 2018).

is comedy mystery, in which the main character is an amateur detective that pretends to have psychic powers, and is hired by the police to help them solve crimes.¹⁴⁸ The first episode of the first season was aired in 2006,¹⁴⁹ and it was copyrighted in 2007 by Universal Studios. In the United States, a work made for hire is protected for either ninety-five years after publication, or one hundred and twenty years after creation (whichever is shorter)¹⁵⁰, and therefore this work is still protected by copyright. The United States and United Kingdom are each signatories to the Berne Convention.¹⁵¹ The Berne Convention requires a minimum term of protection of fifty years from publication for cinematographic work.¹⁵² In the United Kingdom, dramatic works are protected for seventy years after the death of the author.¹⁵³ This applies to specific authors:

Works only qualify for UK copyright protection if the author qualifies or the country in which the work was first published is a qualifying country or, in the case of broadcasts, the place of transmission qualifies. This means a work is protected by UK copyright law only if it was made by a British author or a person who is a national of a country to which the CDPA 'applies' or it was first published in the UK or a country to which the CDPA 'applies' or, in the case of broadcasts, it was made in or sent from the UK or a country to which the CDPA 'applies'.¹⁵⁴

However, since the United Kingdom is a member of the Berne Convention, it is required to give a work copyrighted in the United States the same protection that it would grant a work authored in the United Kingdom.¹⁵⁵ Amazon Prime informs its subscribers that *geographical* licensing

¹⁴⁸ IMDb Psych, <https://www.imdb.com/title/tt0491738/> (last visited Apr. 20, 2018).

¹⁴⁹ *Id.*

¹⁵⁰ Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, Copyright Cases and Materials, 510 (Robert C. Clark et al. eds., 9th ed. 2017).

¹⁵¹ Countries Berne Convention, <https://copyrights.org/countries-berne-convention> (last visited Apr. 20, 2018).

¹⁵² The UK Copyright Service, https://www.copyrightservice.co.uk/copyright/p10_duration (last visited Apr. 25, 2018).

¹⁵³ Hogan Lovells' LimeGreen IP; COPYRIGHTS - COPYRIGHT PROTECTION - UNITED KINGDOM, <http://limegreenip.hoganlovells.com/article/32/copyrights-copyright-protection-united-kingdom> (last visited Apr. 25, 2018).

¹⁵⁴ *Id.*

¹⁵⁵ The UK Copyright Service, https://www.copyrightservice.co.uk/copyright/p10_duration (last visited Apr. 25, 2018).

restrictions prevent the availability of particular works in particular locations. Netflix offers an explanation as to why its subscribers experience this lack of selection depending on their location:

Studios enforce copyright by country, as different markets have different demands for specific content. . . . Netflix and the studios both understand this, and the studios charge more for Netflix to offer streaming of specific titles in some countries compared to others. Because the content deals are country specific, Netflix may choose to pay the studio-demanded price to stream a title in one country, while negotiations in other regions fall flat.¹⁵⁶

Without compulsory licensing, Internet service transmitters are forced to negotiate prices for each type of exclusive right to creative works, such as the right to public performance and the right of distribution. Cable systems have a competition advantage in the form of compulsory license, arguably a form of a monopoly on compulsory licenses for television programs.

Allowing Internet services a compulsory license will help level the playing field, just as the playing field was previously leveled to allow local cable broadcasters to compete with national broadcasters.¹⁵⁷

As mentioned previously, the Berne Convention mandates minimal standards and includes a rule of shorter term, but these approaches have not eliminated the problem of inconsistent protection throughout the globe. Robert Spoo argues that a compulsory license system, if fashioned correctly, may function better than the current approaches taken by the Berne Convention: “In contrast to the rule of the shorter term, the compulsory-license system would have to be designed to overrule any inconsistent international principals, bilateral treaties, or national laws that would defeat the operation of such a world-harmonizing rule.”¹⁵⁸

¹⁵⁶ Netflix FAQs, <https://help.netflix.com/en/node/41049> (last visited Apr. 25, 2018).

¹⁵⁷ Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 Fed. Comm. L.J. 191, 194-195 (1990).

¹⁵⁸ Robert Spoo, *The Uncoordinated Public Domain*, 35 Cardozo Arts & Ent LJ 107, 146-147 (2016).

Revisiting the *Fox TV Stations, Inc. v. Aereokiller* decision, the Ninth Circuit, in ruling against defendant FilmOn, provided dicta as to why the court believed that Internet service transmitters should not be granted compulsory licenses: it would violate certain treaty obligations of the United States.¹⁵⁹ It is true that the Berne Convention does not provide for a compulsory licensing system, and although the Court did not reference any single treaty specifically, it is possible that the Court had international treaties in mind here. If so, the implication of compulsory licensing for Internet service transmissions within international treaties may alter this interpretation by U.S. courts.

The above example focused on Amazon Prime, specifically in the market of the United Kingdom. Expenses have dissuaded Amazon Prime from paying for the rights for certain works in certain locations. Here, the location in question is far from that of a developing country, and yet access to certain copyrighted works is still restricted. This problem would be much worse in developing countries. Although dramatic works are not life-saving like patented medications are, dissemination of culture and ideas is still important for countries around the world.¹⁶⁰ Compulsory licenses for Internet transmissions will help the spread of information and culture, even if it is merely in the form of a television program. Psych may not be considered vital for the spread of science and useful arts in the views of some individuals, but this same problem is applicable to various other television programs and movies, such as scientific and historical documentaries.

Unfortunately, a system of compulsory licenses for dramatic works disseminated through the Internet comes with flaws as well. This decreased the amount of compensation the copyright

¹⁵⁹ *Fox TV Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1011 (9th Cir. 2017).

¹⁶⁰ Alberto J. Cerda Silva, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright*, 60 J. Copyright Soc'y 581 (2013).

holder will get for the exploitation of their work. Additionally, this diminishes the copyright holders' right to decide which markets they would like to distribute their works. However, if the goal is to spread copyright works to the public, and to promote the progress of science and the useful arts, compulsory licenses are one way of accomplishing this goal as they make paying for the licenses much more feasible.

VII. Conclusion

The United States Constitution provides authors of creative works certain protections and rights as an incentive to create.¹⁶¹ This is designed “to promote the progress of science and the useful arts.”¹⁶² Arguably, Congress' goal was to promote the progress in these areas exclusively in the United States, but just as other nations can benefit from the progress made by the United States, so too can the United States benefit from the progress of other nations. Today, the Internet provides a fast and easy way to spread information, but some aspects of copyright law inhibit this free flow of ideas and creative works. The market has not solved the problem, arguably because of an unfair advantage granted to cable systems in the form of compulsory licenses. Currently, neither the United States Copyright Act nor international treaties allow dramatic works disseminated through Internet service transmissions the benefits of compulsory licenses. The market does not appear to be an adequate solution to this problem, just as it did not provide a solution to cable systems in the 1950s. The minimum terms mandated by the Berne Convention ensure that works stay protected for a significant amount of time. Compulsory licenses may help to spread copyrighted works, while still providing some compensation to the copyright holder, and create fair competition.

¹⁶¹ Article 1, Section 8, Clause 8 of the United States Constitution

¹⁶² *Id.*