

Dr. Strange Geo-Blocking Love

Or:

How The E.U. Learned To Stop Worrying About Cultural Integration And Love The TV Trade Barrier

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ABSTRACT

The E.U. Antitrust Case that opened on July 23, 2015 against Sky U.K. and six American studios—Disney, Fox, NBCUniversal, Paramount Pictures, Sony and Warner Brothers—has its structural roots in the Television Without Frontiers Directive, which was vigorously debated as a last-minute standoff that threatened to derail the conclusion of the GATT Uruguay Round of trade negotiations and is still considered to be the cornerstone of the European Union’s audiovisual policy. This Article examines the unique history of a Cultural Exception with respect to audiovisual works as applied in trade negotiations to Hollywood film and television productions, and argues that, rather than violating E.U. regulations, the decades-

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old practice of regional contractual restrictions and geo-blocking is both consistent with and a direct result of the E.U.'s protectionist and paternalistic efforts to shield its individual member states' local production entities from competition and its populations from a perceived and decidedly unwelcomed Svengali-like juggernaut of American cultural influence. The E.U. antitrust action is therefore in direct contravention to the spirit of the trade laws over which Hollywood studios were so stridently subjected to debating and is inconsistent with stated E.U. audiovisual norms. Abolishing regional access limitations will put the future of the E.U.'s various local distributors at risk, for the existing patchwork of distribution related rules impacting foreign property directly impacts American producers' decisions regarding whether and how to continue to do business in the region. Thus, any attempt to implement the E.C.'s aspirational Digital Single Market 2020 target terms must be reconciled in light of the current political climate in Europe and global technological capabilities if the E.U. is to remain a relevant market at the forefront of the modern entertainment industry and continue to benefit from the uniquely privileged relationship it has enjoyed for nearly a century with its many Hollywood studio production partners.

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HOWARD BEALE

We deal in illusion, man! None of it is true! But you people sit there day after day, night after night, all ages, colors, creeds—we're all you know. You're beginning to believe the illusions we're spinning here. You're beginning to think the tube is reality and that your own lives are unreal. You do whatever the tube tells you. You dress like the tube, you eat like the tube, you raise your children like the tube, you even think like the tube. This is mass madness, you maniacs! In God's name, you people are the real thing! We are the illusion! So turn off your television sets. Turn them off now. Turn them off right now. Turn them off and leave them off! Turn them off right in the middle of this sentence I'm speaking to you now! TURN THEM OFF.

– *Network*, MGM/UA (1976)

INTRODUCTION

Unwilling to heed screenwriter Paddy Chayefsky's strident exhortations to simply turn off the tube, audiences in Europe continue to clamor for audiovisual content—increasingly on an “on-demand” basis. Though contemporary delivery systems are decidedly more portable than in the 1970s, the desire for infinite programming options is a natural progression from the early days of cable and satellite systems. To understand how we arrived at the moment in moving image history that precipitated the recent European Commission's 2015 antitrust action against the six major American studios, it is helpful to recall that during the go-go Eighties and Nineties—the period between the creation of the European Union and the conversion to the Euro as a single market currency—there was an abundance of

local cable station air time trying to compete for audience share with established free-to-air channels each separated by national territorial boundaries. These start-up programmers continually sought to entice viewers by filling their broadcast line-ups with high production-value programs at low prices. Perhaps because of affordable costs, shifting tastes, or word-of-mouth popularity, the programs that stocked the Euro systems were disproportionately American in origin. This, in turn, caused a significant amount of consternation about the future of cultural identity in certain E.U. nations with proud but struggling local cinematic production industries—notably France—as internal integration issues loomed. One result was government-imposed content quotas to restrict the amount of hours a broadcaster could devote to programs of non-European origin. Of course, at the time, the options for content delivery were restricted to national broadcasters and privately-operated stations; audience members actively searching the internet for screening suggestions had not yet become a familiar phenom.

Fast-forward past the inevitable European Union integration growing pains plus splice in the digital revolution and while all of the rules in the global media game are changing with hyper-speed, a protectionist mentality that shackles European attitudes continues to create massively inconsistent programming policy waves. Cut to the E.U. today: it is teetering on the brink of economic disintegration. In the summer months immediately following the action, the Euro was trading against the U.S. dollar at near-parity lows not seen for over a decade; Greek debt addiction continued to threaten to undermine the entire economic experiment prompting the term “Grexit” to enter the lexicon—if not the prayers—of many; French farmers bodily border-blockaded trucked food imports originating in Germany and Spain; and from the eastern edges of Hungary to the mouth of the Channel Tunnel, foreign ministers and private companies expended millions of Euros to erect physical barriers in an attempt to stem the ever-rising tide of asylum-seeking refugees—by some estimates the largest humanitarian crisis since World War II—attempting to flood into and circulate throughout Europe,¹ providing a lightning rod of sweeping anti-immigration sentiment that culminated in the Brexit referendum result of June 23 2016.² Even after decades of a trade liberalization legacy implemented by the creation of the GATT in 1947, if this moment in European time were a film, it might seem to be the embodiment of the stop-motion animation classic, *Clash of the Titans*.³

1. UNHCR EUROPE, <https://perma.cc/ZE67-PKAT>, (last visited Nov. 20, 2017); Tom Rawstorne, *Asylum seekers held in Channel Tunnel*, DAILY MAIL, <https://perma.cc/G4TZ-RXGG>, (last visited Nov. 20, 2017); Daniel Nolan, *Hungary orders 100-mile Serbia border fence to keep out migrants*, TELEGRAPH (Jun. 27, 2015, 12:51 PM), <https://perma.cc/X9V9-BKN5>; EUROPEAN COMMISSION, SYRIAN CRISIS ECHO FACTSHEET, <https://perma.cc/2FJS-WRMB> (last visited Nov. 20, 2017); Luke Harding, *Hungarian police arrest driver of lorry that had 71 dead migrants inside*, THE GUARDIAN (Aug. 28, 2015), <https://perma.cc/E5VY-238W>.

2. May Bulman, *Brexit: People voted to leave EU because they feared immigration, major survey finds*, INDEPENDENT (June 28, 2017), <https://perma.cc/5A7X-XETH>.

3. CLASH OF THE TITANS FILMING LOCATIONS, <https://perma.cc/WRQ4-4HAC> (last visited Nov. 20, 2017) (a 1981 feature starring Sir Lawrence Olivier, considered by many to be the chef d’oeuvre of VFX, and king and self-professed Greek mythology fan Ray Harryhausen, and shot in Spain, Italy,

Yet amidst all this xenophobic turmoil, the leadership in the European Commission posits that a significant impediment to the successful integration of its macro-population is the fact that citizens of one Member Nation cannot access pay TV programming which they would be able to watch at home while traveling in another Member State. Moreover, they assert that American studios are to blame for the barriers because of distribution contract terms that limit which audience members may access a local broadcaster's content on the basis of traditional territorial relationships.

And so in July 2015 the European Commission amped up the investigation kerfuffle originally begun on January 13, 2014 by then-E.U. antitrust chief Commissioner Joaquin Almunia.⁴ On July 23, 2015, the Commission sent a formal Statement of Objections⁵ charging Sky-UK, a British / Irish pay-TV broadcaster, plus six major U.S. studios⁶ with purported anti-trust violations⁷ stemming from the long-established and widely accepted European broadcaster industry practice of content distribution based on region and language, and the attendant use of internal geo-blocking⁸ to enforce territorial limits and serve domestic audiences. In the television deal context, geo-blocking is a tool used to prevent streaming to viewers outside the territory. However, because various recent technological innovations—from source-code digital files replacing physical prints to individual Virtual Private Networks (“VPN”s)—have all but rendered geographic barriers obsolete, the territorial limitations can also be used to ensure proper recording of subscriber payments for any broadcaster that succeeded in paying a premium to serve particular content in its defined territory as agreed by Member States. Even though robust free-market competition over what certain subsets of Europeans could watch was tailored to their physical locations and had already taken place at the national broadcaster level, the European Commissioner for Competition Margrethe

Malta, and the UK). For a discussion of the U.S. role in a post WWII trade integration philosophy aimed at fostering stability and preserving a fragile peace that precipitated the GATT / WTO, see Chad P. Brown, *Self-Enforcing Trade 11* (2009), <https://perma.cc/38D7-J2CA>.

4. European Commission, Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services (Jan. 13, 2014), <https://perma.cc/D8MH-6EXZ>.

5. European Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland (July 23, 2015), <https://perma.cc/U4MN-5JBC>.

6. James Kanter & Mark Scott, *E.U. Opens Antitrust Case Against Major U.S. Studios and Sky U.K.*, N.Y. TIMES (July 23, 2015), <https://perma.cc/9GZD-F93P>. The recipients of the Statement of Objections were Sky UK, which is partially owned by 21st Century Fox, Disney, Fox, NBCUniversal, Paramount Pictures, Sony, and Warner Brothers.

7. *Supra* note 5.

8. EUROPEAN PARLIAMENT, DIGITAL SINGLE MARKET AND GEO-BLOCKING (May 2015), <https://perma.cc/4TQC-HZTU>. The European Parliament defines Geo-Blocking as: “commercial practices that prevent online customers from accessing and purchasing a product or a service from a website based in another Member State, or which automatically re-route them to a local site. As a result, consumers are often charged more for products or services purchased online on the basis of their IP address, their postal address or the country of issue of their credit card. Geo-blocking also restricts customers’ access to online services purchased in their home country (e.g. TV channels over internet) when abroad.”

Vestager⁹ tried to shift that decision further downstream to the individual free-range consumer; in the press release announcing the action, she stated:

European consumers want to watch the pay-TV channels of their choice regardless of where they live or travel in the EU. Our investigation shows that they cannot do this today, also because licensing agreements between the major film studios and Sky UK do not allow consumers in other EU countries to access Sky's UK and Irish pay-TV services, via satellite or online. We believe that this may be in breach of EU competition rules. The studios and Sky UK now have the chance to respond to our concerns.

The stakes for the studios in this distribution drama are high since if the antitrust violation allegations are ultimately upheld, each company could face fines of as much as ten percent of their most recent global annual sales and be required to change their business practices.¹⁰ So far, the lone canary in the concession coalmine is Paramount, which in late April of 2016 agreed to cut a deal,¹¹ offering four conciliatory commitments for content distributed via both satellite broadcast and online distribution delivery services;¹² predictably, by early May, local film industry leaders in certain Member States voiced their consternation with the perceived threat to "their very existence."¹³

But the real jaw-dropper is that the E.U. conveniently glosses over the main structural and philosophical basis of their inherently fragmented distribution system: its own *Television Without Frontiers* Directive¹⁴ (though given prevailing local conditions it is perhaps understandable, because if Bobby the British vacationer could access, say, *Nothing To Declare* while on holiday in Crete, maybe he would be distracted from the fact that local ATM machines were periodically disabled from distributing cash).¹⁵ The European Union considers the *Television Without Frontiers* Directive to be:

9. Commissioner Vestager is clearly a global TV citizen, taking to Twitter on August 7, 2015 to lament the end of a favorite program: "How I am going to miss Jon Stewart @TheDailyShow". Margrethe Vestager (@vestager), TWITTER (Aug. 7 2015, 8:30 AM), <https://perma.cc/3Y57-HC66>.

10. Tom Fairless, *EU Files Antitrust Charges Against U.S. Film Studios*, WALL ST. J. (July 23, 2015), <https://perma.cc/DC8D-KVSS>; SONY CONSOLIDATED FINANCIAL RESULTS FOR THE FISCAL YEAR ENDED MARCH 31, 2014 (May 14, 2014), <https://perma.cc/76NP-XQBR> (e.g., in 2014 Sony Picture earnings were approximately US\$8 billion).

11. Leo Barraclough, *Paramount Offers Concessions in European Anti-Trust Case*, VARIETY (Apr. 22, 2016), <https://perma.cc/9YKK-87CV>.

12. OFFICIAL JOURNAL OF THE EUROPEAN UNION, SUMMARY OF COMMISSION DECISION (July 26, 2016), <https://perma.cc/AVU3-54XD>.

13. Ariston Anderson, *Italian Film Industry Condemns Paramount's EU Antitrust Deal*, HOLLYWOOD REPORTER (May 4, 2016), <https://perma.cc/SCC5-33TH>.

14. PUBLICATIONS OFFICE, TELEVISION BROADCASTING ACTIVITIES: "TELEVISION WITHOUT FRONTIERS" DIRECTIVE (Sep. 9, 2008), <https://perma.cc/3KFT-JHWM> (A "directive" is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.).

15. Described by the Sky Guide as a "Fly-on-the-wall documentary following the men and women who defend Australia from drug runners, smugglers and terrorists." NOTHING TO DECLARE occupied two and one-half hours of programming on the network on a single day, Aug. 25, 2015. For a discussion of Greek ATM shortages, see Brian Barrett, *Greece's Empty ATMs Show the Surprising Power of Cash – Even in 2015*, WIRED (June 30, 2015), <https://perma.cc/89YJ-HFK7>.

the cornerstone of the European Union's audiovisual policy. It rests on two basic principles: the free movement of European television programmes within the internal market and the requirement for TV channels to reserve, whenever possible, more than half of their transmission time for European works ("broadcasting quotas"). The . . . Directive also safeguards certain important public interest objectives, such as cultural diversity, the protection of minors and the right of reply.¹⁶

This Article examines the European Union Anti-Trust Case against the six major Hollywood studios in the context of the *Television Without Frontiers* Directive and subsequent relevant E.U. regulations and related business practices, with emphasis on the European Commission's stated objective to create a Digital Single Market by 2020, to investigate whether it is consistent with the spirit of the Directive as represented to the United States and its American content provider partners.¹⁷ It projects how similarly envisaged action will have an adverse effect on the internal E.U. audiovisual market, advocates for the elimination of geo-blocking generally to benefit audiences, and recommends restructuring U.S. entertainment industry distribution strategies to reconcile increasing global IP inconsistencies.¹⁸ To keep an admittedly arcane entertainment issue entertaining, select film and television references set the stage for each section, and the perspective is that of a persistent producer trying to navigate offering the world a worthwhile and desirable product and, with the blessing of The Three Graces, to possibly—just possibly—recoup and repeat.

I. PROLOGUE

A long time ago in a galaxy far, far away . . .

– *Star Wars*, Paramount Pictures (1977)

Relatively speaking, this problem did not really begin that long ago, but given the contentiousness of the initial debate coupled with how rapidly the iterative entertainment industry cycles have changed in the interim, the time has come to seem like more than two decades. In fact, these cultural concerns are neither new nor strictly European. *Let's start at the very beginning, a very good place to start . . .*¹⁹

16. PUBLICATIONS OFFICE, TELEVISION BROADCASTING ACTIVITIES: "TELEVISION WITHOUT FRONTIERS" DIRECTIVE (Sept. 9, 2008), <https://perma.cc/3A8U-WV63>.

17. EUROPEAN COMMISSION, WHY WE NEED A DIGITAL SINGLE MARKET (May 6, 2015), <https://perma.cc/QN5J-JAUM>. Although it sounds like an on-line dating site, the Digital Single Market is the EC's vision for making "the EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one." *Id.*

18. EUROPEAN COMMISSION, ANTITRUST: COMMISSION SENDS STATEMENT OF OBJECTIONS ON CROSS-BORDER PROVISION OF PAY-TV SERVICES AVAILABLE IN UK AND IRELAND (July 23, 2015), <https://perma.cc/F6K4-6JZZ> (The EC has indicated it is considering similar actions against Canal+ of France, Sky Italia of Italy, Sky Deutschland of Germany and DTS of Spain).

19. RICHARD ROGERS & OSCAR HAMMERSTEIN II, DO-RE-MI (THE SOUND OF MUSIC, 1959).

A. URUGUAY ROUND OF GATT (1986-1994)

CAPTAIN SPAULDING

You are going Uruguay, and I'm going my way.

– *Animal Crackers*, Paramount Pictures (1930)

As the world anxiously anticipated the conclusion of the Eighth Round of the General Agreement on Tariffs and Trade (“GATT”) in December of 1993, an eleventh-hour stalemate between the United States and the then nascent European Community (“Community”) over European broadcasting quotas and tariffs on foreign film and television products threatened to thwart the GATT’s resolution. Despite hopes in Hollywood that the U.S. would remain firm on pressing for tariff and quota elimination, in the end the two sides agreed that they would “make no commitments whatsoever concerning movies [and] television programs . . .”²⁰ The standoff was but an episode in the long-running battle the U.S. and the E.C. waged over the Community’s film broadcasting quota, delineated in the 1989 *Council Directive on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities* (“Directive”).²¹

The United States maintained that the provision was protectionist and therefore in violation of the GATT, while the Europeans, led vehemently by the French, responded that the measure was necessary for European integration and cultural protection and that the GATT did not pertain to the issue as these values cannot be commoditized.²² Among the arguments put forth by the E.C. as to why the U.S. should not object to the Directive was that the U.S. had agreed to exclude television and film products from the 1989 U.S.-Canada Free Trade Agreement (“CFTA”) on a similar cultural preservation basis.

20. Keith Bradsher, *US and Europe Clear the Way for a World Accord on Trade, Setting Aside Major Differences*, N.Y. TIMES, Dec. 15, 1993, at D18.

21. *Council Directive 89/552/EEC*, 32 OJ Eur. Comm. (No. L 298) 23 (1989) [hereinafter Council Directive].

22. Matthew Frasier, *A Question of Culture: The Canadian Solution Resolves a Standoff*, MCLEAN’S (Dec. 27, 1993), at 50 (France was the driving force behind the EC’s tough stance. France’s heavily subsidized movie and television industry was at the time the world’s second largest in terms of export revenue after the United States.).

B. U.S.–CANADA FREE TRADE AGREEMENT

STAN MARSH

Mom, can I have eight dollars to see a movie?

SHARON MARSH

A movie?

STAN MARSH

Yeah. It's gonna be the best movie ever. It's a foreign film, from Canada.

– *South Park, Bigger Longer & Uncut*, Paramount Pictures (1999)

In an effort to eliminate barriers to investment and trade between the United States and Canada, officials of the two nations entered into negotiations in 1985.²³ The result was the United States–Canada Free Trade Agreement, which at the time created the largest free trade area in the world.²⁴ The CFTA generally deferred action on the issue of intellectual property protection to the Uruguay Round,²⁵ though at Canada's insistence cultural industries were specifically excluded from the scope of the CFTA.²⁶ The cultural activities exempted from the CFTA included the publication, sale, distribution or exhibition of: books, magazines, and newspapers; film and video recordings; audio or video music recordings; and radio, television and cable dissemination.²⁷

Prior to the CFTA, the Canadian government engaged in the promotion and protection of cultural activities²⁸ with the goal of “fostering Canada’s unique cultural heritage.”²⁹ While the U.S. “recogniz[ed] the importance to Canada of maintaining its cultural identity,” it was concerned that the cultural policies should “not constitute a discriminatory and unnecessary trade barrier to US trade.”³⁰ At the time of the signing of the CFTA, the U.S. reserved the right to file a complaint against Canada if it approved legislation that the U.S. determined to be in violation

23. Canada-U.S. Free Trade Agreement, Can.-U.S., 1988, 27 I.L.M. 281.

24. *Id.*

25. *Id.* at 396 (Part Seven, Chapter Twenty, Article 2004, Intellectual Property reads: “The Parties shall cooperate in the Uruguay Round of multilateral trade negotiations and in other international forums to improve protection of intellectual property.”).

26. *Id.* at 396 (Article 2005, Cultural Industries” reads, in relevant part: “I. Cultural industries are exempt from the provision of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of this Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter”).

27. *United States-Canada Free Trade Agreement Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives*, 100th Cong. 39 (1988) (Second Session on US-CFTA) [hereinafter CFTA House Hearing].

28. Sunny Freeman, ‘CanCon’ In The Netflix Age: Just Don’t Mention It’s Canadian, HUFFINGTON POST (Nov. 29, 2013), <https://perma.cc/U6GR-B7ZE> (For a discussion on the evolution of “Can-Con” rules requiring Canadian broadcasters to apply origin quotas and the effects on domestic producers in the digital era.).

29. CFTA House Hearing, *supra* note 27, at 38.

30. *Id.*

of the spirit of the pact.³¹ There was good reason for American prudence given the threat of the growing Quebec separatist movement, which eventually gathered enough momentum to lead to a(n ultimately failed) provincial referendum on the issue of succession in 1995.³² Sound familiar?

1. U.S. Responses to the CFTA

The Love Boat promises something for everyone.

– “The Love Boat,” Aaron Spelling Productions (1977-87)

In the period that followed the signing of the CFTA and during which both nations were to draft implementation legislation, certain industry groups and others in the U.S. voiced concern with the agreement’s cultural activities exemption.³³ Some anticipated a negative impact on the American film industry, while others believed the CFTA did not provide a powerful enough response mechanism in the case of unfair dealings by the Canadians, while still others were anxious over the potential precedential value the exception would have for other countries.

For example, a powerful group of Senators insisted that, because of the cultural industry exemption, the CFTA would have a “disastrous effect” on the U.S. motion picture industry.³⁴ This assessment came in the wake of a measure—then pending in the Canadian Parliament—regarding film distribution in Canada, which the Senators considered “protectionist.”³⁵ The Senators proposed implementation language authorizing the President to “consider in his assessment of equivalent commercial effect the actual and potential damage to US interests which would result if such Canadian actions were adopted internationally[.]” as well as directing the President to “consult with representatives of the US motion picture industry to assess the ramifications of such Canadian action.”³⁶

Others disliked the CFTA not for the damage that would result to the U.S. film industry from losses in the Canadian market but because they feared similar measures would be enacted by other nations. Forty one California House

31. *California Legislators Advocate Protection for Motion Picture Industry*, 54 ANTITRUST AND TRADE REGULATIONS REPORT 416.

32. QUEBEC SEPARATISM, <https://perma.cc/V773-ZVUB> (last visited Nov. 20, 2017); Nick Bryant, *Neverendum referendum: Voting on independence, Quebec-style*, BBC (Sept. 8, 2014), <https://perma.cc/ZR5X-FEQH>. The question hardly seems settled, having morphed into the “neverendum referendum.”

33. CFTA House Hearing, *supra* note 27, at 498-90 (1988) (letter of Prof. Louis Henkin) (“The Canada-US Free Trade Agreement was concluded by the President of the United States. Whatever authority the President might have to conclude elements of such an agreement on his own authority, he was given, and has acted under, authority to conclude such an agreement by act of Congress (subject to approval of Congress according to the “fast track” process).”).

34. 54 BNA, *Antitrust & Trade Regulation Report* 273 (1988). The six Senators who signed a February 5 letter addressed to House Representative Sam Gibbons were: Alan Cranston, John Heinz, Donald Reigle, Jr., Pete Wilson, Max Bacus, and George Mitchell.

35. *Id.* at 273.

36. *Id.* at 273-74.

Representatives called the Canadian exemption of cultural industries nothing more than a scheme to leave its non-tariff barriers intact: “Under the guise of protecting its culture, Canada is putting up barriers in its marketplace which, if duplicated in other countries, would seriously injure a California industry.”³⁷

American film producers were also concerned about the CFTA and were described as feeling “that the US by conceding to Canada on exempting cultural industries . . . has set a dangerous precedent within the international trading community with regard to a major component of total US service exports.”³⁸ Despite this apprehension, however, the Motion Picture Association of America (“MPAA”) did not oppose the trade agreement but instead advocated that the enabling legislation “clarify the president’s authority to take action against unfair Canadian trade barriers.”³⁹

The then-president of the MPAA, Jack Valenti, expressed conflicting views on the dangers of exceptions on cultural bassets⁴⁰ He argued that no efforts to repair damage made by a cultural exception would be sufficient, though later defended the ratification of the CFTA by pointing to the retaliation clause inserted in the implementing language. The MPAA originally opposed the exception, claiming “if Canada is free to impose any manner of barrier or quota on U.S. cultural industries, the motion picture industry is left effectively unprotected and any resulting U.S. retaliation will not restore the damage occasioned by Canada’s actions.”⁴¹ Yet, in an attempt to distinguish the CFTA from the E.C. Directive, Valenti asserted that

[W]hen the Congress adopted the [Canada] Free Trade Agreement in the implementing language, they put specific words in there that says [sic] “If, at any time, Canada attempts to impose restrictions on the American Television and Movie Industry, the President has the power to take whatever action he believes is appropriate.” So there is suitable protection there.⁴²

Though Valenti may not have viewed the two exceptions as identical, their similarity of potential effect likely occasioned a reasonably consistent view of any impending detriment to the film industry, and so despite protest by the U.S. that the exemption was contrary to the spirit of the CFTA, the result was adoption of retaliatory mirror legislation by the US. The implementing language adopted by the U.S. was a compromise that allowed the cultural exception to remain in the CFTA, though balanced by a provision retaining for the other country “the right to

37. *Id.* at 416.

38. Letta Tayler & Evan Roth, States News Service, March 18, 1988.

39. *Id.*

40. Former special assistant to President Lyndon B. Johnson, Valenti served as the head of the MPAA for 38 years. S. Res. 182, 110th Cong. (2007), <https://perma.cc/68HX-CPT7>; see also Roger Corliss, *What Jack Valenti Did for Hollywood*, TIME (Apr. 27, 2007), <https://perma.cc/5JUL-ZPHN>.

41. Therese Anne Larrea, *Comment, Eliminate the Cultural Industries Exemption from NAFTA*, 37 SANTA CLARA L. REV. 1107 (1997), <https://perma.cc/SJ8B-MZM4>.

42. The Blackwell Corporation, *American Interests “Will American Business be Welcome in a Unified Europe?”* Oct. 27, 1989 (with guests Corrado Pirzio-Biroli and Jack Valenti).

retaliate with measures of equivalent commercial effect whenever the cultural exemption hurts that country's commercial interests."⁴³

C. EUROPEAN COMMUNITY

HARRY LIME

. . . in Italy for 30 years under the Borgias they had warfare, terror, murder and bloodshed, but they produced Michelangelo, Leonardo da Vinci, and the Renaissance. In Switzerland, they had brotherly love. They had 500 years of democracy and peace, and what did that produce? The cuckoo clock.

– *The Third Man*, Selznick Releasing Co. (1949)

Looking to ease the challenges of integration and broadcaster privatization, in 1984 the “Commission” released a Green Paper on the *Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable* (“Green Paper”).⁴⁴ The Green Paper was created in response to a European Parliament Resolution calling for an outline of rules on European television and radio broadcasting, “with a view to protecting young people and establishing a code of practice for advertising at Community level.”⁴⁵ Among the stated purposes of the Green Paper was “to demonstrate the importance of broadcasting (radio and television) for European integration.”⁴⁶ The Commission asserted that “[t]elevision will play an important part in developing and nurturing awareness of the rich variety of Europe’s common cultural and historical heritage.”⁴⁷ The Commission further endeavored to establish a common market in broadcasting—the E.U. was ostensibly aiming to blur its internal borders—and “hence move[d] to secure the free flow of information, ideas, opinions and cultural activities within the Community.”⁴⁸

43. CFTA House Hearing, *supra* note 27, at 51. “Article 2005: Cultural Industries:” reads, in relevant part: “2. Notwithstanding any other provision of this Agreement, a Party may take measures with this Agreement but for paragraph 1.” 27 I.L.M 281 (1988).

44. COMMISSION OF THE EUROPEAN COMMUNITIES, COM (84) 300 FINAL, TELEVISION WITHOUT FRONTIERS (1984).

45. *Id.* at 1.

46. *Id.* at 1-2 (The introduction went on to describe further the need for information to a successful integration of the EC as follows: “Information is a decisive, perhaps the most decisive, factor in European unification. . . . European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity. A European identity will only develop if Europeans are adequately informed. At present, information via the mass media is controlled at the national level.”).

47. *Id.* at 28.

48. *Id.* at 4.

1. Green Paper – Television Without Frontiers

ANNIE HALL

God, it's so clean out here [in Beverly Hills].

ALVIE SINGER

*It's 'cause they don't throw their garbage away,
they make it into television shows.*

– *Annie Hall*, Rollins-Joffe Productions (1977)

Perhaps counter-intuitively, from the Community perspective the optimal way to ensure the free flow of information was by trying to *restrict* satellite broadcasts—as with Orwell's farm animals, some transmissions were deemed more equal than others. According to a report by the Political Affairs Committee, securing the free flow of information required that satellite broadcasts not be allowed “to flood the Community in unlimited quantities as though they were a commercial product.”⁴⁹ The Committee called for a directive to establish restrictions limiting purportedly purely avaricious commercial interests and thereby somehow ensuring the unfettered free flow of information. “Freedom of expression . . . cannot be the prerogative of the highest bidder.”⁵⁰

European Parliament's Legal Affairs Committee expressed a concern that the exchange of information not be hampered by a patchwork of rules and regulations differing from nation to nation, and in an Opinion called for at the very least provisions in Community legislation on the media to “ensure that a variety of opinions, information, and cultures are [sic] expressed.”⁵¹

Echoing the “tyranny of the majority”⁵² concerns that de Tocqueville first expressed during the infancy of the American democratic experiment, there was similarly some apprehension in Europe about the possibility of cultural dominance by one Member Nation over another because of the access trans-border broadcasting would provide.⁵³ However, that perceived threat from Member Nations was ultimately dismissed, principally because of the dominance by the U.S. film industry. “The creation of a common market for television production is thus one essential step if the dominance of the big American media corporations is to be counterbalanced.”⁵⁴ In a nod to the relatively weak economic position of the European film production industry, the Green Paper expressed the hope that “. . . the establishment of a Community-wide market will allow European firms to improve their competitiveness.”⁵⁵

49. *Id.* at 4 (opinion of the political Affairs Committee, drafted by Johan van Minnen).

50. *Id.* at 3.

51. *Id.* at 3.

52. *Election Central*, CONSTITUTIONAL RIGHTS FOUNDATION, <https://perma.cc/4BYW-GHCF> (last visited Nov. 13, 2017).

53. COMMISSION OF THE EUROPEAN COMMUNITIES, COM (84) 300 FINAL, TELEVISION WITHOUT FRONTIERS 33 (1984).

54. *Id.* at 33.

55. *Id.*

2. Directive

HARRY BROCK

You'll do what I tell ya.

– *Born Yesterday*, Columbia Pictures Corporation (1950)

The Directive had much in common with its Green Paper precursor and was adopted on October 3, 1989. Despite efforts by the MPAA to sway Member votes against the Directive,⁵⁶ only Denmark and Belgium objected to its adoption; it was supported by the ten other member states.⁵⁷ In the interceding years between the Green Paper and the Directive, European television programming time continued to be increasingly monopolized by U.S. content.⁵⁸ In 1987, U.S. imports comprised 20,000 hours or approximately eight percent of the 250,000 hours of television programming broadcast in the E.C.⁵⁹

The most assiduously contested provision of the Directive was Chapter Three, Article Four, Section One, which directs that “Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European Works, within the meaning of Article 6, a majority proportion of their transmission time.”⁶⁰ The calculation of proportionate transmission time is not to include that reserved for “news, sports, events, games, advertising and teletext services.”⁶¹ Where the majority cannot be met, the proportion “must not be lower than the average for 1988 in the Member State concerned.”⁶²

The Article Four mandate established a floor requirement, not a ceiling, thus enabling Member nations to reserve fifty percent *or more* of the available time for European Works. France, with its forty percent limit on foreign telecasts, therefore, was in full compliance with the Directive. Any Member nation that elected not to

56. Barbara Hetzer, et. al., *Bold Strategies for a Brave New Market*, BUS. MONTH (Aug. 1989), at 44. In 1987, the ability of any EC Member Nation to veto a bill in the Council of Ministers (the last step before a directive becomes law) was eliminated by a switch to a “qualified majority” system of voting. Fifty-four of the total seventy-six votes were needed to pass a law, making it possible for certain key countries to block a bill. In the spring of 1989, lobbyists for the MPAA tried to persuade Denmark, Germany, and the Netherlands to vote against the Directive.

57. H.R. REP. NO. 110-290, at 1 (1989). The twelve Member States in 1989 were: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. *The Changing Face of Europe*, EUROPEAN UNION, <https://perma.cc/3L6E-YZ26> (last visited Nov. 13, 2017). There are currently twenty-eight Member Countries. *About the EU*, EUROPEAN UNION, <https://perma.cc/7PET-BHKY> (last visited Nov. 13, 2017).

58. America’s entertainment industry was the country’s number two export after defense and ahead of food. Exports of films for European TV grew five times over five years from 1983 levels. *Buddy, Can you Spare a Reel*, THE ECONOMIST, Aug. 1989, at 68.

59. By 2007, domestic European fiction broadcast by European TV channels had gained ground over U.S. content to represent a share of approximately 39%, according to the European Audiovisual Observatory. ESTEVE SANZ, EUROPEAN TELEVISION IN THE NEW MEDIA LANDSCAPE 88 (2012).

60. Council Directive, *supra* note 21.

61. *Id.* at art. 4 § 1. What that left wide open to foreign programming was scripted programming, most often in prime time.

62. *Id.* at art. 4 § 2.

televise any foreign programming at all would also have remained in full compliance. So much for unfettered freedom of expression.

Article Six delineated criteria for qualification as a European work, encompassing essentially three categories: (1) works originating from Member States; (2) works originating from European third States that are parties to the *European Convention on Transfrontier Television of the Council of Europe*; and (3) works originating from other European third countries with which the Community has concluded a special agreement.⁶³ If the work originated from producers mainly residing in any of these sources, it qualified only if it were solely created by such producers, if the production of the work were “supervised and actually controlled” by one or more of the European producers or if the contribution to the work by the co-producers was “preponderant.”⁶⁴ Finally, works that did not fall under the meaning of European in Paragraph One but were mainly made with authors residing in Member States were considered European works to the proportional extent of the contribution of the Europeans to total production costs.⁶⁵ Segregation along national lines was baked into the mandated formula from the very beginning.

Although maintaining European control was the focus of the restriction, it did not eliminate options such as joint ventures, foreign financing, and concept licensing. For example, the practice of licensing television show concepts to be remade in the foreign domestic market was consistent with the Directive. The French version of “Wheel of Fortune”—a show which in the United States owns the mark “America’s Game®”—qualified since it was produced in France under French control, even though the format was created and licensed by legendary American producer and talk-show personality Merv Griffin.⁶⁶ Jack Valenti bristled at this hair splitting, exclaiming at every opportunity that so-called cultural preservation was nothing more than a front to protect existing labor plus create new local jobs. Valenti pointed out that the E.C. position was based on the false premise that “a European TV series or game show is the cultural equivalent of Molière.”⁶⁷

But was the European position as fantastic as Valenti portrayed it? Discounting temporarily that a majority of U.S. programming broadcast in Europe is simply dubbed into the local language and otherwise remains intact, are there differences

63. *Id.* at arts. 3, 6 § 1

64. *Id.* at art. 6 § 2.

65. *Id.* at art. 6 § 4.

66. The Wheel of Fortune was produced locally in France, Italy, Germany, Holland, and Spain; each has its own version of hosts Pat Sajak and Vanna White. Jacqueline S. Gold, *Un des Ces Jours, Alice . . .*, FINANCIAL WORLD, Oct. 13, 1992, at 163.

67. Frasier, *supra* note 22, at 50. Although if he were still with us Valenti might take issue with YouTube for other reasons, today the world wide web offers anyone interested in watching Molière plays performed by the august talents at La Comédie-Française dozens of hours of the highest expression of French culture available on-demand on that platform and for free. Let’s leave any potential bootlegged IP infringement issues aside for the moment and consider these all-access uploads akin to a cultural public service while remaining grateful for any people willing to spend their leisure time absorbing classic seventeenth-century French theater. Even in the modern entertainment economy, an audience member’s time and attention still remain the most valuable metrics.

in how the local production of something even as formulaic as a fill-in-the-blank game show is framed and expressed which can only be attributed to culture, even if the underlying concept is a foreign one but the producers are European? Perspective, linguistic nuances and national references are but the most obvious manifestations of different sensibilities. American artists and producers of films, notably absent in these debates, acknowledge that their products reflect the culture in which they were made as well as reinforce and influence social values.⁶⁸ At the time of the negotiations this bolstered the E.U. position but today seems an equally cogent counterpoint to the anti-trust action; perhaps Franck the Frenchie vacationing in Spain would benefit greatly as an E.U. citizen by watching his neighbor's local, albeit foreign language, production of his favorite game show on the international "Wheel of Fortune" channel, *verdad?*⁶⁹

D. THE GENERAL AGREEMENT ON TARIFFS AND TRADE

JIMMY CONWAY

What did I tell you? I talked to you, didn't
I? . . . *Didn't I say not to go buy anything for a
while?*

– *Goodfellas*, Warner Brothers (1990)

Many Americans believed that the E.C. Directive was inconsistent with the E.C.'s obligations under the GATT.⁷⁰ Intended to reverse the protectionist and discriminatory trade practices that had multiplied during the post-World War I depression years, the GATT, in combination with the International Monetary Fund and the World Bank, was designed "to help the advanced industrial countries achieve the multiple objectives of full employment, freer and expanding trade, and stable exchange rates."⁷¹ The eighth and final round was begun in Punta del Este, Uruguay, during a special session of the GATT and is commonly known as the Uruguay Round.⁷²

68. Bernard Weinraub, *The World Trade Agreement: The Hollywood Reaction; Clinton Spared Blame By Hollywood Officials*, N.Y. TIMES, Dec. 16, 1993 at D9 ("Talent has been uncomfortably on the sidelines in these negotiations . . . This is a trade issue. You don't see anybody directly responsible for talent or the talent business in the discussions.") (quoting John Ptak, Creative Artists Agency).

69. The French version was *La Roue de la Fortune*, which aired on national broadcaster TF1 for approximately twenty years, and the Spanish version is called *La Ruleta de la Suerte* and can be seen on Antena 3. ANTENA 3, <https://perma.cc/ZGD3-YARL>.

70. The GATT was negotiated in 1947 and was the legal basis for world multilateral trade. General Agreement on Tariffs and Trade, opened for signature, Oct. 30, 1949, 61 Stat A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted as amended* in 4 GATT BISD 2, Sales No. GATT/1969-1 (hereinafter GATT).

71. J. JACKSON AND W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 282 (3rd ed. 1986).

72. DAVID P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992 2341 (Terence P. Stewart ed., 1993) ("The seven previous negotiating rounds included: Geneva (1947);

Resting on three major principles, the GATT maintained that: (1) trade should be conducted on the basis of non-discrimination; (2) governmental restraints on the movement of goods should be kept to a minimum, and if changed, should be reduced, not increased; and (3) the conditions of trade, including the level of tariffs, should be discussed and agreed to within a multilateral framework.⁷³

E. U.S. REACTION TO THE E.C. DIRECTIVE

BRONTË MITCHELL FAURE

We don't have to like each other. We just have to get married.

– *Greencard*, Touchstone Pictures (1990)

One week after the adoption of the Directive, then United States Trade Representative (“USTR”) Carla Hills announced that the United States would file a complaint under the GATT unless the U.S. and the E.C. could negotiate a settlement to the dispute.⁷⁴ The United States entered into required GATT consultations with the E.C. on December 1, 1989, but was unsuccessful in effecting change.⁷⁵ By January 18, 1990, France had implemented legislation requiring a reservation of sixty percent transmission time for European Works pursuant to the Directive’s quota.⁷⁶

In criticizing the Directive’s quota system, the United States turned to the first of the stated goals of the GATT and claimed that the quota violated Article III’s national treatment provision, which aims to equalize the treatment of foreign goods as against domestically produced ones.⁷⁷ For certain Member States, it seems that their world was increasingly under siege from an alien menace.

F. E.C. RESPONSES

RANDOLPH DUKE

Mother always said you were greedy.

MORTIMER DUKE

She meant it as a compliment.

– *Trading Places*, Paramount Pictures (1983)

Annency (1949); Torquay (1950); Geneva (1956); Dillon (1960-61); Kennedy (1964-67); and Tokyo (1973-79).”).

73. ANDREAS F. LOWENFIELD, INTERNATIONAL ECONOMIC LAW, IV, PUBLIC CONTROLS ON INTERNATIONAL TRADE 23 (1983).

74. *European Community: Administration Urged to “Protect” US Access to EC Broadcasting Market*, 6 INT’L TRADE REP., (BNA) 1337 (Oct. 18, 1989).

75. *Id.* at 1337.

76. *European Community: USTR Hills Blasts France for “Restrictive” Implementation of EC Television Directive*, 7 INT’L TRADE REP. (BNA) 303 (Feb. 28, 1990).

77. JACKSON & DAVEY, *supra* note 71, at 483.

Back then of course there were only three ways for individuals to enjoy filmed entertainments and hence for the rights' owners to claim payments due them: (1) by watching via a third-party "push" distributor that paid a limited-time, limited-run license fee on behalf of its broadcast audience; (2) by using a home machine to create a lower-quality Betamax or VHS copy via the intermediary of the broadcaster's run and time-shifting the right to enjoy it later; or (3) by purchasing a higher-quality physical copy, if available from the distributor, and exercising a private property interest in the tangible object to watch it as often as the owner wished.⁷⁸ Today with TiVo, digital storage lockers, on-demand access and streaming platforms, it is possible for people to watch programming without resorting to any of these delivery methods, and for related payments to be booked electronically in excruciating specificity of detail. It is that same plethora of individualized data available to broadcasters that, as we shall investigate further in Part II below, vastly complicates and in some cases restricts their abilities to meaningfully measure the increasingly mobile audiences they try to serve.

1. Service Not Good

[T]his story has given faithful service to the Young in Heart; and Time has been powerless to put its kindly philosophy out of fashion. To those of you who have been faithful to it in return . . . and to the Young in Heart . . . we dedicate this picture.

– *The Wizard of Oz*, MGM (1939)

The Community responded that the products at issue are not goods but services, and they pointed to intangible entertainment as separable from the physical cassette or reel on which it was encoded. While the GATT established characteristics as to what constitutes a service—none of which television programming has—the Europeans made a strong argument by asserting that the value of the program is in the content and not its delivery medium.⁷⁹ In an attempt to liken cultural products to other traded goods, the counterargument was that there is or should not be any difference in measuring sales metrics between movies and say, cars, with copyright being wielded as a mechanism to monitor unit sales. But those who made such a claim failed to acknowledge that while cars rarely influence which movies people

78. The basis of *Sony v. Betamax*, the foundation of the business model for TiVo and other similar storage locker services, and which ultimately gave rise to the *ABC v. Aereo* copyright case, which to my mind missed the bigger picture of an individual's ability to access broadcast programming sent out over the federal commons for free while outside her home jurisdiction, and eliminated a mobile viewer's interest in favor of a broadcaster's copyright.

79. Services are produced and consumed simultaneously; may not be stored; cannot be traded over long distances; and usually do not involve tangible output that can be easily counted. Jon Filipek, "Culture Quotas": *The Trade Controversy Over The European Community's Broadcasting Directive*, 28 STAN. J. INT'L L. 323, at 17 (1992).

will see, filmed stories have the power to affect nearly every type of consumer purchase. A classic Hollywood tale from Frank Capra's 1934 romantic comedy road picture, *It Happened One Night*, illustrated this point: there is a scene in which the protagonist, played by Clark Gable, removes his shirt and reveals that he is not wearing an undershirt, causing national sales to plummet in that men's undergarment industry category. This anecdote has passed into legend and is oft-cited as the definitive example linking impressionable fans and influential stars with stories and consumer preferences.⁸⁰ Modern metrics include Joel Goodson in *Risky Business* causing Wayfarer sales to soar⁸¹ or Carrie Bradshaw moving Manolos as a "Sex and the City" sideline, even though HBO never saw a nickel of the spectacular sell-through halo effect.

2. Cultural Exception

CHARLEY (AS PRIEST)

Magna Carta, Master Charga.

– *Johnny Dangerously*, Twentieth Century Fox Film Corp. (1984)

The Community rested its cultural exception on two main pillars: (1) that the GATT allowed for the protection of film on cultural bases;⁸² and (2) that the United States agreed to allow similar restrictions in its 1989 Free Trade Agreement with Canada.

There is little debate that the exceptions to the GATT regarding motion pictures were made in recognition of their cultural value.⁸³ That the exception was to be applied to "films of national origin" should not, however, lessen the validity of the exception's underlying motivation. USTR Carla Hills criticized the E.C. argument by saying that it was "fallacious" since it implied that "the culture of a country such as Spain has more in common with England than with Mexico."⁸⁴ Yet one idea at the heart of the Directive was that although Spain and England do not share a common language, in order to be successful in a common economic future they should learn about each other's different cultural perspectives.⁸⁵ What this perspective ignores at its peril is that there are deep connections to be forged within

80. GARSON KANIN, *HOLLYWOOD: STARS AND STARLETS, TYCOONS AND FLESH-PEDDLERS, MOVIEMAKERS AND MONEymAKERS, FRAUDS AND GENIUSES, HOPEFULS AND HAS-BEENS, GREAT LOVERS AND SEX SYMBOLS* (1974). And for the counterculture potential of US films to turn viewers into subversives in Communist Romania, there's the documentary *CHUCK NORRIS VS COMMUNISM*. See MOVIE TRAILER, *CHUCK NORRIS VS. COMMUNISM*, <https://perma.cc/Q4CL-NRQS>

81. Denise Gellene, *Soaring Sales Make Wayfarers Anything but a Risky Business*, L.A. TIMES (Aug. 7, 1988), <https://perma.cc/BG5Z-XC4T>.

82. For a thorough historical examination of the GATT and television, see Jon Filipek, "Culture Quotas": *The Trade Controversy Over The European Community's Broadcasting Directive*, 28 STAN. J. INT'L L. 323 (1992).

83. The Article Four exception is for cinema pictures.

84. *Bush Urged to Protect Access to EC; US Fails to Get Dispute Aired at GATT*, BURAFF PUBLICATIONS, Oct. 20, 1989, at 2.

85. At least this was the case until Brexit gained Leave traction.

cross-border fantribes for all types of programming—including for the dizzyingly diverse stories that originate in America—that contribute to refining a sense of individual identity of increasing central importance to multi-culti internationals. How did multi-platform mega producer Lauren Shuler Donner embrace and enhance the global-tribal audience for The Donners' Company X-Men films, morphing them into a bona fide franchise? In part by dispatching her multi-national cast as ambassadors to whichever country the stars wanted to host a local launch party.⁸⁶ Or to compare another cross-border community in action, get a group of "Walking Dead" fans from across the ever-expanding international empire that Gale Anne Hurd has cultivated together for a session of "Talking Dead" in whatever language Chris Hardwick will take a tweet.⁸⁷

3. Not Binding

JOEL'S MOTHER

Just use your best judgment. We trust you.

– *Risky Business*, The Geffen Company (1983)

Adding to the local confusion, the Community pointed out that the Directive, while politically binding, was not legally binding on the Member Nations.⁸⁸ Although member states were obliged to pass national legislation complying with the Directive's guidelines within two years, the vague language of Article Four allowed for broad room for local interpretation as to what is "practical" and "appropriate."⁸⁹ Regardless, the prevailing practical sentiment in the United States was concerned with seeking clarity in continuing to do business in Europe. As the head of Walt Disney Studios prognosticated at the time, "We have seen the future and it is France."⁹⁰

86. Conversation with Lauren Shuler Donner (Nov. 6, 2015).

87. 193 countries are members of the United Nations; "The Walking Dead" is distributed in 120 of them. Leo Barraclough, *The Walking Dead' Season 8 Returns to Fox in 125 International Markets*, VARIETY (Oct. 18, 2016), <https://perma.cc/UT5T-29C3>; *Interact with Chris Hardwick and Guests During Talking Dead*, AMC, <https://perma.cc/A8FM-8NM9> (last visited Dec. 5, 2017).

88. "[Article Four] is not a legal obligation, it's a political commitment." Statement of Martin Bangemann, EC Vice President. *Greenhouse, Europe Reaches TV Compromise; US Officials Fear Protectionism*, N.Y. TIMES (Oct. 4, 1989), <https://perma.cc/G9CL-5GY3>.

89. Council Directive, *supra* note 21.

90. Television Broadcasting and The European Community: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong. 50 (1989) (statement of Richard Frank, President, Walt Disney Studios).

G. ANTICIPATED EUROPEAN CLAIMS HAD THE GATT GOVERNED

LE BARON GREGOIRE PONCELUDON DE MALAVOY

Je retourne à mon pays pourri, Madame! Ma place est là-bas. Je ferai des canaux, je monterai des digues! Je creuserai la vase de mes mains s'il le faut.⁹¹

– *Ridicule*, France 3 Cinéma (1996)

And so American studio heads and others took the audience's side and argued that the European people should be allowed to choose what they watch, asserting that the Community was being perilously paternalistic in restricting access to outside ideas.⁹² USTR Mickey Kantor rejected the notion of a French trade victory: "They didn't win. In fact, the French people lost. They are going to be denied the right to their freedom of choice."⁹³

1. Dumping

BARBARA STONE

Do I understand this right? I'm being marked down?

– *Ruthless People*, Touchstone Pictures (1986)

The E.U. could have made a claim that the U.S. pricing and distribution system was tantamount to dumping. At the time of the GATT negotiations, the cost of producing a one-hour television drama episode in the United States was often US\$1 million,⁹⁴ and the cost of producing a half-hour comedy show approximately US\$450,000.⁹⁵ While the episodic cost figures have since changed, both then and now a majority (if not all) of the expenses are recouped in the initial network and syndication sales of a show in its domestic market. And then as now, given how the American traditional broadcast model is structured, by the time a serialized hit reaches the magic 100 episode syndication number, it generally is in pure profit generation mode once offered overseas, so studios can afford to offer it downstream at levels lower than its original market price.

As high/low examples during the Uruguay Round negotiations, in Europe in 1985 the lowest sale price for one half-hour of programming was set in Portugal at US\$215; by 1989 the highest figure paid for a television hour was US\$50,000 in

91. "I'll return to my rotten country, Madame. I belong there. I'll make channels, I'll build dams, I'll dig the mud out with my bare hands if necessary." *RIDICULE* (France 3 Cinéma 1996).

92. Frasier, *supra* note 22, at 50.

93. *Id.*

94. John Marcom, Jr., *Empty Threat?*, *FORBES*, Nov. 13, 1989, at 43.

95. Steven Greenhouse, *The Media Business: For Europe, U.S. May Spell TV*, *N.Y. TIMES*, July 31, 1989, at D1.

the United Kingdom.⁹⁶ The prices were so relatively low that no foreign domestic producer could compete with intrinsic production values, and U.S. market dominance was assured, or so went the argument. Fledgling European channels, lacking adequate capital, were only in a position to buy the majority of their programming, at least until they generated enough money to afford creating original productions.

Of course, European nations could have bought less expensive regionally produced programming, but Hollywood exported guaranteed hits, some of which had proven themselves so popular they were on the air in the States for over a decade. So while it is true that the per episode cost may have been lower than the original production cost, it is also true that quite often—not always, but often—the pool of exceptional talent in Hollywood is so expert at its craft that it creates consistently quality programming that the world wants to spend its precious free time watching.⁹⁷

The Community—rather than considering these programs as relative bargains subsidized by the American people and the corporations that utilized the programs as enhanced advertising delivery vehicles—responded with the belief that their citizens had limited (read: home grown) choices precisely because their markets were open to allegedly illicit U.S. pricing practices.

Either way, the discussion at the time of these negotiations was a side-bar, for under the GATT in Article Four, dumping was not forbidden. The GATT authorized certain unilateral actions to offset the effects of dumping if the dumping “causes material injury to a domestic industry.”⁹⁸ The anticipated remedy to dumping is not, however, restricting market access but levying anti-dumping duties.⁹⁹ Perhaps most importantly, the debate further elucidated the vast gulf in perspective between the United States and European Union concerning the breadth of an inclusively collaborative creative process and the freedom of cultural exchange.

2. Temporary Import Restraints

INIGO MONTOYA

There's not a lot of money in revenge.

96. Colin Hoskins, Rolf Mirus & William Rozeboom, *U.S. Television Programs in the International Market: Unfair Pricing?*, 39 J. COMM. 55, 56 (1989).

97. For a concise understanding of how broadcasters as deficit financiers are akin to venture capital firms, see Jon Nathanson's *The Economics of a Hit TV Show*, in particular the section entitled “A 98% Failure Rate,” in which he discusses the risks and expenses attendant with creating pilots and series. “Only a small number of pilots will become shows, yet a typical half-hour comedy pilot costs \$2 million to shoot, and an hour-long drama costs about \$5.5 million. And that's just for shooting the pilots themselves; those costs don't include the millions of dollars spent acquiring and developing scripts, pitches, and talent deals.” By his estimate in the 2012-13 development season alone “[u]sing industry production-cost averages, . . . Fox spent \$60 million to bring 9 shows to the air, and ABC spent \$90 million to bring 8 shows to the air.” Jon Nathanson, *The Economics of a Hit TV Show*, PRICEONOMICS (Oct. 17, 2013), <https://perma.cc/H2E4-66EC>.

98. JACKSON & DAVEY, *supra* note 71, at 664.

99. *Id.*

– *The Princess Bride*, Twentieth Century Fox Film Corporation (1987)

Alternatively, the E.C. could have tried to utilize Article Nineteen, which provided an escape clause in allowing the use of temporary restraints on imports when imports cause serious injury to a domestic industry.¹⁰⁰ This type of action would have been closer to that taken by the E.C. with the Directive, but its success would have depended on the showing of serious injury to the domestic film industries. That would have been vastly more complicated in that the Directive protected the entire Community, whereas the status of local film industries varied wildly—and continues to today—from Member Nation to Member Nation. So while at the time in the aggregate Europe had an annual trade deficit with the U.S. in movies and TV programs amounting to US\$3.6 billion, significant regional experience differences and local subsidies created serious statistical static.¹⁰¹

For example, even though there were European subsidies in place at the time of the negotiations, in addition to the sixty percent reservation of broadcast time for European works, France heavily subsidized its film industry, with the Minister of Culture providing a grant of FFfr 200 million (approximately US\$35 million) on top of the revenue from taxes of eleven percent on all cinema ticket sales, five and a half percent on all proceeds from television and two percent on sales of pre-recorded video cassettes—a grand total subsidy of FFfr. 2.1 billion.”¹⁰² Since then, the amount of subsidies has only increased, and by 2012 “between them, EU governments pa[id] out over €3 billion using measures ranging from direct subsidies to tax breaks to the film industry.”¹⁰³ In 2013 France turned the hold-out screws yet again, and playing the culture card threatened to “veto the bloc’s trade talks with the US until the [film] sector was exempted from the negotiations.” Among the many concessions that the E.C. granted and that were hailed in France as “a great outcome” and that then-Competition Commissioner Joaquin Almunia

100. *Id.* at 298. See AMELIA PORGES, FRIEDL WEISS & PETROS C. MAVROIDIS, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 515 (6th ed. 1995). Article XIX Emergency Action on Imports of Particular Products reads in relevant part: “1. (a) If, as a result of unforeseen developments and of the effect of obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.”

101. Frasier, *supra* note 22, at 50.

102. *Culture and Trade: Cola v. Zola*, ECONOMIST, Oct. 16, 1993, at 78.

103. Benjamin Fox, *EU Pleases France, Widens Film Subsidy Rules*, EUOBSERVER (Nov. 15, 2013, 8:47 AM), <https://perma.cc/CBR8-3CJP>. He further indicated that in 2013, “[t]he [European entertainment] sector employ[ed] one million Europeans.” In the EU-28 zone in June 2015, the aggregate number of unemployed people, as estimated by Eurostat, was 23.3 million (of whom 17.8 million were in the euro area). “Among the Member States, the lowest unemployment rates in June 2015 were recorded in Germany (4.7%) and the Czech Republic (4.9%), and the highest in Greece (25.6% in April 2015) and Spain (22.5%).” News Release, *Euro Area Unemployment Rate at 11.1%*, EUROSTAT (July 31, 2015), <https://perma.cc/77HR-CTP9>.

considered “essential to help preserve cultural diversity” was that “Governments will also be able to require that between 50 to 80 percent of subsidized films’ budgets must be spent within the country.”¹⁰⁴ So much for freedom of movement of capital.

Do these E.U. cinema subsidy transfers in turn give other E.U. member citizens a(n albeit miniscule) pro-rata financial interest in the outcome of the films that their taxes pay to keep the French movie industry alive, and, if so, an eventual “Pay-TV”-esque right to access the results of their indirect investments where ever they are in the Union (or, as we will examine below, beyond its borders)? If yes, then perhaps the U.S. should consider renewing the argument USTR Chief Negotiator Mickey Cantor made during the GATT negotiations and ask for concomitant consideration to exercise any financial interests flowing from discriminatory pricing premiums on U.S. films that are transferred to subsidize European content. The French, for example, place a hefty tax—during Cantor’s era of service it exceeded ten percent—on theatrically released American movies and use the proceeds to fund projects from domestic producers such as powerhouse pay TV player Canal+.¹⁰⁵ And while one studio’s subsidy is another’s diverted royalty, as we shall examine in greater depth below, for many artists in both systems this strict follow-the-funds mentality is utterly beside their creative point.

H. U.S. COURSES OF ACTION

JEFFERSON SMITH

I wouldn't give you two cents for all your fancy rules if, behind them, they didn't have a little bit of plain, ordinary, everyday kindness and a little looking out for the other fella, too.

– *Mr. Smith Goes to Washington*, Columbia Pictures Corporation (1939)

The disappointment of the Hollywood community in the USTR’s failure to eliminate the restrictions entirely during the GATT negotiations was tempered by certain strategic and practical factors. Since no European concession was imminent, by pulling the issue out of the scope of the GATT the U.S. preserved its right to take retaliatory action.¹⁰⁶ While Section 301 of the Omnibus Trade and Competitiveness Act of 1988¹⁰⁷ was a potential weapon, despite the legitimacy of a

104. Fox, *supra* note 103.

105. KERRY SEGRAVE, AMERICAN FILMS ABROAD: HOLLYWOOD’S DOMINATION OF THE WORLD’S MOVIE SCREENS FROM THE 1890S TO THE PRESENT 273 (1997); Edward Jay Epstein, *Hollywood’s Big Loss*, SLATE (Nov. 21, 2005, 12:58 PM), <https://perma.cc/6Z8D-6AZP>.

106. Peter Passell, *How Free Trade Prompts Growth: A Primer*, N.Y. TIMES, Dec. 15, 1993, at A1.

107. Section 301 (a) and (b) provide:

(a) Mandatory Action

(1) If the United States Trade Representative determines under section 304(a)(1) that –

(A) the rights of the United States under any trade agreement are being denied; or

Super 301 action, non-governmental endeavors by the private sector to strengthen existing ties with their overseas industry partners proved to be the most effective practical solution.¹⁰⁸

1. Super 301

SUPERMAN

Easy, Miss. I've got you.

LOIS LANE

You—you've got me? Who's got you?!

– *Superman*, Warner Brothers (1978)

The United States had had the power all along to initiate a Super 301 action against the E.C. In 1991 and 1992 the U.S. placed the E.C. on its priority watch list because of the broadcast quota.¹⁰⁹ Some urged that a Special 301 complaint be lodged, pointing to the success the threat of unilateral trade retaliation by the U.S. has had in the past with other nations.¹¹⁰

(B) an act, policy or practice of a foreign country –

(i) violates or is inconsistent with, the provisions of or otherwise denies benefits to the United States under any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct to the Trade Representative to take under the is subsection, to enforce such rights or to obtain the elimination of such act, policy or practice.

(b) Discretionary Action – If the Trade Representative determines under section 304(a)(1) that –

(1) and act, policy or practice of a foreign country is unreasonably or discriminatory and burdens or restricts United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to specific direction, if any, of the President.

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164-65 (1988).

108. “Super 301. . . . Under this amendment to the *Trade Act of 1988*, the U.S. Trade Representative was required in 1989 and 1990 to designate “priority foreign countries” chosen for the number and pervasiveness of their policies or practices impeding U.S. exports, and for the U.S. export gains that might come from removal of those practices. The law called for *retaliation (Sec. I)* if foreign action was insufficient or not forthcoming.” *IV. Terms Related to US Trade Legislation*, INSTITUTE FOR TRADE & COMMERCIAL DIPLOMACY, <https://perma.cc/GJ2G-649A>.

109. Josephine Ludolph, *The EC's Accomplishments in and Prospects for a Single Market in Services*, BUS. AMERICA, Mar. 8, 1993, at 6, 9.

110. In 1985, the MPAA filed a Section 301 complaint against South Korea over its disparate treatment of domestic and foreign film products. The complaint was withdrawn after South Korea changed its practices. *Unfair Trade Practices: Film Industry Files Section 301 Complaint Claiming Korea Has Failed to Live Up to Pact*, 5 INT'L TRADE REP. (BNA) 37, at 1269 (Sept. 21, 1988).

While under the provisions of Section 301 this situation would have qualified for its use, political considerations were factored into the decision whether to move ahead. The United States was often criticized that the Super 301 provision is itself in violation of the GATT. More importantly, however, there had been no demonstrable adverse effect to the U.S. film industry. Despite quota restrictions, at the time of the negotiation Europe accounted for seventy five percent of total revenues U.S. television program sellers pocketed from sales abroad.¹¹¹ After the conclusion of the Uruguay Round, several U.S. movie executives were understood to have believed that “business realities had been overshadowed in the dispute between the US, France and the EC” and to have pointed to the fact that “the use of quotas to limit the amount of American films and programming was not new and had not hurt the American industry.”¹¹² In fact, in the ten years preceding the initial trade negotiations, Hollywood productions accounting for market share of the E.U. were up by twenty percent, from sixty to eighty percent of total,¹¹³ and in 1990, U.S. TV shows accounted for two-thirds of Europe’s programming, and syndication of TV shows like “*Dallas*” earned one billion U.S. dollars in 1990 alone.¹¹⁴

So if the threat to the U.S. industry was indeed so slight, why did the United States pursue the issue in regards to Canada and even more heatedly when it came to the European quota? There are indications that the U.S. employed the culture question against Canada much in the same way some have hinted it did in the Uruguay Round GATT negotiations with the E.C., inflating the importance of the issue to the other side with the goal of creating a throw-away point to bargain with as a concession against other crucial industries at greater risk.

Former U.S. Chief Negotiator Peter Murphy is reported to have confessed to a conference of Quebec business leaders that cultural issues were “. . . something that I used to the maximum degree possible, and X-ed out in the end, only as a point of negotiation to get the best possible deal.”¹¹⁵ He went on to reveal that “American negotiators considered Canadian cultural issues ‘a joke’ during the free-trade talks in the late 1980s and never seriously intended to include them in the agreement.”¹¹⁶ Quebec had been dubbed “crucible of cultural nationalism in North America.”¹¹⁷

There was speculation in Europe that the increased zeal with which the U.S. addressed the issue in the GATT discussions with the E.C., as contrasted with the relatively mild treatment of the cultural exception of the CFTA, conveniently provided a bargaining chip to be used against the E.C. regarding agricultural

111. Elizabeth Guider, *Mavens See Bullish Future: Despite Euro Uncertainties, U.S. Marketgoers Confident*, VARIETY, Apr. 11-17, 1994, at A1.

112. Weinraub, *supra* note 68, at D1.

113. *Battling for the Box*, ECONOMIST, Apr. 9, 1994, at 52.

114. Carl Bernstein, *The Leisure Empire*, TIME, Dec. 24, 1990, at 56.

115. Jeff Heinrich, *Negotiator Says He Exploited Cultural Concerns in Trade Talks; Murphy Says an Independent Quebec Wouldn't Have to Worry in New Talks*, GAZETTE (Montreal), Mar. 24, 1992, at C1.

116. *Id.*

117. Alexander Cockburn, *The Mission: Reagan, Hollywood and the American Empire*, NATION, Apr. 18, 1987, at 494.

subsidies and other related points, even though media and entertainment have been America's number two exports, behind arms and ahead of food, which gives a startling sense of what the world hungers for.¹¹⁸

2. Foreign Joint Ventures

SEÑOR FERRARI

My dear Rick, when will you realize that in this world, today, isolationism is no longer a practical policy?

– *Casablanca*, Warner Brothers (1942)

All the reel-rattling sowed seeds for a potential trade war between the United States and the European Union, and each side was certainly equipped with adequate trade laws to retaliate against the other. But while legislators and lobbyists on both sides of the Atlantic pontificated furiously, business wisely pursued its own parallel course and carved out a practical alternative: forging joint ventures.

Like the proverbial optimistic shoe salesman landing on an island of barefoot inhabitants,¹¹⁹ Hollywood producers and studio leaders recognized that the explosion of available channels created a demand for available product to fill the broadcasters' needs.¹²⁰ This marketplace catalogue deficiency coupled with the weaker condition of the European film production industry created a climate of opportunity in which local producers looked to Hollywood to provide both teachers and partners. The film and television business is by definition one of the most collaborative, and the prevailing attitude was that Europe's protectionist stance simply could not prevent all boats from rising together in the higher content consumption tide if those talents found ways to cooperate.

Several American film company executives indicated that there were more trans-Atlantic movie deals at the time of the stand-off than ever before,¹²¹ and the major U.S. broadcast networks all entered into co-production arrangements with local partners in several European Member Nations.¹²² Hollywood studios made

118. Interview with Congressman Dan Glickman, former United States Secretary of Agriculture and Chairman & CEO of the MPAA (Sep. 21, 2016).

119. It is an old advertising industry sales strategy allegory in which two shoe salesmen arrive on an island where everyone is barefoot. The first looks around and reasons the market for his product doesn't exist so concludes that it is a waste of his time and leaves; the second calls the home office and says, "Send every pair you've got; we'll create demand and make a killing."

120. *Culture and Trade: Cola v. Zola*, *supra* note 102, at 79.

121. Weinraub, *supra* note 68, at D1.

122. FISR En Banc Hearing in MM Dkt No. 90-162, at 6-7 Before the FCC (Dec. 14, 1990) (Testimony of Jack Valenti). For an excellent and thorough treatment of European joint ventures, see Ann Moebes, *Structuring Media Joint Ventures in the European Community*, 14 HASTINGS COMM. & ENT. L.J. 1 (1991).

concrete investment strides to establish themselves in Europe through partnerships or the creation of overseas production centers.¹²³

Rather than continually seeking ways to punish the very entities that have for decades made the best good faith—and legal—efforts to adapt to the integration concerns of the E.U. based on its stated audiovisual objectives, the E.C. should once again consider looking to its American partners for guidance and insight as the entertainment industry adapts to navigate the free content explosion tsunami in our digital age. Because in order to stay financially afloat in the tidal wave of content flooding the modern market, as Chief Brody foreshadowed in *Jaws*: “You’re gonna need a bigger boat.”¹²⁴

II. CULTURE OR CASH?

GEORGE FIELDS

OK, I know this is going to disgust you, Michael, but a lot of people are in this business to make money.

MICHAEL DORSEY

Don’t make me out like I’m some kind of flake, George. I’m in this business to make money, too.

GEORGE FIELDS

Really?

MICHAEL DORSEY

Yes!

GEORGE FIELDS

The Arnold Theater for the Blind? Strindberg in the Park? The People’s Workshop at Syracuse?

– *Tootsie*, Columbia Pictures Corporation (1982)

So which is it? Should Europeans have every audiovisual opportunity to learn about one another in as unfettered a manner as possible or should all “European consumers” have the right to exercise their financial interest by accessing content paid for domestically as they move through Europe—and potentially beyond? If it is to be both—which seems to be the most logical bases of the E.U. arguments as well as, like it or not, the direction in which the entertainment industry is heading—then why stop at the borders of the Community? Why not simply allow Béatrice the Belgian her right to watch her favorite entertainment when traveling on holiday to the U.S. as well, or anywhere else in the world for that matter?¹²⁵ She has already proven to be a good-faith entertainment ecosystem actor by trading cash for

123. FISR En Banc Hearing, *supra* note 122, at 6-7.

124. JAWS (Universal Pictures 1975). See also *Jaws (1975) Quotes*, IMDB, <https://perma.cc/BWA4-8F6Q> (last visited Nov. 16, 2017).

125. For an analysis of the legalities of cybertravel, see Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567 (2012).

the right to watch programming, plus doing so would certainly be more economically efficient and technologically effective if she were able to pay a single source provider and eliminate many of the attendant transaction costs that waste her valuable time and inflate passed-through prices. Or to make a more specific example in the case of self-described “The Daily Show” fan Competition Commissioner Vestager, instead of allowing herself to be coerced into subsidizing her local broadcaster, she could pay Comedy Central directly as she watches reruns to cope with any attendant Jon Stewart withdrawal pangs.¹²⁶

After all, among the observations that the E.C. makes in its “Why We Need A Digital Single Market” fact sheet¹²⁷ are that “*1 in 3 Europeans* is interested in watching or listening to content from their home country *when abroad*” (emphasis in the original, though the use of “abroad”¹²⁸ could imply outside the E.U., unless this pan-European integration experiment is still not gelling on the most fundamental level) and that when it comes to “Tackling geo-blocking: In 52% of all attempts at cross-border orders the seller does not serve the country of the consumer → less [sic] clients, less revenues for companies.” Admittedly, the E.U. does not have reach in territories outside its own jurisdiction, but if the action is meant to optimally protect its citizens, then extrapolating the effect would surely expedite giving the European people what they want wherever they want it.

Moreover, there is philosophical internal support for eradicating internal obstacles. In the press release announcing a strong commitment to the Digital Single Market, Vice-President Andrus Ansip stated: “Let us do away with all those fences and walls that block us online. People must be able to freely go across borders online just as they do offline.”¹²⁹ His colleague Günther H. Oettinger, Commissioner for the Digital Economy and Society, affirmed that “Europe cannot be at the forefront of the digital revolution with a patchwork of 28 different rules for telecommunications services, copyright, IT security and data protection.” Let us next examine some of the practicalities involved for the E.U. to make their unification dreams a reality, and the impact this unification plan will have on producers (spoiler alert: to make this a little more attractive, you may have to pull as far back as Cleveland . . .).

A. ELIMINATING THE MIDDLECASTER

THE MIDDLEMAN

126. See Margarethe Vestager, FACEBOOK (Aug. 7, 2015), <https://perma.cc/U6RD-AKNZ>.

127. EUROPEAN COMMISSION, WHY WE NEED A DIGITAL SINGLE MARKET, *supra* note 17. On the other hand, they also admit that only “*1 in 5 Europeans* is interested in watching or listening to content from *other EU countries*.” (emphasis in original).

128. Abroad is defined variously as “In or to a foreign country; away from one’s home.” It is reminiscent of a comment Jefferson Davis made at the waning end of the U.S. Civil War: “If the Confederacy fails, there should be written on its tombstone: Died of a Theory.” KEN BURNS, RICK BURNS & GEOFFREY C. WARD, THE CIVIL WAR (1990).

129. EUROPEAN COMMISSION, DIGITAL SINGLE MARKET STRATEGY: EUROPEAN COMMISSION AGREES AREAS FOR ACTION (Mar. 25, 2015), <https://perma.cc/KN88-DZY7>.

I tell ya. Some chucklehead's always tryin' to take over the world.

– *The Middleman*, ABC Family (2008)

Eliminating what I term the “MiddleCaster” might at first blush sound like more of a land grab for U.S. content companies, but streamlining to a more transparent direct-to-consumer distribution system could benefit E.U. consumers as well as their domestic content producers, and equally help promote their various cultures abroad. Take for example the case of the recent hit comedy film, *Les Garçons et Guillaume à Table!* Heard of it? The 2013 feature, a Franco-Belgian co-production with no less than seven co-producing partner companies and distributed by French cinematic founding institution Gaumont, in 2014 won five César awards (the French equivalent of Hollywood’s Oscar[®], an achievement akin to the one-fell-swoop accolades Woody Allen received in 1977 for *Annie Hall*) for its writer and star Guillaume Gallienne of the Comédie Française.¹³⁰ Because of theatrical distribution obstacles, it has yet to be released in the United States, and because of source region geo-blocking, it is not possible to order the film in the U.S., nor is it possible to purchase a DVD copy of the film in France that isn’t encrypted. So even with a fervent desire to pay the producers their €10 due, an eager potential overseas viewer interested in supporting current French cinema is met with repeated transaction barriers. One solution for the impatient foreign territory scofflaw? Go online where the entire film is available for free on Vimeo. Perhaps the E.U. should consider taking the lead to remove its geo-blocks on their content to help realize their projection that “. . . digital spending on entertainment and media has double digit growth rates (around 12%) for the next five years.”¹³¹

Three obvious reasons why this has not yet happened and why it will not likely soon are concerns about: (1) privacy, (2) propriety and (3) piracy. In considering the following section, it may be helpful to recall that E.U. citizenship is an addition to, not a replacement for, Member Nation citizenship.¹³² In the audiovisual sector, this creates an additional layer of complications for producers and distributors to take into consideration when making investment and programming decisions. It also sheds further light on why attempts to transfer blame to American studios for territorial exclusivity restrictions is misguidedly myopic.

130. The picture won awards for *meilleur film*, *meilleur acteur*, *meilleur premier film*, *meilleure adaptation et meilleur montage* (best film, best actor, best debut film, best adaption and best editing), and full disclosure, GG’s a pal, but there is no friendly sugar coating needed when it comes to pure success. See *Awards: Me, Myself, and Mum*, IMDB (Nov. 23, 2017), <https://perma.cc/CSSL-EYTU>.

131. EUROPEAN COMMISSION, WHY WE NEED A DIGITAL SINGLE MARKET, *supra* note 17.

132. “Any person who holds the nationality of an EU country is automatically also an EU citizen. EU citizenship is additional to and does not replace it.” See *Freedom to Move and Live in Europe: A guide to your rights as an EU Citizen*, EUROPEAN COMMISSION (2013), <https://perma.cc/6SKF-JETM>. For a concise description of how European Law supersedes national, see Claire Bradley, *Does European Law Override National Law?*, EUROPEAN LAW MONITOR (Jan. 4, 2016), <https://perma.cc/6MV4-26CL>.

1. Privacy

NORMA DESMOND

I am big. It's the pictures that got small.

– *Sunset Boulevard*, Paramount Pictures (1950)

Did they ever. Norma Desmond would be horrified at the miniaturization of her iconic close-up. The myriad personal devices—smartphones, tablets, etc. . .—that people carry with them not only help them navigate and consume web-based content but of course also serve as nifty tools for tracking people's movements. With the shift from traditional linear programming to Subscription on Demand (“SVOD”) as a more popular content consumption preference, Europeans will eventually have to consider whether they are willing to become accustomed to what Netflix customers are already routinely subjected to in the States: rooms of analysts monitoring their viewing habit data.¹³³

Netflix, by far the largest provider of commercial streaming video programming in the United States, registers hundreds of millions of [discrete viewer action] events. As a consequence, the company knows more about our viewing habits than many of us realize. Netflix doesn't know merely what we're watching, but when, where and with what kind of device we're watching. It keeps a record of every time we pause the action—or rewind, or fast-forward—and how many of us abandon a show entirely after watching for a few minutes.¹³⁴

Eliminating territorial boundary restrictions within the E.U. thus has the potential to raise correlated Freedom of Movement issues. Commissioner Vestager's example of a Brit on holiday deserving to access his pay cable subscription is rather straightforward, so let's parse through a slightly more complicated scenario (while acknowledging that the outcome of the Brexit referendum decision is at the time of this writing still far from final; either way, it is illustrative of much larger systemic cross-border symptoms).

A relatively recent case on Freedom of Movement rights involved a multi-passport holding family in which the husband is a dual British and Irish citizen, his wife a Colombian, and their young children British. They reside in Spain. Before the Court of Justice of the European Union (“CJEU”) ruling, the wife was required to get a visa every six months in order to visit her family in the U.K., then the CJEU decision valued Freedom of Movement within the Union more than the U.K.'s

133. *Subscription Video On Demand (SVOD)*, TECHNOPEdia, <https://perma.cc/D29Y-H8UQ> (“In the U.S., the revenue from SVOD services was around \$4.3 million in 2010. In 2011, this figure reached a whopping \$454 million, establishing SVOD as the biggest segment of the online movie industry in the U.S. Netflix and Hulu are two of the most popular SVOD providers.”).

134. Andrew Leonard, *How Netflix Is Turning Viewers Into Puppets*, VARIETY (Feb. 1, 2013), <https://perma.cc/9EBK-WBGE>.

stated concern of increased risk due to unmanageably porous borders and eliminated the visa requirement for certain “third-country nationals.” That prompted one U.K. official to comment, “This ruling extends the so-called ‘right to free movement’ to millions of people from anywhere in the world who don’t have citizenship of any country of the EU.”¹³⁵

Let us further suppose that the family’s vacation home in Ireland has a subscription to Sky, via which the multi-culti family enjoys a multi-culti mix of U.S. and E.U. origin programming. At the conclusion of their time visiting family they return to Spain for the remainder of the year and while on the Continent continue to watch programming that’s been chosen for local U.K. resident consumption. (Presumably this is precisely what the E.C. has in mind—and indeed the daily rainy weather reports serve as an amusing reminder to reinforce the family decision to reside in sunny Spain.) But in order to do that, the distributors must track each of these people, possibly asking for nationality card credentials simply to authenticate their desire to assuage a bout of insomnia with “Glee” reruns.¹³⁶ That likely will not go over easily, since according to the E.C., “72% of Internet users in Europe still worry that they are being asked for too much personal data online.”¹³⁷

And though it might be fine to watch the Fox show called “Glee” in Spain, a trademark dispute brought in the U.K. by the owner of “The Glee Clubs UK” has alleged territorial infringement on a pre-existing mark.¹³⁸ After having lost the preliminary rounds and with an appeal to the European Court of Justice (“ECJ”) pending plus damages that for Fox might potentially run “into the millions,” the possible resulting rebrand could hit a sour note for the future of the series at least in that section of E.U. territory; if it does, what practical solutions will the

135. Ian Traynor, *Non-EU family members do not need visa to enter UK, says European court*, GUARDIAN (Dec. 18, 2014), <https://perma.cc/M6PF-HNAW>.

136. *But cf.* Todd Spangler, *Password Sharing: Are Netflix, HBO Missing \$500 Million by not Cracking Down?*, VARIETY (July 15, 2015), <https://perma.cc/HB4S-74QE> (“Technically, sharing passwords with anyone outside your household violates SVOD providers’ terms of service, which specify that access to the services are only for personal use and ‘nontransferable.’”); *see also* Zack Guzman, *Sharing a buddy’s Netflix? You’re not alone*, CNBC (May 18, 2015), <https://perma.cc/QCX7-NXBL> (noting, “Every good child learns that sharing is caring. And as it turns out, that lesson hasn’t been lost on Netflix and Hulu users. . . . [A]lmost one in 10 [broadband households] aren’t paying for the services they use. Netflix account owners are the most likely sharers, with more than 10 percent of users saying they use an account paid for by someone else.”).

137. EUROPEAN COMMISSION, WHY WE NEED A DIGITAL SINGLE MARKET, *supra* note 17, at 12.

138. *See* Claire Carter, *‘Glee’ may be renamed for British viewers because of copyright*, TELEGRAPH (Jul. 18, 2014), <https://perma.cc/67FK-J36K> (noting, “Comic Enterprises claimed that Twentieth Century Fox’s broadcast of Glee in the UK breached its trademark rights to the phrase The Glee Club.”); *see also* Alice Vincent, *Glee could flee UK TV screens following lawsuit*, THE TELEGRAPH (Feb. 7, 2014), <https://perma.cc/V5U6-5UWM> (noting, “The ruling could mean that Glee is taken off air in the UK, where it is broadcast by another Murdoch-owned company, Sky, Glee merchandise and DVDs removed from UK shops and music downloads halted.”); Maane Khatchatourian, *U.K. Court Demands ‘Glee’ Name Change*, VARIETY (Jul. 19, 2014), <https://perma.cc/QJF2-EG82> (Explaining that Deputy High Court Judge Roger Wyland ordered Fox to make an interim payment of \$170,000. Upon entering this order, Judge Wyland remarked, “I find it hard to believe that the cost of the re-titling and publicizing of the new name would be so prohibitive compared to the value of the series. I was told many times during the course of the trial how this series is a ‘blockbuster.’”).

Community be able to implement to enforce a Spaniard's right to watch a program whose title is automatically invalidated once that traveler enters U.K. territory?¹³⁹ While it may sound like a stretch right now, would the Community eventually be willing to bear any reciprocal responsibility to the Hollywood studios to ensure that Community members with privileges to watch licensed programs on a mobile hand-held—say a shared family iPad—do not permit free-roaming devices to be passed on to others from non-E.U./non-Schengen third-countries?¹⁴⁰ If so, the enforcement scenario possibilities alone give new meaning to the phrase “Euroseptic.”

But it is a plausible—and potentially preferable—solution: to peg all consumption to individuals rather than households, which would make a not-too-far-off common pricing strategy different from simply watching a show together as a micro-tribe in the den. So if you stay home in Luxembourg while your darling teen twins travel, and little Luca goes on a class ski trip to Switzerland while little Lea visits her grandparents at their holiday rental in Italy, the broadcaster / distributor should ostensibly have the right to know who is entitled to watch what where and on what basis (and good luck avoiding a meltdown when explaining that because of differing currency payment complications, only one of the kids can access the family account while away). Further, presuming the E.C. eventually follows the money that pays for every show—because even so-called “free-to-air” broadcast programs were obviously never in fact “free”—perhaps eventually children would enjoy a lessened economic interest in their access rights since nearly all are financially dependent on their parents and few pay taxes. Though the E.C. conveniently goes after deep-pocket American studio targets today, their definition of Television Broadcaster is as broad as their presumptively punitive pay-TV reach:

Transmission over air, cable or satellite for public viewing. Under the AVMS Directive the media service provider is the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the service and determines the manner in which it is organized. For television broadcasts, this will be done on the basis of a programme schedule for simultaneous viewing.¹⁴¹

Will this soon encompass branded story programming with integrated native ads like that offered by Austrian energy drink company Red Bull¹⁴² or pure internet-based reality-stars with enormous fan-bases like Swedish sensation Felix Kjellberg,

139. Duncan Lindsay, *This is why TV hit Glee may have to be completely renamed in the UK*, METRO.CO.UK (Feb. 10, 2016), <https://perma.cc/HP8P-LBVG>.

140. Not all E.U. Member States are within the Schengen Area as defined in the Schengen Agreement of 14 June 1985, and some non E.U. nations, notably Switzerland, have joined the Schengen Area. For a list and map, see <https://perma.cc/F4TN-F2FV>.

141. EUROPEAN COMMISSION, DIGITAL SINGLE MARKET GLOSSARY, <https://perma.cc/BG2W-7PLR>.

142. *See id.* (“Advertising spots on television may not exceed 12 minutes per hour. . . . The Court found that an advertising spot is any type of advertising broadcast between programmes or during breaks . . .”).

who has nearly sixty million direct YouTube channel subscribers?¹⁴³ Are they equally deserving of a proportionate share of EC cultural exception protection and subsidies? If so, the E.U. is going to need to carve up a much bigger (PewDie)Pie.

2. Propriety

ADAM

*I want to eat! And what do I want to eat?
Something that you made? No. I want something good.
I want something that I made!*

– Northern Exposure, *The Big Feast*, Universal Television (1993)

This brings us to content restrictions based on moral customs and conventions. One of the fascinating things about licensing the same show in different territories is that—as when making a new production—it is impossible to predict what will work and what will not. For example, “Knight Rider” (1982-86) and “Baywatch (1989-2001) reruns both brought back-end bonanzas in Germany, where David “The Hoff” Hasselhoff was so popular in his (partial) ancestral homeland that he was invited to sing—in English—at the Brandenburg Gate on New Year’s Eve in 1989 to celebrate German reunification.¹⁴⁴ But cut to April 2015 and The Hoff had, via Vevo, released a music video entitled *True Survivor* for a film called *Kung Fury*, described as “an ’80s action comedy about a super Kung Fu cop in Miami, who decides to travel back in time to kill Adolf Hitler.”¹⁴⁵

While this plot may be less popular than, say, Babewatching Pam Anderson slo-mo running alongside him at the beach, there are greater region-specific concerns than ratings. Unsurprisingly given the song’s subject matter, the backgrounds in certain scenes are peppered with swastikas, which are not symbols that are a problem for Bobby the Brit to consume in the U.K., but pose a potential issue in Germany and Austria, where displays of Nazi insignia remain subject to heightened scrutiny and under certain circumstances are codified as potentially criminal.¹⁴⁶

143. Social blade estimates PewDiePie’s monthly earnings as high as US\$1.2 million and yearly earnings at US\$13.8 million dollars. See *PewDiePie*, SOCIAL BLADE, <https://perma.cc/GX8F-VNUP> (last visited, Dec. 1, 2017).

144. See Hanna Pilarczyk, *Our Bad: Germany Still Looking for Freedom from David Hasselhoff*, SPIEGEL ONLINE INT’L (Nov. 5, 2009), <https://perma.cc/7LT2-D4F4>.

145. Logan Rhoades, *David Hasselhoff’s New Music Video Has Hitler, Dinosaurs, And So Much ’80s-Ness*, BUZZFEED (Apr. 16, 2015), <https://perma.cc/AS4N-NJ5G>.

146. For an enumeration of the applicable articles in Section 86a of the German Strafgesetzbuch (Criminal Code [hereinafter StGB]), see Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 GERMAN L.J. 174, 181-82 (2007) (“Additional problems with regard to the term ‘domestically’ according to Section 86a (1), no. 1 StGB emerge when the offenders act abroad. German spectators of a football match in Poland being broadcasted on television in Germany were punished for showing the Hitler greeting in the stadium because, by transmission, the symbol was perceived [in Germany]. In a sense, part of the action took place in Germany; therefore the offence was committed ‘domestically’ according to the provision about the place of the act, Section 9 (1) StGB. For the same reason, it may be expected that the use of the

While the *True Survivor* video may qualify for an *Indiana Jones-esque* film-as-art exemption, for the prudent producer it still raises first instance issues of local law, and who knows best about local laws and mores and tastes?¹⁴⁷ The local broadcaster who invests in the program does, because it has a vested interest that is aligned with the producers' in capturing audience share and advertiser revenue. Their employees have built curatorial careers around also knowing which voice-over artists are audience favorites and thus appropriate for dubbing which foreign actors, and when to time marketing campaigns that are attuned to national holidays, and how to give a title local language cut-through-the-clutter flair. In some jurisdictions—say wealthier, solvent Germany—where sales can translate to a revenue premium, certain content exceptions are taken into consideration (or as some less culturally sensitive marketing teams might say, censored).

Such was the case with a videogame called *Wolfenstein: The New Order*—which admittedly falls into the German category of “toys” and is not subject to the *Indy*-as-art exemption, but as the lines siloing kinds of “content” continue to blur, so do the distribution categories defining them.¹⁴⁸ Banned in Germany and Austria for nearly twenty-five years, once it was scrubbed of any Nazi-era references, the globally popular game produced by Sweden's MachineGames studio was offered for sale in 2014, but only with the caveat that “copies of the game are ‘geo-locked’—meaning that uncensored versions of the PC game could not be used in Germany or Austria.”¹⁴⁹ Sounds like a commercial-cultural win-win, right? Local sensibilities persuade “foreign” content creators to adapt to their unique perspective and history, and by private agreement restrict access on territorial bases to satisfy their local distribution partners' particular parameters.

Europe, however, aspires to be treated soon as a Digital Single Market, in which presumably all programming that producers release must be able to be viewed in all regions simultaneously. Admittedly this is not what the EC asserts in the antitrust action today—or by their own analysis are anywhere near ready to undertake—but it is a next logical step in their pan-programming progression.¹⁵⁰ Taken to its

symbol of a banned organization on a web site of a foreign internet server would be prosecuted if the web site was retrieved in Germany. However, this would interfere with the jurisdiction of other countries, which may be likewise unlimited. Moreover, providers would be overwhelmed by attending to every national legal system. Especially in countries like the USA, the UK and Australia, the restrictions of free speech in Germany often cause surprise. Thus, German law should only be applied if the web site connects to domestic matters, especially if it is written in German or otherwise obviously aimed to Germany. This topic is controversial because there is no jurisdiction to discuss that question in the context of Section 86a StGB.”)

147. RAIDERS OF THE LOST ARK cost US\$20 million to make in 1981, earned US\$116 in theatrical rentals and by 2003 had pulled in US\$400 million worldwide. Kathleen Sharp, MR. & MRS. HOLLYWOOD: EDIE AND LEW WASSERMAN AND THEIR ENTERTAINMENT EMPIRE 389 (2003).

148. For a perspective on the cross-border influence in the contemporary post-Charlottesville USA, see Vice News, *Wolfenstein II Is The Video Game That's Pissing Off The Alt-Right*, HBO (Oct. 27, 2017), <https://www.youtube.com/watch?v=wb-tF7WilP8>.

149. Mark Wilson, *German Gamers Get Nazi-Free Version of Wolfenstein: The New Order*, BETANEWS, <https://perma.cc/9JZM-5WTE>.

150. A significant number of the approximately 508 million people in the E.U. has never used the internet, and there are stark divides across regions, so while “In the EU, the proportion of individuals

optimally efficient promotion end, any studio would do well to treat all “HoffFans” around the world as equal members of a single tribe, so there would be a coordinated global marketing campaign with the attendant flurry of social media buzz: Twitter and Facebook and Instagram and Meerkat and Periscope and Snapchat and WhipClip feeds all serve up accurate fan engagement data in real-time better than any extrapolation-based ratings delivery service. None of this activity would fall within the purview of the local distributor, who is inevitably “made redundant”—all a viewer needs to call up programming is a telecom-based ISP and an indexed search function (e.g., Google), preferably for mobile Millennials on their phones. The studios, who would house their entire content catalogues on their own servers and unlock any program on an individual access basis, must therefore treat all citizens and residents in each of the twenty-eight Member States¹⁵¹ as equal potential customers and be burdened by taking myriad regional and cultural factors into consideration, not to mention different end-user operating platforms. Think of it as Tentpole Television Transmissions.

So if you were running a studio, would you even bother to dub any episodes into, say, Croatian?¹⁵² Maybe, maybe not—and maybe that job will be crowd-sourced beyond any rights holders’ control.¹⁵³ Either way, who is going to be penalized for this populist pan-release effort? The little Croatian distributor, relegated to showing largely local content: it will be out of the mixed-origin broadcast business faster than you can say “Prošek.”¹⁵⁴ And the consumer in Zagreb who has relied on a favorite linear channel to curate programming will instead have preferences suggested by algorithms (more on that below)—but on the plus side, his English will likely improve.

who have never used the internet ... fell [to] ... 21% in 2013, [it] is still six percentage points above the Digital Agenda 2015 target of 15%. Large digital divides remain as regards levels of non-use by country. The highest proportions of the population with no experience of internet use (whether at home, at work or elsewhere) were registered in Romania (42%), Bulgaria (41%) and Greece (36%), and the lowest in Denmark and Sweden (4%), the Netherlands and Luxembourg (5%) and Finland (6%). In four Member States (Italy, Cyprus, Portugal and Poland), about a third of the population are non-users.” See *Archive: Internet use statistics—Individuals*, EUROSTAT (last modified May 19, 2016), <https://perma.cc/J6L2-8A7W>.

151. Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and (for the moment) the U.K. Collectively, they are sometimes referred to as the “E.U.-twenty eight.”

152. The 2013 population estimate for Croatia is roughly 4.3 million people, or approximately half the population of New York City.

153. For a description of the “cash compensation free, passion driven” cottage subtitle community in China, see Gloria Cheung, *Passion or Piracy? Chinese Fans Are Hard to Label*, VARIETY, Aug. 18, 2015 at 74-75 (describing the admitted rights-violation practice of subtitling delayed-broadcast shows like “House of Cards” in China that has led to over “200 million views” and “cultivate[s] interest and demand for imported entertainment.”).

154. Prošek is a sweet Croatian dessert wine that is under AOC pressure from the E.U. to change its name as potential source of confusing conflict with the Italian sparkling drink Prosecco. See Cliff Rames, *Are You Pro Prošek? 12 Reasons Why You Should Be*, WINES OF CROATIA (Aug. 26, 2013), <https://perma.cc/V64E-PB9D>.

3. Piracy

HOLLY GOLIGHTLY

Hey, did you ever steal anything from a 5 & 10—when you were a kid, I mean?

PAUL VARJAK

No, I'm the sensitive, bookish type. Did you?

HOLLY GOLIGHTLY

I used to. I still do every now and then, sort of to keep my hand in. Come on, don't be chicken.

— *Breakfast at Tiffany's*, Paramount Pictures (1961)

But enough back-story exposition, let us cut to the chase: the only thing that is certain (apart from *Death Wish* and Value Added Taxes) is that consumers will continue to try to watch what they want to watch and as technology makes it ever-easier for them to do so, whenever possible wherever they are. So Commissioner Vestager only got it partially right and if she were truly looking at—you will pardon the expression—the big picture, could have more accurately expressed that: “European consumers want to watch the pay-TV channels of their choice regardless of where they live or travel in the EU.”¹⁵⁵

Anyone with a pair of eyes, a series binge itch that needs scratching and a long-haul flight ahead of them knows that; where the E.U. falls short is that it aims to unfetter our content while keeping its mid-stream piece of the revenue pie. Unfortunately, relentless corporate pressure from advertisers or shareholders or both to quantify engaged eyeballs is simultaneously forcing the audiovisual sector to experiment with recalibrating the way its products are valued, and hurtling the industry towards collapsing windows and zero-cost pricing. All the while waiting in the wings lurks the specter of a Napsterized music industry fate befalling, it hovers over entertainment conglomerate boardrooms like the Ghost of Christmas Opening-Day Past. What makes a post-Sony hack Media Mogul sleep with one eye open? The constant vigilance necessary to stave off a pervasive Sharing-Is-Caring band of swashbuckling data liberators, who imagine themselves as digital Johnny Depps (“*He* definitely doesn’t need any of my money!”) starring as legends-in-their-own-minds in *Pirates of the Caribbean 6: The Price of Freedom*.

For better or worse, we live in a world where content wants to be free (or at least the consumers want it that way), and so it shall be . . . The market usually stabilizes at the lowest common denominator, and in this case it is free. There is just so much free

155. European Commission, Antitrust: Commission Sends Statement of Objections on Cross-Border Provision of Pay-TV Services Available in UK and Ireland (July 23, 2015), <https://perma.cc/6KQC-DDWA> (alterations added).

content floating around now that the competition for viewers pulls the price down. It is hard to compete against free.¹⁵⁶

It certainly is, and people everywhere around the world are getting into the gratis act, including many of the E.U.'s own citizens who are complicit in contributing to the trending shift away from lawful bargained-for-exchange payment-based consumption. One consultancy report commissioned by the International Chamber of Commerce's Business Action to Stop Counterfeiting And Piracy ("BASCAP")¹⁵⁷ group estimated single year retail losses due to audiovisual piracy in only "Europe's five main national markets (the UK, France, Germany, Italy and Spain)" to "approximate €5.3 billion."¹⁵⁸ The main reason geo-blocking exists as a practice in the E.U. is due largely to the misnomered *Television Without Frontiers* position on regional paternalism and protectionism that the studios have been dealing with accommodating since the Uruguay Round, and these efforts to shield local E.U. Member Nation distributors' economic interests are unquestionably contributing to rampant piracy rates and runaway anti-piracy STEM costs.

In some ways this is nothing new: there has been physical satellite signal bleed for decades in Europe and everyone in our industry knows it. This phenomenon rendered negotiating anti-spillover clauses in distribution agreements a foregone exercise in futility since it was impossible to prevent satellite transmissions from exceeding their territorial license footprint. While there has long been language in contracts addressing spillover, until very recently there was no scalable solution for tracking infringement or collecting damages. So the deals continued to be uneven, reflecting the size and purchasing power of individual markets rather than a fixed price for a particular program, with part of the pricing strategy taking some proportion of free-riders in smaller neighboring countries picking up satellite signals that delivered premium content they did not pay for. It also keeps an alphabet soup of benevolent sounding "not-for-profit" (only fees) European retransmission collection and artists' rights tracking services like AGICOA,¹⁵⁹ CISAC,¹⁶⁰ FIAPF¹⁶¹ and ISAN-IA¹⁶² in business, effectively creating a secondary European managed meta-tagged data system to track American content payments.

156. Schuyler Moore, *A World Where Films are Free*, FORBES (May 25, 2015), <https://perma.cc/N9PN-4QEJ>.

157. See generally The International Chamber of Commerce, *Counterfeiting & Piracy (BASCAP)*, <https://perma.cc/EM37-D6LB>.

158. TERA CONSULTANTS, BUILDING A DIGITAL ECONOMY: THE IMPORTANCE OF SAVING JOBS IN THE EU'S CREATIVE INDUSTRIES 33 (2010), <https://perma.cc/LX3J-2HLA>.

159. AGICOA: *The Rights People*, AGICOA, <https://perma.cc/B4XZ-VCYK> (last visited Nov. 22, 2017). AGICOA claims it can collect royalties for: ADSL, cable, satellite platform, mobile applications, DVB (Digital Video Broadcast), and DVB-T (Digital Video Broadcast-Terrestrial), as well as points of reception such as households and hotels rooms. *Frequently Asked Questions*, AGICOA, <https://perma.cc/R6UQ-LEEP> (last visited Nov. 22, 2017).

160. *Who We Are*, CISAC, <https://perma.cc/KW2A-D7BB> (last visited Nov. 22, 2017).

161. FIAPF, <https://perma.cc/YJS8-3YCG> (last visited Nov. 22, 2017).

162. *About ISAN*, AGICOA, <https://perma.cc/T3XT-SV8T> (last visited Nov. 22, 2017).

Like his beloved Lucy, lately everyone's angling to get in the act whether Ricky Ricardo likes it or not. *Ai yai yai*.¹⁶³

a. Power to the Popcorn People

LORD VARYS

*Power resides where men believe it resides.
No more and no less. It's a trick.*

– *Game of Thrones*, HBO (2012)

The plot twist is that today while more stringent infringement enforcement is possible, no one wants to dissuade a rabid fan, especially one who is willing to risk fines or worse just to watch a show on the same spoiler-alert-free schedule with their friends in another jurisdiction. And while Netflix institutionalized what every expat or student abroad who once received VHS tapes from home already knew when they debuted “House of Cards” in a thirteen-episode chunk—that binging on story is often a sustained immersive salve to soothe the strains of daily life—the more seismic series landscape shift was HBO’s double-down distribution decision to go global-simul in over 170 countries with season five of “Game of Thrones”¹⁶⁴ That series is oft-touted both as the most popular and (somewhat boastfully) as “the most pirated show in the world.”¹⁶⁵ Unfortunately, the tactic did not completely stem the illicit-download hemorrhage: the fifth season premiere, *The Wars to Come*, actually broke previous series piracy records.¹⁶⁶ TorrentFreak and TruOptik reported that it was illegally downloaded an estimated thirteen million times, and while “10 percent [of those downloads] were from within United States,” in the number two piracy spot—ahead of vastly more populous Brazil, China, Russia—was France.¹⁶⁷

163. For insight into movie mogul Sam Goldwyn's regard for the Desilu hit show “I Love Lucy” as “film for television,” see Desi Arnaz, *A BOOK: THE OUTSPOKEN MEMOIRS OF “RICKY RICARDO” – THE MAN WHO LOVED LUCY* 268 (1976).

164. Rex Crum, *Netflix Says Binge Watching Is the New Normal for TV Viewing*, MARKETWATCH (Dec. 13, 2013), <https://perma.cc/785A-GR8A>; Brian Steinberg, *HBO's 'Game of Thrones' to Launch Season 5 Simultaneously Around the Globe*, VARIETY (Mar. 10, 2015), <https://perma.cc/733R-ZZA4>; Emil Protalinski, *HBO Will Air Game of Thrones Season 5 in Over 170 Countries Simultaneously*, VENTUREBEAT (Mar. 10, 2015), <https://perma.cc/2H45-K37Q>.

165. Ernesto Van der Sar, *NO. The Grand Tour is NOT the Most Pirated TV-Show in History*, TORRENTFREAK (Dec. 13, 2016), <https://perma.cc/A35Q-Z462>.

166. James Hibberd, *'Game of Thrones' Piracy Hits Record High Despite HBO's Stand-alone Service*, ENT. WEEKLY (Apr. 21, 2015, 12:00 PM), <https://perma.cc/PY4S-EN24>.

167. Ernesto Van der Sar, *Game of Thrones Piracy Surges to New High*, TORRENTFREAK (Apr. 22, 2015), <https://perma.cc/TWG4-PNP7>; *Infographic: Game of Thrones Season 5 Premier Week*, TRUOPTIK, <https://perma.cc/H7A4-YA3N> (last visited Nov. 22, 2017). Andy Samberg's 2015 HBO password sharing Emmy stunt only intensifies the climate of server-crashing hits. See Sarah Perez, *Andy Samberg Gives Out a Functioning HBO NOW Login on Tonight's Emmys*, TECHCRUNCH (Sept. 20, 2015), <https://perma.cc/63BT-UU3J>.

So if *The Economist* were looking for a purer substitute for its Big Mac Currency Index, it might instead opt for an unedited English language episode of “Game of Thrones” to measure in every market the demand for an identical underlying program (and, yes, one is which Jon Snow was, at least for a time, rivetingly dead).¹⁶⁸ Individual shows were never priced that way in Europe—or for that matter elsewhere—because different kinds of people in different cultures valued different shows differently and/or could afford more or less per episode relative to their pre-and-post-Euro economies. According to Trey Hatch, HBO’s Vice President and Senior Counsel for Programming, “*Game of Thrones* is considerably shorter on HBO Asia and . . . on Free TV in the Middle East.” So although there is an ostensible flattening of fan tribe members found across the globe in the not-too-distant offing, the editing required to keep source content locally compliant plus the inconsistent panoply of potentially applicable rules governing viewer access only creates increasingly disparate audience experiences. And where’s the tribal fun in that?

That is one reason that intellectual property education efforts, rather than clarifying the situation, often only further confuse things for average consumers, and variations in copyright protection laws around the world make on-demand infringement literally child’s play. In the race to the global bottom of copyright-infringement rules, forum shopping has its advantages. Australia, for example, does not criminalize the use of VPNs to circumvent geo-blocking, and it is not just kids getting into the “Greed is Good” act.¹⁶⁹ As reported by Statista, VPN usage penetration as of first quarter 2014 by age group revealed that during the survey period, “26 percent of global internet users aged 35 to 44 years were using a virtual private network or a proxy server to go online. The main reasons for doing so was [sic] in order to access geo-blocked social platforms or media content.”¹⁷⁰

For Stéphanie Röckmann, Director of Content & Media at Proximus, one such service that is forcing a recalibration of catalogue valuations is Popcorn Time.¹⁷¹ The site (originally based in Argentina, but which has since found mirror hosts in countries like Australia and Panama)¹⁷² absolves itself of all legal responsibility by

168. See D.H. & R.L.W., *The Big Mac Index*, THE ECONOMIST (July 13, 2017), <https://perma.cc/7D3Y-UGYQ>.

169. Malcolm Turnbull, Federal Member for Wentworth, Minister for Communications of the Australian Parliament, offers this analysis:

Q: Many Australians use a VPN to access Netflix in the US. Is it illegal for me to use a VPN to access Netflix?

[A:] The Copyright Act does not make it illegal to use a VPN to access overseas content. While content providers often have in place international commercial arrangements to protect copyright in different countries or regions, which can result in ‘geoblocking’, circumventing this is not illegal under the Copyright Act.

Online Copyright Infringement FAQs, MALCOLMTURNBULL.COM.AU, <https://perma.cc/QN7V-FUCD> (last visited Nov. 22, 2017).

170. *When You Access the Internet, Do You Do So Using a VPN or Proxy Server?*, STATISTICA, <https://perma.cc/KGA3-ZQZ4> (last visited Nov. 22, 2017).

171. Interview with Stéphanie Röckmann, Dir. Content & Media, Proximus (Aug. 27, 2015).

172. Todd Spangler, *Popcorn Time Reality Check: Usage of the Piracy App Is Actually Tiny*, VARIETY (Mar. 10, 2014), <https://perma.cc/3GS6-HT6D>.

shifting copyright compliance monitoring on the end user to determine whether or not participation is a jurisdictional violation.¹⁷³ Can we expect the same thing from studios in a post anti-trust action regime in which keeping track of the hodgepodge of applicable E.U. regulations, windows, and territories simply becomes too burdensome for ROA to bear? Perhaps in an effort to combat piracy, every individual's social security or equivalent national identity card number is pegged to a corresponding Internet Protocol address, and rules regulation plus enforcement are once and for all shifted to end users to sort out with their local government officials.¹⁷⁴ Violate them and expect a knock on the door from the piracy police—or some supranational cyber cop from ICANN¹⁷⁵—and a direct debit of fines charged conveniently to your kid's credit card.¹⁷⁶ *That's entertainment?*

Except that going after the little guy with a pan-European perspective is not working. Recent David versus Goliath cases include two average pub owners in the U.K. who thought they knew the value of saving a pound and ultimately triumphed over the big bad BskyB. Both Karen Murphy and Michael Thorpe were thrifty comparison shoppers who realized a benefit to decoding sporting event signals with a significantly less expensive sister Member Nation system for commercial consumption in their respective British pubs; in Ms. Murphy's case by using a Greek decoder, in Mr. Thorpe's an Albanian subscription.¹⁷⁷ Both quickly found themselves facing severe charges, spent many years in court to vindicate their actions, and bore an outsized financial burden relative to the Sterling they thought they would save by forum shopping within the E.U. Although the content in question was sporting rather than serialized, the attendant commercial consumer

173. Popcorn Time, <https://perma.cc/ZB6P-XJZV> (last visited Nov. 22, 2017). The Popcorn Time site describes its service in this way: "Popcorn Time streams movies and TV shows from torrents. Downloading copyrighted material may be illegal in your country. Use at your own risk." It further clarifies matters for its potential users with this non-dispositive FAQA: "Is Popcorn Time legal? Depends on where you're from, really. Once again: we're using torrents, so if you really care, you'd better google what the legal situation around this protocol is where you live." *Frequently Asked Questions*, POPCORN TIME, <https://perma.cc/9K6Z-SK5G> (last visited Nov. 22, 2017).

174. Sound far-fetched? Then you have never had to enter your passport number when trying to rent cyber café time in Rome.

175. ICANN, <https://perma.cc/4WX9-AXSC> (last visited Nov. 22, 2017).

176. In 2013, France's Ministry of Culture and Communication tried coupling fines with penalizing repeat offenders by shutting off their internet access all together, but that penalty was abandoned after the French minister in charge of Internet policy was quoted as saying that cutting off internet access was "like cutting off water." Jacob Kastrenakes, *France Reverses 'Three Strikes' Piracy Law, Will No Longer Suspend Violators' Internet Access*, VERGE (July 9, 2013), <https://perma.cc/X4UT-U7C7>. More recently, in 2014, an infringer of the Hadopi (*Haute Autorité pour la diffusion des oeuvres et la protection des droits sur l'internet*) in a suburb outside of Lille was fined 800 Euros. Gilles Durand, *Lille: Sanctionnée Pour Avoir Téléchargé. Illégalement (et Maladroitement)*, 20 MINUTES (July 10, 2014), <https://perma.cc/Y8YR-XPCC>. The average monthly salary in that city is estimated at 2,100 Euros. *Les Salaires à Lille*, JOURNAL DU NET, <https://perma.cc/EHK2-NEJU> (last visited Nov. 22, 2017). On a purely anecdotal basis, the most resounding defense is proving to be "it was the babysitter." For a list of revised rules and regulations, see *Téléchargé. Illégalement: Les Sanctions Hadopi*, DROIT-FINANCES.NET, <https://perma.cc/UZ43-YD82> (last visited Nov. 22, 2017).

177. Ms. Murphy thought her Greek subscription would save her £7,600 per year; it cost six years of her life in litigation. See *Pub Landlady Karen Murphy Wins TV Football Court Case*, BBC NEWS (Feb. 24, 2012), <https://perma.cc/8GPW-KB54>.

complications are far from resolved and the result in each case was decidedly high drama.¹⁷⁸

b. Taking The Theatrics Out Of Theatrical

STEPHEN FALKEN

The whole point was to find a way to practice nuclear war without destroying ourselves. To get the computers to learn from mistakes we couldn't afford to make. Except, I never could get Joshua to learn the most important lesson.

DAVID LIGHTMAN

What's that?

STEPHEN FALKEN

Futility. That there's a time when you should just give up.

– *WarGames*, United Artists (1983)

For every lawsuit or action against the individual end-user,¹⁷⁹ the rampant aggregate nature of piracy is what is driving an American industry shift towards experimenting with ever escalating war game exercises. Included in the arsenal is the trend towards deploying “global day-and-date” releases for all kinds of filmed entertainments, and not just theatrical tentpoles.¹⁸⁰ As Schuyler Moore, top Hollywood entertainment industry tax guru at Greenberg Glusker is oft-heard to say, there are in truth “only two windows: first run and piracy.”¹⁸¹ The challenge is many movie house operators are staunchly convinced that the best way to ensure people come to their theaters is with an inviolate series of hold-back windows.

178. For an examination of “the impact the European Commission inquiry into TV licensing arrangements with Hollywood film studios could have on sport’s TV licensing model,” see Craig Giles, *Broadcasting: Post-Murphy: The Territorial TV Sports Licensing Landscape*, BIRD & BIRD (July 15, 2014), <https://perma.cc/3SQX-4ACE>.

179. The producers of some of the content available on Popcorn Time have been vigilant in their quest to stop individual users in various jurisdictions from infringing on their rights, launching suits in Denmark and the U.S. Ray Walsh, *Beware! Film Makers Targeting Popcorn Time Users*, BESTVPN (Apr. 1, 2015), <https://perma.cc/Q66B-K46Q>; Ernesto Van der Sar, *Movie Studio Sues Popcorn Time Users in the U.S.*, TORRENTFREAK (Aug. 19, 2015), <https://perma.cc/BG2P-RHGF>.

180. For example, Jens Richter, CEO of TV production and sales group FreemantleMedia argues that the proliferation of Netflix and other SVOD services has increased demand for “day-and-date” release of American series, explaining, “[i]f you aren’t day-and-date with an American show, in Sweden, for example, you’ll lose your first 300,000 viewers to piracy.” Scott Roxborough, *Why Europe Is Kicking U.S. Series Out of Primetime*, THE HOLLYWOOD REPORTER (July 24, 2015), <https://perma.cc/3GS6-HT6D>.

181. Moore defines the “piracy window” as “the time between the theatrical window and the home video window.” Schuyler Moore, *Netflix Will Rip the Heart Out of Pre-Sale Film Financing*, FORBES (Aug. 9, 2014), <https://perma.cc/M28B-GJLA>.

Traditionally, theatrical exhibitors have refused to budge from their model requiring studios to wait at least 90 days before a film can make its home entertainment debut. This model hasn't changed in decades despite shrinking ticket sales, the proliferation of home theatres, the rise of online viewing, and rampant piracy.¹⁸²

Somewhat ironically, that petrified position is what motivates people like Federico Abad, one of the founding creators of Popcorn Time. He aimed much of the frustrated, alienating ire he has for geo-blocking not towards the creative artists but the interstitial distributors who maintain a lock-step stranglehold on releases.¹⁸³

Going to the movies is very expensive in Argentina. Only a small circle has traditionally had access. We [at Popcorn Time] open up the culture so that not only a small group of moviegoers can participate. . . . I think the blocking of sites is damaging to Hollywood. . . . To combat piracy, they must have global premieres in all platforms. A good Netflix without country restrictions. But Hollywood only makes problems. . . . I am convinced that the Popcorn Time killer is going to be a Netflix without borders. They should remove national restrictions for films, making them available in cinemas and in streaming services simultaneously everywhere, regardless of platform for phone, tablet and TV, wherever you want, with subtitles. Had they done so, it would kill Popcorn Time once and for all.

That same "I-am-not-a-plunderer-but-member-of-the-posse" perspective is what fueled die-hard "Star Trek" fan and admitted geo-blocker-buster Dr. Marcus Kuhn to circumvent Sky's VideoCrypt security system back in 1994, after he claimed Sky denied him the right to buy a subscription in Germany that would have enabled him to watch the undubbed version of his favorite series, "Star Trek."¹⁸⁴ "Rather than being driven by a 'pirate' ethos, Kuhn simply wanted to pay for a product¹⁸⁵ that should have been freely available. When primitive licensing arrangements and restrictive business practices stopped him from doing so, Sky and its partners paid the price."¹⁸⁶

Two decades later Dr. Kuhn still asserts that he meant "no harm" but that the distributor brought this Streisand Effect of insulted and irate hacker consequences

182. Jody Simon, *Reinventing Hollywood's Theatrical Distribution Model*, FOX ROTHSCHILD LLP (Aug. 5, 2015), <https://perma.cc/JN9D-9VJ6>.

183. Osman Kibar, *Inside Popcorn Time—The World's Fastest Growing Piracy Site*, MAGASINET (Jul. 10, 2015), <https://perma.cc/G4X5-TERX>. "I love Netflix. I pay for it too. But its catalogue in Argentina is absolutely horrible. Even the latest additions they put out are several years old." More to the good faith economic actor looking to be included, Abad likened his film experience to song purveyor Spotify: "I look up a song in Spotify and it is disabled in Argentina. As if you are not part of the rest of the world. I pay for Netflix. I pay for Spotify. So give me the entire catalogue. I pay for this!" *Id.*

184. Andy, *Geo-Blocking Caused Massive TV Piracy 20 Years Ago*, TORRENTFREAK (July 26, 2015), <https://perma.cc/4GQ5-6BS9>.

185. If "EU antitrust rules prohibit the restriction of passive sales, i.e. the sales of products cross-border in the internal market responding to demands from customers not solicited by the seller," then it can hardly be American studios' fault that it's taking so long for the Union to coalesce across sectors. EUROPEAN COMMISSION, ANTITRUST: COMMISSION SENDS STATEMENT OF OBJECTIONS ON CROSS-BORDER PROVISION OF PAY-TV SERVICES AVAILABLE IN UK AND IRELAND, *supra* note 155.

186. Andy, *supra* note 184.

on itself.¹⁸⁷ In other words, Dr. Kuhn could have cared less about Sky as an entity; what he was after was access to watching stories about The Borg on his favorite show. The MiddleCaster was only getting in his way, and resistance was futile.

My recommendation to Hollywood studios and the MPAA? Call off the convoluted copyright infringement *Blairwitch*-hunts and on-board these geniuses *Catch Me If You Can* style pronto because perhaps the scariest of all tech truths is that they love the movies as much as the rest of us in the business do (of all the problems to which they applied their obviously vast intelligence to trying to solve, it was not easing climate change or disease or famine but “how can I watch what I want?”), and are more adept than life-long lot dwellers at the logistics of back-end coding for global-simul digital distribution. They are one of us—or could be if they had a way to direct access their favorite stories in real time. Let them feel embraced and included and part of the glamorous global Hollywood party that almost everyone on earth wants a comped ticket to, and I would wager they would gladly accept.

c. Goodbye to Global Gitmo

COLONEL NATHAN JESSEP

You can't handle the truth!

(beat)

Son, we live in a world that has walls. And those walls have to be guarded by men with guns. Who's gonna do it? You? You, Lt. Weinberg? I have a greater responsibility than you can possibly fathom.

– *A Few Good Men*, Warner Brothers (1992).

Or to paraphrase seminal multi-platform storyteller Aaron Sorkin's Colonel Jessup, yes, it is true that the E.U. is searching for the right content-access weapon to pick up. But just like for the sentries standing at perpetual post in Hungary or at the Channel Tunnel entrance, defending those walls has significant costs to society. House-divided governments that expend enormous efforts to block their citizens behind broadcast barriers while simultaneously claiming they want internal borders eradicated cannot stand. These brilliant coders can eliminate obstacles in a coherent way but increasingly it appears that current legal constructs prove Hollywood doesn't get digital and would prefer to divert valuable time and resources away from making meaningful stories to ramping up to Code Red levels of “You want me on that wall, you need me on that wall” hyper-vigilance.¹⁸⁸

187. Kuhn is quoted as saying, “I don't want to cause any harm to Sky and I even asked them for a regular subscription some time ago, but they refused to sell one to Germany. So they have to live with the consequences of attracting the interest of high-tech freaks to the technical details of their access control system.” *Id.*

188. Kibar, *supra* note 183. “The global film industry is in panic mode about [Popcorn Time]. A British High court recently ordered the country's largest ISPs to block Popcorn Time. Just two weeks

And a main reason Hollywood cannot or will not modernize its distribution methods is because a raft of MiddleCasters has come between artists and audience. To be sure, these MiddleCasters provide much needed cash flow, particularly when purchasing catalogues on an output basis. But once upon a theatrical time, the MiddleCasters were also a bona fide brick-and-mortar necessity, receiving and processing prints and supervising local advertising. Today “P&A” costs are ever diminishing to the point of being practically non-existent; in some cases there are no physical prints to deliver—so no one has to lubricate the local logistics and clear a reel through customs anymore to get it to the theater or station in time. The sheer volume of available content coupled with social media platforms mean that the audience is increasingly complicit in accomplishing the “A.” Keeping all the many hands that touch a single property in business is an increasingly complex burden with rapidly diminishing benefits.

Let us take the example of the work involved in distributing another 2013 film you may not have heard of but that has stars that are well known throughout the world. *A Thousand Times Good Night* had Juliette Binoche and Nikolai Coster-Waldau from, yes, “Game of Thrones,” above the title, plus a reported budget of approximately five million Euros; it made an estimated four million U.S. dollars at the opening weekend box office. The distributor, Germany’s Global Screen, made separate deals with over twenty-five international regional distributors to help the film close the deficit and possibly recoup.¹⁸⁹ It also put all those regional distributors to work; each company came to the table with its own sets of rights and contracts and negotiation styles and data security breach possibilities—a veritable smörgåsbord of cinematic struggles. Depending on whether you are from the Ministry of Labor or Finance, it is either a cradle-to-grave employment godsend or wildly inefficient; it is a question of which side of the heavily-guarded administrative fence you are on.

B. ABSORBING THE HISTORY OF THE WORLD, PART I

King T'Challa

*Now more than ever, the illusions of division
threaten our very existence. We all know the truth:*

ago, Danish police raided the homes of two youngsters who had posted information online about how easy it is to use Popcorn Time. Norway’s Rights Alliance just announced that it has started monitoring the ip addresses of the Norwegian users of Popcorn Time and is considering going to court to have it blocked. A court in Israel recently concluded that blocking would be futile, because there are simply no effective ways to defeat the service.” *Id.*

189. These deals included distribution rights for France and Belgium (Septième Factory), Greece (Danaos Cinema), Brazil (Mares Filmes), Central America (Wiesner), Argentina (CDI Films), Lithuania (Scanorama), U.S. (Film Movement), Canada (Pacific Northwest Pictures), Japan (Kadokawa Corporation), Australia (Regency Film Distribution), U.K. (Arrow), Spain (Golem), Portugal (Lanterna de Pedra Filmes), Benelux (Wild Bunch), South Korea (Cinema Republic), China (Champs Lis), Hong Kong (Edko), Denmark and Finland (Smile), Turkey (Yeni Bir Film), ex-Yugoslavia (Discovery d.o.o.), Bulgaria (Multivision), Latin America (HBO), Israel (Shoval), Middle East (Italia Film Int.), Indonesia (Suraya) and other territories. *Distributors for “1,000 Times Good Night”*, IMDB, <https://perma.cc/3LYC-SNF3> (last visited Nov. 22, 2017).

more connects us than separates us. But in times of crisis the wise build bridges while the foolish build barriers. We must find a way to look after one another as if we were one single tribe.

– *Black Panther*, Marvel Studios (2018).

Because it is only by getting off the fence—ideally tearing it down for good—and trotting out to take a full-field view of the global content game that we can appreciate what’s really in play. This is about more than a standoff between “Unfettered Free TV Access” and “Maximizing Unmonetized Demand Potential”—that purely managerial perspective misses the point of why actors and writers and directors and producers and scores of other creative talents gravitate to our industry. Generating revenue helps keep the klieg lights on while refining our crafts but an oft-overlooked element in U.S. copyright law is that it is intertwined with a presumed contribution to our collective store of common knowledge¹⁹⁰ and the transference to society of the gift that is the essential donative driver of innate talent.¹⁹¹ On balance, the energy is more give than on-the-take.

The chance to connect with extraordinary talent is the reason people return time and again to experience a resonant story well told in any medium. Simply put, audiences need artists. Story is equipment for living. Film is about capturing feelings. Celluloid protagonists act as our emotional surrogates. Irrespective of regime rules, the entertainment industry will survive and continue to thrive because a shared story is an indelible part of our collective human experience and people

190. In a letter to Isaac McPherson, Thomas Jefferson said: “If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.” Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THE FOUNDER’S CONSTITUTION (ONLINE EDITION), Article 1, Section 8, Clause 8, Document 12 (Phillip B. Kurland & Ralph Lerner eds., University of Chicago Press 2000), <https://perma.cc/57LU-BEAF>.

191. In his seminal piece THE GIFT, Lewis Hyde argues: “[A] work of art is a gift, not a commodity. Or, to state the modern case with more precision, . . . works of art exist simultaneously in two ‘economies,’ a market economy and a gift economy. Only one of these is essential, however: a work of art can survive without the market, but where there is no gift there is no art. . . . [A] gift is a thing we do not get by our own efforts. We cannot buy it; we cannot acquire it through an act of will. It is bestowed upon us. Thus we rightly speak of ‘talent’ as a ‘gift,’ for although a talent can be perfected through an effort of the will, no effort in the world can cause its initial appearance. Mozart, composing on the harpsichord at the age of four, had a gift.” LEWIS HYDE, THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD xvi (2d ed. Vintage Books 2007). And that connection to donative spirit can be modulated if mistreated, as Hyde further points out: “Moreover . . . a gift that cannot be given away ceases to be a gift. The spirit of a gift is kept alive by its constant donation.” *Id.* at xix.

will always gather around our global campfire to seek guidance and companionship as they muddle through and try to make sense of their sometimes bewitched, bothered and bewildered lives—whether that heroic metaphor comes via a sporting event or a magical boy-wizard overcoming perils on an imaginary Quidditch field or a *Sound of Music* sing along. If it resonates, people will come in droves.

The flip side of the perennial nature of our business is that today's original content creators are not simply competing with each other for a sliver of audience heart-plus-mindshare anymore, but with everything in existence that has ever been filmed: suddenly the field for new entrants is lined with heavy historical hitters since a viewer could as easily call up *Casablanca*¹⁹² or *Seinfeld*¹⁹³ as *The Walking Dead* or *Black Mirror*. Variety dubbed this phenomenon “The Retro Revival,” noting that “There have always been reruns and classic TV shows, but it seems like we are in a new era of viewers who are fanatic about nostalgia for their favorite shows and characters.”¹⁹⁴ This can be good news for new artists, as long as the tried-and-true residual streams help keep new studio productions in production, for long before an unknown overnight sensation becomes a blockbuster hit someone has to be willing to take a creative gut-based gamble. If made exclusively to feed ego and line the pockets of the already privileged, the bettor risks losing the power of having her finger on the pulse of the public. The serial home run investor willing to make a wager and trade cold, hard, up-front cash for the rights to promote a particular point of filmed view is ultimately guided by a combination of tenacity and timing and taste. Which is another way of saying, cue Ted Turner.

C. CONTROLLING A CATALOGUE WITHOUT FRONTIERS

BILL SAMPSON

The Theatuh, the Theatuh –

(he sits up)

*– what book of rules says the Theater exists only
within some ugly buildings crowded into one square mile
of New York City? Or London, Paris or Vienna?*

(he gets up)

192. This is not necessarily a bad thing; Ray Bradbury exhorted everyone who wants to work in film: “I absolutely demand that you see every important picture ever made. That’s a couple of thousand of them. I’d love to join you, because I don’t want to see most of the new films.” *Ray Bradbury, in CONVERSATIONS WITH THE GREAT MOVIEMAKERS OF HOLLYWOOD’S GOLDEN AGE AT THE AMERICAN FILM INSTITUTE* 366, 367 (George Stevens, Jr. ed., 2006).

193. Hulu recently made a deal with Sony for rights to all 180 episodes of the 90s sitcom. With approximately nine million paid subscribers, Hulu is estimated by industry insiders to have paid between US\$700k and US\$1m per episode. “The money doled out by Hulu to acquire the series would be split among Sony TV, Time Warner’s Castle Rock Entertainment and the two men who created the show: Jerry Seinfeld and Larry David.” Lance Whitney, ‘Jerry, Hello’—Hulu Lands All 180 Episodes of ‘Seinfeld’, CNET (Apr. 29, 2015, 7:58 AM), <https://perma.cc/DQ3R-AJ48>.

194. Pat Saperstein, *Why Nostalgia Rules the Internet and You Can’t Escape ‘Full House,’* VARIETY (Aug. 2015), <https://perma.cc/MTK3-PUWX>.

Listen, junior. And learn. Want to know what the Theater is? A flea circus. Also opera. Also rodeos, carnivals, ballets, Indian tribal dances, Punch and Judy, a one-man band - all Theater. Wherever there's magic and make-believe and an audience, there's Theater. Donald Duck, Ibsen, and The Lone Ranger, Sarah Bernhardt, Poodles Hanneford, Lunt and Fontanne, Betty Grable, Rex and Wild, and Eleanora Duse. You don't understand them all, you don't like them all, why should you? The Theater's for everybody - you included, but not exclusively - so don't approve or disapprove. It may not be your Theater, but it's Theater of somebody, somewhere.

– *All About Eve*, Twentieth Century Fox Film Corporation (1950)

The one-time one-man copyright conglomerate pioneer Ted Turner ultimately sunk 1.2 billion 1986 U.S. dollars to control the 2,200 film content catalogue that comprised a single studio library: the glamorous MGM goldmine.¹⁹⁵ Ownership has its privileges, or so one would be forgiven for thinking, especially after having paid so handsomely, and occasionally moguls confuse their moneymaking moxie for creative talent. It turns out this fate befell Ted, who notoriously decided that his black and white pictures deserved to be improved upon, especially once civilization had progressed to inventing colorization.¹⁹⁶ We all know what came next in the formulaic script—furious outcries of “foul!” rose from all corners of classic filmdom. But what recourse remained for interested but non-rights-holding creative parties? It depended on in which jurisdiction they attempted to assert their claims, for in the intellectual property philosophical showdown between the U.S. works-made-for-hire collective and European *droits moral* individual author ownership regimes, the critical nexus was determined by dissemination location. *The Asphalt Jungle* decision delivered screenwriter Ben Maddow and director John Huston’s heirs a local author’s rights victory by enjoining a French broadcaster, *La Cinq*, from airing a colorized version of their classic *film noir*, on the basis that “governing law on issues of authorship is the law of the country where the infringement occurs—in this case, France, where the colorized film was to be broadcast.”¹⁹⁷

The possibility that the implications of infringement attach not at the modern catalogue owner’s home jurisdiction or even where the (offensive) act of

195. Al Delugach, *Turner Sells Fabled MGM but Keeps a Lion’s Share*, L.A. TIMES (June 7, 1986), <https://perma.cc/K8Z5-PZM2>.

196. Even though when the film was shot in 1950, when the technology to shoot in color existed, the black and white quality of this literal *film noir* was seen by the new owner as a defect rather than a creative choice.

197. PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 137 (2003).

colorization takes place but instead at the site of broadcast emanation offers another sobering incentive for U.S. studios to find ways to minimize possible foreign influence over their property by going direct to consumer and eliminating any intermediary MiddleCaster meddling.¹⁹⁸ For in “Hollywood, a town built by mavericks and rebels and mobsters, risk takers all, [that] had now become utterly risk-averse”¹⁹⁹ nothing gets a rarin’-to-invest gambler to pocket her dice and find another equity crap shoot faster than not knowing which rules apply to the global “I-got-the-horse-right-here-the-name-is-Paul-Revere” game.²⁰⁰ This issue absolutely transcends copyright, as Stanford Law Professor Paul Goldstein noted, “the notion of two diverging cultures of copyright has made for unnecessary obstacles in international trade, as Ted Turner discovered in Paris; more significantly, it has been used to rationalize protectionist postures in international copyright trade.”²⁰¹

To its credit, the Commission acknowledges that if it is to achieve its Digital Single Market objective, it must “reform E.U. copyright rules.”²⁰² But the interim trickle-down effects of uncertainty are Reagan-esque in their reach and make it increasingly difficult for producers—even those with stellar proven track records like perennial U.S. cultural powerhouse Lynda Obst²⁰³—to get an almighty greenlight from the powers that pull the (preferably pre-refunded) purse-strings: “[T]his is about an industry that for more than half a century has been the caretaker of an indigenous art form possibly relinquishing responsibility for that art form altogether. Sure, it was always show *business*, never show *art*. But now it is *business* business.”²⁰⁴

198. The issue of the integrity of imputed director’s moral rights was also at issue in a similar case involving *The Seventh Cross* brought on behalf of the director Fred Zinnemann by his son Tim in cooperation with the Artists Rights Foundation, an entity created by the Directors Guild of America and “dedicated to safeguarding the rights of film artists and protecting their work from alteration. The Artists Rights Foundation provided the legal and financial backing for [the Zinnemann] suit in the tradition of support provided by the Directors Guild in the Huston case.” FILM FOUNDATION, <https://perma.cc/848Q-T5D9> (last visited Nov. 17, 2017).

199. LYNDA OBST, *SLEEPLESS IN HOLLYWOOD: TALES FROM THE NEW ABNORMAL IN THE MOVIE BUSINESS* 11 (2013).

200. *Fugue for Tinhorns*, GUYS AND DOLLS, The Samuel Goldwyn Company (1955), <https://www.youtube.com/watch?v=RthEYvh6aMM&list=PLBQxd1K9yLE-FRl38gLfJ9BW3PxbdrJbA>.

201. GOLDSTEIN, *supra* note 197, at 139.

202. “As part of its Digital Single Market strategy, the Commission will propose to reform E.U. copyright rules. It seeks to improve people’s access to cultural content online as well as to open new opportunities for creators and the content industry. More specifically, the Commission wants to ensure that users who buy online content such as films, music or articles at home can also enjoy them while travelling across Europe. Currently, service providers, in particular in the audio-visual sector, may be prevented from providing such portability features by copyright licensing arrangements.” EUROPEAN COMMISSION, <https://perma.cc/SF4V-97RC> (last visited Nov. 17, 2017).

203. Among Lynda Obst’s many hit productions is the series “Hot In Cleveland” and her feature films include *THE FISHER KING*, *SLEEPLESS IN SEATTLE*, *THE INVENTION OF LYING*, *CONTACT*, *HOPE FLOATS*, *ONE FINE DAY*, and *INTERSTELLAR*.

204. OBST, *supra* note 199, at 13.

Bottom line: as more and more players claim a tangential interest in using their own decks to get a piece of the global back-room action, those essential members of the biz are having a hard time anteing up in the very game they invented.

1. Outsourcing Automated Quality Control

GEORGE PAPPAS

(opening book)

The, uh, illustrations are hand tipped.

JOE FOX

And that's why it costs so much?

GEORGE PAPPAS

No, that's why it's WORTH so much.

– *You've Got Mail*, Warner Brothers (1998)

Extraterritorial meddling that exacerbates rendering “content” as more purely “business” than “show” imbalances that traditional symbiosis. Once upon a time in Hollywood—as at Cinecittà or Pinewood or Pathé Frères—each studio stood for a particular point of view and its products were representative expressions of its unique moments in time and of place and community’s commitment to quality. The best production chiefs had an innate feel for anticipating shifts in the zeitgeist, and their traditional linear broadcaster partners helped them understand the local sensibilities, and occupied a unique social function by acting at once as content curators and trend-setters.²⁰⁵ While there is much speculation that their modern-day descendants are going the way of those now-quaint professions as book editors or travel agents, Do-It-Your-Selfie audiences are increasingly left to their own (you will again pardon the expression) devices—fueled by their algorithm-generated advertiser-driven push-content consumption suggestions.²⁰⁶

Over the years, Netflix has built a robust recommendations system, which enables it to serve personalized content to the viewers that are most likely to watch it. Netflix will be leveraging that data and recommendations system to drive people to the new show, rather than spending marketing *House of Cards* through online and TV ads outside the site. Instead it will be able to target the show to users who watch a lot of

205. See ROBERT EVANS, *THE KID STAYS IN THE PICTURE* 167 (1994). “The big honchos, Harry Cohn, Louis B. Mayer, Jack Warner, were all gone now. They had been owners, not employees. Now the new game to play in Hollywood was musical chairs. No longer moguls for decades, rather kings for a day. . . . Film was no longer an art to be nurtured but a commodity to be sold. The Zanucks were gone – the boards of directors were in. Making announcements to save jobs came before the passion to create.” *But see* RICHARD MERYMAN, *MANK: THE WIT, WORLD, AND LIFE OF HERMAN MANKIEWICZ* 14-15 (1978) (describing HJM’s view of Columbia Pictures chieftan Harry Cohn’s unscientific and eccentric quality-control methods).

206. Though the algorithms have yet to discern that when searching a beloved star’s clips through post-suicide news tears is sub-optimal for serving up auto insurance ads. (Robin Williams, you are still sorely missed on this earth.)

David Fincher films, or have rated up a bunch of Kevin Spacey films, or even those who [rated] generally serialized dramas.²⁰⁷

This tell-us-what-you-want-so-we-can-give-it-to-you approach portends to take much of the alchemical out of our magical picture making process. Whereas traditionally programming executives relied on intuition and experience and went with their gut to guide their audiences by creating stories that they believed in and wanted to see themselves, now automation is making all those touchy-feely feelings seem positively passé.²⁰⁸

But there is a reason our industry continually references that ineffable “chemistry” quotient²⁰⁹—the electricity that sparks around when the fates convene to bless a particular project—and all the data dumping in the world can’t predict it.²¹⁰ If it is spot on, all the transmission time quotas devised cannot prevent people from seeking it out to see it, whether they are in Rome or Romania or Romeoville. An artistic triumph is an elusively difficult experience to conjure. The annals of our industry are filled with testament to the vagaries of craft’s toil: famed American playwright/lyricist, Alan Jay Lerner once replied when asked about his Oscar® winning process, “You write a hit the same way you write a flop.”²¹¹ Serially successful writer/creator Peter Casey cautioned: “Have *you* ever written a TV show before? It’s *hard*.”²¹² And renowned Hollywood Screenwriting guru Robert McKee keenly observed:

Today European filmmakers blame their failure to attract audience on a conspiracy of distributors. Yet the films of their predecessors – Renoir, Bergman, Fellini, Bunuel, Wajda, Clouzot, Anotnioni, Resnais – were screened throughout the world. The system hasn’t changed. The audience for non-Hollywood film is still vast and loyal. Distributors have the same motivation now they had then: money. What’s changed is that contemporary “auteurs” cannot tell story with the power of the previous

207. Ryan Lawler, *How Netflix Will Use Big Data to Push House of Cards*, GIGAOM (Mar. 18, 2011), <https://perma.cc/VUY9-C6GC>.

208. *But see* BRANDON TARTIKOFF, *THE LAST GREAT RIDE* 208-9 (1992) (“But viewers won’t be shaping their schedules around network programming forever. . . . In the not-very-distant future, we’re going to go several steps further. . . . What the future of television comes down to, ultimately, is a great power shift – away from the networks and toward the viewers. Instead of someone like me deciding what goes on the air – and when – you’ll be making the decision for yourself. You, too, can be your own television programmer, your own Ed Sullivan. You’ll be able to turn on whatever acts and wonders turn *you* on. I hope you have as much fun as I did.”).

209. If you want to see chemistry or the lack thereof in action, watch Bogie & Bacall sizzle (and in real life then head to the altar) in *TO HAVE AND HAVE NOT*, followed by Cruise & Kidman fizzle (and then in real life head to divorce court) in *EYES WIDE SHUT*.

210. For a truly magical take on the creative process—complete with drinking whiskey by the fire in Ireland and glimpses of the ghost of Melville, see Ray Bradbury’s description of how he got the job writing the screenplay to *MOBY DICK* from John Huston. *See* STEVENS, *supra* 192, at 368-69.

211. Alan Jay Lerner won Oscars for *AN AMERICAN IN PARIS* and *GIGI*. *See* IMDB, <https://perma.cc/9XAM-V3ZM> (last visited Nov. 17, 2017).

212. Conversation with author on March 6, 2014. A writer / creator / executive producer of some of the most admired – and exported – shows including “The Jeffersons”, “Cheers”, “Wings”, and “Frasier” – Peter Casey has been nominated for fifteen Emmy awards and honored with seven. Clearly, it is less hard for some talents than others. *See* EMMYS, <https://perma.cc/ZZ35-DPWY> (last visited Nov. 17, 2017).

generation. Like pretentious interior decorators, they make films that strike the eye, and nothing more. As a result, the storm of European genius has become a slough of arid films that leave [*sic*] a vacuum for Hollywood to fill.²¹³

Because despite the algorithm driven insights—this star + this director + this genre = surefire global megahit!—the truly irritating reality is there is something purely unpredictable about what and when and how something resonates with audiences.²¹⁴ That is why the savviest studio heads recognize that exceptional creative artists who dedicate their careers to interpreting their particular moments on earth via the arts require repeated opportunities to cultivate their well-crafted perspectives. By providing a nurturing the try-fail-try-again environment that only well-provisioned studios can, these studios perpetuate modern “Medici moments” because they are not only in it for quarterly earnings, they are equity participant partners curating our collective consciousness.²¹⁵

D. (DIS)AGGREGATING A DEMOCRATIC AUDIENCE

JERRY MULLIGAN

Where is everybody?

MILO ROBERTS

Here.

JERRY MULLIGAN

Downstairs?

MILO ROBERTS

No. Here in this room. . . .

JERRY MULLIGAN

Ohhh! You mean the party's just you and me.

MILO ROBERTS

That's right.

JERRY MULLIGAN

Oh I see. Why, that's kind of a little joke, isn't it?

— *An American in Paris*, MGM (1951)

What happens when the collective consciousness is reduced to an overwhelmed party of one? The drive to custom individualization of a medium that was conceived for collective consumption potentially portends more than viewers becoming isolated creatures of habit continually seeking the familiar while

213. ROBERT MCKEE, *STORY, SUBSTANCE, STRUCTURE, STYLE AND THE PRINCIPLES OF SCREENWRITING* 14 (1997).

214. See Evans, *supra* note 205, at 174 (“How could we miss with Alan Jay Lerner and Fritz Loewe? With *Gigi*, *My Fair Lady*, and *Camelot* (all for other studios), they'd batted a thousand on the big screen. We [Paramount] got Lerner and Lowe's *Paint Your Wagon*, which cost megabucks, and struck out—*Paint Your Wagon* painted Paramount's wagon bright red.”).

215. OBST, *supra* note 199 at 47-8.

traveling.²¹⁶ Professor Cass Sunstein is wary of a world in which “a dramatic increase in available options, a simultaneous increase in individual control over content, and a corresponding decrease in the power of general interest intermediaries” tax an individual’s psyche while causing imbalance in democratic societies.²¹⁷

[M]any or most citizens should have a range of common experiences. Without shared experiences, a heterogeneous society will have a much more difficult time in addressing social problems. People may even find it hard to understand one another. Common experiences, emphatically including the common experiences made possible by the media, provide a form of social glue. A system of communications that radically diminishes the number of such experiences will create a number of problems. As preconditions for a well-functioning democracy, these requirements hold in any large nation. They are especially important in a heterogeneous nation, one that faces an occasional risk of fragmentation. They have all the more importance as each nation becomes increasingly global and each citizen becomes, to a greater or lesser degree, a “citizen of the world.”²¹⁸

Founder and Chairman of CBS, William S. Paley, a literal pioneer in radio and television, recognized that broadcast was powerful precisely because it:

reaches into nearly every home in America . . . It binds our vast, pluralistic country together as one nation. With television and radio, we can all see and hear the same things together. We see and are exposed to more facets of American life than any generation before us.²¹⁹

Today in Europe—by its own dysfunctional design—there is simply no equivalent to the American tradition of national broadcasters; there is a French version and a German version and a Spanish version, etc. . . . This systemic impediment is a huge integration obstacle—at once as much intellectual as infrastructural—perhaps that explains why twenty years later E.U. leadership doesn’t yet grasp the fundamental irreconcilability of the system the antitrust action now aims to alleviate. These various warring micro and macro European regulatory states are retarding the

216. Like those who take comfort in Häagen-Dazs on the Champs Elysées but never venture to the Île St. Louis to discover Berthillon.

217. Cass Sunstein, *The Daily Me*, in REPUBLIC.COM 3, 11 (2002), <https://perma.cc/P8BT-XUSC>.

218. *Id.* at 5. For a discussion on why “the imagined world of innumerable, diverse editions of the ‘Daily Me’ is the furthest thing from a utopian dream, and it would create serious problems from the democratic point of view,” see *The Daily Me*, in REPUBLIC.COM, <https://perma.cc/P8BT-XUSC>.

219. WILLIAM S. PALEY, AS IT HAPPENED A MEMOIR 371 (1979). “What bothered me was that we were putting out a lot of programs that weren’t being used. It was a waste. I wanted our affiliates to carry those programs, but at that time they had to pay for them, and they weren’t about to spend that money, so I created this new system of payment. We said that everything we did would be theirs for free. They could take and use it all. In return for that we wanted special privileges.” MICHAEL PYE, MOGULS: INSIDE THE BUSINESS OF SHOW BUSINESS 88-9 (1980). *But see* BRANDON TARTIKOFF, THE LAST GREAT RIDE 206-09 (1992) (“The mass audience is an endangered species, and one not likely to make a comeback. . . . while this trend constitutes real progress, it also has a downside. We may soon lose forever the sense of shared experience we as a nation had . . . [and] TV watching will become an increasingly isolated experience. . . . The good news is that the quality of television will get better— . . . there will be a substantial improvement in TV-show content. . . . What the future of television comes down to, ultimately, is a great power shift—away from the networks and toward the viewers.”).

potential evolution of its industry, so although there is enormous talent within Europe, there is no credible truly European intermediary showcase for it (apart from EuroNews or EuroSport)—for there exists no continental CBS equivalent.

Rather than punishing the Hollywood studios that supply it with a literal steady stream of compelling programming for playing by its patchwork of programming rules, Europe could instead turn its attention to finding a way to aggregate and export the best current program offerings representing each of its Member Nations. There certainly exists a wellspring of homegrown talent that is waiting in the rules-riddled wings, causing one legislative analyst to decry, “France’s strict regulatory regime is like the Maginot Line . . . French broadcasters need more edgy dynamic series but they’re hampered by regulatory constraints.”²²⁰ Or to paraphrase Henry Kissinger: “If I want to watch European TV, what channel do I turn to?”²²¹

E. VENTURING FORWARD WITH NOT-SO-FOREIGN FOREIGNERS

*Everything is awesome
Everything is cool when you’re part of a team
Everything is awesome when we’re living our dream
Everything is better when we stick together
Side by side, you and I gonna win forever, let’s
party forever
We’re the same, I’m like you, you’re like me, we’re
all working in harmony.*

– *The Lego Movie*, Warner Brothers (2014)

That desire to showcase exceptional talent is a critical factor of commonality between U.S. and European producers, and why the members of our industries on both sides of the Atlantic acknowledge that these cultural products deserve special consideration in our increasingly transactional world. The staunch affection harbored for the most beloved “content” is evidence of why in fact scripted movies and series are not precisely equivalent replacements for The Economists’ Big-Mac-as-currency experiment. By their nature, the best filmed stories have an enduring emotional value that outlasts the bounds of time. Anyone who has ever welled up when Rick and Ilsa part on the tarmac, witnessing a surrogate for their own star-crossed love instantly knows that feeling intimately but one viewer’s *Casablanca*.

But one viewer’s *Casablanca* is another’s *Mujeres Al Borde De Un Ataque de Nervios*, and different sensibilities undoubtedly gravitate to different stories. That delicious diversity is ultimately enriching to our human experience, and is most likely what inspired former E.C. president José Manuel Barroso to reaffirm early in

220. Martin Dale, *Gallic TVs Innovation Rep Rises*, VARIETY (Sept. 2015), <https://perma.cc/HV28-H48T>.

221. James Meek, *What is Europe*, GUARDIAN (Dec. 2004), <https://perma.cc/62GN-KQ5Z>.

his tenure that “on the scale of values, culture comes before economics.”²²² This is why E.U. leaders remain committed to the belief then as now that although quantifiable, tales shouldn’t be commodified like so many tins of tuna, and why withholding them from the citizenry seems suspect. It is not a purely corporate cost-of-doing-business decision calculus—there is a raft of hearts and minds and souls that are at stake as well, and, like roaring at a well-timed Belgian Waffle joke told on “The Jon Stewart Show” after a long day of slogging through E.U. antitrust actions, that is invaluable.²²³ Hollywood’s partners in overseas governments can either be an enormous help or hindrance in our contemporary creative endeavors to entertain and enlighten audiences throughout the world, because in the end, we’re all left laughing or crying or bored stiff together.

III. CONCLUSION

ELLIS BOYD ‘RED’ REDDING

I find I am so excited I can barely sit still or hold a thought in my head. I think it's the excitement only a free man can feel – as free man at the start of a long journey, whose conclusion is uncertain. I hope I can make it across the border. I hope to see my friend and shake his hand. I hope the Pacific is as blue as it has been in my dreams. I hope . . .

– *The Shawshank Redemption*, Castle Rock Entertainment (1994)

This antitrust case implicates so much more than isolated pay television geo-blocking contract terms and thus is aptly categorized: it is tantamount to political leaders saying that they no longer trust their American studio partners, that they are willing to put aside a century of close cooperation to punish them for trying to play by E.U. House Rules. Like any creative industry, the entertainment business is one that is deeply relationship driven and no relationship can function absent mutual trust. This therefore is a pivotal opportunity for the U.S. studios to decide how best for the global entertainment system to evolve because the existing European distribution and payment mechanisms are by design inefficient plus create increasingly insurmountable internal rights conflicts. Even though Hollywood has tried for the past twenty years to cajole, convince and cooperate as coherently as possible, the efforts remain misunderstood. Before matters get truly out of hand, it may be wise to devise a way to pick up the bag of Big Blue Movie Marbles and

222. “Oubliées les paroles enflammées du Président Barroso qui assurait en 2005 que « dans l'échelle des valeurs, la culture vient devant l'économie ».” *The Cultural Exception is Non-negotiable!*, LEPETITION (2013), <https://perma.cc/CK96-C776>.

223. Simon Bosmans, *Jon Stewart on Belgium in the Daily Show*, YOUTUBE (Mar. 11, 2014), <https://www.youtube.com/watch?v=4dNLe3mXDZc>.

rejigger the distribution game—for as they say in Polish, *Nie mój cyrk, nie moje malpy*.²²⁴

Moreover, the *Television Without Frontiers* Directive experiment has worked: according to Eurodata, the percentage of American TV shows that dominated prime time ratings in Europe had dropped by nearly half in approximately five years. With some regions in which one “Can’t find any US series in primetime” in favor of local programs, it appears nearly three decades of protectionism have done their job and there is an embarrassment of home-grown European riches.²²⁵ Indeed, it took half a century from the creation of the French television system in 1935 for the number of channels to expand from one to three; by 1987, there were only six channels (or seven if one paid for a subscription to Canal+); since the conclusion of the Uruguay Round, the number of sanctioned broadcasters that compete for their national audience’s attention is estimated at 120.²²⁶ Looking at the E.U. in aggregate, according to the European Audiovisual Observatory (EAO, 2011), “the total number of available television channels (including terrestrial, broadcasting, and satellite) in the E.U. countries rose from a few hundred at the turn of the century to more than 9,800 in 2010. That is quite a lot to offer its people to absorb, and yet content quotas remain steadfastly in place with the E.U. considering as early as 2001 this practice to be:

a very positive account of the application of Articles 4 and 5 of the Directive. The report shows that, as regards the programming of European works, the average broadcasting time was almost 67% in 2001 and 66% in 2002, which is well above the threshold of 50% prescribed by the TVWF Directive. The production of European works by independent producers has stabilised at one third of the total authorised broadcasting time or, in general terms, at 50% of all European works (by independent producers and others). This is well above the 10% set by the Directive.²²⁷

Given how many Internet users watch video online in this context the “fragmentation of audiences” has become a complex matter to observe or measure,²²⁸ which is problematic because there is a reason it is called *broadcasting*. Even at the Pay TV level, the scale of message dissemination is one main factor that attracts the best and brightest talents to the medium. The fact that dramatic artists continue to dedicate their careers to the “show” end of the business demonstrates their enduring desire to be part of the reach and scale of shared experience and to serve rapt audiences. Hollywood does not particularly care where the eager artists came from—if we could put Truffaut and Tarantino and

224. See *Idioms of the World*, HOTELS, <https://perma.cc/AHN6-NY6Q> (last visited Nov. 17, 2017). *Nie mój cyrk, nie moje malpy* translates to “Not my circus, not my monkeys.”

225. Roxborough, *supra* note 180.

226. Brigitte Rollet, *Television in France*, in TELEVISION IN EUROPE 35, 41 (James A. Coleman & Brigitte Rollet eds., 1997).

227. *Television Broadcasting Activities: “Television without Frontiers” (TVWF) Directive*, EUR-LEX, <https://perma.cc/Z6RY-27JK> (last visited Nov. 17, 2017).

228. *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: European Television in the New Media Landscape*, JRC, <https://perma.cc/VELA-ADCQ> (last visited Nov. 17, 2017).

Tarkovsky and Teshigahara in a room together, they would communicate just fine for ultimately they all speak the same cineaste language—so as long as dedicated professionals have the will to come in, there is always a way to build a bigger talent tent.

That is why the raft of regulations intended to hinder viewing of foreign entertainment industry partner programming remains shortsighted—in a post-linear TV world, there is more non-professional content available on the internet than ever before—and by robbing Peter’s U.K.-based TV signal to pay for Portuguese Paul’s *Breaking Bad* addiction, local European broadcasters plus consumers will lose in the inevitable race to the pricing bottom. The E.U. simply cannot have it both ways, and so must therefore either abandon the staunch, internally divisive cultural stance that gave rise to protectionist geo-blocking practices within Member Nation borders to embrace a true *Television Without Frontiers* System, else allow each Member Nation to exercise its particular and often-conflicting cultural rules and requirements and use geo-blocked implementation practices consistent with local language and viewing customs. And it must make up its mind fast, because though the audience is still tuning in, we all know that engagement can quickly turn to ennui or—heaven forefend—abandonment. Just like Elvis, once they leave the building, it is a safe bet they are not coming back for an encore.

I’ll wrap up with the warm-hearted wisdom of a true Creator Without Frontiers, the British-born co-founder of United Artists who experienced—if only for a golden glimmer of time—the artistic freedom he sought in the United States, Charlie Chaplin. Once the most famous human being on the planet, Chaplin’s comedic genius transcended borders and cultures and languages to touch people across classes and countries during a period of unprecedented conflict in which the world seemed to be going straight to the opposite of what the angels had in mind for us while we must inhabit this earth together. His uplifting message encouraging interconnectedness endures:

HYNKEL, DICTATOR OF TOMANIA

We all want to help one another. Human beings are like that. We want to live by each other’s happiness, not by each other’s misery . . . Now let us fight to free the world—to do away with national barriers . . .

– *The Great Dictator*, Charles Chaplin Productions (1940)

IV. EPILOGUE

EDUARDO

So when will it be finished?

MARK

It won’t be finished. That’s the point. The way fashion’s never finished.

EDUARDO

What?

MARK

Fashion. Fashion's never finished.

EDUARDO

You're talking about fashion. Really? You?

MARK

I'm talking about the idea of it and I'm saying that it's never finished.

EDUARDO

O.K., but they manage to make money selling pants.

– *The Social Network*, Columbia Pictures (2010)

Nearly two and a half years have elapsed since the E.U. opened this anti-trust case, and it's fairly safe to state that when it was launched no one in Brussels anticipated that continental Europe would have to contend with negotiating the terms of a divorce from the U.K., or could have imagined that the President of the United States—who is as close to the living embodiment of the protag to his favorite movie²²⁹ as Mankiewicz plus Welles could have conjured—would have advocated erecting a physical wall between the USA and Mexico. Although global fuel prices are rising while many local E.U. currencies fall,²³⁰ and the gap is widening between rich and poor “at a record rate,”²³¹ physical international travel remains robust—“residents (aged 15 and above) from within the EU-28 made an estimated 1.2 billion tourism trips in 2015, for personal or business purposes”²³² and globally IATA²³³ reported 3.8 billion 2016 air travelers that it forecasts will double in the next twenty years.²³⁴ In parallel, the World Bank provides data to support the obvious observable phenomenon that wealthier members of society travel more frequently than their poorer fellow citizens.²³⁵ This is perhaps an even greater reason to permit all members of the same society access to programming that has the ability to unite them wherever on earth they might find themselves.

229. David Canfield, *Donald Trump Once Did a Surprisingly Introspective Interview with Errol Morris About Citizen Kane*, SLATE (Oct. 25, 2016), <https://perma.cc/5FUG-5YHG>.

230. *Weekly global fuel price review*, GLOBAL PETROL PRICES, <https://perma.cc/SM7C-U95T> (last visited Dec. 21, 2017).

231. *International Trends and Driving Forces*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://perma.cc/R3JM-2AED> (last visited Dec. 21, 2017).

232. *Tourism Statistics*, EUROSTAT, <https://perma.cc/W2EA-M2ZB> (last visited Dec. 21, 2017).

233. *About us*, INTERNATIONAL AIR TRANSPORTATION ASS'N, <https://perma.cc/26LB-RAQP> (last visited Dec. 21, 2017) (“The International Air Transport Association (IATA) is the trade association for the world’s airlines, representing some 275 airlines or 83% of total air traffic. We support many areas of aviation activity and help formulate industry policy on critical aviation issues.”).

234. Press Release, IATA Forecasts Passenger Demand Double Over 20 Years, International Air Transportation Ass’n (Oct. 18, 2016), <https://perma.cc/L7MB-EMA7>.

235. *Air transport, passengers carried*, THE WORLD BANK, <https://perma.cc/B582-EQUF>, (last visited Dec. 21, 2017).

Instead of promoting increased unity, however, the E.U. system shows no signs of coalescing any time soon. Brexit caught many legislators by surprise and, consistent with corresponding Article 50 invocation timelines, the U.K. is scheduled to leave the Union on March 29, 2019—though there’s always the possibility that all twenty-eight E.U. members might agree to extend the negotiation over terms or to lengthen further the transition time.²³⁶ So it might be a two year done deal, and then again, it might turn out to be the *Ishtar* of integration experiments, a romantically exotic bumbling buddy road picture jinxed from the get go and never coming close to recouping its initial investment. A main “creative difference” within the U.K. is how to reconcile the issue of participating in a single market versus a customs union versus a free trade area²³⁷—which is a simmering microcosm for the larger debate in the ambitious E.U. socioeconomic plan. On a more practical level, the loss of payments to the budget by the U.K. is estimated to be anywhere “from £12bn to £24.5bn,” which is a hefty arithmetic problem to solve swiftly, bringing even further interim discord and distress to the E.U.’s door.²³⁸

Rather than risk running afoul of the Commission’s incoherent and potentially interminable action, in June 2016 Paramount conceded to and the Commission accepted their commitments, minus any admission of liability. Comprised of four key points,²³⁹ the commitments are applicable “throughout the EEA for a period of five years and cover both standard pay-TV services and, to the extent that they are included in film licensing contracts for pay-TV with a broadcaster, [SVOD], ... online services and satellite broadcast services.” In addition to a non-circumvention clause, there are “clauses on the review of the commitments and the appointment of a monitoring trustee.”²⁴⁰ While the case against Paramount was

236. Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Nov. 13, 2017), <https://perma.cc/FRJ5-NZEZ>.

237. Jonty Bloom, *Free trade area, single market, customs union - what's the difference?*, BBC NEWS (Aug. 14 2017), <https://perma.cc/9TUZ-FT6T>.

238. Vincent Wood, *EU at war: The member states REFUSING to pay Brussels more after Brexit*, The Express (Feb. 25, 2018), <https://perma.cc/GV58-9ZXM>.

239. EUROPEAN COMMISSION, ANTITRUST: COMMISSION ACCEPTS COMMITMENTS BY PARAMOUNT ON CROSS-BORDER PAY-TV SERVICES (July 26, 2016), <https://perma.cc/PVB8-3ASU> [hereinafter Paramount Settlement Press Release].

“The Commission has made the commitments ... legally binding on Paramount:

1. When licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which prevent or limit a broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the broadcaster’s licensed territory (no “Broadcaster Obligation”);
2. When licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (no ‘Paramount Obligation’);
3. Paramount will not seek to bring an action before a court or tribunal for the violation of a Broadcaster Obligation in an existing licensing agreement;
4. Paramount will not act upon or enforce a Paramount Obligation in an existing licensing agreement.”

240. *Id.* For an economic analysis of what kind of headache passive sales issues make for American companies with distributors in Europe, see Thomas G. Funke, *Territorial Restraints and Distribution in the European Union*, OSBORNE CLARKE 5 (Sept. 2013), <https://perma.cc/4FUV-UXLM>

officially closed on 12 January 2018,²⁴¹ ironically the settlement may have actually placed Paramount's future revenues in greater peril, for regardless of whether there were ever in fact a finding of EU competition rules violations as a result of the investigation this studio is now potentially on the hook for a fine of ten percent of global revenues if it were to breach the commitments.²⁴² On the bright side, it merits noting that 2016 saw Paramount announce a \$115 million write-down for a feature film that would never see the light of day, and was the fifth straight year that Paramount came in dead last in box office grosses compared to the other U.S. studios,²⁴³ so if the brewing merger reuniting CBS with Viacom does go through perhaps Les Moonves can rejoin his comrades and negotiate a collective-bargaining solution, *Friends*-style.²⁴⁴

In the meantime, the remaining five U.S. studio respondents are digesting the implications of the Paramount settlement.²⁴⁵ After initial fears that the challenging business model the E.U. adopted as a result of their own position in the GATT would "explode"²⁴⁶ the existing story distribution system, in early 2017 some studios thought they saw glimmers of "softening" on the E.U. side. The brightest spot came on the heels of a protest signed by over a hundred industry players in the audiovisual space²⁴⁷ portending the potential effects on the hundreds of thousands of industry executives they represent in an aim to quantitatively underscore the degree of concern in the sector. This seemed to spark hope that Commissioner

("It is common for EU consumers to find out that there is a better deal from a distributor in another EU member state, so they approach that reseller and order from him rather than from the local reseller. [An American company] cannot prevent this from happening, at least not fully: the German reseller can be obliged to refrain from any marketing specifically aimed at French customers. But where the French customer takes the initiative and visits the German reseller's website, it is free to buy from it. Under EU law this is called a 'passive sale,' and must not be obstructed.")

241. Paramount Settlement Press Release, *supra* note 239.

242. "Article 9 of the EU's Antitrust Regulation (Regulation 1/2003) allows the Commission to conclude antitrust proceedings by accepting commitments offered by a company. Such a decision does not reach a conclusion on whether EU antitrust rules have been infringed but legally binds the company to respect the commitments. If Paramount were to breach the commitments, the Commission could impose a fine of up to 10% of Paramount's total annual turnover, without having to find a violation of the EU competition rules." *Id.*

243. Tom Huddleston, Jr., *Can Viacom's Paramount Turn Around Its Box Office Performance?*, FORTUNE (Feb. 8, 2017), <https://perma.cc/AMP5-65R8>.

244. Dade Hayes & Dawn C. Chmielewski, *In A CBS-Viacom Merger, What Would The Combined Company Look Like?*, DEADLINE (Jan. 29, 2018), <https://perma.cc/D8MH-6EXZ>; Emily Steel & Sydney Ember, *Reunited? CBS and Viacom Are Talking About It*, N.Y. TIMES (Feb. 1, 2018), <https://nyti.ms/2GBInSO>; Jethro Nededog, *How the 'Friends' cast nabbed their insane salaries of \$1 million per episode* (Oct. 6, 2016), <https://perma.cc/4NGF-YJUR>.

245. Georg Szalai, *Paramount Offers Concessions in EU Antitrust Probe of Studios' Europeans Pay TV Deals*, THE HOLLYWOOD REP. (Apr. 22, 2016), <https://perma.cc/JFP9-U37X>; Leo Barraclough, *Paramount Offers Concessions in European Union Anti-Trust Case*, VARIETY (Apr. 22, 2016), <https://perma.cc/YBF4-33WE>; John Hopewell, *Mark Ryan, Jean Prewitt on Why Global Film/TV Industries Should Not Drop Their Guard On Europe's Digital Single Market Drive*, VARIETY (Jan. 20, 2016), <https://perma.cc/BD8K-RH4E>.

246. Leo Barraclough, *European Union's Antitrust Probe May Explode the Continent's Business Model*, VARIETY (Jan. 15, 2016), <https://perma.cc/P6D6-8DJX>.

247. John Hopewell, *Europe, Hollywood Denounce European Commission Digital Market Plans*, VARIETY (May 2, 2017), <https://perma.cc/P6D6-8DJX>.

Vestager might take a more nuanced approach to the economics of keeping the E.U. imposed barriers in place, particularly when she acknowledged that: “Barriers between national markets may be justified under certain conditions, in particular when they are necessary to launch new products.”²⁴⁸

But does this signal taking one step forward and two steps back in the area of portability as a catalyst to Single Market integration? There is an inherent tension between treating filmed stories as commodities and applying economic norms in the race to the pricing bottom that the E.C. is far from solving for its constituents. While the government tries to get its regulatory act together, the people of Europe risk growing steadily angrier at the very companies they once lured to do business in their various once-sovereign territories with sweetheart deals, and global business leaders, motivated by the siren song of unrelenting efficiency instead of a paternalistic concern that tempers competition, steamroll steadily towards consolidation by doing what they do best: cutting killer deals.²⁴⁹

MR. RAWLSTON

*But how is [Kane] different from Ford?
Or Hearst for that matter? Or Rockefeller?
Or John Doe?*

– *Citizen Kane*, RKO Radio Pictures (1940).

Antitrust is a matter of managing economies of scale natural tendencies towards monopolistic economics that distort and inflate price to a consumer disadvantage, or in the case of monopsony, limiting small sellers’ competitive advantages by reducing the number of buyers to provide a single purchaser with a disproportionate market share.

Here, pricing trends are headed towards zero, and there is no danger of Sky putting the internet or any free to air broadcaster out of business as long as they all show programming their core audiences are willing to pay attention to. Further, the traditional barriers to entry in our business that Charlton Heston famously observed are all but gone—there is little stopping aspiring content creators from accessing an

248. John Hopewell, *Hollywood Anti-Trust probe in Europe Might Be Softened*, E.U. Official Hints, VARIETY (Jan. 25, 2017), <https://perma.cc/7XPE-S23V>.

249. Tim Adams, *Margarethe Vestager: ‘We are doing this because people are angry,’* THE GUARDIAN (Sept. 17, 2017), <https://perma.cc/9FZ9-T3Q9>. Think the people of Europe are angry now? Wait until they can’t forget their troubles by watching their favorite shows and their internet simply doesn’t work—and neither do they because scads of U.S. companies have thrown up their hands and closed up local shop. Or worse, if UPS wins its suit against the European antitrust regulator and other potentially wronged companies follow their lead, the ECJ is going to extra busy checking the commission’s balance of power—and indirectly writing billion Euro checks. Aoife White, *UPS Sues EU for \$2.1 Billion After Botched Veto of TNT Bid*, BLOOMBERG (Feb. 26, 2018), <https://perma.cc/325F-D6GQ>; *UPS sues EU for \$2 billion over blocked merger*, THE WASHINGTON POST (Feb. 26, 2018), <https://perma.cc/M3QT-G8YB>; Natalia Drozdiak, *UPS Sues EU Regulator for \$2.15 Billion Over Decision to Block TNT Deal, Delivery business seeking compensation after decision was later overturned*, WALL ST. J. (Feb. 26, 2018), <https://perma.cc/77QT-85NY>.

iPhone and finding an indexed outlet for their filmed stories (presuming the E.U. has the sense to recant its record setting and wildly aggressive Apple and Google antitrust enquiries; she does her citizens no good to relegate them to the dial-up dark ages of the Minitel, or ask them to squander precious resources catching up by competing in a global market dominated by tech standard setters that are light years ahead).²⁵⁰ Finally, geo-blocking is not a private 1909 General Film Company style old-school monopolistic shakedown²⁵¹ nor is it anywhere akin to the block-booking vertical integration woes that signaled the beginning of the end for—and ultimately effectively felled—the Hollywood studio system as resulting from the *U.S. v. Paramount* decision seventy years ago.²⁵² These deals were legitimate bargained for exchanges by mature companies following the stridently expressed edicts of their *Television Without Frontiers* directive inspired leaders. This is essentially a matter of the most time-tested show biz axiom: give the people what they want. And what they want—and are still *mirabile dictu* willing to pay attention to—is U.S.-originated programming. Why? Because as John Ptak observed during the Seventieth Anniversary Celebration of the AFI, “there are two kinds of movies: domestic and American.”²⁵³

Col. Steve Austin

*I've got a blowout. ... I can't hold altitude.
... FlightCom. I can't hold it! She's breaking
up! She's break -- .*

V.O.

Steve Austin. Astronaut. A man barely alive.

Oscar Goldman

*Gentlemen, we can rebuild him. We have the
technology. We have the capability to make the world's
first bionic man. ... Better than he was
before. Better. Stronger. Faster.*

– *The Six Million Dollar Man*, Harve Bennett Productions (1974)

So why not get out of the way and rather than blocking access and confusing the marketplace with ever shifting barriers and delivery regulations that would make

250. As Heston insightfully noted, “. . . film is the only art form in which the artist can't afford the raw materials he works with. Someone has to pay.” *Charlton Heston Was Larger than Life*, TODAY (Apr. 6, 2008), <https://perma.cc/EV5M-UQK9>; Mark Scott, *Google Fined Record \$2.7 Billion in E.U. Antitrust Ruling*, N.Y. TIMES (June 27, 2017), <https://nyti.ms/2tePxqP> (Google “holds a market share of more than 90 percent in online search in Europe.”). In 2016 the E.U. “ordered Ireland to collect \$14.5 billion in unpaid taxes from Apple, a record penalty.” Instead of going after the big, bad, deep pocketed American corporation, perhaps it would be wiser for Europe to expend its energy getting its member states all on the same incentive page? James Kanter & Mark Scott, *Apple Owes \$14.5 Billion in Back Taxes to Ireland, E.U. Says*, N.Y. TIMES (Aug. 30, 2016), <https://nyti.ms/2jDZeY0>.

251. MORRIS L. ERNST, TOO BIG 138 (1940).

252. *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); see also Scott Bomboy, *The Day the Supreme Court Killed Hollywood's Studio System*, CONSTITUTION DAILY (May 4, 2017), <https://perma.cc/CM8Z-TF5C>.

253. John Ptak, Remarks at A Tribute to 50 Years of the AFI (Oct. 26, 2017).

even the most determined fan a neurotic, give E.U. citizens the cyber equivalent of end user agnostic open sourced geo roaming passports so that they can access what they want wherever they are. Because let's face it—there is no way to let everyone enjoy their cross-border cake without causing some of the artificially protected players to starve to death. If the regulation on *Cross-Border Portability of On-Line Content within the EU*²⁵⁴ is any harbinger, permitting piecemeal portability will in all likelihood diminish the degree to which travelers within Europe will engage with local content as well as penalize the paid online content providers over the unpaid providers.²⁵⁵ Either the E.U. wants an efficient, reliable pan-European system that looks like, swims like and quacks like a well-oiled monopoly to help its compatriots stay competitive in the digital world, or not. If the former, the U.S. can continue to show how the cooperative path to integrated success works; if not, the E.U. should try building its own systems from scratch.

And that would prove an exercise of nearly existential proportions within Europe: exacerbating the dramatic tension between individualism versus interconnectivity. Like the fickle fads that dictate fashion, it's possible that soon scanty ROI will be too low to fully cover exposed deficit-financed assets. Instead of trying to play perpetual wack-a-mole across disparate IP surveillance systems that were never designed to cooperate with tracking U.S. copyright holders' underlying interests and which fall outside America's purview to patrol, why not follow the Facebook²⁵⁶ model employed for its nearly two billion members: keep access free, subsidize it by advertising against unadulterated content, and track the related things that can be more easily tracked and that are properly the subject of the GATT/WTO—tradable goods. How did The Artist Formerly Known as Prince reward his fans? He gave away CDs.²⁵⁷ How did George Lucas become so stratospherically wealthy? Twentieth Century Fox famously—infamously?—let him keep the merchandising rights²⁵⁸ to *Star Wars: A New Hope* and forty years later fans are still forking over serious funds in a quest to recreate their fantasy-

254. Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market Text with EEA relevance, 2017 O.J. (L 168), <https://perma.cc/E4H3-7Q2T>.

255. *Id.* Marketa Trimble, *Your Movements Shall Be Traced: The New EU Regulation on Cross-Border Portability*, TECH. & MARKETING L. BLOG (May 30, 2017) (“As some of my colleagues have noted, it is an unfortunate commentary on the world that users are presumed to want to spend their vacations watching their home programming rather than enjoying local programming and learning about the country they are visiting.”), <https://perma.cc/8NSR-CBWJ>.

256. Josh Constine, *Facebook now has 2 billion monthly users...and responsibility*, TECHCRUNCH (June 27, 2017), <https://perma.cc/RPA3-3VAN>.

257. Mike Masnick, *Music Retailers Flip Out That Prince Wants To Give Away His Music*, TECHDIRT (June 29, 2007), <https://perma.cc/598T-KWPT>; Jim Farber, *Prince's CD Sales a 'Given,'* DAILY NEWS (June 8, 2004), <http://www.nydailynews.com/archives/nydn-features/prince-cd-sales-article-1.624916>; *but see* Katie Allen, *Music industry attacks Sunday newspaper's free Prince CD*, THE GUARDIAN (June 29, 2007), <https://perma.cc/RNA4-H3EU>.

258. Brian Warner, *How One Brilliant Decision In 1973 Made George Lucas A Multi-Billionaire Today*, CELEBRITY NET WORTH (Dec. 14, 2015), <https://perma.cc/9YD5-3PWP>; Jonathan Chew, *Star Wars Franchise Worth More Than Harry Potter and James Bond, Combined*, FORTUNE (Dec. 24, 2015), <https://perma.cc/K6UN-TMCX>; Dave McNary, *'Star Wars' Helps Licensed Merchandize Sales Grow to \$251.7 Billion*, VARIETY (June 21, 2016), <https://perma.cc/W5A4-9PZM>.

based feelings in real life. How did Desilu physically connect with the many million Americans who comprised their phenomenally unheard of 70 rating to their Monday night TV time slot? In addition to their dynamic production company, Desilu “also had a merchandising business. It was possible to furnish a house and dress a whole family with items carrying [the] *I Love Lucy* label.”²⁵⁹ The sheer amount of competition for attention is causing the entertainment industry to morph into loss-leading guardians of stories that get people shopping, and so, like it or not, the revaluation of asset investments is inevitable.

This article is bookended by a particular pair of Academy Award winning screenwriters’ notions of networks—whether of the traditional broadcast type that Paddy Chayfesky presciently satirized in the 1970s or the more modern IP tussle that was the subject of Aaron Sorkin’s 2010 skewering—as platforms for systems to interconnect people through stories. Once established, those genuinely deep bonds are darn difficult to quash; try it sometime: ask a random stranger about their favorite filmed entertainment and watch their faces light up or, even better, if it turns out to be one of yours, feel the spark of electric connection flash between you. That emotional energy can bridge time and distance like no other, and once established, it renders recouping a synergetic reflex. Because a story can nourish the soul instead of merely siphoning funds, it therefore deserves to have its engagement potential as an antidote to a world increasingly trending towards disjointed territorialism along financially monopolistic strata safeguarded by the wisest stewards of our symbiotic international systems, before overwhelmed global audiences turn off and tune out—for good.

GORDON GEKKO

259. LUCILLE BALL, LOVE, LUCY 224 (1996). “*I Love Lucy* has been called the most popular television show of all time. Such national devotion to one show can never happen again; there are too many shows, on many more channels, now. But in 1951-1952, our show changed the Monday-night habits of America. Between nine and nine-thirty, taxis disappeared from the streets of New York. Marshall Fields department store in Chicago hung up a sign: ‘We Love Lucy too, so from now on we will be open Thursday nights instead of Monday.’ Telephone calls across the nation dropped sharply during that half hour, as well as the water flush rate, as whole families sat glued to their seats.” *Id.* at 215. *Bien hecho, amigos.* But see Gerald S. Lesser, Children and Television: Lessons from Sesame Street 7, 31, 41 (1974). Acknowledging that there were significant objections to television as a teaching tool, Sesame Streets’ creators noted “the argument that television is a major contributor to the dehumanizing technological orientation of our society. According to this argument, television has made us lose contact with each other, and to seek and accept solitary vicarious spectatorship as the normal course of human activity. Not only does it destroy relationships between people, but its bombardment of commercialization—its use in selling products both to adults and to children -- forces us to regard each other as markets instead of people, diminishing us both as individuals and as a society.” To bring their vision of harnessing the potential of the “apparent natural addiction of children to television” for “constructive educational use,” the Children’s Television Workshop first had to “obtain the consent of the then roughly 180 public-broadcasting station managers around the country to carry the series at a morning time when preschoolers were likely to watch.” Their collaborative efforts in building a network paid off; approximately forty years after its debut Sesame Street “reaches 156 million children across more than 150 countries.” Press Release, Sesame Workshop and HBO Announce Five-Year Partnership (Aug. 13, 2015), <https://perma.cc/EG3F-ZVZY>.

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DR. STRANGE GEO-BLOCKING LOVE

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The one thing I learned in jail is that money is not the prime asset in life. Time is. And, uh, your time is just about up.

– *Wall Street: Money Never Sleeps*, Twentieth Century Fox (2010)