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**NEGOTIATING CULTURE IN AN ERA OF GLOBALIZATION:
The Potential For Multilateral Cooperation**

by

Wendy L. Cohen

A thesis submitted to
The Faculty of Graduate Studies
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University

Ottawa, Ontario

December 8, 1999

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**Negotiating Culture in an Era of Globalization:
The Potential for Multilateral Cooperation**

**Submitted by Wendy Lee Cohen,
in partial fulfilment of the requirements for**

the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

**Carleton University
January 2000**

Abstract

The research analyses the current situation of Canadian policy efforts to promote cultural protectionism in an era of globalization particularly as it affects Canada-U.S. relations. It discusses the notion of the culture and trade quandary in both a theoretical and practical way in the context of ideology and international law and notes the relationship between law and social transformation. Finally, it assesses the concept of a multilateral instrument on cultural cooperation as a viable political project for Canada. International tribunal and court rulings are examined to identify emerging issues and trends in support of the research.

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CHAPTER 1

Introduction

This thesis is intended to contribute to the international debate surrounding cultural protection in an era of free trade with emphasis on finding a mechanism to deal more effectively with the growing number of conflicting issues. In order to draw some conclusions, the research had to have three characteristics: 1) it had to be sufficiently broad to identify the growing number of issues involved; 2) it had to be sufficiently deep to reflect their complexity; 3) it required some field research and analysis of current thinking to develop a sense of *where we were, where we are, where we are going* and *how we will get there*. The area of study is a continually moving target influenced by global forces and politics. To await “final” developments would have been futile. Hence the research had to have a deadline or risk never being completed. Compiled over the last two and one-half years, the research is current to October 30, 1999. The following chapter by chapter breakdown and brief explanation is intended to assist the reader in better understanding the organization of the thesis, the relationship between chapters, the evolution of issues and events and the interpretation of laws in the realm of domestic and international cultural relations, all of which lead inexorably to conclusions and a recommendation.

Chapter 1 summarizes the research problem. It provides a general overview of the issue including political and economic considerations. In the section on *Relationship between law and society*, it describes the transformation of the cultural constituency from its initial fragile position of wanting absolute protection to its strengthened less protectionist state of recommending an internationally negotiated solution. It also provides a quick sketch of the 1997 WTO trade ruling

(elaborated in Chapter 4) which has had a significant impact on Canadian cultural policy, giving rise to the increased attention paid to the culture and trade quandary, and prompted the Government of Canada to take a more pro-active approach.

Chapter 2 highlights existing knowledge in the field, noting the disconnection between the cultural and trade constituencies of the past and the influence of globalization.

Chapter 3, as a point of reference, outlines some theoretical considerations which enabled the author to qualify, in some instances, the substance of the problem in the context of understanding the behaviour of independent states *vis-à-vis* economic and cultural interests, and American cultural imperialism. It also reinforces the importance of understanding a country's culture before entering negotiations to develop an international instrument of any kind (which is the subject of the concluding chapter of the thesis).

Chapter 4 consists of legal analysis which was carried out in two phases between June 1998 and March 1999. The objective was to qualify and quantify some of the conflict between culture and trade, i.e. the impact of court interpretations and tribunal rulings, including for these purposes the WTO, on the cultural industries sector. The scope of this research is just broad enough to illustrate the international dimensions of the issue as well as the inconsistent interpretation of law. The point here is twofold: 1) the interpretation of statutory instruments can adversely affect the efficacy of cultural policy measures designed by government to achieve domestic cultural policy goals; 2) the 1997 WTO ruling on magazine policy reinforced the problem that cultural

policy and trade policy can generally be expected to be in conflict. The research provides some evidence for the statement of the research problem and the need for policy reform and another mechanism to achieve cultural goals such as an international instrument on culture. Policy reform and a means to deal with culture in an international trade context is the central theme of the thesis.

Chapter 5 highlights the trade policy principles, issues and emerging trends as they relate to cultural industries. It summarizes the current state of play, providing examples, making comparisons to other countries and documenting a brief chronology to set the context. It also lists the key considerations which can influence, in a profound way, how best to negotiate a solution. This was a natural precursor to the final chapter which assesses the options, concludes and recommends.

Chapter 6 documents the options to deal with the culture and trade quandary presaged in Chapter 1. It analyses the options against information and criteria developed in preceding chapters. It highlights the pros and cons in each case in light of culture and trade policy implications, key political, economic and global considerations as well as current thinking, noting expert opinions and the recommendations of the House of Commons Standing Committee on the Department of Foreign Affairs and International Trade (DFAIT) and the next round of WTO negotiations. It concludes by providing a critical path and a recommendation to proceed with the negotiation of a solution to the culture and trade quandary.

Statement of Research Problem

“Never before in modern history has a country dominated the earth so totally as the United States does today.” -*Der Spiegel*, Germany, 1997

Domestic policy is traditionally developed, implemented and administered by national governments in both the industrialized and developing world. The phenomenon of globalization is having a growing impact on that ability as economies are responding less to political control and more to world market forces and the relative power of the wealthier economies than before. The result is increasing integration of economies and homogenization of cultures. This poses a number of challenges to the nation state. In the context of Canada-U.S. trade relations, the influence of the United States is, *a priori*, profound.

This project reviews the evolution of the culture and trade quandary and the policy implications of a global environment. It assesses, more specifically, the efficacy of current Canadian policy measures to achieve Canadian policy objectives in the context of the global environment. It also looks at current international laws affecting trade in cultural products and explores the problems and the potential for finding a solution for the twenty first century.

Rules for globalization and trade raise questions as to how traditional areas of domestic policy which influence trade may be reconciled with international obligations. This has particular resonance in the area of domestic cultural policy and international trade, i.e. achieving a reasonable balance between the desire for liberalized trade and the maintenance of our cultural identity. To clarify, the key issues/questions surrounding culture and trade are highlighted below.

Is Canada's cultural identity at risk in an era of globalization and freer trade? Cultural nationalists such as Margaret Atwood, Robertson Davies, Maude Barlow, John Gray and others insist that it is. Politicians support this notion. Ministers of Canadian Heritage have been talking about it for years and the Prime Minister reinforces the importance of protecting Canadian culture in every Speech from the Throne. What does this mean and how can it be achieved? In 1995, the Government of Canada published a Government Statement entitled *Canada in the World*, essentially a foreign policy paper produced by the Department of Foreign Affairs and International Trade (DFAIT) together with the Canadian International Development Agency (CIDA). It pledged an open foreign policy process, identifying goals and aspirations and three key objectives which became known as the three *pillars* of foreign policy. They follow:

- * The promotion of prosperity and employment;
- * The protection of our security, within a stable global framework; and
- * The projection of Canadian values and culture.

It was thought at the time that additional resources (more money) would be allocated to the Cultural Bureau within DFAIT to develop the third pillar. While the concept still exists, the funding never materialized and the *cultural pillar* became less of a reality in a foreign policy context. The Department of Canadian Heritage has, in the meantime, taken up the cause and is reportedly drafting advice to Cabinet on the importance of cultural diplomacy.

On the other hand, Canadian policy instruments designed by the Department of Communications were at least being well funded. The mission statement for the Department of Communications

(DOC) was to foster the orderly development of culture in Canada according to the 1985 Main Estimates¹. DOC's mandate was to develop arts and culture policy and to create the best possible environment for Canadian culture to grow and develop. In 1994, the Department of Communications was merged with the Secretary of State Department, Sports Canada and smaller parts of other departments to become the Department of Canadian Heritage. The *Department of Canadian Heritage Act* expanded the definition and understanding of culture identifying the Minister's role in society with regard to Canadian identity and values, cultural development, heritage, and areas of natural or historic significance. As defined in the 1999/2000 Main Estimates, "The Minister of Canadian Heritage, with the Secretary of State (Multiculturalism) (Status of Women) and the Secretary of State (Parks) supported by the Department, is responsible for policies and programs relating to arts and heritage, cultural development, Canadian identity, multiculturalism, official languages and sport as well as policies governing national parks and national historic sites."² The *Mission Statement* is "strengthening and celebrating Canada"³, the *Business Strategy* is "cultural industries that create, produce, distribute and promote Canadian products"⁴, and the *Long-Term Expected Results* are threefold:

- * Creation, production, distribution, preservation and consumption of Canadian cultural and heritage products and services.

- * National and international recognition and acceptance of Canadian cultural

¹ Compiled annually by Treasury Board, identifying operational mandates and budgets for all Government departments and agencies; published by the Department of Supply and Services, Government Publishing Centre.

² *Main Estimates*, input prepared by Canadian Heritage for the 1999-2000 Estimates, A Report on Plans and Priorities, Departmental Overview, Ottawa, April 1999, p. 3.

³ *Ibid.*, p. 4.

⁴ *Ibid.*, p. 15.

creations and heritage collections.

* Support for the Canadian model of promotion, and support for Canada's cultural diversity in relevant international fora.⁵

While the umbrella is important, cultural policies governing cultural industries have been designed to keep the cultural industries in *business* so that there will always be a strong Canadian presence in what one sees on television and in movie theatres, what one reads in books and magazines, the art and music one enjoy and so on; In short, space for Canadian artists and creators and a distribution infrastructure which favours Canadian cultural products. These cultural products personify a cultural identity. One's cultural identity is what reinforces cultural sovereignty. These policies have another dimension, however, in that they assist with international market access, also linked to *trade*.

Canada is a nation heavily dependent on trade, hence rules-based trade is vital to stable economic growth and to prevent bigger and more powerful economies from operating outside the rules. That is why Canada chose to play an important role in the establishment of the World Trade Organization (WTO) as the cornerstone of the international trading system. Equally, the dispute settlement mechanism of the WTO has been heralded by Canada as the most effective means to pursue its trade interests.⁶ That being said, the 1997 WTO ruling on "split-run" magazines blew Canada's position on cultural policy out of the water. The cultural support measures for magazines and periodicals were challenged by the U.S. at the WTO as being unfair trade practice

⁵ *Ibid.*, p. 12.

⁶ "Getting the International Rules Right: World Trade Organization", DFAIT website: <www.infoexport.gc.ca>.

and discriminatory. They were subsequently found by the WTO Dispute Settlement Body to be inconsistent with our multilateral obligations. In other words, this manifestation of *culture* was treated as any other tradeable good. This landmark decision may have created a precedent for future cases involving cultural industries.

Should cultural products such as films and sound recordings be treated differently in the world trade forum? Are current cultural policies and regulatory measures needed to defend our cultural identity or are they being used increasingly to shield domestic markets, on a pure trade basis, from international competition? Will these traditional cultural protectionist measures survive into the 21st century? What is the potential for solving the culture and trade quandary? Canada is committed to culture and to maintaining cultural policies⁷. Canada is equally committed to liberalized trade and the WTO. In the extreme, the suggestion is that one without the other may render us impotent, i.e. as a nation without cultural identity or isolated and poor. Is there sufficient understanding, international interest, honesty and goodwill to engage in productive debate and to find a solution? What instruments exist which might help facilitate some kind of reconciliation between culture and trade in a global environment? How do other nation-states respond?

There is growing complexity from both philosophical and trade perspectives and new challenges emerging as the millennium approaches with the next generation of technology and new media.

⁷ Statements made by the Prime Minister in support of Bill C-55, Canada's response to the WTO dispute on publishing policy, were widely quoted by Canadian Press, January 1999.

The growing dispute between our trade agenda, on the one hand, and our cultural policy goals, on the other, has recently been debated by the House of Commons Standing Committee on Foreign Affairs and International Trade in the context of finding a mechanism to deal with the culture and trade conflict.

Thesis Question/Hypothesis

Globalization has challenged Canada's ability to develop and implement cultural policies. The U.S., in particular, as a major player in the global environment, has been critical of cultural policies which are perceived as protectionist, calling them barriers to free trade. The U.S. wants to maintain its dominant market position as the world leader in entertainment products. Canada wants to maintain its right to protect cultural industries in the interests of cultural identity and sovereignty. Is there a way to reach some compromise in the culture and trade quandary associated with globalization? Is it possible to reconstruct our cultural policy framework? Would an international instrument such as a multilateral instrument⁸ on cultural cooperation, negotiated outside of the WTO agreement, be viable or practical in terms of finding a solution? Would a sectoral agreement on culture, negotiated within the WTO framework agreement, be negotiable and viable? A separate international instrument negotiated by like-minded countries outside the WTO agreement would likely prove the easier task as you are agreeing on universal cultural principles and not mixing them with trade principles. How effective would this instrument be in the face of a culture/trade challenge as in the case of Certain Measures

⁸ Treaty or Memorandum of Understanding signed by any number of interested parties.

Concerning Periodicals? If the parties concerned are also members of the WTO, the WTO would likely take precedence. On the other hand, a sectoral agreement, if negotiated within the WTO framework agreement, would have to be consistent with the principles and rules-based infrastructure of the WTO. How easy would it be to negotiate with 135 countries, the relative power gap and within a reasonable time frame? Are there other options?

Consultation with like-minded countries, also challenged by global pressures and cultural dilution, is important. This has been an evolving process involving, *inter alia*, the Council of Europe, the European Community, The Commonwealth, The Francophonie, the Organization for Economic Cooperation and Development (OECD) and UNESCO. Canada has played a role as both observer and participant over the years. Canada has also been the leader in the context of promoting cultural diversity and cooperation amongst like-minded countries. In 1998, Canada hosted a Meeting of Cultural Ministers in Ottawa and, in September 1999, the same group of Ministers met in Oaxaca, Mexico to exchange views on ideas and experiences in the field of culture at the international level. The Ministers of Culture represented at this meeting reaffirmed their willingness to defend and promote cultural diversity.⁹ The United States was represented at the meeting by the head of the National Endowment for the Arts (NEA)¹⁰ in the United States.

⁹ Countries on record are: Barbados, Brazil, Canada, Colombia, France, Greece, Hungary, Ivory Coast, Mexico, Norway, Russia, Senegal, South Africa, Spain, Sweden, Switzerland and the United Kingdom. The conclusions of the Second Informal Meeting of the International Network on Cultural Policies were in the form of a work report sent to DFAIT and Other Government Departments (OGDs) by the Canadian Embassy in Mexico, October 1999.

¹⁰ The NEA is not a government body, but a government and industry funded organization. There is no government department or minister responsible for culture in the United States.

The United States views were not represented in the final report. This may be because the NEA is not empowered to speak for the U.S. government in this area. In any case, the U.S. curiously appears not to be an active member in this network.

It is the author's view that to advance the Canadian cultural cause requires cooperation from like-minded countries, but fundamentally requires concurrence from the United States given its dominant world position in the culture and entertainment sector, economically and politically. In its concluding chapter, the thesis offers an analysis of the current options on the table to deal with the culture and trade quandary and recommends a mechanism which takes into consideration the political, economic and practical considerations.

The Dynamics of Canada-U.S. Relations and Other Considerations

"Public opinion was particularly intense in respect of four areas of concern to Canadians. The preservation of our Canadian cultural identity, including cultural diversify throughout the world....." *Canada At the WTO: Towards a Millennium Agenda*, preface by Bill Graham, Chair of the Standing Committee on Foreign Affairs and International Trade, June 1999 Report.

Bilateral relations with the United States are, for the most part, excellent (politically, economically and socially). John F. Kennedy aptly summed it up when he said: "Geography has made us neighbours. History has made us friends. Economics has made us partners and necessity has made us allies." Our economies are more integrated than ever before.¹¹ Trade has increased 2.5 times over ten years, investment has doubled since 1988, cross border business is growing and so on. While overall relations are excellent, the Canadian and U.S. policy positions

¹¹ Press reports following the Cabinet Retreat on Canada-U.S. Relations held June 28 and 29, 1999.

on culture and trade are opposing and have been the source of friction and threatened trade retaliation. U.S. cultural products flood the Canadian marketplace accounting for approximately 97% of box office receipts, 60% of television programming, 85% of sound recording sales and approximately 70% of English-language book and magazines sales.¹²

The U.S. is likely the only country in the world where its cultural and trade policy interests might be considered synonymous. Entertainment, for the U.S., is its most profitable export¹³ so it is understandable that the U.S. government and trade lobbies will combine forces to protect that position. Canada, on the other hand, wants to protect its culture, but advance its trade interests with the United States, a partner it cannot afford not to trade with. The Canadian economy is dependent on trade with the U.S. representing 85% of all exports, 78% of imports, 68% of Foreign Direct Investment and 34% of Canadian GDP.¹⁴

Certain Measures Concerning Periodicals - the issue of split-run magazines

Traditional cultural policies measures have provoked U.S. threats of retaliation for over fifty years which, in turn, has impacted on our ability to implement cultural policy effectively. The Canadian Government response to the 1997 WTO ruling in *Certain Measures Concerning*

¹² Notes published by DFAIT for the 40th Annual Meeting of the Canada-United States Inter-Parliamentary Group, May 20-24, 1999.

¹³ This statistic has been unofficially documented by a committee of government offices (Canadian Heritage, Statistics Canada, Foreign Affairs and International Trade, Industry Canada) attempting to compile cultural statistics from U.S. Dept. of Commerce statistical data and Statistics Canada data. The objective is to develop a cultural statistics profile for Canada compared to other countries. I participated as a contributor to the committee in 1998.

¹⁴ DFAIT website <www.dfait-maeci.gc.ca>

Periodicals is a case in point. After failed consultations, the U.S. had challenged Canada's publishing policy measures at the WTO and succeeded in having them eliminated. Canada, while conforming in principle to the WTO ruling, developed new policy measures in the form of proposed legislation, Bill C-55, *The Foreign Publisher Advertising Services Act*. This provoked threats of retaliation from the U.S. in pulp and paper, steel, textiles, plastics and hockey equipment (all sectors of significant economic importance to Canada). After nearly two years of negotiation, inspired by the WTO dispute settlement mechanism and influenced by political manoeuvres, a deal was struck. This issue dominated the press for over a year - a May 20, 1999 article in the *Globe and Mail*¹⁵ sums up the seriousness of the issue with the lead story captioned as "'It's up to the PM' as trade war nears, U.S. ultimatum in magazine battle - leaves Chrétien with a tough decision". The overall cost v. benefit is yet to be assessed,¹⁶ but the publishing community has publicly declared its dissatisfaction with the amended *Foreign Publisher Advertising Services Act*. In response, the Minister (and the Department) are working on developing a package of subsidy measures. Press articles over the late summer suggested that there are discrepancies over the amount, ranging between \$50 million to \$90 million¹⁷.

Key issues involved in the case of *Certain Measures Concerning Periodicals*: On the technical

¹⁵ Written by Shawn McCarthy, *Report on Business* correspondent.

¹⁶ To put it into a context, the approximate total value of advertising revenues in Canada is Can\$500 million per year. Two-way Canada-U.S. trade is estimated at Can\$1.6 billion per day. The Canadian advertising market value was brought up in discussions with the Department of Canadian Heritage. The Canada-U.S. trade statistic is on the DFAIT website, <www.DFAIT-MAECI.gc.ca>.

¹⁷ Series of press clipping from the *Globe and Mail* and the *National Post* collected between April and September 1999.

side, there was serious disagreement over whether the measures should be considered “services” in the context of the General Agreement on Trade in Services GATS (the Canadian argument) or whether they are “goods” and come under the General Agreement on Tariffs and Trade, GATT (the U.S. position and WTO ruling). On the political side, while Canada agreed to implement the WTO ruling, a concomitant trade war loomed. Canada’s original Bill C-55, *The Foreign Publisher Advertising Services Act*, proposed new publishing policies considered by the U.S. to be protectionist and inconsistent with the WTO ruling. The U.S. response to Bill C-55 was to threaten trade retaliation. A weakened *Foreign Publisher Advertising Services Act* was the result. Did the political posturing on both sides achieve a desirable result in the context of the future of cultural policy for Canada? Will it impact on our ability to implement regulatory cultural policy measures in the future? Details of both technical and political issues are examined in the section of this thesis dealing with the case of “split-run magazines”.

Critique of Inquiry

The critique of inquiry is threefold: 1) American cultural imperialism and its implications: Is dominance of American cultural products in Canada a threat to Canadian cultural identity? Can Canadian culture stand alone or is the real issue the extent to which it ought to be allowed to be changed by another hegemonic cultural force. Is this just a matter of the tools of the hegemony - the cultural products that battle for the hearts and minds of Canadians?

2) The Canadian policy approach: While it is understood that cultural identity is important and some form of cultural protection may be necessary, the Canadian Government continues to launch protectionist cultural policies which appear to be contrary to trade policy goals and

threaten trade relations with the U.S. 3) How will these issues influence our ability to negotiate a solution?

Relationship between law and social transformation

...We might wonder about a complete exemption for cultural industries as in the case of NAFTA. This so-called complete exemption did not protect Canada's interests in culture, because the United States can impose trade sanctions when it wishes, and under whatever conditions it wishes. Most of the time, Canada has had to back down when the United States did not like one of our cultural programs.

Prof. Gilbert Gagné, Dept. of Political Science, Concordia University,
testifying before the Standing Committee March 25, 1999, Montreal.

When creating a new instrument of law, it is essential to have political will and a government infrastructure to support it. It is also important to have the concurrence, in principle, of the people who will be affected by the instrument. Therefore, in developing new government policies, programs and laws, an impact analysis is generally carried out through the consultative process. In order for the government to be mandated to work towards an agreement, such as a Multilateral Agreement on Culture, consultations with stakeholders, e.g. the cultural community, have to take place. During the negotiations for the Multilateral Agreement on Investment (MAI) launched by the OECD, Canadian cultural nationalists, notably personalities like Maude Barlow, National Chair of the Council of Canadians, and members of the Cultural SAGIT¹⁸, testified against the MAI on the basis that they felt it would compromise Canadian sovereignty. The

¹⁸ Sectoral Advisory Group on International Trade (SAGIT). The SAGITs were originally set up by the Canadian Government to represent private sector interests in negotiating the Canada-U.S. Free Trade Agreement (FTA). They were defined by market sector, e.g. agriculture, cultural industries, etc. and made up of leading industry representatives. They have been restructured somewhat, but essentially provide the same service to the Government on trade issues.

position held by the cultural constituency, notably the SAGIT, was that any agreement involving trade and investment must contain a “cultural exemption”¹⁹. Their position was absolute. In the final analysis, the failure of the MAI cannot be linked to this exclusively, but it certainly played a role in sensitizing Canadians to some of the broader social and cultural issues involved in international negotiations. The French Government (traditionally supportive of protecting culture with a cultural exemption) also withdrew from MAI negotiations following the Lalumiere Report²⁰ although there is some controversy over this as noted in the testimony of the House of Commons Standing Committee on FAIT (1998/99 hearings on the next round of WTO negotiations, specifically the testimony on culture). The issue here is not the reason for the failure of the MAI, but to document a transformation of thought in the cultural constituency as follows.

Less than two years later, following the treatment of a cultural matter at the WTO in the 1997 ruling on *Certain Measures Concerning Periodicals*, the SAGIT positions changed. Whereas the SAGIT position to have a “cultural exemption” in any internationally negotiated instrument involving trade and investment was absolute, it was now favourably disposed to the notion of negotiating a new international instrument on culture. In other words, the “exemption” route was being abandoned in favour of a “negotiated” option. This is documented in the February 1999

¹⁹ A clause exempting cultural industries from the provisions of an accord, e.g. first negotiated in the 1989 Free Trade Agreement (FTA) to protect Canadian cultural industries from American commercial entertainment domination.

²⁰ The Report was named after the Chair of the Committee (Catherine Lalumière, Member of the European Parliament) dealing with MAI.

SAGIT Report.²¹ The report provides four options to deal with culture, including a cultural exemption, but favours a new international instrument on cultural diversity. It justifies the transformation stating that Canada is at a crossroads in the relationship between cultural policies and international agreements on trade and investment. Furthermore, during the 1998/99 hearings of the Standing Committee on Foreign Affairs and International Trade on the next round of WTO negotiations, witnesses on culture generally agreed that the previous policy approach of pursuing an exemption for culture in trade agreements was no longer feasible and therefore supported the SAGIT's proposal. Chapter 7 of the Committee Report²² recommends that Canada seek allies among other countries to promote the idea of a new international instrument on cultural diversity, if feasible within the WTO framework.

The U.S. challenge and subsequent WTO ruling (international trade law in the context of the WTO ruling) had made an impact on the cultural constituency in Canada. More reference to the international instrument on cultural diversity as outlined in the Report of the Standing Committee on DFAIT, is highlighted in Chapter 2 of this paper, Relationship to Existing Knowledge. It is also documented in Chapter 6.

In order to make a case for policy reform, to support a multilateral agreement (also known as an international instrument), it is important to understand and document emerging issues. The

²¹ *Canadian Culture in a Global World: New Strategies for Culture and Trade*, Ottawa, SAGIT Report, DFAIT/PCH/Government of Canada, February 1999), p. 31.

²² Report of the Standing Committee on Foreign Affairs and International Trade, *Canada at the WTO: Towards a Millennium Agenda*, Ottawa, June 1999, p. Sum-8.

research in Chapter 4 of this paper examines some of the actual and potential conflicts that occur between the goals and instruments of cultural policy, trade policy, competition law and copyright law. In addition to cultural policies and the WTO, there are other noteworthy trends. For example, for several years, litigation of Intellectual Property (IP)/anti-trust rights occurred mainly in the patent area, but copyright increasingly seems to be playing a role as one of the principal areas of IP/anti-trust litigation. As copyright is a key instruments designed for the protection of cultural industries creations as well as the distribution of cultural products, it is an important component in the research.

Significance

Solving the culture and trade quandary is a moral and emotional issue in the minds of many Canadians who fear loss of profile or identity in a global world. It is also an economic issue. It requires understanding and patience on both sides of the (culture and trade) equation and a willingness to work together to find mutually beneficial solutions. It requires compromise and conformity with global trends in order to play in a global world, to trade with our partners and continue our growth and development as a leading member of the economic order and the G-8. Therefore, our policy and legal instruments affecting culture have to work together to achieve a higher goal in the interests of the future and our profile and ability in a global world. The Government of Canada has published a discussion paper²³ which is designed to complement the

²³ "Towards a Canadian Position on Trade in Cultural Goods and Services." A discussion paper in *Consultations with Canadians* on the website *Trade Negotiations and Agreements*, which is itself a part of the Department of Foreign Affairs and International Trade website. At <<http://www.dfait-maeci.gc.ca/tna-nac/discussion/culture-e.asp>>. It seeks the opinion of Canadians, notably Canadian stakeholders, on how Canada can continue to achieve its cultural and trade policy objectives in a manner that maximizes opportunities and

work of the SAGIT in attempting to identify options which might address the issue. The paper identifies the issues and the five principal areas where trade agreements may have commitments that affect cultural industries (goods, services, intellectual property, investment and competition policy). It also seeks the views of Canadians on the options. Engaging the stakeholders, the government, the politicians and the legal community is a step in the right direction. While there are a number of options identified, the Government seems favourably disposed to a multilateral agreement on culture. There is, however, a critical path and a number of issues to examine before one can conclude anything. The critical path has yet to be defined in a constructive way. A multilateral agreement on culture may be worth pursuing as a theoretical framework as well as a viable political, economic and cultural project for Canada. The more challenging task, however, might be to involve the United States in a multilateral process where it clearly has the biggest economic interest and likely the least to gain. In order to work, the ultimate agreement, whatever form it takes, would have to be consistent with trade interests and obligations; it would have to be technology-neutral (to avoid being outdated before its creation) and would have to have one of the following faculties: i) It would have to be a binding instrument (an international trade law) in terms of its universal application in member countries or, ii) be an instrument which could transcend such trade law. Are member countries ready for this?

Definitions

“Television networks are the single most constant power in the American cultural life since the Second World War”. Frank Rich, *New York Times*, 1999

reduces uncertainties in the international marketplace.

Culture:

The word “culture” is one of the most controversial words in the English language. There are many definitions of what it is and what it isn’t. In the broadest sociological sense, it encompasses language, values, traditions, experiences, creativity and is the quintessential essence of who we are, what we believe, how we behave and so on. “Our culture is what we have inherited from our forebears and forerunners, all that we invent or create or imagine and figure forth in art and the works of intellect, our culture is our community and our reason for existing as a nation , as a multicultural society, as a people, as a political entity.”²⁴ One’s culture is what one reads, what one hears, what one sees, what and how one feels, what is reflected in books, magazines, sound recordings, films, on television and multi-media....a Canadian perspective. Canada must reserve some *shelf space* for our Canadian voices, the instruments (cultural products) that reflect culture so that there will always be a Canadian choice in the mix of what is available in the cultural environment. If all that exists in the immediate environment is non-Canadian product then who and what is Canada and Canadian?

Sovereignty:

A fundamental concept of international law denoting the supreme undivided authority possessed by a state to enact and enforce its law with respect to all persons, property, and events within its borders. Sovereignty is unfettered by the control of other states. By being sovereign "externally", a state enjoys certain immunities and privileges, such as sending and receiving diplomats, engaging in treaty making, and possessing immunity from the jurisdiction of other states. In

²⁴ Presentation by Bernard Ostry (then CEO at TV Ontario) to a Seminar entitled “Cultural Sovereignty: Myth or Reality”, published in the *Proceedings of the 28th Annual Seminar on Canadian American Relations held at the University of Windsor*, Windsor, November 5-7, 1986.

reality, however, the exercise of sovereignty is not absolute. Through the corollary doctrine of state consent, each state may accept limitations on its sovereign powers by accepting the restrictions under international law and by virtue of decisions rendered by international organizations of which it is a member. States must abide by the legal norms established by the international community and are subjected to particular restraints embodied in treaties and set by international organizations. *Significance*: Sovereignty is the benchmark of the international personality of an entity seeking a status legally equal to other members of the community of nations."²⁵

Cultural Industries:

Many definitions of culture and cultural industries exist at multilateral, regional and domestic levels, e.g. UNESCO, the Council of Europe, the NAFTA, the Canadian definition used in most bilateral agreements such as in Foreign Investment Review Agreements (FIRAs). The definition is limited to the cultural industries most frequently traded across borders and as most commonly understood in multilateral, regional and domestic documentation, i.e. published materials, audiovisual materials, sound recordings and multimedia. The Canadian definition (in the context of multimedia) is broken down into four components: 1) literary works (books, magazines, manuals); 2) artistic works (visual art including photography); 3) dramatic works (audiovisual work including film products for theatre, television, multimedia); 4) musical works (sound recordings).²⁶ For simplicity, the following should suffice:

For the purpose of this research, cultural industries means: published works, audiovisual works, sound recordings and multimedia/new media products. While the carriers or transmitters of cultural products such as cable or the internet "web"

²⁵ Definition, Robert L. Bledsoe and Boleslaw A. Boczek, *The International Law Dictionary*, Santa Barbara, California: ABC-CLIO, c1987.

²⁶ Johanne Daniel and André Dorion, "Propriété intellectuelle - Concurrence - Multimédia, Voyage au coeur d'un kaleidoscope virtuel", *Les Cahiers de Propriété intellectuelle*, Vol. 9, no. 3, Cowansville: Les Éditions Yvon Blais, 1997.

are not defined as cultural products, there are clear implications which are considered. Analysis of sales across borders is, however, limited to available statistical data in the context of cultural goods and services traded across borders.

CHAPTER 2

Introduction

This chapter provides a synopsis of where society is now in addressing the culture and trade conflict. It documents Canadian industry and Government positions and identifies the steps that have been taken to address the issue. It then reflects on the current thinking of noted experts on both sides of the culture and trade equation. It is important to understand the current situation, to be able process this knowledge before proceeding with the next steps in attempting to find a solution.

Relationship To Existing Knowledge

As globalism and tribalism contend and collide in sometimes unforeseen ways, the contradictions of an often disorderly international system continue to present a medium-sized nation such as Canada with many challenges.²⁷ In order to address the issues surrounding trade policy and cultural policy in the 21st century, one has to understand the historical significance, the policy process and the evolution of both cultural and trade policies. Why do these policies exist and are the policy goals realistic in an era of globalization and liberalized trade? A great deal has been learned about the impact of multinational corporations on governments and the increasing incompatibility of culture and trade in the global market context. Finding the right solution is a challenge politically, practically, culturally and economically. There are proposals as noted

²⁷ *Canada At the WTO: Towards a Millennium Agenda, A Citizen's Guide to the World Trade Organization and to the Committee's June 1999 Report*, preface by Bill Graham, Chair of the Standing Committee on Foreign Affairs and International Trade, Ottawa, June 1999.

above which merit more research.

In June 1999, the House of Commons Standing Committee on Foreign Affairs and International Trade published its report on the next round of WTO negotiations.²⁸ The process had begun nine months earlier in a consultative process, the largest and most intensive parliamentary consultation ever held on international trade issues. Over 400 witnesses across Canada testified before the Committee. Michael Hart's submission²⁹ to the Committee follows:

Over the past decade....Canadian participation in the global trade regime has reached a new level of maturity. Canadians have become more prepared to pursue opportunities and less reluctant to accept some of the risks of a more open economy. They successfully convinced the global community to adopt a stronger institutional basis for multilateral trade cooperation, and they are at the forefront in ensuring that the WTO evolves into a forum for the governance of the global economy.

For Canadians, the need to be active in the further developments of the multilateral system cannot be overemphasized. Canada depends on and benefits from an effectively functioning trade and payments system. Its ability to play a constructive role is equally clear. But the ability to ensure that Canadian values and priorities are reflected in the evolving regime requires that Canadians analyse the issues and make their contributions early in the process. As a relatively small player, that is where they are most likely to influence the content and course of a negotiation. In short, Canadians need to be quick, early, and creative.

Culture and knowledge-based and technology-driven sectors were on the agenda of the Committee in the context of discussions surrounding the next round of WTO negotiations. The

²⁸ *Ibid.*

²⁹ Michael Hart is an author, trade negotiator and professor at Carleton University. His written submission to the Committee was entitled "Canada at the Millennium Round: Forging Global Rules for a Global Economy", April 26, 1999.

February 1999 Report of the Cultural Industries SAGIT was the basis for those discussions. The SAGIT report provided four options to deal with the culture in a trade context; 1) A broad cultural exemption - the acceptable wording for such an exemption, as proposed by SOCAN for the MAI, is “Nothing in this Agreement shall be construed to prevent any party from taking any action or measure which it considers necessary to protect or promote its cultural industries”; The cultural exemption in the FTA and NAFTA has never been invoked successfully. 2) Make no commitment on culture, known as a country-specific sectoral reservation. This was perceived to be about as effective as the cultural exemption. Without the support of other countries, however, Canada would be subject to continued international pressure to change domestic cultural policies. This was the avenue followed during GATS negotiations and failed in the 1997 WTO ruling as the magazine policies challenges were perceived to be goods not services and hence came under the GATT and not GATS; 3) Create a new international instrument on cultural diversity, a kind of blueprint for the treatment of culture in a global world, including references to competition and copyright given their prominence in cultural activity and trade. 4) Develop agreements covering specific cultural industry sectors, measures or practices, a sort of piece-meal approach instead of dealing with cultural industries as a whole. The Committee’s recommendation is that Canada pursue option 3, a new international instrument on cultural diversity. The Committee heard testimony from witnesses on all the options. Witnesses include some of the current consultants in the field including Dennis Browne of the Centre for Trade Policy and Law, Ken Stein, Senior Vice-President, Corporate and Regulatory Affairs, Shaw Communications and

Chair of the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT)³⁰, Ivan Bernier, Professor of Law at Laval University, Ann McCaskill, Consultant to the Department of Canadian Heritage, Christopher Maule and Keith Acheson of Carleton University's Norman Patterson School of International Relations Program. The March 9th, 1999 transcript of the Standing Committee on FAIT illustrates the transformation from the protectionist position held by SAGIT members during MAI negotiations. As noted earlier, while the Cultural SAGIT had been vehement in its position that a cultural exemption provision must be included in all trade and investment agreements, its position has shifted towards negotiating some form of multilateral instrument which would recognize culture as needing some form of special treatment. While certain witnesses commented on the need to have such an agreement consistent with WTO obligations, the recommendation was very general and did not make significant reference to having the new instrument negotiated under the WTO umbrella. It is evident that the SAGIT now recognizes that the cultural industries cannot survive without being part of the global market. Canada's relatively small population cannot support competitive cultural industries. Access to the global market, however, provides opportunities for growth and development.

Canada is leading the charge to move the agenda forward and in September, 1999, culture ministers from thirteen countries³¹ met in Oaxaca, Mexico to discuss the fate of national cultures in an increasingly globalized world. In a statement September 2nd in Ottawa, just prior to the

³⁰ SAGIT, *loc. cit.*, p. 12.

³¹ Armenia, Brazil, Egypt, Mexico, Senegal, Sweden, Britain, Ukraine, France, China, Malaysia, Austria and Hungary.

meeting, President Jacques Chirac adamantly confirmed the French position for a cultural exemption. He commented that the exemption was primarily for cinema and television and that he would prefer to have the issue discussed at UNESCO instead of the WTO. Prime Minister Chrétien responded by saying that Canadian and French objectives for culture were the same, but the mechanisms to achieve the objectives were different. President Chirac noted the change in the Canadian position from fighting for a cultural exemption in the NAFTA to today's desire for a different approach. The September meeting in Oaxaca was a follow-up to the Ottawa conference, spearheaded by Minister Sheila Copps, to develop an international network of cultural ministers. This was a new initiative of the Minister curiously around the time of the WTO decision on split-run magazines and likely to gain some support for the Canadian position on magazines.

Professors Christopher Maule and Keith Acheson have done extensive research and published a number of articles on the culture and trade quandary. Christopher Maule has indicated that a sectoral agreement would be the more viable option. On the more general subject of the efficacy of Canadian cultural policies today, Professors Maule and Acheson sum it up quite tidily in an article aptly entitled "If the Horse is Dead Dismount".³² They suggest that while cultural policies were appropriate 25 years ago, and worked well to develop and sustain all four cultural industries (film, broadcasting, publishing and sound recording), they now need reevaluation. Christopher Maule has indicated that he believes some form of cultural support is necessary, but it must be a

³² Keith Acheson and Christopher Maule, "If the Horse is Dead, Dismount", *Electronic Times Report: Opinion*, Vol. 3, No. 2, April/May 1998.

different kind of support to the traditional policy measures that have been developed. What form that support would take is the question. It could, as suggested by the SAGIT, be a multilateral instrument or, it could be a sectoral agreement on culture under the WTO. The latter is of particular interest because the WTO has a viable enforcement mechanism through its Dispute Settlement Mechanism.

Impact/Role of Globalization

The dominant development model of our time is economic globalization, a system fuelled by the belief that a single global economy with universal rules set by global corporations and financial markets is inevitable. Everything is for sale, even those areas of life once considered sacred.

- "Global rules could paralyse us", Maude Barlow, editorial comment in the *National Post*, August 31, 1999, p. A18.

In 1965, Raymond Vernon began research on the increasing role played by multinational corporations and the limits to governmental power. His work contributed to our understanding of how the pragmatic decisions of global companies had a growing impact on the economic forces once controlled by governments, such as trade and investment. In his later work, he identified how European nations, in an effort to combat the power of American multinationals, created state-owned corporations. He predicted that state-owned enterprises would not be able to compete with investor-owned multinationals.

The role of globalization, as described by Claude Ake follows:

Among other things, globalization is the march of capital all over the world in search of profit, a process reflected in the reach and power of the multinational corporation. It is about growing structural differentiation and functional integration in the world economy; it is about growing interdependence across the

globe; it is about the nation-state coming under pressure from the surge of transnational phenomena, about the emergence of a global mass culture driven by mass advertising and technical advances in mass communication... For all its complexities, ambiguities, contradictions, and historical specificities, globalization has an overriding trend, namely homogenization.³³

However, globalization is uneven. While the overriding trend of globalization, according to Ake, is towards homogenization, it is not just an abstract process of homogenization. One cannot overlook the disproportionate contribution toward international homogenization of the political and economic weight of the United States. A more recent article entitled *Economic Globalization and the Nation-State: Shifting Balances of Power*³⁴ substantiates the shifting balances of power. Both works elaborate how Canadian cultural policy struggles have evolved. Some of the works focus on the growing gap between north-south relations, but the overriding issues is how economic power and the interests of the stronger economy prevail. While it is premature to give any concrete evidence of its over-arching influence as a large ideological group, the European Union might be an example of how countries might be reacting to U.S. ideology. Perhaps the amalgamation of European economies into the European Union is a protectionist response to the superpower status of the U.S. and this might be an example of the lengths to which nation states must resort in order to combat ideological pressure from the U.S. in the new era of homogenization.

³³ Claude Ake, "The New World Order: A View from Africa" in Hans-Henrik Holm and Georg Sorensen, eds., *Whose World Order?: Uneven Globalization and the End of the Cold War*, Boulder: Westview Press, 1995.

³⁴ David Goldblatt, David Held, Anthony McGrew and Jonathan Perraton, (1997) 22 *Alternatives*, p. 269-85.

Now that the dynamics are in place, it is important to assess the cultural policy objective in the context of the current global trade environment. Do Canadian cultural products risk extinction? Can Canadian culture stand alone and can Canadian cultural products compete globally without regulatory policies and legal instruments? As a founding member of the World Trade Organization (WTO) and as a member of the G-7, Canada clearly has trade policy goals. These goals have to be examined in the context of their impact on public policy, specifically cultural sovereignty.

The thesis research analyses the current situation of Canadian policy efforts to promote cultural sovereignty in an era of globalization. Is the course of action in pursuit of this goal viable? I would suggest that it is not. The current posturing for protectionist measures does not inspire creativity and cooperation among partner countries, notably with the United States. Threatened trade retaliation from the United States over *Certain Measures Concerning Periodicals*³⁵ and current posturing at the political level suggest there are larger problems. There are, additionally, actual and potential conflicts that occur between the goals and instruments of cultural policy, trade policy, competition law and copyright law which question the efficacy of policy structures to achieve national objectives.

³⁵ Canadian support to the publishing industry, specifically four policy measures involving an excise tax, a tariff code and two subsidies, were struck down by the WTO in July 1997 as being inconsistent with our multinational trade obligations.

CHAPTER 3

Introduction

The objective of this chapter is to provide a theoretical reference for the concept of American cultural imperialism and a theoretical framework for understanding the behaviour of nation states in the context of international relations, i.e. to create, within the limits of theoretical possibility, a more predictable negotiating environment. A predictable environment would greatly assist any international negotiation and, in the case of this thesis, an instrument or mechanism to deal with the culture and trade conflict in a global era.

Theoretical Considerations

In order to address the issues surrounding cultural and trade policy in the 21st century, it is necessary to understand the concept of culture and the impact of globalization on national cultures. It is also important to understand the notion of cultural protectionism in an era of liberalized trade and the contemporary social, political, economic and legal implications. While there is no one theoretical model to explain this, there are generalizations one can draw from a number of theoretical schools which shed some light on the evolution of thought which has created the environment for this research. Theory, properly conceived, seems to aim at generalizations looking to the universal and the uniform rather than to the unique, the particular, or the discrete.³⁶ This paper draws briefly upon a mix of classical and contemporary theories to provide a general context for this research using three bodies of work: 1) Marxist and post

³⁶ James E Dougherty and Robert L. Pfaltzgraff, Jr., *Contending Theories of International Relations*, Philadelphia: Lippincott, 1971, p. 45.

marxist theory to explain the notion of ideology as it relates to American cultural imperialism;

2) International economic theory as it relates to understanding international economic relationships, international organizations and methods of solving conflicts within the organizations. Some business school philosophy has also been added which contributes to the understanding of the evolution and power of the multinational corporation. 3) International relations theory in a general context as a practical approach to understanding the rationale behind the desire to find balance between nation states and the search for solutions. A perspective on international law has also been added since it is this body of law which is examined in the thesis.

This framework provides the basis for understanding five themes as follows:

- 1) the notion of American cultural imperialism.
- 2) the challenge to the sovereign powers of the nation state in the new global environment.
- 3) the evolution of the culture and trade conflict.
- 4) the desire to find solutions to reconcile the culture and trade quandary.
- 5) the role of culture and politics in international relations.

Chronological historiography of the notion of ideology as it relates to American cultural imperialism

The following is used to help situate or provide some understanding of the notion of American cultural imperialism. It is important insofar as "American cultural imperialism" is a frequently used expression and societal issue related to the culture and trade quandary. The theory, however, is not meant to rationalize the larger issue of the culture and trade quandary, but to situate it by serving as a guide to understand the perception (or misperception) of those who feel

somewhat threatened by the dominance of American cultural products worldwide.

The principles of Marxism still remain at the base of much of the critical social and cultural thought of our century. Marx and Engels's base and superstructure, defined in *The German Ideology*, that the production of ideas, concepts and consciousness, is first of all directly interwoven with the material intercourse of man, the language of real life,³⁷ i.e. one cannot get outside of one's economic circumstances and therefore one's ideas, concepts etc. flow from this base. They argued that the relations of units of production are independent of human will; the sum total of these relations of production constitutes the economic structure of society, ...the real foundation, on which a legal and political superstructure rises and to which definite forms of social consciousness correspond: "the mode of production of material life conditions the social, political and intellectual life process in general."³⁸ Therefore, within a Marxist world view, social being determines consciousness.

One important concept that belongs under the Marxist theoretical umbrella is ideology. Sam Solecki³⁹ defines it as any complex of attitudes and ideas concealing the real nature of social relations and thus helping to justify and perpetuate the oppressive social dominance of one class over others; [and] to what Engels described as 'false consciousness', which is any process of thought in which the real motive forces impelling (a thinker) remain unknown to him ... the term has also been used more generally to refer in a value-neutral sense to any system of norms or

³⁷ Terry Eagleton, *Marxism and Literary Criticism*, Berkeley: University of California Press, 1976.

³⁸ *Ibid*, p.5.

³⁹ Makaryk, *op. cit.*, p. 559.

beliefs directing the social and political attitudes of a group, a social class or a society as a whole. The Italian philosopher Antonio Gramsci followed on Marx's binaric concept with the concept of hegemony. Simply stated, hegemony is any type of dominance achieved through consent and coercion. The value of hegemony as a concept would seem to depend on maintaining its connections with both social class and cultural production.⁴⁰ Gramsci believed that the bourgeoisie exercised hegemony over lower classes in capitalist states. It was his contention that, while the bourgeoisie might dominate society through political and legal institutions, it leads through hegemony in the private sector by representing the universal advancement of society. A subordinate group with its identity rooted in economic terms will achieve intellectual, ethical and political fulfilment because its own interests can transcend the corporate limits of the economic class, and can and must become the interests of other subordinate groups. A dominant class has achieved hegemony when its world view is suffused through society. The concept of hegemony, as defined by John Thurston⁴¹ is particularly suited to the analysis of modern representative democracies where force is seldom used as a means of social control. The development of civil society in such areas as education and health care, *mass media and entertainment*, political organizations and trade unions contributes to the regulation of hegemony by the dominant capitalist class, especially since the state has expanded inextricably with these areas. Gramsci's analysis of hegemony thus accords with the work of Theodor Adorno and Herbert Marcuse on the *cultural industry* as a mechanism through which dissidence is pacified

⁴⁰ Gramsci, Antonio, *Selections from the Prison Notebooks*, ed. and trans. Quintin Hoare and Geoffrey Nowell Smith, New York: International Publishers, 1971, as quoted in Makaryk, *op. cit.*, p. 550.

⁴¹ *Ibid.*

and integrated, and radical ideas are diffused or nullified.

Marxist critic, Terry Eagleton⁴² uses hegemony as a synonym for any type of dominance achieved through consent and coercion. The value of hegemony as a concept is useful as a tool in critiquing a system which depends entirely on maintaining ideological connections with both social class and cultural production. This concept provides a tool for analysing the relations of culture and society. After Gramsci's theories had impact on the world in terms of cultural interpretation, a French theorist, Louis Althusser, following Gramsci's lead, developed and reassessed the notion of ideology to add yet another twist into Marx's earliest work.

Louis Althusser's formula of ideology is the comprehensive system of ideas, beliefs and values that influences human behaviour in any society."⁴³ Althusser's *Ideological State Apparatuses* (ISAs) are the apex of his view as to what is inherent in any system that purports to reinforce the major influences on our ideas, beliefs and values that shape our behaviour. These institutions represent the perpetuation or maintenance of the *status quo* in society; these social formations of the superstructure include religious, ethical, legal and political spheres to name several. To further add to the layering of theory pertaining to ideology, Raymond Williams,⁴⁴ incorporates both the original and the modified Marxist view by placing ideology in a context of change comprising 'residual, dominant and emergent' elements in culture. At any historical moment,

⁴² *The Ideology of the Aesthetic*, Oxford: Basil Blackwell, 1990.

⁴³ Makaryk, *op. cit.*, p. 550.

⁴⁴ Raymond Williams, *Marxism and Literature*, Oxford: Oxford University Press, 1977.

the dominant elements form the controlling ideology, while residual aspects of previous ideologies maintain some influence and emergent elements, in the form of new ideas and values, initiate change by challenging central beliefs.

What is most integral to the methodology of post-marxist theory to the issues surrounding the impact of globalization on culture is Althusser's stance on art and how the position of the subject can be represented in a non-traditional or non-ideological form. Understanding Althusser's theory of interpellation is important in the context of a society accepting a view of itself through the eyes of something which is not in the best interest of the subject. The commercial for (trade name) *Gap* jeans is often used to illustrate this theory. Gap jeans are modelled by a number of girls and boys, men and women - and designed to look current or "trendy" for everyone watching the commercial, regardless of age, gender, size, social class etc. In other words, "one size fits all" - Gap is good for you too. Realistically, all people may not look good in Gap jeans, but are led to believe, in commercial terms, that they represent us in today's trendy society. Ross King summarizes Althusser's theory by saying, "Althusser develops the term in order to demonstrate how ideology is not simply an illusion or false consciousness masking the 'real' nature of society but is instead a material system of social practices (what he calls 'ideological apparatuses') producing certain effects upon individuals and providing them with their social identities... Ideology 'naturalizes' or 'makes obvious' the ways in which people live their lives in society."⁴⁵

⁴⁵ Makaryk, *op. cit.*, p. 567.

Furthermore, one of the more contemporary post-marxist thinkers, Fredric Jameson⁴⁶ believes that the use of Althusserian analysis can be seen as a prelude to the creation of a more just society. He suggests that a Marxist practice of ideological analysis should deal with the utopian impulses within ideological cultural texts. In other words, people have instincts which are rooted elsewhere.

At the heart of the analysis of globalization, public policy and culture, lies a limited number of issues. The two most prominent are economic and cultural where neither is mutually exclusive of the other. If one were to assess the process or inception of globalization and resultant trade/cultural relations from a post-Marxist perspective, globalization (Jameson's state of late capitalism) takes precedence over culture (more specifically, national cultural interests). Where might culture be positioned in this sphere?

International Economic Theory and Business School Teachings

Theories of international economic law are in perpetual change and ongoing development. This theoretical framework is useful in attempting to understand the behaviour of nation states and institutions in the context of trade and market development. The theory behind trade sanctions is also examined in the context of market manipulation and political profiling.

There are a number of definitions of international economic law. It can be generally described as the total range of norms (directly or indirectly based on treaties) of public international law with

⁴⁶ Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act*, Ithaca: Cornell University Press, 1981.

regard to transnational economic relations. In Erler's opinion, the definition should not be founded on the origin of the norms, but on the object of the norms - the international economic transactions.⁴⁷ This suggests that national norms regarding transnational economic relations and norms of private law as well as those of public law regarding the ordering of transnational economic relations must be included in the definition of international economic law. As early as 1903, Balfour commented that the currents of economic life flow in a bed which was not created by nature but by a system of treaties of international public law.⁴⁸ International public law concerns itself with the ownership and exploitation of national resources, production and distribution of goods, invisible international transactions of an economic and financial character, currency and finance, related services and organization of the entities in such activities. International economic relations are also regulated by contracts and other norms of private law.

In non-traditional areas, there are emerging trends. For example, trade sanctions are imposed on nations whose governments' behaviour fails to conform to what are deemed to be internationally accepted codes of conduct. They are economic instruments which have the intended purpose of inducing a change in the behaviour of a target government and represent an alternative to diplomatic initiatives or direct military intervention. The objective is to raise the cost to the target government of continuing with a behaviour which is considered unacceptable to those imposing the sanctions. Both Canada and the United States have used trade sanctions to exert

⁴⁷ Quotation in Pieter VerLoren van Themaat, *The Changing Structure of International Economic Law: A contribution of legal history, of comparative law and of general legal theory to the debate on a new international economic order*, The Hague: Martinus Nijhoff, T.M.C. Asser Institute, 1981, p. 10.

⁴⁸ *Ibid.*, p. 10.

pressure on nations engaged in policies which, for example, violate universal principles such as human rights.

The problem with sanctions, however, is that they seem to be more effective when evaluated relative to less ambitious goals such as satisfying a domestic political constituency or appear to be punishing the target country's actions or policies without expecting a change in behaviour.⁴⁹

While, typically, sanctions are placed on a limited range of goods and services, strategically chosen to produce maximum disruption to the economy of the target country, the imposing country often fails to consider the target economy's ability to adjust to the sanctions which can ultimately force the target country to find an alternate source of supply. Also, from a political perspective, it has been argued that in some circumstances, where compelling a change in behaviour is the publicly stated goal of trade sanctions, it may be more difficult for the target country to comply since it would be seen to be yielding to foreign pressure.⁵⁰

There are ways of dealing with sanctions to perhaps render them more effective such as applying them on an intermittent basis, just long enough for the target country to develop (at great cost) a new infrastructure. Then, the country imposing the sanction removes it, leaving the target country with the high cost of production (plant, equipment, labour). This ultimately results in the

⁴⁹ William A Kerr and James D. Gaisford, "A Note on Increasing the Effectiveness of Sanctions", *Journal of World Trade*, Vol. 28, Geneva: Werner Publishing Company, February, 1994, p. 171.

⁵⁰ D. Leyton Brown, "Lessons and Policy Considerations About Economic Sanctions" in *The Utility of International Economic Sanctions*, London: Croom Helm, 1986, p. 304.

target country's domestic products being uncompetitive with the imported product when the sanctions are lifted. Trade sanctions which result in very expensive domestically produced products provoke smuggling of cheaper products into the country. On the other hand, if a target country is aware that sanctions will be applied intermittently, the target country can manipulate the system by stockpiling to ensure sufficient supply.

With reference to the treatment of culture in a global market or environmental issues such as global warming, it requires international or supranational norms. The problem evolves as there is public interest at stake and, while a number of countries have regulatory authority in the field, it has become increasingly difficult to regulate such activity at an international level. There are no norms.

While one sees the emergence of standards-setting and universal principles of good governance on the political and *soft power*⁵¹ agenda, has it influenced trade patterns? While governments would generally agree on the importance of universal standards and principles in those areas of global concern, the overwhelming pattern which has been documented is the growing influence of transnational corporations and the power of money over national public interests .

In the context of cultural products, there are three dynamics at work. 1) Domestic (public)

⁵¹ Foreign Affairs Minister Axworthy speaks of "soft power" which refers to the human security agenda such as banning land mines and children in arms conflict. It also refers to protecting the environment and cultural diversity. Joseph Nye is the originator of the concept.

regulatory policies in Canada which are in conflict with our obligations under international trade law. 2) Difficulty in regulating these problem areas through statute law, e.g. copyright and competition laws are not concurrent with cultural policy goals, i.e. they do not necessarily favour domestic policy interests over international competition.

It might, therefore, be useful to study in greater detail the regulations of national public law and the private international arrangements in the field of study so that it would be possible to give a better indication of the reasons why it has not been practical to find solutions through these channels. 3) The third dynamic is how to synchronize national public law, domestic regulatory measures and international private arrangements in the interests of all, i.e. the public interest in cultural sovereignty and the private interest in profit making.

Harvard Business School Professor Raymond Vernon studied the international economy from the mid sixties to the nineties, particularly the increasing role played by multinational corporations and the limits to governmental power. He anticipated that multinationals, as efficiency-seeking enterprises, would transfer labour-intensive work on standardized products to developing nations. He analysed how the pragmatic decisions of increasingly global companies held increasing sway over economic forces once controlled by government, such as trade flows and levels of investment.⁵² He later documented the European response to combat the power of American multinationals by fostering the creation of state-owned corporations, predicting that state-owned

⁵² Raymond Vernon, *Storm Over the Multinationals: The Real Issues*, Cambridge: Harvard University Press, 1977.

corporations would not be able to compete with investor-owned multinational companies.⁵³

The challenge ahead, in consideration of international economic theory, is to negotiate a multilateral agreement or instrument on culture successfully with countries with which Canada trades extensively in these products, notably the United States.

3) International Relations Theory and International Law

A contemporary theoretical approach to international relations provides a useful vehicle to explain the evolution of the culture/trade quandary and the means to find an appropriate multilateral approach to the problem. Why countries react the way they do is a function of their culture and how we respond is a function of ours.

The body of international theory includes the tripartite categorization of traditions known as realism, rationalism and revolutionism. In its origins, international theory paid little attention to the thinking of the major political theorists (Hobbes, Thucydides, Machiavelli, Rousseau) who wanted to understand relationships between nation states during the sixteenth and seventeenth centuries. It evolved however as scholars of the English School attempted to fill that gap drawing upon a tripartite taxonomy of Hobbes's tradition of power politics, Grotius's concern with the rules that govern relations between states and the Kantian tradition of thinking which transcends the existence of the states system.

International theory incorporates, not only the traditions, but the contradictions as

⁵³ Raymond Vernon and Debora L. Spor, *Beyond Globalism: Remaking American Foreign Economic Policy*, New York: Free Press, c 1989.

well (Wight). Each tradition embodies a description of the nature of international politics and also a set of prescriptions as to how men should conduct themselves. Each tradition analytically explores facets of the same interconnecting series of questions, each emphasizing the aspects that most directly concern its own separate agenda.⁵⁴

John Austin (1790 - 1859) “concluded that international law was not true law but positive international morality only, analogous to the rules binding a club or society.”⁵⁵ . His theory may have been right for the era, but new approaches have emerged paying more attention to the analysis of power politics and the comprehension of international relations in terms of the capacity to influence and dominate. The behaviouralist movement emerged, introducing elements of psychology, anthropology and sociology into the study of international relations and paralleled similar developments within the Realist School, altering the emphasis from analyses in terms of idealistic or cynical (realistic) conceptions of the world political order, to a more socially-oriented perspective to be studied in the context of law and social transformation. Such methods enable a greater depth of knowledge and comprehension to be achieved and a wider appreciation of all the various processes at work.⁵⁶ “In the face of change, ...Realism is about international politics, an effort to understand the basic characteristics of the international system. ...Sovereign states are the constitutive components of the international system, the system is anarchical and self-help is the necessary principle of action. ...The distribution of power depends

⁵⁴ Ian Clark, “Traditions of Thought and Classical Theories of International Relations” in *Classical Theories of International Relations*, ed. by Ian Clark and Iver B. Neumann, London: Macmillan Press in association with St. Antony’s College, Oxford, 1996, pp. 1-19.

⁵⁵ I. A. Shearer, *Starke’s International Law*, 11th ed., London and Boston: Butterworths, 1994, p. 16.

⁵⁶ M. N. Shaw, *International Law*, 3rd ed., Cambridge: Grotius, 1991, pp. 50-4.

on the relative wealth of the state in the system.”⁵⁷ International theory, in the classical sense, helps us interpret relationships and interaction between states. A nation state’s reaction to an international issue is a function of its culture. Hence, international theory can be used to interpret the international response to American cultural imperialism.

International law is one of the most dynamic areas of law today and one of the most important, as global interdependence deepens and the transnational movement of people, ideas, goods and services continues to grow. The legal system in the modern world is characterized by rules of considerable specificity emanating from courts, legislatures, and executive or administrative tribunals. In the context of international relations, however, there is an absence of enforceable laws or law-creating agencies in the international legal network with the exception of the WTO. This is a key consideration in this paper. The essential function of international theory, in a contemporary sense, is to provide one with the tools to improve his/her knowledge of international reality. It helps to order existing knowledge and to discover new knowledge most efficiently. It provides a framework of thought which helps to define research priorities and to determine the most appropriate tools for assessing data. It draws attention to similarities and differences and provides proof that one has used his/her mental capacity to problem solve with precision, imagination and profundity. This, then, provides the inspiration to others to carry out additional study in support of, or in contradiction of, that proof. International theory is multi-faceted being descriptive, speculative, predictive and normative. The more highly developed the

⁵⁷ “International Relations Theory in a World of Variation”, op. cit., p. 188.

field as a whole, the more likely it will involve a synthesis of “what is”, “what might be”, “what probably will be” and “what ought to be”.⁵⁸ Politics also often takes precedence over legal interpretation as summed up in this quote: “The concept of world order based on the rule of law overlooks the fact that social and cultural differences are usually resolved by political means. Although there may be a common legal rhetoric among international lawyers, that rhetoric, for reasons integral to the ideology, rely on political principles to justify the outcomes to international disputes”⁵⁹.

Increasingly governments are studying the culture of nations they trade with as a way of understanding and facilitating negotiations. An example of this is the process whereby Canada took the lead in negotiating the ban on land mines, the Anti-Personnel Land Mines Treaty which became known as *The Ottawa Process*. A study was undertaken as follows:

The multilateralisation and regionalisation of the security-building process has meant that the cross-cultural aspects of contemporary security dialogues have assumed a much more prominent place in policy debates. Cultural factors have been cited to explain persistent miscommunication and misperceptions on issues of war and peace, or the origins of (and different reactions to) various weapons, taboos and the importance of ideas such as transparency and verification. ... Beliefs and attitudes play a crucial role in both the exacerbation and resolution of disagreements, and behind so-called “objective” interests lie culturally-informed sets of ideas that shape how states define and act upon these interests. ... With these considerations in mind, case studies were undertaken to determine under what conditions and to what extent cultural factors make a difference. ... Culture consists of those enduring and widely-shared beliefs, traditions, attitudes, and symbols that inform the ways in which a state’s/society’s interests and values with respect to security, stability and peace are perceived, articulated and advanced by

⁵⁸ James E Dougherty and Robert L. Pfaltzgraff, Jr., *op. cit.*, pp. 44-5.

⁵⁹ Martti Koskenniemi, “The Politics of International Law”, (1990), 1 *European Journal of International Law* 7.

political actors and elites.⁶⁰

This study reinforced the important role that culture plays in negotiations. The research covered a range of states and regions including the legacy of the East-West (or Western experience), Southeast Asia, China, India, Latin America, and the Middle East. Among other things, it examined the role of culture “writ large”, orientations towards regional and multilateral relations, specific cultural practices or styles of diplomacy and negotiation, societal attitudes towards authority (hierarchical versus egalitarian), violence, rule of law, and domestic conflict management. It was considered a useful tool in developing successful negotiating strategies and could equally be used in determining how one might approach a multilateral agreement on culture.

⁶⁰ *Cross-Cultural Dimensions of Multilateral Non-Proliferation and Arms Control Dialogues*, Research Report Prepared for the Non-Proliferation, Arms Control and Disarmament division, Department of Foreign Affairs and International Trade, ed. by Professor Keith Krause, Ottawa: Department of Foreign Affairs and International Trade, December 1997, p.v.

CHAPTER 4

Introduction

In an effort to further substantiate the statement of the research problem identified in Chapter 1 and the role of globalization examined in Chapter 2, the author researched case law involving trade in the cultural industries sector. The objective was to determine, over a period of twenty-five years, the scope and the number of cases to determine whether there had been a significant increase. This involved an extensive search using internet websites and QuickLaw to identify as many cases as possible involving the statutory and regulatory instruments most often used to protect cultural industries, i.e. copyright and competition laws. It also documents the number of cases involving cultural industries which had been taken to the WTO. The research indicated that there had been an exponential growth in the number of cases involving copyright and competition and, in addition, it notes the high percentage of cases at the WTO involving cultural industries. There was sufficient information here to proceed with the second step which was to carry out a legal analysis, a sort of forensic analysis, to determine whether court interpretations and tribunal rulings in the areas of copyright, competition and trade involving cultural industries are consistent or in conflict with cultural policy goals.

Phase I notes trends, influencing factors and the number of cases involving cultural industries. It illustrates the growing number of cases and the associated problems giving rise to the conflict.

Phase II reviews the issues in the context of cultural policy and trade policy objectives, competition and copyright laws. It is followed by a legal analysis and elaboration of three cases. The purpose was to find some examples in order to evaluate the interpretation of statutory and

regulatory instruments by the various courts and tribunals including, for these purposes, the WTO Dispute Settlement Body, in order to determine whether they were consistent or in conflict with cultural policy.

Trade in the Cultural Industries Sector

Research/Phase I: Examining court and tribunal rulings in the areas of intellectual property and competition affecting trade in the cultural industries sector (June to August 1998)

Issue

There has been a growing number of court and tribunal rulings in the areas of intellectual property and competition/anti-trust law affecting trade in the cultural industries sector. The Canadian Competition Tribunal, federal and provincial courts as well as multilateral trade tribunals in the context of the WTO and NAFTA are being challenged to deal with issues considered by the plaintiffs to be inconsistent with multilateral trade obligations in the context of competition or anti-trust laws as well as intellectual property rights, particularly copyright. Some of the recent rulings have been inconsistent or in conflict with Canadian (and other states') cultural policies. The issue, therefore, is whether cultural policies need revising and whether statutes, regulatory procedures and tribunal mandates need to be revised or reformed. How can the government reconcile the growing importance to the economy of a healthy competitive trade and investment environment with the need to protect and maintain cultural identity through domestic cultural policies?

There are two influencing factors here. 1) In both private and public law matters, the interests of the plaintiffs, or equally defendants, do not necessarily represent the interests of the state. Cases are argued as creatively as possible and on the basis of whichever legal regime or statute is likeliest to serve the individual litigant's interests. 2) Cultural industries in Canada have traditionally depended on a degree of public support and have been treated differently in the context of trade. In bilateral and multilateral negotiations, Canada has argued to keep culture "exempt", i.e. not on the negotiating table, with the objective of maintaining the right to special treatment such as the cultural exemption in the NAFTA or the agreement not to include cultural industries in the GATS schedule attached to the WTO. It could be argued that while cultural industries are protected in terms of trade negotiations, the reality of the marketplace prevails and they are treated no differently. The expression "cultural exemption" has proven to be fallible in terms of its being invoked successfully. While a statute is considered absolute, there is a diversity in the scope of application and enforcement of competition/anti-trust and intellectual property laws.⁶¹ Additionally, regulatory measures, tribunal mandates and cultural policies are vulnerable in the context of international trade in cultural industries.

A private case in point is *The Director of Investigation and Research and Warner Music Canada Ltd., Warner Music Group Inc., and WEA International Inc.* involving the Canadian

⁶¹ This subject has been studied by Professor Barry Hawk and is discussed in *Anti-trust and Market Access, The Scope and Coverage of Competition Laws and Implications for Trade*, Paris, OECD, 1997.

sound recording distribution industry. On the public agenda, the WTO recently ruled in favour of the U.S. in a case dealing with Canadian publishing policy measures. Both cases are analysed in Phase II of this chapter.

Both private law suits and state-initiated proceedings involving the application of competition/anti trust-law and copyright law and the cultural industries sector were documented. Internet web sites and QuickLaw data base searches included, *inter alia*, the *Canadian Intellectual Property Reporter*, the Copyright Board, the Canadian Competition Tribunal, the Trade Marks Opposition Board, *International Law Update*, the International Trade Tribunal, Provincial Courts of Canada, Federal Court of Canada, Supreme Court of Canada and the *Canadian Patent Reporter*. While the searches were focussed on competition/anti-trust and copyright laws affecting trade in the cultural industries sector, a number of other cases came up in the search which crossed into the tax and trademark area or, combined, for example, copyright and trademark issues in one suit. In summary, the author documented 68 private law suits and 21 state-initiated proceedings. The summary follows:

Private law suits

Sound Recording: A total of 12 cases: 10 - 1990s; 2 - 1980s; 1 - 1970s

Copyright: three U.S.-Canada cases and two involving European and foreign interests; Six Canadian cases although foreign interests were involved

Excise Tax Act: One U.S.-Canada case suing for sales tax reimbursement

Audiovisual: A total of 23 cases: 20 - 1990s; 3 - 1980s

Copyright: seventeen cases: seven U.S.-Canada cases; one involving a foreign interest;
nine Canadian cases, including eight retransmission rights cases

Telecommunications and licensing: one U.S.-Canada case

Trademarks: four U.S.- Canada cases

Excise Tax Act: one U.S.-Canada case

Published materials: A total of 21 cases: 17 - 1990s; 4 - 1980s

Competition Law/Mergers/Acquisitions: three Canadian cases

Copyright: three U.S.-Canada cases; one Canada-European; two Canadian

Trademarks: three U.S. - Canada cases; three Canadian

Customs Act: two U.S.-Canada cases

Excise Tax Act: four Canadian cases

Performing Arts: a total of 7 cases; 6 - 1990s; 1 - 1980s

Copyright: two Canadian cases

U.S. Immigration Act: These were neither reported cases nor even matters ultimately brought before courts or tribunals, but rather matters brought as complaints to the Department of Foreign Affairs and International Trade including complaints made directly to the Canadian Embassy in Washington. Complaints had been made by U.S. impresarios and Canadian performers in circumstances where Canadian performers (under contract to the U.S. impresario) were not granted working visas or were eventually granted visas but only with great difficulty. Whether

the issue was politically motivated or not was never determined, but the U.S. Immigration Act was enforced to the letter of the law where, in the past, there had been degrees of flexibility.

Multimedia: a total of 5 cases; 3 - 1990s; 1 - 1980s

Copyright/Patent Law: 1 U.S.-Canada case; 3 Canadian

Competition/Exclusive dealing: 1 U.S.-Canada case

State- initiated proceedings/World Trade Organization

The search of the WTO data base, done in August 1998, reinforced the author's position that the number of cases was growing and that the timing was right to address the issue. There were 18 active cases, 14 completed cases and 28 settled or inactive cases for a total of 60 cases. Of the 60, 21 involved the cultural industries, 15 active cases and six completed, settled or inactive cases. These were not exclusively with Canada, but involved other countries which, for the purpose of this thesis, were useful to note. In other words, cultural industries appeared, at face value, to represent almost one-third of the state-initiated cases. These are summarized below.

WTO: Active/Ongoing Cases involving cultural industries and multi-media

A. The U.S. has launched 12 investigations in the following areas:

- 1) Intellectual Property/Copyright infringement regarding the broadcasting of U.S. motion pictures in Greece
- 2) Intellectual Property enforcement issues - against Sweden, Denmark, and Ireland
- 3) Certain Income Tax Measures Constituting Subsidies - against Ireland, Greece, the

Netherlands, Belgium (not specifically targeted for cultural industries, but could be used for cultural industries)

- 4) Copyright and Neighbouring Rights - against the E.C. and Ireland
- 5) Certain measures concerning periodicals/Postal subsidies, the Excise Act supporting Canadian publishing - against Canada
- 6) Taxation of foreign film revenues - against Turkey
- 7) TRIPS/Copyright infringement involving U.S. sound recordings - against Japan

B. The European Community has launched one investigation as follows:

- 1) Unfair competition/ film distribution policy - against Canada

C. Korea has launched one investigation as follows:

- 1) Anti-dumping duty on multi-media products - against the United States

WTO: Inactive, Closed or Completed Cases

A. The European Union brought about three cases as follows:

- 1) IP/copyright infringement in sound recordings/inconsistent with TRIPS - against Japan
- 2) Competition/bid rigging re satellite procurement (multi-media issues) - against Japan
- 3) Competition/exclusive dealing laws, regulations and practices as discriminatory against foreign suppliers in the telecommunications sector - against Korea

B. The U. S. brought three cases as follows:

- 1) Film tax - against Turkey
- 2) IP/copyright infringement in sound recording - against Japan (EC took similar action citing TRIPS)
- 3) Publishing sector - certain matters concerning periodicals - against Canada. (While this issue has been dealt with and Canada has agreed to comply, the implementation date is October 30, 1998)

Competition Tribunal

There were five cases out of 24 which involved the cultural industries and were documented on the Competition Tribunal web. These cases were accounted for in the search.

Conclusions

There is little doubt that marketplace interests are taking a front seat over cultural policy issues and that multinational companies are engaging in suits employing IP/copyright and competition/anti-trust laws to their advantage and ultimately reaping more profit. From the above study and in consideration of current affairs, industry activity and the marketplace, it appears that cultural products are increasingly being treated as non-negotiable, tradeable goods. Another influencing factor which cannot be overlooked is that common issues are frequently cross-border (Canada-U.S.) trade irritants which also clearly affect trade through the political process. Canadian cultural policies are increasingly being challenged in the context of multilateral trade obligations relating to competition/anti-trust and intellectual property.

On the free market side, however, there is increasing Canada-U.S. co-operation in the film and television production including, *inter alia*, i) U.S. support of Canadian trials of video-on-demand trials, i.e. Hearst Corporation's support of the Videotron trials in Canada, ii) the merger this year of two of the largest Canadian film producing and distributing companies, Alliance Communications Corporation and Atlantis Communications Inc., iii) the fact that revenues generated outside of Canada by the Canadian film industry are greater than what can be generated in the domestic market, e.g. 89% of Canadian production/distribution companies' licensing revenues are generated outside of Canada⁶², iv) Canadian companies have taken advantage of investment opportunities in foreign markets, e.g. Canadian ownership in Australia's Channel 9 Broadcast Network. It is obvious to free market promoters and many industry people that competition is as necessary in the cultural industries sector as it is in the banking industry. The problem rests, however, with the smaller indigenous companies producing cultural products and unable to survive without government support. The Government policy objective has been to encourage greater Canadian representation in Canada of Canadian cultural goods and to ensure that there will always be a Canadian choice in the mix of cultural products being offered. An underlying objective of that cultural policy has been, in part, to be sufficiently protectionist to enable Canadian companies to be more competitive at home through ownership rules and broadcasting quotas. The ultimate benefit is for them to become sufficiently strong to become internationally competitive. In the distribution sector, however, one questions the effectiveness of policies in the context of competition and copyright. Despite the policies

⁶² Statistics taken from the 1996 and 1997 Annual Reports of Atlantis Film Distributing Co.

(before the 1997 WTO ruling on magazines) *Time* and *Readers Digest* were distributed in Canada with national treatment. The eight major (U.S.- based) film studios (members of the powerful U.S. entertainment lobby, the Motion Picture Association of America [MPAA]) distribute most, if not all, U.S. and foreign films in Canada. There is now the case of split-run magazines⁶³ and *Sports Illustrated* (Phase II/*Certain Measures Concerning Periodicals*). Another significant area of policy activity was to develop a Canadian talent pool, a Canadian star system. Yet, despite Canadian ownership of a Canadian theatrical chain, Cineplex Odeon, access for Canadian films to Canadian theatrical screens did not increase. Between 94% and 97% of screen time in Canada is taken up by foreign (largely U.S.) product.⁶⁴

Research/Phase II: The Potential Conflicts between the goals and instruments of cultural policy, trade policy, competition law and copyright law: Are cultural policy goals attainable in today's economy? (October 1998 to March 1999)

There is growing complexity from both philosophical and trade perspectives and new challenges emerging as the millennium approaches along with the next generation of technology and new media. For example, for over 60 years, litigation of Intellectual Property (IP)/anti-trust rights occurred mainly in the patent area, but copyright increasingly seems to be playing a role as one of the principal areas of IP/anti-trust litigation.⁶⁵ As copyright is a key instrument designed for

⁶³ Split-run magazines are essentially U.S. magazines which are circulated in Canada as domestic magazines with a minimum of Canadian content added. They take Canadian advertising revenues away from Canadian publishers. Split-run magazines were prohibited under Tariff Code 9958 until the WTO ruling.

⁶⁴ "Canadian Culture in a Global World", *New Strategies for Culture and Trade*, The Cultural Industries Sectoral Advisory Group on International Trade, Ottawa: Government of Canada, February 1999, p. 4.

⁶⁵ Interview with André Dorion, lawyer and published author of legal articles on competition policy and intellectual property, January 7, 1999.

both creators and licensees of those original creators (distributors) to protect their rights, there might be growing conflict among the rights holders, e.g. the monopolist distributor v. the composer. It follows, therefore, that copyright could have a growing impact on trade in the cultural industries sector. It might also be argued that a more competitive environment for the distribution of cultural industries products might increase opportunities for the creators.

As Canada is a nation heavily dependent on trade, effective trade rules are vital to stable economic growth and to prevent bigger and more powerful economies from operating outside the rules. That is why Canada chose to play an important role in the establishment of the World Trade Organization (WTO) as the cornerstone of the international trading system. Equally, the dispute settlement mechanism of the WTO has been heralded by Canada as the most effective means to pursue its trade interests.⁶⁶ That being said, the 1997 ruling on “split-run” magazines, which is analysed in this section of Chapter 4, suggests that the WTO may not, in the end, be the best forum, from Canada's perspective, for a dispute in the cultural industries sector, given the country's sensitivity and attachment to “cultural identity”. The cultural support measures for magazines and periodicals were challenged by the U.S. at the WTO as inconsistent with our multilateral obligations.

The first study highlights a Canada-U.S. case involving the distribution of sound recordings in Canada in the context of intellectual property rights versus competition law. The second case

⁶⁶ “Getting the International Rules Right: World Trade Organization”, DFAIT website: <www.infoexport.gc.ca>.

outlines the issue of split-run magazines in Canada and the WTO ruling which defeated Canadian publishing policy support measures. The research focuses on one element of these measures, namely, the excise tax. The third study involves the publication of television program listings in Ireland and Northern Ireland. While the latter does not appear to be a culture-specific industry on its face, the case epitomizes the conflict between copyright and competition illustrated in the Canadian sound recordings case. It involves the clash of the IP rights of three broadcasters wishing to maintain the exclusive (and anti-competitive) copyright in their television listings against the claims by the plaintiff of its entitlement to publish these by reason of its presence in the television listings business.

The dominant interests of omnipresent multinational companies are represented in these case studies. Harmonization of policy interests and trade laws in the global environment may become a conflictual rather than an evolutionary process.

1) Cultural Policy Objectives⁶⁷

The ultimate objective of cultural policy in Canada is to ensure that there will always be a Canadian choice in the mix of cultural products being offered in the Canadian marketplace. It is based on the dictum that maintaining our own stories, hearing our own voices, and seeing ourselves represented in all forms of media is important in the context of our own cultural identity. The goal of the Canadian Government is, therefore, to create the best possible

⁶⁷ As the Department of Canadian Heritage is mandated to foster the development of cultural policy in Canada, the policy objectives defined herein are summarized from documentation published by the department.

environment for cultural industries to flourish. In the interests of ongoing growth and development of the cultural industries, it is equally a policy goal to secure access to foreign markets. Reference was made to this in the Throne Speech to the 35th Parliament and recently reinforced in the Throne Speech to the Second Session of the 36th Parliament as follows:

“Foreign markets for our goods and services provide us with new opportunities...the government will increase its trade promotion in strategic sectors with high export potential from ... information technology to culture...”⁶⁸. This not only provides increased opportunity for international sales and revenue generation back into the industries, but also serves to profile Canadian culture on the international stage in a diplomatic sense. In summary, the overall objective is to develop and sustain cultural industries in Canada and abroad.

Problematic

The Canadian market for cultural products, like other national markets for such software, is dominated by foreign, usually U.S., entertainment output, the products of multinational companies. This dominant market position is considered by Canada and, indeed, other nation states, as a threat to the sustainability of domestic cultural industries and their cultural sovereignty generally.

Sound recording: Based on creativity and intellectual capacity, the industry is considered important to the development and promotion of Canadian culture. The policy objective is to

⁶⁸ Speech from the Throne to open the Second Session of the Thirty-Sixth Parliament of Canada, found on the Privy Council Office website, <www.pco-bcp.gc.ca/sft-ddt/doc/fulltext_e.htm>, 12 October, 1999.

ensure a healthy presence of Canadian sound recordings in the Canadian marketplace and access by Canadian sound recording artists to international markets. Policy instruments and support measures which have been used include: a) subsidies designed to help new artists; b) foreign ownership rules to ensure majority ownership and control of cultural industries, including the distribution infrastructure, in Canada; c) radio broadcast quotas ensuring airtime for Canadian artists and musicians; and d) intellectual property laws.

The Canadian music industry has been termed by the Canadian Music Industry Information Centre (CMIIC) as an Intellectual Property (IP) industry. Copyright is designed to protect, *inter alia*, the rights of sound recording artists.

Publishing : Canadian magazines interpret Canada to Canadians. The policy objective is to ensure that Canadian readers have access to a wide range of high quality Canadian content in magazines. Measures which have supported the industry include: a) a tariff code to prohibit the entry into Canada of “split-run” magazines (magazines which were mostly American content, but were attracting Canadian advertising revenues); b) the imposition of an 80% tax on advertising revenues made by split-run publications in Canada, via Part V.I of the *Excise Tax Act*; c) a postal subsidy; d) commercial postal rates favouring Canadian publications; e) the provision of tax relief to Canadian advertisers advertising in Canadian publications via S. 19 of the *Income Tax Act*; f) foreign ownership rules in cultural industries; and g) intellectual property laws. The first four measures noted above were found to be inconsistent with our multilateral trade obligations (WTO ruling June 30, 1997).

2) Trade Policy Objectives

For Canada, there is no question that the underlying objective is liberalized trade and rules-based trade. There is, equally, no question that the United States is our most important trading partner (85% of all our trade) and that Canada is working toward increasing that trade as much as possible. Canada is, *a priori*, committed to the freer trade process in the interests of growth, development and prosperity as a G-7 player. It negotiated and signed the Free Trade Agreement (FTA), the North American Free Trade Agreement (NAFTA) and is a member of the World Trade Organization (WTO). Canada has also signed Canada-Chile and Canada-Israel Free Trade Agreements and is working towards expanding the NAFTA, a Free Trade Agreement with the Americas, as well as negotiating new arrangements with Europe and new instruments which would facilitate easier trade with Asia such as the current negotiation of a Foreign Investment Review Agreement with China. While both the FTA and the NAFTA include provisions to exempt culture and Canada did not take undertakings to include culture in the context of the services agreement under the WTO, there is discrepancy over what and how the exemptions apply and whether culture is traded as a good or a service.

In the context of culture, Prime Minister Chrétien stated the following in the throne speech to the First Session of the 36th Parliament: “We will assist our artists to reach audiences at home and abroad by increasing support for the Canada Council. And we will make a special effort to promote trade in Canadian cultural and educational products and services abroad. By the year 2000, we will make the new information and knowledge infrastructure accessible to all

Canadians.”⁶⁹

3) Legal Instruments: Competition Law and Copyright Law

Competition Law: The overall objective is to ensure fair competition in the marketplace and applied particularly to prevent monopoly interests from abusing IP statute protection to circumvent competition law or to prevent reasonable competition in the marketplace.

The *Competition Act*⁷⁰ states:

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Under “Definitions” in the act, the word “product” is interpreted as a good or a service.

Both NAFTA and TRIPS (WTO) have IP and anti-competitive provisions. In the case study, the author examines S. 75 of the *Competition Act* which is a “refusal to deal” provision which may give the Competition Tribunal the right to order compulsory licencing. For example, if there is insufficient supply of product in the marketplace and certain conditions prevail, the Tribunal may order that copyright licence be extended to distribute the product in question.

⁶⁹ Speech from the Throne to open the First Session of the Thirty-Sixth Parliament of Canada, found on the Privy Council Office website, <www.pco-bcp.gc.ca>.

⁷⁰ R.S.C. 1985, c. 19 (2nd Supp.), s. 19

(While accurate, one can note a potential contradiction between the preceding and the following paragraphs. Copyright gives the owner an exclusive right which is restrictive of output [e.g. protection against piracy], while competition policy tries to expand output and reduce prices to the consumer. The conflict is between the producer and consumer interests.)

Intellectual Property/Copyright: The objective of copyright law is to provide creators with protection in the form of exclusive use of their works, the paternity and integrity (the “moral” rights) of the creator. It grants copyright owners the sole and exclusive right to reproduce, perform or publish a work. These rights give copyright holders control over the use of their creations, and an ability to benefit, monetarily and otherwise, from the exploitation of their works. It also protects the reputation of creators. It comes under the larger body of law known as intellectual property, the word “intellectual” distinguishing it from physical property.

Copyright does not protect *ideas*, it protects the *expression* of ideas on the basis that ideas themselves are in the public domain and no one can have a monopoly on them. Copyright protection in Canada extends to rightsholders in ninety other countries, including the United States, by virtue of Canada being signatory to the *Berne Convention*.⁷¹ In general, individuals are responsible for enforcing their rights under the *Copyright Act*, while the government is responsible for the administration and revision of the Act.

⁷¹ Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, revised at Stockholm on July 14, 1967, and revised at Paris, July 24, 1971.

The *Copyright Act* states that copyright subsists “in every original literary, dramatic, musical and artistic work.” It also states that “every original literary, dramatic, musical and artistic work includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches and plastic works relative to geography, topography, architecture or science.” In addition to the four categories of protected works, namely literary, dramatic, musical and artistic works, copyright subsists “in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if those contrivances were musical, literary or dramatic works.”⁷²

Case Studies

The following case studies were useful in identifying the scope of the problem and the potential ineffectiveness of cultural policies to achieve cultural goals in the jurisprudential environment, i.e. judicial interpretations are not based on cultural policy goals except to the extent that these are *perfectly* translated into statutory instruments. Generally, they are not. The first case highlights the power of multinational corporations; The second case reinforces the role of globalization; and the third case illustrates the inconsistent interpretation of copyright and competition laws when compared to the first case.

1) Sound Recording

⁷² Information in this section is taken largely from Lesley Ellen Harris, *Canadian Copyright Law*, Toronto: McGraw-Hill, 1992, as well as from the *Copyright Act*

IN THE MATTER of an Application by The Director of Investigation and Research pursuant to S. 75 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended;

AND IN THE MATTER OF an inquiry relating to the refusal of Warner Music Canada Ltd. (WMC) and its affiliates, Warner Music Group Inc. and WEA International Inc. to deal with BMG Direct Ltd.⁷³

Between

The Director of Investigation and Research and Warner Music Canada

The multinational infrastructure & monopoly

Most major and relevant distribution infrastructures in Canada are foreign (mostly U.S.) controlled. In this case, the ownership and control rests in the U.S. "WMC" is a wholly-owned subsidiary of WEA which is a wholly-owned subsidiary of Warner Communications Inc. ("WCI"). WMG is also a wholly-owned subsidiary of WCI.

The business of WMG includes managing companies affiliated with its parent, WCI, which are involved in the recording industry and engaged in the development of copyrighted musical repertoire and the negotiation of the supply of Warner reproduction and sales licences on behalf of WMC and WEA.

⁷³ BMG stands for Bertelsmann Music Group and is part of the second largest multi-media empire in the world, owned by Bertelsmann. Its trade name in Canada is BMG Direct Ltd. and it appears by that name only in the text of the case.

The business of WEA includes the supply of Warner reproduction and sales licences in Canada in respect of Warner master recordings of all “non-Canadian” signed artists. The business of WMC includes the supply of Warner reproduction and sales licences in Canada in respect of Warner master recordings of “Canadian” signed artists.

Warner sound recordings are also made available in Canada by means of the supply of Warner reproduction and sales licences to the Columbia House Company in Canada (CHC), the dominant national mail-order record club in Canada. CHC is an equal partnership of WMC and Sony Music Entertainment (Canada) Inc. CHC reports to The Columbia House Company in the United States, which is an equal partnership between WCI Record Club Inc. and Sony Music Entertainment Inc. The Chief Executive Officer of WMG sits as one of the representatives on the common “Board of Representatives” for CHC and for the Columbia House Company in the United States.

WMC supplies Warner reproduction and sales licences in Canada to CHC in respect of Warner master recordings of all “Canadian” signed artists. WEA supplies Warner reproduction and sales licences in Canada to CHC in respect of Warner master recordings of all “Canadian” signed artists. The licences supplied by WEA and WMC to CHC are considered non-exclusive Warner reproduction and sales licences.

BMG Direct Ltd. (“BMG [Canada]”) is a wholly-owned subsidiary of BMG Direct Marketing Inc. (“BMG [U.S.]”) and is located in Mississauga, Ontario. It commenced a national mail-order

record club business in Canada in December 1994. With the entry of BMG (Canada) into the Canadian market, Columbia House (Canada) ceased to be the only mail-order record club in Canada offering sound recordings in most music categories.

Monopolies, copyright and competition: For the purpose of this study, the monopoly interest is the distributor, i.e. WMC/WEA . WMC/WEA had granted copyright licence to CHC to copy and distribute its sound recordings in Canada and CHC enjoyed exclusive mail order record club rights to distribute Warner product in Canada.

As a point of clarification, however, there are some overlapping interests which can be confusing for the layperson. In the context of authors, e.g. songwriters and sound recording artists, they have the copyright in their own works, but may sell that right to a larger interest. Most belong to “collective societies” which collect royalties on their behalf. The collective society negotiates with the recording and distribution companies. All works and all performances can be interpreted as monopolies in themselves. “An artistic qualified recording of music, of a work, is in itself the product of a single author, of a single artist, and as such it is an individual ‘monopoly’, another general good of the marketplace as potatoes or shoes.”⁷⁴ The question or the issue might be how much monopoly power to grant to an artist or creator. (The quote is technically accurate, but in consultation with Competition Tribunal lawyer, André Dorion, I understand that it is incorrect, i.e. practically speaking, it does not work that way.)

⁷⁴ Quote is taken from a presentation by Norbert Thurow to the 41st Conference of the Association littéraire et artistique internationale, publication of proceedings, Quebec, 1997, p. 703 .

Copyright law does not directly involve itself in contractual arrangements, i.e. between creators and collective societies or between creators/collective societies and licensees. In the United States there is no “moral right”, i.e. no copyright protection for the creator once he has agreed to provide an exclusive licence to a distributor such as WMC. In Canada, the *Copyright Act* recognizes the moral right of creators, but no such protection exists, as such, in the United States. When a creator (of any nationality) has contractual arrangements with an American distributor to sell his works, the creator has, in effect, given the distributor the right to exploit his works on his behalf. Normally this will work quite well and, the more popular the creator, the better the deal for the creator. On the other hand, the broader or longer-term interests of the smaller creator may be lost in cases where licensees “refuse to deal”, i.e. license other distributors.

The Facts

1) BMG Direct Ltd. is a company engaged in the production and distribution of sound recordings made from master recordings. BMG was seeking a licence (for the Canadian market) to manufacture, advertise, distribute and sell sound recordings which it would make from master recordings owned or controlled by Warner Music or any of their affiliates; BMG was seeking to be treated at least as favourably as the beneficiaries of any comparable licence or licences, such as The Columbia House Company in Canada (CHC). BMG wanted the right to at least an equal number and variety of Warner master recordings as are supplied to CHC.

2) Warner Music Canada Ltd. (and affiliates) are in the business of i) contracting with artists to record master recordings, ii) acquiring and supplying Warner reproduction and sales licences,

and iii) marketing Warner sound recordings, Warner master recordings and the rights to produce and market sound recordings from Warner master recordings which are owned or controlled by them or their affiliates pursuant to contracts with artists or productions companies.

Applicable Law

Section 75 of the *Competition Act*⁷⁵ deals with the issue of refusal to deal in products and follows:

PART VIII

MATTERS REVIEWABLE BY TRIBUNAL

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Director, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market

⁷⁵ R.S.C. 1985, c. C-34, s. 75; R.S.C. 1985, c. 19 (2nd Supp.), s. 45.

accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of "trade terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Court Decision

The Competition Tribunal ruled in favour of the respondent's argument to dismiss the motion.

The motion by the plaintiffs for compulsory licensing under S. 75 was dismissed. In the summary judgment,⁷⁶ paragraphs 30, 31 and 32 state:

30. Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in Section 75 of the Act, because on a sensible reading Section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in Section 75, but must be read in context. The requirements in Section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" –there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and

⁷⁶ (1997) C.C.T.D. No. 51 (Comp. Trib. Dec. No. CT9703/012).

there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of Section 75 of the Act which would reveal an intention to have Section 75 operate as a compulsory licensing provision for intellectual property.

31. As well, the Tribunal has accepted the respondents' submissions that , when considered in the context of Sections 32 and 79(5) of the Act, the term "product" in Section 75 cannot be read to include these copyright licences.

32. Although the Tribunal was commenting on Section 79 and intellectual property (trade -marks) in *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*,⁷⁷ we are of the view that its statement is very compelling in the circumstances of the motion before us:

The respondents' refusal to licence their trade-marks falls squarely within the prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

Interpretation

Fundamentally, the Director lost the case because the copyright licence it sought could not be ordered under S. 75. WMC was, therefore, not obliged to license its copyrights to BMG to enable it to distribute its sound recordings in Canada . The reason, as stated above, was that the Tribunal would not read S. 75 so as to construe "copyright" as a "product" for purposes of the section, with the consequence that Sections 1 (a) through (d) could not apply. The restrictions

⁷⁷ (1997), 73 C.P.R. (3d) 1 at 32, [1997] C.C.T.D. No. 8 (QL) (Comp. Trib.).

provided in S. 75 with respect to the supply of “products” do not, it decided, extend to the supply of intellectual property rights. In this case, copyright trumped competition on the basis of the interpretation of the definition of “product” not applying to “copyright” (even though S. 2 of the Act defines “product” to include IP rights).

Two other issues were raised by the defence, namely i) prematurity of application and ii) extraterritoriality. Neither of these issues was relevant since BMG was not granted the licence it sought to WMC copyrights.

Analysis

BMG wanted the right to distribute Warner sound recordings on the same basis as CHC. The Tribunal ruling dismissed the BMG motion leaving Warner with its IP right intact.⁷⁸ The following points attempt to define some of the issues and analyse the grounds for the Tribunal ruling. What were the conflicting issues? Did this ruling impact on Canadian cultural industries policy interests?

1) It was pointed out above that BMG could have purchased the actual recordings wholesale (like any distributor or retailer). That would, however, have simply meant buying them (not copying them) at a wholesale price and selling them at a club retail price. This was not the applicant’s preferred option for two reasons: i) it is much more costly and thus not as

⁷⁸ In the final analysis, Warner ended up licensing the rights to BMG anyway for the right price.

commercially viable; and ii) it would not have left them on a level playing field with CHC. BMG wanted the right to manufacture products from master recordings on the basis of a licence to reproduce (copy) which would enable it to compete in the mail order sound recording field in Canada on the same basis as CHC:

2) S. 75, the “refusal to deal” provision, did not help BMG in the end because the Tribunal ruled that there was no obligation on the part of the holder of an IP right to make that right available to others on the basis that that IP right is not considered a “product” under S. 75. Moreover, the decision did not turn on whether the IP right was a “good” or a “service”.⁷⁹

3) In this case, the Tribunal held that the definition of “product” in S. 75 could not include an IP right because the context, the facts surrounding the case, would not here (or ever, by the interpretation applied) permit the inclusion of a copyright since the terms of the section are limited to a product which is in “ample supply”. Since the Tribunal interpreted the legal nature of intellectual property as exclusive, it could not be in ample supply.

4) On the definition of the IP right, the Tribunal stated that usual trade terms were not present given the exclusive nature of the product, i.e. when licences may be withheld. It concluded that the right granted by Parliament to exclude others is fundamental to intellectual property rights and could not be considered to be anti-competitive. Nothing in S. 75 reveals an intention to have

⁷⁹ Cf. S. 2 of the *Competition Act* which defines “product” as follows: “‘product’ includes an article and a service”.

it operate as a compulsory licensing provision for *intellectual* property (although S75(2) could end up doing it).

5) In its decision, the Tribunal also relied by analogy on S. 79 of the Act which deals with trade-marks. The precedent cited was a trade-mark case, *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*⁸⁰ That decision concluded that trade-marks are valuable assets and represent considerable goodwill in the marketplace. "The decision to license a trade-mark -- essentially, to share the goodwillis a right which rests entirely with the owner of the mark."⁸¹

6) The rationale provokes a number of questions. For example, just because trade-marks and copyright are both IP rights does not necessarily lead to the conclusion that the two are so similar as to justify identical legal treatment. For one thing, there are distinct acts which govern each right.

7) *The Competition Act* should be considered to be technology-neutral so that it can keep pace with business and the economy. To exclude intellectual property rights from the definition of "product" narrows the application of the Act. When one considers the technological era society is currently living in, such restrictive practice undermines the public purpose of the Act, specifically defined in S. 1.1 as follows:

⁸⁰ (1997), 73 C.P.R. (3d) 1 at 32, [1997] C.C.T.D. No. 8 (QL) (Comp. Trib.).

⁸¹ *Ibid.*, at 32.

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

8) The reason that this is relevant to the overall issue under debate here is that it has potential impact on the distribution of all cultural products. Most of what is being dealt with in the context of distribution of cultural industries products (film, video, sound recording and publishing products) involves IP rights. In effect, it reserves the right of the IP licensee to maintain a monopoly in the distribution of the product. One can presume that this is why Warner was so committed to winning this case. Had Warner lost the case, it would likely have opened the door to compulsory licences not only in the distribution of sound recordings, but also the distribution of other cultural products noted above where they have copyright interests.

9) The creators or artists, on the other hand, who have contractual arrangements with Warner Brothers, benefit only in terms of Warner's distribution of their works (in this case, CHC's distribution of their works in Canada). This, arguably, limits their exposure. If there is more competition in the market place, i.e. more than one distributor representing the artists' works, most artists stand to benefit more from increased exposure and increased royalty payments. (Of course, artists like the Rolling Stones or Céline Dion don't need more exposure and have the

clout to exclude club rights in negotiations.)

10) Would the outcome have been different if this case had been heard in the United States or Europe? Perhaps the compulsory licensing would have been ordered if a "competition" or "damage" test had been undertaken to take into consideration the impact on the stakeholders, the creators and artists. S. 75 does not require a "damage" or "competition" test and thus, in the case of *Warner v BMG*, the creators and artists were not consulted. The S. 75 provision, pursuant to which compulsory licensing can be ordered without the test, is unique to Canada. In the United States, there is no equivalent legislation. In other words, a damage test is a prerequisite to any anti-trust ruling in the United States. This is an important issue and is confirmed as follows: "The United States has no legislation and no judicially-developed doctrine under which unilateral refusal to deal is proscribed in the absence of resale price maintenance, group boycott or attempt to monopolize. It is still the general rule in the United States that.... '[w]e have not yet reached the stage where the selection of a trader's customers is made for him by the government.'"⁸² S. 4.1 of the U.S. *Anti-trust Guidelines for the Licensing of Intellectual Property*, issued by the U.S. Department of Justice and the Federal Trade Commission, April 6, 1995, reinforces this. Similar conditions exist in the European Union as follows: "Some European countries prohibit unilateral refusals to deal under certain circumstances..."⁸³ In the European Union, Article 86 of the Treaty of Rome, requires a review by the Court of Justice to

⁸² R. J. Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, Second Edition, Canadian Legal Text Series, Toronto: Butterworth, 1996, p.209.

⁸³ *Ibid*, p. 209.

establish whether the conduct in question is affecting trade. (Use of this provision is the great part of the rationale in ordering compulsory licencing in the *Magill* case which is the third case study in this paper.)

11) Warner lobbied against compulsory licensing on the basis that exclusive rights, it contended, foster creativity, i.e. market development (known as “A & R” in the industry) in the interests of the artist. Warner’s position was that compulsory licensing would stifle creativity.

12) Would the outcome have been different on the basis of evidence not heard, e.g. the voice of the creators, the exclusive supply arrangements? BMG might have won, thus establishing a precedent in favour of more competition which, in turn, might have benefited the creators and artists.

13) Many artists believe that monopolies can have deleterious effects on creativity.⁸⁴

Monopolies will affect artists entering into one-sided contracts. Rights they might cede to Warner, for example, include certain rights to record club distribution. Few artists have the popularity or the clout to segment that out for themselves. Had BMG won, the *BMG v. Warner* case might have been a landmark case for artists who stand to be helped more in a competitive environment than in a monopolistic environment. BMG, for example, had a “no commitment” clause which meant that it differed from the CHC Club. CHC obliged the consumer to undertake

⁸⁴ Interview with André Dorion, lawyer and published author of legal articles on competition policy and intellectual property, March 1999.

to buy a certain number of recordings upon signing, thus losing potential customers who did not want to commit themselves to the bigger purchase. BMG appealed to a different audience and might have captured the market not taken by CHC for that reason.

14) There is an expression, “the lazy monopolist” which, if applied to IP, expresses the sentiment of some economists who believe that IP may not be essential for market development and innovation. The concept that the sacrosanct IP right must be maintained, against all antitrust odds, is old thinking and doesn’t hold true in economic circles.⁸⁵ Microsoft is a case in point as it must now “acquire” innovation. In 1958/59 Harvard University conducted a study on Patents and the Corporation concluding that compulsory licensing had, at most, marginal impact on continuing investments in research, development and innovation, etc.⁸⁶ The entertainment monopoly through its distribution channels can earn more profit without competition and enjoy exclusive access to its market without additional efforts, for example, to find new distribution techniques and market opportunities. It can become lazy!

15) To permit the right to be exercised within the Statute of Limitations, the copyright licence has to be in abundant supply. It was, however, not in abundant supply. In the case of BMG v. Warner, the Tribunal ruling was based on the definition of IP being exclusive and not in abundant supply. There seems to be a contradiction here. Conceptually this may be right, but

⁸⁵ *Ibid.*

⁸⁶ F.M. Scherer, Outline of FTC Testimony, Harvard Business School study, November 29, 1995.

practically it does not seem just. Indeed, in the U.S., Warner licensed those rights on a non-exclusive bases (for fear of potential antitrust liability).

16) The laws are different in the U.S. An artist may lose his right if he has waived it in the context of a contractual relationship; thus he is at the mercy of the distributor. Generally speaking, however, contractual arrangements between the artist and the distribution company are sufficiently stratified and lucrative so as not to compromise the rights of the artist in any way. In the E.U. and Canada, the artist's right is protected under a "moral right" which the artist retains *qua* creator, as a matter of public policy. It is a provision of the *Berne Convention* which has been ratified in Canada through Bill C-32, the amended *Copyright Act*. The United States, while a signatory to the Convention, does not recognize the moral rights provision.

17) There are other interesting issues surrounding this case. Within five days of the Competition Tribunal ruling (dismissal of the motion), the Competition Tribunal issued a press release indicating that matters had been settled satisfactorily. Warner and BMG had clearly made a deal. While the terms of the deal are unknown, one might speculate that BMG ultimately obtained the distribution licence from Warner for a very high price. One cannot overlook the fact that BMG is also a multinational corporation with similar interests to Warner in respect of distribution of cultural products. Ironically, had it succeeded, it too risked suffering in other areas of its own activities from a ruling which could have required compulsory licensing there. It might thereby have lost its monopoly interests in other cultural industries. It is hardly reckless to speculate that it was in the interests of Warner and BMG to reach an agreement.

18) While in the Warner v. BMG ruling, there is no reference to established precedents under S. 75 where compulsory licensing was ordered, there were, in fact, two cases: i) The Director of Investigation and Research v. Chrysler Canada Ltd. (1989), which led to a legal battle and an enforcement of the “order to supply” (auto parts) by the Supreme Court; ii) The Director of Investigation and Research v. Xerox Canada Inc., (1990), where the Competition Tribunal established that Xerox did not have legitimate business reasons not to supply and the “order to supply” was therefore enforced. The argument against Xerox was that it was trying to protect its “after” or subsidiary markets. If The Tribunal had used the criteria documented in these cases, i.e. that the IP rights holder wanted to protect its commercial interests in CHC, not its IP rights, perhaps the ruling in the BMG case might have been different. For one thing, the issue of the definition in S. 75 not extending to IP would not have been an issue.

19) Did Warner see this case as a sort of Pandora’s box? Could it have been a precedent for future cases affecting its monopoly distribution of other cultural products, e.g. film and videos? Since S. 75 of the *Competition Act* did not require the “competition test”, Warner was presumably comfortable in its position that it required IP for the purpose that it is intended, i.e. to foster creativity and innovation. Upon reflection, however, that does not appear to be so factual. It also was able to establish that the circumstances/facts were different on the basis that the copyright licence, like a trademark, is an exclusive right that the owner needs to protect. Copyright licences must be in ample supply to enable a ruling under S. 75(d). The other issue was the fact that it was not a “refusal to supply”, but a “refusal to commence supply” which also renders its definition incompatible with the definition of product under S. 75.

20) This appears to have been the only way to protect the IP (monopoly) interest in this case. If U.S. courts can prove that there is “damage” and unfair competition in the workplace, compulsory licensing can be ordered. U.S. anti-trust guidelines support that thinking although multi-national companies do not.

21) There are so many complex facts in this case that make it a wonderful study. The way the law was applied, conceptually rather than factually, gives reason to believe that the case might have been handled differently if the facts had been presented differently. Would the ruling be different or would it have gone to trial? If it had gone to trial, BMG might have won on factual evidence. Warner had introduced the issue of an appeal to Federal Court, but perhaps in its own defence. If it had lost its motion to dismiss and a trial had been ordered, it would have been hard, if not impossible, for it to maintain its monopoly copyright. Also, by raising the possibility of Federal Court, Warner was able to highlight that going to Federal Court on this case may not have been compliant with our multinational trade obligations under NAFTA and TRIPS, as the enabling disposition, Section 32 of the *Competition Act*, requires.

Impact on cultural policy objectives

Did the ruling support the needs of the artists and the cultural industries in the context of more shelf space for Canadian products domestically and access to international markets? No, in fact, one might say both policy objectives were hindered as the U.S. monopoly infrastructure was sustained.

2) Certain Measures concerning Periodicals

The objective of the following study is to provide a general picture of the conclusions of the WTO and then to focus on one aspect, the excise tax. There is not sufficient scope in this comparative paper to do much more.⁸⁷ The information has been compiled from a number of sources including, *inter alia*, the Report of the Panel and Appellate Body,⁸⁷ the WTO website, backgrounders from the Department of Canadian Heritage, and the Association of Canadian Publishers.

The Cultural Policy Measures

- 1) An excise tax on advertising in split-run magazines (Part V.1 of the *Excise Tax Act*).
- 2) Tariff Code 9958 which prohibited the importation of split-run magazines.
- 3) Commercial postal rates which were lower for Canadian magazines.
- 4) The postal rate subsidy.
- 5) Provisions of the *Income Tax Act* which provides a tax benefit for Canadian advertising in Canadian magazines was not part of the WTO case. Tax measures fall under the economic policy umbrella and are generally not considered within the realm of trade policy. Tax measures are also thought to be the sacred cow of support measures and are generally not tampered with by foreign countries whose own tax measures might then be challenged.

⁸⁷ *Canada - Certain Measures Concerning Periodicals, Report of the Panel*, Geneva: WTO, March 14, 1994 and *Report of the Appellate Body*, Geneva, WTO, June 30, 1997.

The Facts

In February 1996, the U.S. announced that it would seek a WTO panel to examine the Canadian measures, specifically the 80% excise tax, tariff code 9958, and the commercial postal rate for domestic publications.

Applicable Law

The GATT

WTO Ruling

In June 1997, The World Trade Organization (WTO) Dispute Panel ruled that the measures were inconsistent with GATT obligations, as noted below. The Canadian Government agreed to a 15-month implementation period.

- 1) The excise tax was inconsistent with the “national treatment” rule, specifically Article III:2, first sentence of the GATT 1994.
- 2) Tariff code 9958 was inconsistent with Article XI (general elimination of quantitative restrictions) of GATT 1994, specifically Article XI:1.
- 3) The commercial postal rate was inconsistent with “national treatment” rule, specifically Article III:4 of the GATT 1994.
- 4) The postal rate subsidy was inconsistent with Article III:4 of the GATT 1994. (This measure was, in the first finding of the Dispute Settlement Body, considered consistent with Article III:8(b), but later overturned.

Background/Part V.1 of the Excise Tax Act

The excise tax measure, in the author's view, was the most contentious issue and gave rise to the WTO challenge. Hence, for the purpose of this study, the author chose it to illustrate the conflict associated with this type of regulatory policy, trade realities and politics. To attempt to analyse all four measures would have been a major undertaking and not realistically possible or necessary for this thesis. Indeed, the split run issue in its totality provides sufficient material for a major research paper.

Split-run publications became an issue when Tariff Code 9958, a code prohibiting the entry into Canada of split-run magazines, was circumvented by *Sports Illustrated* magazine.⁸⁸ The Report of the Task Force on the Canadian Magazine Industry⁸⁹ recommended, *inter alia*, that an excise tax be imposed on split-run magazines. The Task Force also said that the measures was consistent with international trade obligations. The recommendation, including the definition of split-run magazines, follows:

...that an excise tax be imposed on a magazine or periodical distributed in Canada that contains advertisements primarily directed at Canadians and editorial content which is substantially the same as the editorial content of one or more issues of one or more periodicals that contain advertisements that, taken as a whole, are not

⁸⁸ The Minister of Canadian Heritage, when introducing Bill C 103, commented that Sports Illustrated Canada had managed to get around custom Tariff Code 9958 because most of its content was sent electronically from the United States and it was simply a loophole in the tariff law since electronic transmission made it possible to avoid tariff regulations, House of Commons Debates, September 25, 1995, pp. 14790-1. (As Professor Maule points out, however, in his submission to the Senate Standing Committee April 26, 1999, this was not the first time the electronic process had been used. Time-Warner used it for Time Canada as early as 1988 without a grandfathering provision for this measure.)

⁸⁹ *A Question of Balance: Report of the Task Force on the Canadian Magazine Industry*, Ottawa: Supply and Services Canada, 1994.

primarily directed at Canadians.⁹⁰

The *Excise Tax Act* was amended in December 1995⁹¹ to include such a provision which imposed an 80% tax on the value of all advertising contained in each split-run magazine. The tax measure was designed to deter split-run magazines from coming into Canada and to reserve Canadian advertising revenues for Canadian publications. U.S. split-run magazines, specifically *Sports Illustrated*, were perceived to be taking Canadian advertising revenues away from Canadian publications because a split-run edition was able to sell advertising space at a much lower cost in Canada since it had already recovered most, if not all, of its production cost in the U.S. market.⁹²

Key issues surrounding the demise of the excise tax

1) The argument in the case was whether the tax was related to a “good” and was subject to the national treatment principle in the GATT or whether, as Canada argued, it related to a “service” and came under the GATS. Canada argued that Part V.1 of the *Excise Tax Act* was a measure designed to tax advertising services and, as such, that the measure should rightfully come under the GATS. The U.S. argued that it was a measure related to periodicals which were goods and it would therefore come under the GATT. The national treatment principle, GATT 1994 Article III:2 states:

1) The contracting parties recognize that internal taxes and other internal charges,

⁹⁰ *Ibid.*

⁹¹ *An Act to Amend the Excise Tax Act and the Income Tax Act*, S.C. 1995, c. 46, s. 35(1) and s. 36(1).

⁹² Impact analysis of WTO ruling on *Certain Measures Concerning Periodicals*, Informetrica 1997, Toronto: Harrison, Young, Pesonen & Newell, 1997.

and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products...should not be applied to imported or domestic products.

2) The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3) The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the placation of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not of the nationality of the product.

2) Canada's view was that the purpose of the measure was to regulate trade in services and should come under GATS. The point for Canada was that, while it had obligations under the GATT, it had not made specific commitments regarding advertising services under the GATS. Since it was not obliged under the GATS to provide national treatment to members of the WTO regarding advertising services in Canada, the measure was, in its opinion, consistent with its obligations.

3) The U.S. argued that the measure related to a periodical and, as such, was attached to a good. The U.S. further stated that, if Canada's view prevailed, it would open the floodgates for WTO members to adopt "services" measures that would have a discriminatory impact on imported goods, contrary to the national treatment principle, Article III of the GATT.

4) On the subject of whether there was a conflict between obligations under GATT and GATS, the Dispute Settlement Panel concluded that the two agreements could co-exist and that one does not override the other.

5) Canada argued that, since editorial content was an essential characteristic of a periodical, periodicals with Canadian market-specific editorial content were distinguishable from split-run magazines which were reproducing foreign content. In other words the two types of products were not “like products” for the purpose of Article III:2.

6) The U.S. argued that the excise tax created an artificial distinction between split-run magazines and other types of magazines. By imposing the tax only on split-run magazines, the U.S. argued that Canada was treating imported magazines in a different manner to “like domestic products”, i.e. domestic magazines.

7) The WTO Dispute Settlement Panel concluded that imported split-run periodicals and domestic non split-run periodicals were “like products” within the meaning of Article III:2. To arrive at this conclusion, the Panel examined the treatment of imported split-run periodicals and domestic non split-run periodicals on the facts of the case considering such factors as the product’s end use, consumer tastes, and the product’s properties, nature and quality. Canada disputed this finding because, it argued, the DSP did not look at the evidence at hand, but used a single hypothetical example test, examining two imported “Canadian” editions rather than an imported product and a domestic product.

8) With respect to the consistency of Part V.I of the *Excise Tax Act*, there were two key issues:

- i) the “like products” issue as noted above with reference to Article III:2 of the GATT;
- ii) whether the excise tax was applied so as to afford protection to domestic production, as prohibited by the second sentence of Article III:2.

9) The Appellate Body also stated that the magnitude of taxation levied by Part V.I of the *Excise Tax Act* was sufficient to prevent the production and sale of split-run magazines in Canada and, as such, was inconsistent with the provisions of the second sentence of Article III:2 of the GATT.

10) In the process of arriving at its finding, the Appellate Body referred to the Task Force Report, Ministerial statements and the demonstrated effect of the measure in concluding that the “design and structure of Part V.I of the *Excise Tax Act* is clearly to afford protection to the production of Canadian periodicals.”

Analysis

1) The WTO Appellate Body was clear in that the excise tax was prohibitive, the effect of which was to block a product competing with Canadian publications from entering the Canadian market. The “like products” clause was also an issue, but it was clear, from the Appellate Body study, that split-run and non-split run magazines do not differ significantly to enable them to circumvent that clause. Article III:2 was applied.

2) In looking at the history of the excise tax measure, it seems clear that the final analysis of the WTO is to the point. The excise tax was introduced in response to *Sports Illustrated*

circumventing Tariff Code 9958. The measure was so severe that one could anticipate, *a priori*, that the U.S. industry giant, Time-Warner, would protest in the most effective way possible, which was to take the measure to The United States Trade Representative (USTR) and request that it be brought before the WTO. The process provided ample opportunity for consultations leading up to USTR getting involved, but it seems the political constituencies prevailed in that consultations were not fruitful. Had the excise tax not been part of the package, perhaps the other measures would not have been challenged and the status quo would have been maintained.

Impact on cultural policy measures

Would the excise tax have achieved the cultural policy objective? Yes, if one were to accept the policy at face value only and did not have to consider the U.S. reaction and impact of potential retaliation. On the other hand, if the Canadian Government had not imposed the tax, would *Sports Illustrated* and other split-run magazines flood (electronically transmitted) into the Canadian market and usurp valuable Canadian advertising revenues? This remains the fear of the Canadian Publishing Association which is why new measures have been introduced in legislation currently before Parliament, Bill C-55, *The Foreign Publisher Advertising Services Act*.

The Canadian Publishing Association contends that American split-run magazines can offer far more competitive advertising rates to Canadian advertisers than Canadian magazines can as the American publication can recover its primary production costs in the U.S. market. Canadian publications, however, depend on Canadian advertising revenues for survival.

Another point to ponder is the other side of the equation. While the Canadian industry-generated statistics have suggested that there would be substantial loss to the Canadian periodical publishing sector, the Canadian company, Québecor, was printing and publishing *Sports Illustrated* in Canada and generating jobs and profit in Canada.

Some interesting facts on the case are raised by Professors Maule and Acheson⁹³. They remind us that *Sports Illustrated* was not the first split-run publication to come into Canada illegally. They state: “Many believe that split-runs were prohibited by Canadian policy in the period between Bill C-58 (1976) and the introduction of the excise tax, and that *Sports Illustrated* found a loophole in the policy. This belief is incorrect. It disregards the fact that *Time* had been doing the same thing for twenty years.” They go on to explain the sequence of events that confirms the fact. The paper also highlights a potential deficiency of the proposed legislation. “[I]t relates only to printed magazines and not to electronically delivered material where growth is occurring and attracting some advertising revenue.” Professors Maule and Acheson also believe that the competitive circumstances for foreign split-runs in Canada are not sufficiently favourable so as to create an uncompetitive environment for Canadian publications, particularly the niche market publications. In the period following Bill C-58 (1976), no other split-run publications had entered Canada. This suggests that the alarms of the Canadian Magazine Publishers Association (CMPA) may have been overstated.

⁹³ Acheson, Keith and Christopher Maule, submission to the House of Commons Standing Committee on Canadian Heritage, Hearings on Bill C-55, November 13, 1998.

The WTO case of *Certain Measures Concerning Periodicals* was the first to consider the possibility of conflict between GATT and GATS and has documented a goods v. services argument. It has also defined the concept of “like products” under Article III:2 of GATT. It has the potential for longer term impact on our ability to protect services-related measures under GATS. Countries that protect cultural policies by not making specific commitments under GATS may find that those policies could now be challenged under the GATT.

Bill C-55

As noted above, new legislation was tabled by the Minister of Canadian Heritage in October 1998 to effectively replace the lost measures and to placate the publishing sector. Bill C-55, *The Foreign Publisher Advertising Services Act*, is a regulatory measure designed to reserve Canadian advertising for Canadian publications. It intends to make it a criminal offence for advertisers who place ads “directed at the Canadian market” in any foreign magazine available in Canada. The legislation was passed into law in June 1999 with several amendments.

There were many issues surrounding Bill C-55. In the context of international trade law issues, the Minister of Canadian Heritage contends that the new measures relate to the services sector and are GATS-consistent. They may, however, not be GATT-consistent. As emphasized in a submission by Carleton University Professors Maule and Acheson⁹⁴, Canada lost the former measures, in part, because the offending excise tax affected a service which was tied to a good.

⁹⁴ *Ibid.*

It was, therefore, considered a “good” and was subject to GATT rules. While “Bill C-55 includes the word ‘services’ in the title and has been fashioned so as to fall under the GATS, the advertising service is still tied to a good, namely, the hard copy of the periodical.”⁹⁵ Hence, one questions whether the new measure will be considered any differently than the former measures.

In the final analysis, it would appear that political discussions surrounding Bill C-55 took place and the proposed legislation was revised significantly to placate U.S. interests. In September 1999, the response of the Canadian publishing industry to the watered down *Foreign Publisher Advertising Services Act* was negative. In other words, the new measures, in the view of the stakeholders, did not serve their needs nor did it achieve the stated cultural policy objective. Minister Copps had indicated that she would not back down or change the original Bill C-55 and then ultimately did exactly that. This left the publishing community feeling shafted.

Concluding Comments

In conclusion, I believe the excise tax, while designed to assist the publishing industry, has had a negative impact. First, it triggered the response of the U.S. which led to the WTO ruling. Second, it may have set a precedent for future tax measures and, indeed, may impact on the sustainability of other cultural support measures. The cultural policy issue is whether existing and proposed measures are appropriate in terms of the stated objectives.

⁹⁵ *Ibid.*

3) Publication of broadcast program listings

(While the following case may be considered to be outside the cultural industries sector, it is relevant in comparison to the *Warner v BMG* case. The *Magill* case deals with “abuse of dominant position” or “market power”, a well used concept in antitrust law as it deals with IP. Had the same law been applied as effectively in the *Warner v BMG* case, BMG would have been licensed to distribute Warners sound recordings, providing more opportunity to the creators/artists and, furthermore, introducing more competition into the marketplace in Canada.)

In the matter of

Radio-Telefis Eireann and Independent Television Publications Limited (Intellectual Property Owners Inc. intervening) v. E.C. Commission (Magill TV Guide Limited intervening)
(Joined Cases C 241 - 242/91P)

Before the Court of Justice of the European Communities

The case concerns the following as noted in the opinion of the Advocate General (April 1995)

... the Court is to rule on whether the Commission, by a decision on the basis of Article 86 EEC,⁹⁶ could require undertakings to licence their copyright works. The Court is thus asked to decide whether it is possible on the basis of the competition rules of the Treaty in special circumstances to interfere with the specific subject-matter of copyright. The cases again raise the fundamental issue of the balancing of two conflicting interests, on the one hand the concern to protect industrial and commercial property rights based on national law and on the other the concern for undistorted competition which it is one of the Community's tasks to ensure.⁹⁷

⁹⁶ The Treaty establishing the European Community, signed in Rome on 25 March, 1957, Chapter 1, Rules on Competition, Section 1, contains Articles 85 - 90.

⁹⁷ *Common Market Law Reports*, June 1995, p. 725.

The Facts

Magill TV Guide Ltd. ("Magill") is a publisher of TV listings in Ireland and Northern Ireland.

RTE, ITV and BBC are broadcasters of program material in the U.K.

ITP was part of ITV publishing the ITV listings.

Other cases cited in support of the court decision can be found in *Common Law Reports*, June 1995, pp. 718-21. The procedure in arguing any case is to cite such precedents.

Court Decision

The final judgment dismissed the appeals made by the broadcasters to maintain their copyright interests on the following basis: existence of dominant position, abuse of dominant position, effects on trade between Member States, the requirements of the *Berne Convention*, non-compliance with Community law.

Background to the cases

Program listings contain information on the title, channel, date and time. They are produced by the television broadcasting organizations for the purposes of the program schedule. Program listings enjoy copyright protection as literary works and compilations under the United Kingdom *Copyright Act 1956* and the Irish *Copyright Act 1963*.

Magill publishes a weekly paper in Ireland and Northern Ireland containing information on forthcoming television programs. At first the paper only contained information on the weekend

programs of RTE, BBC, ITV and Channel Four and highlights from the week's programs. In 1986, an edition of Magill TV Guide appeared containing all weekly listings for all television channels that could be received in the area.

At the time, there were three weekly television guides marketed in Ireland and Northern Ireland, *TV Times*, *Radio Times* and *RTE Guide*. Unlike in other EC Member States, there was no television guide which contained all program listings for all the available channels in Ireland and Northern Ireland until the Magill TV Guide appeared.

In 1986, in response to an application from RTE, BBC and ITV, an Irish court issued an interim injunction restraining Magill from publishing the weekly program listings of those undertakings on the grounds that such publication infringed their copyright. That judgment was upheld in a decision of the High Court in July 1989.

The injunction was, however, later lifted on the basis that the RTE and ITP had infringed Article 86 of the EEC as they had prevented the publication and sale of comprehensive weekly television guides in Ireland and Northern Ireland by refusing to grant licences for the reproduction of their advance weekly program listings. The decision also required the companies to grant compulsory licences for the listings to third parties on request on reasonable terms. ITP, BBC and RTE lodged applications for the annulment of the Commission's decision as it obliged the applicants to permit reproduction of their listings. The cases were referred to the Court of First Instance (CFI).

The CFI concluded that the broadcasters were abusing their dominant position. RTE and ITV appealed, challenging the concept of abuse of dominant position as interpreted by the Court of First Instance (CFI). RTE also challenged the CFI's findings as regards (a) the concept of interstate trade and (b) the inapplicability of the *Berne Convention for the Protection of Literary and Artistic Works*, while ITP alleged that the CFI had (a) misinterpreted Article 3 of Regulation 17 in finding that it empowered the Commission to order compulsory licensing, the order doing so being disproportionate, and (b) failed to apply Article 190 EEC⁹⁸ in holding that the Commission's decision was adequately reasoned, particularly as regards the assessment of abuse of dominant position.

It should also be noted that the new rules which came into force in the U.K. on March 1, 1991,⁹⁹ oblige broadcasters to license the reproduction of their program listings. BBC and ITP had begun to market their own comprehensive weekly television guides.

The court ultimately ruled in favour of competition as noted above under "court decision".

Comments

The above summary covers two cases joined, six orders, opinions and judgments between December 1988 and April 1995. It is a most interesting case as it analyses the clash between IP

⁹⁸ Article 190 of the Treaty establishing the European Community, signed in Rome on 25 March, 1957.

⁹⁹ S. 176 of the U.K. *Broadcasting Act 1990*.

and competition laws. There is provision for compulsory licence of copyright under competition law in the European Union and this case highlights all the rancour and attack in opposition to intellectual property rights, specifically copyright. It is a classic case where the monopoly interest sought to protect its copyright at all costs and lost.

Impact on cultural policy measures

Were the legal instruments effective in terms of achieving their policy goals? Yes. The IP policy goal is to provide market protection in the interests of creativity and innovation. The IP rights of the broadcasters were exercised purely and simply to protect their commercial interests. Indeed, one might even speculate that the broadcasters holding exclusive rights to publish their own listings enjoyed their protected markets. They did not need to make any additional effort to enhance the products or promote them differently. Can it be said that they may have been “lazy monopolists”? In fact, some IP analysts dismiss this “precedent” on the basis that it wasn’t even a true copyright (the originality criteria not being fulfilled).¹⁰⁰

The policy goal of competition law to restore fair competition was achieved. The ruling in this case provided Magill with the right to publish all television listings in one comprehensive guide, the first of its kind in the market. More to the point, it facilitated consumers’ access to all the information in one single location and better exposure for all television products. The product was new and the distribution techniques were likely more effective. Magill developed a better

¹⁰⁰ Interview with André Dorion, March 1999.

product, one which was not available before, and which served the consumers' interests in the context of culture in having the full range of programming.

Conclusions

The research in Chapter 4 provided a useful basis upon which to substantiate some of the work involved in developing the thesis. There was insufficient time to carry out analysis on all documented cases so three cases were selected to provide a useful sample of activity. The cases were chosen because they involved the interpretation of copyright and competition laws as well as trade law in the context of the WTO. They highlighted Canada-U.S. issues and provided a good example of a copyright/competition case in Europe where fair competition prevailed. This background reinforces some of the key issues as follows: 1) It illustrates the growth in the number of cases affecting trade in the cultural industries sector; 2) It reflects the scope of the problem, i.e. it is not just a domestic problem for Canada, but trade in the cultural industries sector is a global issue; 3) It illustrates the might of multilateral corporate power, notably U.S. entertainment in the sound recording case; 4) It examines the impact of court interpretations and tribunal (WTO) ruling on cultural policies generally; and 5) It notes the growing ineffectiveness of national politics and policies to achieve cultural policy goals. The thesis indicates that there is a need for action and recommends a potential solution.

CHAPTER 5

Introduction

The objective of this chapter is to examine trade policy principles in the context of issues and emerging trends as they relate to cultural industries. It summarizes the current state of play, providing examples, making comparisons to other countries and documenting a brief chronology to set the context. It also lists the key considerations which can influence, in a profound way, how best to negotiate a solution.

Trade Principles, Issues and Emerging Trends

All trade policy decisions involve discrimination. Non discrimination is, however, the principle of all trade agreements including the FTA, the NAFTA, the GATT, the GATS. It is represented in Articles I (MFN) and III (NT) of the General Agreement on Tariffs and Trade (GATT) (1947) and in Articles II (MFN), III (Transparency) and XVII (NT) of the GATS (1994). The three basic principles follow:

- 1) Most Favoured Nation (MFN) status: The connotation is non-discrimination, i.e. countries that are partners to trade agreements agree to grant all their trading partners “most- favoured-nation” (MFN) status, i.e. to treat them all equally.
- 2) National Treatment: The connotation is same or equal treatment, i.e. when a trading partner’s goods or services enter a country’s market, the receiving country agrees to give them “national treatment” or treat them the same as its own national goods and services.
- 3) Transparency: The connotation is predictability, i.e. countries agree to make all their trade practices “transparent” or “visible” to their trading partners, and avoid unfair or less visible practices, such as subsidizing industries or dumping products. Countries also agree to negotiate binding agreements that create a predictable trade environment, so foreign companies and investors don’t have to worry about countries suddenly throwing up arbitrary barriers to trade.

Market Access and GATT, GATS AND FTA/NAFTA

Market access restrictions conflict with the principles of free trade, noted above.

Market access is regulated in the cultural industries sector through restrictions on the amount of foreign content and foreign investment/ownership in the cultural industries sector. It is the most contentious cultural policy mechanism and increasingly subject to challenge. Canada's disposition is that cultural industries fall within the realm of services. During the Uruguay Round, Canada did not list cultural industries in the schedule of GATS so as to keep them exempt from trade rules. Market access for *goods* is subject to the rules of the GATT and while cultural industries are considered by Canada to be *services*, Canada has been corrected in the context of *Certain Measures Concerning Periodicals*. In the FTA and NAFTA, the cultural industries were *exempt* from the agreement. The *quid pro quo* negotiated by the Americans, however, gave the U.S. the right to retaliate to equivalent commercial effect in the event of a policy which caused any commercial harm to the U.S. industries. The cultural exemption has never been invoked successfully and has come to be viewed by some trade constituencies as nothing more than political manoeuvring to placate the cultural lobby in Canada.

Subsidies and GATS, GATT and NAFTA

On the issue of subsidies, the GATS, Article XV establishes only a general commitment to enter into negotiations with a view to developing subsidy disciplines. There are, however, no specific disciplines in the GATS controlling the use of subsidies and countries are only bound by the commitments they make in the GATS schedule. As Canada did not make any commitment for its cultural industries in the GATS schedule, Canada is, in principle, not obliged to provide NT

or MFN treatment to foreign cultural industries.

Within the GATT, however, Canada is obliged to respect the principles. As noted in earlier chapters, there has been controversy over whether the cultural industries should be considered in the context of GATT or GATS. In *Certain Measures Concerning Periodicals*, magazine policies (magazines plus advertising) were considered “goods” and hence were subject to GATT.

The NAFTA provides general language on national treatment in services, but includes a cultural exemption (Annex 2106, Article 2005(1) under the FTA) which provides that any measure adopted or maintained with respect to cultural industries shall be governed exclusively in accordance with the provisions of the FTA. Chapter 14 (Services) of the FTA specifically provides that the Chapter does not apply to subsidies, thereby creating no obligation or right for Canada in respect of subsidies to cultural industries. The cultural exemption is not needed nor has it ever been invoked successfully.

Regulatory Measures affect market access and hence are the bigger issue in the culture and trade quandary: What is the relative success of these measures, what is the cost and, is there a compromise?

Regulatory measures are often the preferred instrument of government policy involving cultural industries. They are generally considered by industry to be more effective and more dependable than subsidies. In the following three examples, occurring both before and after the cultural exemption was negotiated, the instruments have arguably been unsuccessful. 1) Bill C-32, the 1989 *Film Products Importation Act* proposal, was designed as a licensing regime to ensure that

only licensed distributors of film could distribute product in Canada. The criteria for licence depended on ownership being majority Canadian or the distributor had to hold world rights, i.e. having purchased Canadian rights in a legitimate way. Traditionally, U.S. film distributors usurped the Canadian rights in distribution deals. To a large extent they still do. Bill C-32, developed over two years, never saw the light of day nor did it resurface with the negotiation of the cultural exemption. 2) The *Baie Comeau Publishing Policy*¹⁰¹ was designed to ensure that indirect (foreign) takeovers of publishing houses would not prejudice Canadian subsidiary companies. The criteria was that the Canadian subsidiary had to have majority Canadian ownership and control, i.e. it had to be offered for sale to a Canadian or, if there was not a Canadian buyer, the Government of Canada would buy it at fair market value. The result was that Canada ended up being the buyer at greater than market value in two major takeovers involving Ginn and Company and Gulf and Western. 3) Most recently, *The Foreign Publisher Advertising Services Act* ended in a controversial political mess with the resultant policy very much changed as noted in Chapters 1 and 4. These were three major areas of policy development for the Canadian Department of Communications (DOC) and ultimately the Department of Canadian Heritage which took on the cultural mandate following the break up of the DOC. It is *a priori* clear that the primary reason for the failure of these regulatory policy measures was a function of U.S. corporate and political might.

On the other hand, CRTC broadcast content regulations have survived thus far and it is fair to say

¹⁰¹ Publishing policy introduced by the then Minister of Communications, Marcel Masse in 1986.

that they are largely responsible for the relatively high percentage of Canadian content on Canadian television. Without the CRTC regulations, broadcasters would be free to purchase inexpensive foreign, largely U.S., programming which has already had its development cost covered in its domestic market. Broadcasters' profits would be greater, but there would be a lot less Canadian content. Canada never accepted trade obligations with respect to broadcast services, i.e. National Treatment obligations never applied. CRTC regulations were only challenged once: in the 1994 case of Country Music Television (CMT), an American channel thought to be displacing Canadian programming related to satellite services. CMT was removed to make room for the Canadian equivalent, New Country Network (NCN). In 1996, however, CMT and NCN struck a deal. There had been a lot of controversy in the Canadian media as many artists were unhappy with the departure of NCN believing that its departure from the Canadian scene limited their exposure and opportunities. The CRTC ultimately changed the rule in 1997. The CRTC Public Notice¹⁰² stated that "it will not be disposed to remove a non-Canadian service in a competitive format". CRTC and cultural industries generally were exempted from the schedule of concessions in the context of multilateral trade negotiations leading up to the Punta Del Este Declaration which concluded, *inter alia*, that new rules in trade in services would be explored in the Uruguay Round 1994 where the GATS was born. The CRTC regulations are considered GATS consistent.

With the exception of CRTC regulations, Canadian content rules and investment regulations

¹⁰² CRTC Public Notice 1997-96, Ottawa, July 22, 1997.

have been the subject of trade consultations and, at least in one case, been subject to a negative WTO ruling. The continuing effort by the U.S. to curtail Canadian cultural policy will influence future negotiations.

How do Canada and other countries compare

One can trace the problem back to the 1920's with the development of screen quotas in Europe, led by France, to protect the indigenous film industry from an invasion of U.S. made films. The U.S. film industry worked with the government and film quotas were overturned by the end of the war. In 1947, however, Article IV of the GATT was negotiated which recognized film quotas on the basis of their relative importance in the context of culture. The debate continued, however, with the U.S. leading the charge to eliminate quotas which were imposed in some 21 countries around the world. The Tokyo Round of GATT negotiations was unable to deal with it. The European Union Directive, *Television Sans Frontiers*, introduced in the mid-eighties, required a majority European content rule for broadcasting¹⁰³. The U.S. film lobbies, both the Motion Picture Association of America (MPAA) led by Jack Valenti, and the American Film Marketing Association (AFMA), led by Jonas Rosenfield, addressed this as a major issue of concern. The matter was ultimately deferred to become part of the larger debate in the context of negotiations on services.

¹⁰³ The Audiovisual Directive of the European Union was introduced in 1986 with a two year implementation period. It was successful to the extent that each member country was obliged to ratify the instrument. In practice, however, it does not appear to have been very successful.

During and following the Uruguay Round , Canada and France played a key role in defending the need to support cultural industries. The countries differ, however, on how to achieve this which is becoming increasingly apparent. The French still favour the “exemption” route although there is indication now that the French position might be shifting. On October 26, 1999 the European Union (EU) Council in Brussels set out an EU objective for culture as follows: “to maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of preserving their cultural diversity”¹⁰⁴. Canada has gone much further in its proposal to negotiate a multilateral agreement on culture by initiating discussions with the Network of Cultural Ministers. Minister Pettigrew also issued a press release and backgrounder, *Canada’s Position on WTO Negotiations*, wherein he lays out the government’s objectives. Under culture, it states: “pursue a new international instrument to set out clear ground rules that would enable countries to maintain policies that promote their culture”.

Emerging Issues

This section sums up the emerging trends in the treatment of cultural products.

GATT or GATS: The definition of whether the product is a “good” or a “service” determines whether it comes under the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS). When there is a definitional dispute, the WTO Dispute Settlement Body of the WTO will interpret it. In the case of *Certain Measures*

¹⁰⁴ Report by the Department of Canadian Heritage following meetings in Brussels with members of the EU Council, October 26, 1999.

Concerning Periodicals, the WTO ruled that advertising plus editorial content constituted a magazine and that that was considered a “good”. This may be an important precedent in future decisions insofar as cultural products coming under the GATT.

Are cultural policies really just shielding domestic industries from international competition?

The trade side of the argument contends that current cultural policy practices are obsolete and are increasingly being used as shields against international competition in the sector.¹⁰⁵ These practices include foreign investment guidelines, regulatory policies and preferential tax treatment which are often the enforcement mechanisms of Canadian cultural policies, such as the film distribution policy, broadcast quotas, and publishing policy. A factor worth considering here is that there is a growing dependence on U.S. cooperation in jointly sponsored and managed goods produced for the international marketplace.

Market Access: The U.S. dominates the Canadian cultural market?

The United States has the largest share of the world market for entertainment or cultural products, film, television, sound recording and publishing. It is, therefore, not surprising that the entertainment sector ranks as the second most profitable sector in the United States, after aerospace. It is the only country where trade policy objectives and cultural interests are not in conflict. Canada, and other countries producing cultural products, would like easier access to their own market and, indeed, to the larger and lucrative U.S. market. This would enhance the

¹⁰⁵ Vincent Cable, “The new trade agenda: universal rules amid cultural diversity”, *New currents in trade policy thinking, International Affairs*, Vol. 72, No. 2, Royal Institute of International Affairs, April 1996.

opportunity to recover production costs and to realize profit. Foreign competition, mostly U.S. dominates the Canadian cultural market. They account for:

- * 45% of book sales in Canada
- * 81% of English-language consumer magazines on Canadian newsstands and over 63% of magazine circulation revenue;
- * 79% (over \$910 million) of the retail sales of tapes, CDs, concerts, merchandise and sheet music;
- * 85% (\$165 million) of the revenues from film distribution in Canada; and
- * between 94% and 97% of screen time in Canadian theatres. The situation is most extreme in the film industry where the Hollywood studios have historically treated Canada as part of the U.S. market.¹⁰⁶

Market Access in Reverse

There are other trends worth noting here in the context of market access. Increasingly American film producers and major studios are shooting films in locations outside California. It is not a new concept, however, and has been going on since the early 1900's, eg. Columbia shot 14 productions in 1928, dubbed the "quota quickies" and designed to circumvent the 1927 British quota law (films made within the British Empire).¹⁰⁷ Canada, notably British Columbia, has been a prime location for a number of American films, e.g. the 1990 Hollywood feature *Bird on a Wire* shot in Victoria, B.C. Location shooting has angered film crews in the U.S. who say they are losing jobs to Canada. They have taken up this cause more proactively in the last twelve

¹⁰⁶ "Canadian Culture in a Global World", *New Strategies for Culture and Trade*, The Cultural Industries Sectoral Advisory Group on International Trade, Ottawa: Supply and Services Canada, February 1999, p. 4.

¹⁰⁷ Mike Gasher, PhD candidate, Concordia University, "The Audiovisual Locations Industry in Canada: Considering British Columbia as Hollywood North", pub. Canadian Journal of Communications, <www.cjc-online.ca/BackIssues/20.2/gasher.html> February 1999.

months and their lobby has reached eight Congressmen representing California, Chicago and Florida. The eight have taken up the cause with the United States Trade Representative (USTR). They blame Canadian tax incentives for attracting production to Canada. They purport that the impact on jobs and revenue in California is profound. They want the issue raised at the Third WTO Ministerial Conference scheduled for November 30 to December 3, 1999.

The fact is, however, that while major film studios (e.g. Paramount, Disney) are increasingly filming in Canada, locations shooting in Canada is only a tiny proportion of Hollywood-based production - less than 2%.¹⁰⁸ One can speculate that the reason for this is attributable to a number of things -- lower cost, lower dollar, well-trained film crews and there are also tax credits. The issue, therefore, is only an issue for the film crews and not for the major studios and producers who can save money. In recent years, major studios and independent producers alike, have suffered budget cuts to compensate for big budget flops and increasing multimedia competition. The major studio producers can produce films a lot cheaper in Canada than they can in California and, with a Canadian partner, can take advantage of the tax credits.

There are two film and video tax credits available in Canada: 1) The Canadian film or video production tax credit (CPTC) (governed by S. 125.4 of the *Income Tax Act* and draft section 1100 of the Regulations to the Act) generally requires that the production corporation must be a prescribed taxable Canadian corporation, the activities of which are primarily carried out in

¹⁰⁸ Allan King, President, Directors Guild of Canada in a speech entitled "The 'Runaway' Production: A Canadian Response" delivered in Toronto, June 10, 1999.

Canada. 2) The film or video production services tax credit (PSTC) (governed by S. 125.5 of the *Income Tax Act* and draft section 9300 of the Regulations to the Act) is available to any corporation, Canadian or foreign-owned, the activities of which are primarily carried out through a permanent establishment in Canada: Tax incentives generally fall within the realm of economic policy and should therefore not be considered relevant in a trade policy context. If, however, the tax measures was construed as a subsidy which assisted the export of the film product, it might be subject to challenge under the GATT. Since the product being exported, however, is likely going to be the product of a runaway production, i.e. foreign, this would likely not happen as the industry would be hurting itself.

On the other hand, the U.S. film crews losing jobs to the crews in Canada, argue that film tax credits take U.S. business away from them and are unfair. The film crews would prefer that the tax incentives not be available or accessible to U.S. producers. Hence, the tax cannot be viewed as discriminatory. Film tax credits are not new and, in fact, are available in Australia and Great Britain where the Films Order 1999 was recently published by the Department of Culture, Media and Sport. Film tax credits are also available in 40 out of 50 United States, so one can defend the Canadian position. The U.S. however has taken the issue of Canadian tax credits to the USTR as a potential trade issue and requested that it be part of the Seattle Round of WTO negotiations. While the runaway production issue was debated in the U.S. House Ways and Means Trade Subcommittee, no commitment has been made by USTR to bring this matter up in the context of the WTO negotiations. This is just another example of an issue which crosses the culture and trade line. It concerns economic policy involving film production and is being treated by some

U.S. constituencies as a trade issue.

Definition of Canadian content

While not so relevant to the tax credit eligibility, the description of what constitutes *Canadian* in the context of content for television or eligibility for subsidy is also somewhat confusing and subject to controversy. Canadian content, by definition, runs on a point system which generally requires that the film or video has to be directed or written by a Canadian. The rule is, however, confusing, i.e. if an American produces a film about Canada, it does not qualify. If a Canadian produces a film about Canada or the French Revolution or any other foreign content, it does qualify.

Efficacy of IP and Competition: There is disagreement amongst business and government leaders as to how to address perceived anti-competitive conduct which is being challenged in the context of fair trade. The concept that the sacrosanct IP right must be maintained is *old thinking* in many economic circles.¹⁰⁹ The suggestion has also been made that strong IP can even stifle creativity.¹¹⁰

Can harmonization be achieved?: Many believe that trade policy is the vehicle for change. The WTO has the only effective enforcement mechanism. Many disagree and believe that trade

¹⁰⁹ F.M. Scherer, Harvard Business School study, November 29, 1995.

¹¹⁰ L'Association littéraire et artistique internationale, 1997 Conference at Montebello, Quebec.

policy is not the appropriate way to resolve differences and that it will be an evolutionary process.¹¹¹ Issues may be more successfully resolved in stages, first bilaterally and then multilaterally; for example, by the harmonization of competition laws among member states of the European Union.

Impact on cultural industries

Economic policy which includes income tax measures and subsidy measures are not trade related. Regulatory measures which discriminate between foreign and domestic treatment are trade related and subject to challenge. All regulatory policies in Canada which have been discriminatory are now, more than ever, subject to change. Subsidy measures have also been put to the test as noted in *Certain Measures Concerning Periodicals*. The prognosis for future cultural policy measures based on principles which do not respect the three basic principles of trade are vulnerable in the world trade organization. The goods vs services argument has reinforced this position.

Another factor influencing the cultural industries, however, is the inconsistent application internationally and domestically of competition and copyright laws. These laws should be complementary instruments of government policy with the objective of promoting an efficient economy. Each provides incentives for innovation and the rapid diffusion of new technology.

¹¹¹ This is the subject of a paper presented to the Fordham Corporate Law Institute's Annual Conference on International Antitrust Law & Policy Conference, October 23, 1998, by Calvin S. Goldman, Q.C., of Davies, Ward & Beck, Toronto.

As noted in Chapter 4, however, they do not necessarily complement each other and in some cases have been supportive of cultural constituencies or cultural policy objectives. In all cases, the power of the purse and political might has had a profound influence on the success of negotiations and the application of the law.

There has been an exponential growth in cultural products internationally, notably in the U.S. In tandem with the growth in the U.S. industries internationally, cultural policies have evolved in consultation with like-minded countries in Europe, Australia and New Zealand in an effort to balance the effect of U.S. cultural domination. While cultural policies have served a useful purpose in developing a cultural industry infrastructure, current mechanisms no longer appear to be as effective and domestic laws affecting trade in the cultural industries sector don't necessarily support domestic cultural policy objectives. What is worse, however, is that they are being challenged in the world trade context. If culture cannot survive without some form of protection, it has to be addressed in a more creative way than in the past and with the concurrence of the United States. Any creative mechanism would also have to be consistent with trade obligations. This does not mean that all laws affecting cultural industries would have to be reassessed, but rather that the mechanism would have to be given precedence in the certain circumstances.

Ten key considerations

(1) The exponential growth of new technologies and creative global marketing mechanisms continue to have a profound impact on the cultural industries, i.e. methods of production and

distribution outpace traditional methods of regulation, e.g. telecommunications companies provide local cable service and internet access. Internet and software provide entertainment to the home. Within the next five years broadcasting will change radically. Packaging and distribution will be very different. It will be an era of interactive TV where the viewer/consumer will be able to order desired programming through links to an international menu. Among other things, the viewer/consumer will be able to watch a documentary on any subject and make links to specific areas of interest in the documentary taking us out of , for example, a documentary on whale watching in Canada to a (U.S.) National Geographic site on whales. Broadcasting in Canada is still regulated because of its dependency on radio frequency spectrum. Cable and telecommunications delivery mechanisms are now digitized so capacity is much greater and they cannot effectively be regulated.

(2) If we attempt to negotiate culture at the WTO, we could lose. In the case of telecommunications regulations, we lost the monopoly right and the right to protect, i.e. the right to use only Canadian equipment and transmitters.

(3) Canadian definitions of what qualifies as “Canadian” are increasingly grey and subject to challenge or manipulation so as to render them impotent. The Minister of Canadian Heritage, the Honourable Sheila Copps, defines Canadian culture as Canadian content and has made several references to wanting her daughter to have access to Canadian stories. Yet, in film production, to qualify for subsidy or support in the context of Canadian content, the author or director has to be Canadian - the content can be non-Canadian. In other cases, the content has to be Canadian

regardless of the nationality of the author, eg. in qualifying a magazine as “Canadian”. Foreign ownership/investment regulations governing the cultural industries, administered by Industry Canada, can impede foreign (largely U.S.) access to support measures. Tax measures are, however, increasingly being accessed by the film sector outside of Canada, e.g. location shooting.¹¹² As this is big business, Canadian Film Commissioners and provincial governments promote foreign location shooting in Canada. This is now causing problems amongst U.S. union who have taken the issue to USTR arguing that Canadians are taking valuable jobs and revenues out of the U.S., mainly California.

(4) Cultural industries are inherently international. As Maule and Acheson suggest, it might be American dominance of production and distribution of international content by a system that is also international. Bernard Simon suggests that the coming of age of Canadian culture may not depend on our ability to protect it at home, but to project it on the world’s stage.¹¹³

(5) Laws emanate from courts, legislatures, and executive or administrative tribunals. In the context of present-day international relations, we find an absence, outside of the WTO, of law-creating agencies in the international legal network. There is no central court of compulsory jurisdiction and no vertical system of lesser courts; hence common law is non-existent. In international law, there is no central world legislature to issue comprehensive statutes regulating

¹¹² U.S. production companies, largely the major Hollywood Studios, are shooting roughly 2% of their films in Canada, according to statistics compiled by the Directors Guild of Canada from figures available from the Motion Picture Association of America and the Canadian Film and Television Production Association, 1999.

¹¹³ Bernard Simon’s article “Canada’s Cultural Struggle”, *Journal of Commerce*, February 21, 1997, p. 9A.

international affairs. There are arguably exceptions with the new jurisdiction of the International Court of Justice, but it requires the full cooperation of state governments, without which, it is impotent.

(6) American hegemony is at a peak and may go down hill from here because *local* is becoming increasingly important to the domestic audience.¹¹⁴ For example, 10 years ago in Germany, television programming was more than 50% American and today it represents far less than half. The domestic market is looking for high quality, locally made programming.

(7) Canadian cultural industries are thriving and Canadian creative talent is well represented on the international stage, e.g. Celine Dion, James Cameron, Norman Jewison, David Cronenberg, Alliance-Atlantis.

(8) Global marketing and international trade law has changed the environment. It presents competition, but also provides opportunities. If we cut off one, we may lose the other.

(9) Political will - The U.S. Democrats may be sympathetic to culture, but the likelihood of the U.S. agreeing to rules which would, in any way, inhibit market access for American entertainment (its second most profitable export) is remote. To get the National Endowment for the Arts (NEA) in the U.S. to sign a non-binding agreement on universal principles of culture

¹¹⁴ Comments by Michael J. Wolfe, Consultant with Booz Allen, during his presentation on "The Entertainment Economy" panel at the Canadian Association of Broadcasters Convention, Montreal, October 1999.

may be possible, but is not probable given its current mandate. Such an instrument would likely never resonate in Congress in any case.

(10) Can we adapt cultural policy mechanisms to existing WTO rules?

CHAPTER 6

Options to deal with the culture and trade quandary: Finding solutions including the Big MAC

In this section, options for a solution to the cultural trade quandary are examined in the context of current field expertise, analysis and recommendations. Each option is addressed independently with concluding comments. The chapter ends with final conclusions and recommendations. A chart is also provided which ranks the options against certain of the criteria.

Options are highlighted in a) to e) followed by a breakdown, analysis and comments

- a) A new international instrument (NII) on cultural principles/diversity aka a multilateral agreement on culture (MAC) outside of the WTO
- b) A sectoral agreement (also multilateral in scope) on culture under the WTO
- c) A bilateral solution: A Canada-U.S. agreement on cultural industries
- d) Hybrid (X) a two-tier approach: 1) common statement of understanding (OECD); 2) Working within the WTO framework, i.e. using existing rules to define the treatment of culture
- e) Hybrid (Y) a two-tier approach: 1) Canada-U.S. agreement on rules; 2) Canada-U.S. model to serve as a precedent for agreement within the WTO framework

In confronting this issue a couple of years ago, I attended a conference on the culture/trade quandary hosted by The Centre for Trade Policy and Law in 1997. Laval University Professor, Ivan Bernier, had presented a paper¹¹⁵ wherein he identifies the debate over the cultural exception, and more generally over the place of cultural goods and services in international trade

¹¹⁵ *Cultural Goods and Services in International Trade Law*, presented to a conference entitled The Culture/Trade Quandary: Canada's Policy Options, hosted by The Centre for Trade Policy and Law, Ottawa, October 9, 1997.

law. He concludes that we require an approach that would distinguish between the industrial and the cultural objectives of government intervention. At the international level, he states that efforts should be made, not so much to exclude altogether cultural products from international trade agreements, but rather to find a way of allowing for the derogatory State's interventions in defined circumstances. He suggests that since it was possible in the GATT of 1947 for cinema, it should be possible to find a broad solution for cultural industries adapted to the conditions of the 21st century.

The February 1999 SAGIT report¹¹⁶, adopted by the House of Commons Standing Committee, recommends a new international instrument on cultural diversity which would:

- * recognize the importance of cultural diversity;
- * acknowledge that cultural goods and services are significantly different from other products;
- * acknowledge that domestic measures and policies intended to ensure access to a variety of indigenous cultural products are significantly different from other policies and measures;
- * set out rules on the kind of domestic regulatory and the measures that countries can and cannot use to enhance cultural and linguistic diversity; and
- * establish how trade disciplines would apply or not apply to cultural measures that meet the agreed upon rules.¹¹⁷

¹¹⁶ "Canadian Culture in a Global World", *loc. cit.*, p. 97.

¹¹⁷ *Ibid.*

On the other hand, the long debate over the last eighty years has placed culture closer and closer to trade. Michael Walker of the Fraser Institute argues that “culture being nothing else than the total sum, at the level of society, of what individuals consume, there is no need to treat cultural products differently.”¹¹⁸ Paul Spurgeon of the Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) in his testimony before the Standing Committee on March 24th stated that Canada can no longer pretend that our cultural industries are protected under international trade treaties, when a rising tide of disputes clearly demonstrates they are not¹¹⁹.

a) A New international instrument (NII) aka as a multilateral agreement on culture (MAC) outside of the WTO

The February 1999 SAGIT Report¹²⁰ and the Report of the House of Commons Standing Committee on Foreign Affairs and International Trade¹²¹ recommend a new international instrument as noted in the preceding section and in Chapter 2, in the section entitled “Relationship to Existing Knowledge”. It was suggested that “if feasible” it should come under the WTO. In this section, however, an examination is made of the instrument outside the ambit of the WTO.

¹¹⁸ Appearing in Professor Bernier’s text, Michael Walker, “Comments on the Role of Economics in Understanding Cultural Change”, document presented for discussion, Cuernavaca, Mexico, 1992, p.30.

¹¹⁹ *Canada and The Future of the World Trade Organization: Advancing a Millennium Agenda in the Public Interest*, Report of the Standing Committee on Foreign Affairs and International Trade, Ottawa, June 1999, p.7-1.

¹²⁰ “Canadian Culture in a Global World”, *loc. cit.*, p. 97.

¹²¹ *Canada and The Future of the World Trade Organization: Advancing a Millennium Agenda in the Public Interest*, *op. cit.*, p. 118

There are a couple of points worth noting. An instrument which is outside the WTO would likely not have the same membership as the WTO. Members of the WTO, however, who might choose to be signatory to this new international instrument, would be bound by WTO rules. Hence, any other agreement that WTO-member countries might wish to sign would have to be consistent with WTO rules or these other agreements would be rendered ineffective. What makes the WTO the more effective is the Dispute Settlement Mechanism which provides for enforcement of rules and, hence, WTO rulings. The new international instrument on culture would be more difficult to enforce. In the case of a dispute between such an instrument and a WTO ruling, if the parties concerned were WTO members, the WTO ruling would take precedence.

International instruments such as conventions are successful in specific circumstances, but fundamentally require the full cooperation of governments. The Vienna Convention is a good example of a multilateral convention where governments have not always cooperated. There were two cases in the U.S. where Canadian citizens were sentenced to death and were not advised of their right, under the Vienna Convention on Consular Relations, to contact a Canadian consular officer.

The majority of witnesses testifying before the Standing Committee on FAIT support an international instrument without particular reference to whether it needs be negotiated within the ambit of the WTO or outside the WTO. Some felt that it would be better to keep the instrument outside the realm of trade and trade bureaucrats. ACTRA supported the development of a global

charter of rights for cultural diversity (Meeting No. 125, April 29, 1999, Calgary). The Canadian Conference of the Arts (CCA) recommended that Canada should convene a conference of international representatives specifically designed to draft a protocol or covenant to apply to all international trade and investment agreements (Meeting No. 96, March 9, 1999).

Both the ACTRA recommendation for a global charter of rights and the CCA recommendation for a covenant have, in principle, the same implications. The CCA recommendation for a protocol to be applied to all trade and investment agreements would likely present problems not unlike the problems surrounding the cultural exemption which is not the considered option. The comments regarding an international instrument outside the WTO. (e.g. multilateral agreement on culture [MAC], convention or treaty) could apply equally to a global charter of rights or a covenant. Countries already signatory to the WTO are obliged by WTO rules, so no matter what they sign, their trade obligations under the WTO will prevail.

In a bilateral context, Canada has instruments such as Film and Television Co-production Agreements with over 25 countries which, for the most part, work because there are advantages for both sides and it is in their mutual interest to cooperate. In the Canada-U.S. relationship, there are over 300 agreements and treaties. There are examples, however, of non-compliance in the context of bilateral agreements if countries disagree or choose not to cooperate and, there is no effective recourse as there is no dispute settlement body or international law to deal with non-compliance in this context. An example of this was the Canada-U.S. Pacific Salmon Treaty of 1972.

On the subject of the MAC and where such an agreement might reside, Professor Bernier of Laval University said that it could only be done under UNESCO if not done under the WTO, but he said that there would be a potential problem insofar as there is conflict between UNESCO and the WTO on those issues (meeting No. 104, March 22, 1999, Quebec City). The other problem with negotiating an agreement under the UNESCO umbrella is that the United States is not a member of UNESCO and hence, for reasons already stated, it would likely not work.

There are many international bodies with an interest in culture, e.g. The United Nations, The Council of Europe, The Commonwealth, The Francophonie, The OECD. There are equally a great number of multilateral agreements. Within the United Nations alone, there are some seventy-eight organizations each with agreements in principle to cooperate in various sectors, e.g. waters resources, rural development, nutrition, drug control, distance learning etc. In the cultural sector, Canada is a member of the United Nations Educational, Scientific and Cultural Organization (UNESCO). The mandates of UNESCO and the WTO, as referenced in Professor Bernier's remarks to the Committee, are conflictual.

The examples of cooperation identified above are viable concepts predicated on goodwill and understanding among nations. They are successful within the limit of what nations can and are prepared to do. With the exception of the European Union which can enforce its Directives on its member countries, there are no enforcement mechanisms for any of the agreements noted in the preceding paragraphs. A MAC would not withstand the pressures of global commercial

interests and trade rules. Owen Lippert¹²² contends that, apart from oft-cited NAFTA Chapter 11 (the investment chapter) and intellectual property treaties, international treaties are rarely enforced and have little domestic impact beyond generating a bit of warm and fuzzy noise. Mr. Lippert may be exaggerating the point, but international treaties do not work well without the cooperation of all parties because there is no viable international enforcement mechanism to ensure effective implementation. Negotiated trade rules are complex and require enforcement or why bother.

Concluding comments: It could be a relatively easy set of negotiations to arrive at an agreement or convention identifying universal cultural principles among like-minded nations. Ideally, such an agreement or convention should include both developed and developing nations. A World Forum On Culture might be proposed.

A MAC identifying a set of common principles could be a precursor, a first step, towards achieving the larger goal of an enforceable set of rules. While like-minded countries agree on the principles, they disagree on the methodology and leadership. Also, the self-appointed body drafting this agreement might not have influence in the international sector, particularly if the United States is not represented or is represented as an observer only or by a person who has no political influence.

¹²² "Trade Law poses no threat to Canada", editorial comment in the *National Post* of August 31, 1999.

If the agreement identified rules and regulations governing the treatment of cultural industries in the context of trade, it would not be so easy. To work, the rules and regulations would have to a) be consistent with WTO obligations; b) have the concurrence of the United States and c) have balanced representation. Economic activity would be subject to a new framework and a different set of rules which countries would be reluctant to follow unless it was decidedly economically viable for them. There is no impact analysis to guide them.

On its own, it would not achieve the desired goal if the goal continues to be policies which restrict market access for foreign cultural goods and services. International agreements have to be buttressed by enforceable laws. Enforcement of international agreements is difficult. In the final analysis, it may be possible to negotiate such an instrument identifying the principles of culture and specificity in the context of trade as a precursor to trade negotiations.

b) A Sectoral Agreement on Culture - within the WTO framework

The House of Commons Standing Committee on Foreign Affairs and International Trade in its June 1999 report recommended that a new international instrument be negotiated, if feasible, within the ambit of the WTO. This was not fully explored by the SAGIT or the Standing Committee, but the Ministers of Canadian Heritage and International Trade have been mandated to negotiate a new instrument on culture one way or another. As noted earlier, any instrument signed by WTO members would have to be consistent with WTO rules. A sectoral agreement within the within the WTO framework would certainly seem to be the most effective instrument to treat culture in trade terms and to be assured of compliance. There are two reasons: 1) The

scope of the agreement would be broad-based multilateral, its membership being the parties to the WTO. This would engage the U.S., the most important partner in the negotiation and the primary reason behind the need for such an instrument. 2) The Dispute Settlement Mechanism of the WTO provides a basis for enforcement of the rules of a sectoral agreement under the umbrella of international trade law. Member countries of the WTO are obliged to observe the rules. If they do not respect the rules, they are subject to a WTO challenge and a fairly complex and comprehensive investigation and ultimate ruling. All participating countries to date that have been subject to a ruling have implemented the ruling. Conceptually, it is viable in that the WTO structure was designed to facilitate additional sectoral agreements. There are a number of them already, for example, in telecommunications, and in intellectual property (TRIPS). In other words, there are precedents.

In the final chapter of their book, *Much Ado About Culture*¹²³, Carleton University professors and published authors, Christopher Maule and Keith Acheson, address the issue of a sectoral agreement on culture as a viable option making reference to other sectoral agreements, namely in telecommunications and financial services. A sectoral agreement is far reaching and might be able to ultimately deal with evolving technologies and obligations with respect to trade in goods and services, investment, cross-border access for individuals and companies, copyright and competition issues. I have dealt in earlier chapters with the principles of liberalized trade, the issues surrounding market access and controversial regulatory measures, copyright and

¹²³ Keith Acheson and Christopher Maule, Ann Arbor: University of Michigan Press, 1999, pp. 346-348.

competition as well as the treatment of subsidies. These are issues which will have to be addressed in any case in the context of continuing disputes in the sector until such time as member states can agree on new rules in the cultural sector. As Maule and Acheson contend, dispute resolution is here to stay with or without a sectoral agreement on culture.

Acheson and Maule put the issue in the context of goals to work towards as follows: no tariffs and quotas, minimal foreign-ownership restrictions, nondiscriminatory market access, freedom to work, coordinated enforcement of national antitrust laws, no direct or indirect protection of wholesale or distribution networks, national treatment in the application of censorship, national treatment of programming in “safe sanctuary” periods of the day, subsidies allowed to fill “gaps” in content, national treatment in tax provisions, and transparency. They identify a preliminary work plan as follows:

- 1) Drawing the boundaries for the inclusion/exclusion of relevant activities in a way that would permit the impact of future technological development to be taken into account.
- 2) Determining the scope of the agreement with respect to trade in goods, services, investment, intellectual property, and the movement of persons.
- 3) Identifying factors affecting market access by foreign firms to domestic markets. The list would be both general to the cultural sector and specific to each subsector.
- 4) Developing a list of subsidies and tax incentives affecting the industry.
- 5) Developing a list of private actions that affect trade and identifying the scope of

antitrust policy to deal with these policies from a trade policy perspective.

6) Examining the alternative dispute resolution procedures.¹²⁴

They conclude by saying that such a formal approach will not work without the widespread belief that trade liberalization and openness will benefit national culture and the civility of everyday life. In tandem with that conclusion, Dennis Browne testified before the Standing Committee on FAIT on the next WTO round, commenting that “We can all recognize that a sense of shared values is fundamental to the continued success of a democratic society....The only way we’re going to maintain this sense of shared values is to have frequent opportunities to exchange and to share value-laden expression of ideas that reflect Canadian culture, whatever Canadian culture might be.”¹²⁵ The definition of what culture is and the process by which we sustain it is evermore confusing. As with many controversial social issues (the effects of smoking, violence on television, etc.) public advocacy is needed to get the public and the political infrastructure motivated.

It cannot be overlooked that the WTO is not a supranational organization. It only administers what its members have agreed to. Would there ever be consensus on such a controversial subject where every country has its own interests and its own agenda to protect and promote. All domestic trade policy involves discrimination which would have to be balanced. This means that

¹²⁴ *Ibid*, p. 347.

¹²⁵ *Canada and the Future of the World Trade Organization: Advancing a Millennium Agenda in the Public Interest*, *op. cit.*, p. 118

negotiation would require compromise and trade-offs, i.e. gains in one area that offset losses in another. In this regard, the U.S. would demand unobstructed market access for its cultural products and investments. What could we agree to and what could we get in exchange? Or conversely, what are we prepared to give up to enable us to continue with even moderate regulatory measures.

There are two other major implication; 1) The critical path is long and arduous. For example, Canada has to come to grips with objectives and results in the policy context and measure the relative success of each policy against the objective. Constituent interests, stakeholders and politicians would have to agree. Other like-minded countries would also have to agree and some sort of consensus be reached on objectives, desired results and the right kind of governance structure that would enable it to be technology neutral. 2) Establishing and achieving this within a reasonable timeframe would be next to impossible. Technology is eroding our ability to regulate effectively so it is left to political, economic and social will. If that doesn't work, there is no harness for technology.

Political Implications: Even if the U.S. could be co-opted on the bases of negotiated trade-offs attractive to the U.S., the U.S. would need to pass fast track¹²⁶ legislation. Without it, the powerful U.S. lobbies would never agree on anything collectively. At this time, President Clinton has a little more than a year left in his mandate and a Republican-led House of Representatives

¹²⁶ If the President has fast track authority (to negotiate a trade agreement), he is not obliged to follow the normal treaty procedures, i.e. Congress has the right to accept or reject the agreement, but cannot amend it.

and Senate. Even if he could get fast-track (and we know he cannot) his term will be up before any agreement could be concluded. Should a Republican candidate such as George Bush be elected, there is even less cause for optimism. Generally speaking, if history is our guide, the Republican stance on cultural diversity and tolerance has been less than sympathetic. The conclusion here is that there would be no political ability or will, particularly in an election year, to negotiate such an agreement.

Dennis Browne, former senior trade commissioner and head of several foreign missions during his career with the Department of Foreign Affairs and International Trade, was also consulted. He is currently Executive Director of the Centre for Trade Policy and Law. Mr. Browne, referring to the growing number of WTO rulings against Canada, has said that we have to be a little more careful in ensuring our trade policies are in line with our obligations. Mr. Browne, however, is not so favourably disposed to a sectoral agreement. His position is highlighted in the next two options.

Concluding Comments: A sectoral agreement would seem to have the necessary criteria to address three major issues, i) consistency with trade rules, ii) enforcement, and iii) important multilateral partnership embracing both the developed and developing world. It would, however, likely be difficult to get consensus among member states, particularly the U.S., and difficult to negotiate and finalize in a reasonable timeframe. In view of the economic and technological implications, lack of U.S. concurrence up front, a sectoral agreement could be pre-empted by technology and market forces. We are already seeing the repackaging of broadcasting

worldwide, daily developments on internet capabilities and major mergers of U.S. multi-nationals, the consequences of which leave countries unable to control broadcast and media delivery in any case. The most recent merger of two of Americas largest media/entertainment conglomerates (America On-Line [AOL] and Warner Brothers) combines both the production and distribution of cultural/media/entertainment/communications products with sophisticated state-of-the-art technology and communications systems world-wide.

c) A Canada-U.S. Agreement on Cultural Trade

Communications has become so pervasive that the reach of any nation to contain dissemination of information is futile. Instead, all they can hope to do is manage and oversee such exchanges in a way that provides some protection for citizens in terms of appropriate content, ensures vigorous competition, and promotes economic value-added. With this as a premise, the U.S. and Canada should explore alternate approaches that bring all relevant stakeholders -- industry groups, government regulators and promoters of culture and communications -- in order to strike a broader agenda encompassing the range of domestic and international issues, and respecting the extent of sensitivities and interests on both sides of the border.

Reed E. Hundt, former chairman of the FCC
as quoted by Jonathan P. Doh, of the American University, at the
CSIS Conference on U.S. Trade Strategy and Canadian Culture,
May 21, 1999 Washington, DC.

Christopher Sands¹²⁷ suggests that the time is right to negotiate an agreement on culture between Canada and the United States. If this were possible, would we need a NII or MAC? The Canadian government is favourably disposed to rallying support for such an instrument - assuming perhaps that the U.S. (the most important player) would ultimately agree or sign on.

¹²⁷ Director and Fellow, Canada Project, Americas Program at the Center for Strategic and International Studies, Washington DC., author of a paper entitled "An Argument for the Negotiation of a Bilateral Agreement on Cultural Trade with Canada Now" which was presented to a conference on U.S. Trade Strategy and Canadian Culture, May 21, 1999, Washington, DC.

Historically, the U.S. has not responded to this kind of strategy. Canada and the United States, however, have been successful in the most difficult negotiations and, indeed, led with the FTA quite successfully.

Mr. Sands' position for an agreement is based on the current state of industry and commerce. He suggests that both Canada and the U.S. have experienced changed circumstances that may make negotiation possible. Canada's protectionist stance has failed and changes in the structure of the U.S.-based media may contribute to greater flexibility for U.S. trade negotiators, i.e. vertical integration of the entertainment sector in the U.S. portends greater negotiating flexibility.

The internet is changing the unique access to international markets enjoyed by the major studios. Neither the U.S. nor Canada can control the internet. It is market driven. The next question is, therefore, is it in our mutual interest to seek an agreement with the United States? The objective would be to negotiate ways of dealing with all the surrounding issues of, *inter alia*, who owns copyright on the internet - the carrier or the content provider? There are already a number of Canada-U.S. working groups addressing issues which resonate in the cultural sector, e.g. e-commerce, ethics, pornography, violence on television, telecommunications standards, etc.

Other groups in the U.S. have expressed the need for global dialogue on the issue of cultural diversity.¹²⁸ There is always hope of finding common ground, but the fundamental problem,

¹²⁸ Center for Arts And Culture *Conversations* series on Global Partnerships and Government Roles, Washington DC, October 5, 1999.

however, revolves around the disconnection between the U.S. non-profit cultural sector organizations and the for-profit entertainment industry. In Canada, the lobby is, for the most part, one-and-the-same. Thomas Friedman, author of *The Lexus and the Olive Tree: Understanding Globalization*¹²⁹, who was a participant at the Center for Arts and Culture Conference,¹³⁰ posited that the U.S. did not need to have a Minister of Culture and argued that strengthening one's own culture would be more successful than trying to protect it against the forces of technology.

There are other issues that merit further examination in the final analysis, however. Dennis Browne's position¹³¹ on Bill C-55, in retrospect is that, while the publishers were not content with the outcome of Bill C-55 and the *Foreign Publisher Advertising Services Act*, the negotiations were not without concession on the part of the Americans. The big trade test is always the measure of how much one can influence the market in favour of one's own producers. In effect, the magazine agreement (negotiated with the U.S. during the 15 months following the 1997 WTO ruling) was groundbreaking in a way. In fact, Mr. Browne contends, we have *de facto* agreement that Canadian content can be a condition for market access and investment access. The Act sets out the conditions which, fundamentally, enable the U.S. to have access to investment rights provided that they create majority Canadian content. While acquisitions of Canadian publishers will not be permitted, U.S. interests can establish new periodical businesses

¹²⁹ New York: Farrar, Straus & Giroux, 1999.

¹³⁰ *Ibid.*

¹³¹ Telephone discussion with Dennis Browne, November 1999.

in Canada. In addition, the rules governing tax deductibility available to Canadian advertisers have been changed to permit full deductibility regardless of the nationality or ownership of the publication, provided that the publication produces 80% original or Canadian content. Canadian advertisers can also enjoy one-half the deduction for advertising in split-run magazines which contain the minimum amount of Canadian content (on an escalating scale of 12% to 18% over three years).

Dennis Browne's position is that there may be negotiating flexibility in the United States to develop a common position on culture. The problem surrounding C-55, however, may have rested largely with the political rhetoric insofar as Minister Copps preached to the publishing community and the public that she would not backdown or change anything in C-55 - and then did. The result was the widely published anger and frustration of the publishing community who felt short-changed by her.

The critical path would, therefore, be to hold bilateral consultations with the United States to determine 1) level of interest and whether it is worth pursuing; 2) whether common ground could be established, i.e. mutual interests/concerns in the global era; and 3) whether there could be agreement on principles and rules, specifically in liberalized investment and ownership rules in exchange for agreement on subsidies and content. In short, could a cooperative agreement be established which would address the issues and concerns of both sides, i.e. negotiate cooperation in a global era. Negotiating cultural policy maintenance in a regulatory context in the current and future environment would be counter productive. What has the U.S. to gain? Negotiating

avenues of opportunity for growth and development in a global era with the world's biggest producer is timely for Canada. This is potentially viable for the following reasons:

- a) Content rules and subsidies have worked in Canada.
- b) Liberalizing investment is a fact of globalization. If countries do not agree, it might evolve, in any case, as it has in the telecommunications sector.
- c) As technology will erode the ability to regulate, the U.S. is less likely to be concerned with content rules as long as they do not discriminate and, as noted earlier, the U.S. acceptance of the *Foreign Publishers Advertising Service Act*, in the context of our implementation of the 1997 WTO ruling, can be interpreted as *de facto* acceptance of market access based on non-discriminatory content rules.
- d) If trade in cultural goods becomes market-driven, the U.S. doesn't have to worry about market access rules in the future. It could, however, benefit from rules governing the sector in terms of protecting rights in an era of technology.

Concluding comments: Canada-U.S. consultations would be an excellent beginning. Defining the status quo and a set of principles to work with would engage the U.S. in the process early on without the politics of gang warfare¹³² which historically has not worked. As Dennis Browne commented¹³³, if we include them, we have a basis on which to build, if we exclude them, they will be as angry as hell. Canada and the U.S. are, afterall, each others biggest allies, friends and

¹³² Like-minded countries signing on to something and then presenting it to the U.S. in the hope that it might capitulate.

¹³³ Telephone discussion with Dennis Browne, November 1999.

trading partners. Whether or not the timing is right, there is no other time - globalized trade is a fact of life. The United States has also recently appointed William Bader as Assistant Under Secretary for International Cultural Affairs (formerly U.S. Information Agency and now part of the State Department).

Finally, it would appear that there is room to negotiate with the Americans. If, for example, we were prepared to liberalize foreign investment rules in Canada in exchange for maintaining Canadian content and subsidy rules, it could work. This would be a bilateral negotiation, but might later serve as a model for regional or multilateral negotiations.

d) Two-tier approach (X): 1) OECD/Common Statement of Understanding (among all member countries); 2) Working Within the WTO Framework, i.e. using existing rules to define the treatment of culture (as a second step following the signing of a common understanding or convention)

1) OECD/Common Statement of Understanding

To arrive at a common understanding may require a non-negotiating forum. The OECD provides that forum and, indeed, a precedent. Both Dennis Browne and Pierre Sauvé have commented that the OECD would be an excellent forum to bring member countries, including the United States, together to arrive at some consensus on cultural policy in a world of free trade. Dennis Browne referred to the 1987 OECD Ministerial Statement supporting the need for a change in the agricultural sector. This statement ultimately led to the WTO agreement on agriculture. Perhaps the same process could be applied to culture.

As discussed earlier, drafting a statement of universal cultural principles could be relatively simple. There are lots of examples in other multinational fora. The territory would be non-confrontational and the U.S. would be present. The OECD is an appropriate forum to achieve this and there are precedents to suggest that we could come out at the end of the day with a Common Statement of Principles of Understanding on Culture particularly if we have had an opportunity to engage the U.S. on a bilateral basis first.

Comment: The only negative implication is that the OECD represents the developed world. As noted earlier, in negotiating an instrument on cultural diversity, it would seem a contradiction in terms to exclude the developing world. This was one of the criticisms associated with the MAI. The OECD, which launched the MAI, did not represent the developing world, i.e it was considered as an agreement among rich nations.

Assuming that tier I is successful, the next step follows:

2) Working Within The WTO Framework, i.e. using existing rules to define the treatment of culture (as a second step following the signing of a common understanding or convention)

Scope already exists for support of cultural diversity once the specificity of culture is accepted. Government subsidies, for example, are permitted under international trade rules in a variety of circumstances such as research and development, environmental protection and regional development. A similar approach to cultural subsidies could be clarified and incorporated into the WTO Agreement on Subsidies and Countervailing Measures. Excise taxes can be used on a non-discriminatory basis to provide user-pay funding to cultural creators. This approach is already embodied in the Canadian Television Fund and could likely be applied to other cultural sectors. In the case of film screen quotas, the concept of reserving cultural 'shelf space' for domestic content is already embodied in article IV of GATT, but it needs to be further refined for application to other cultural sectors. The special economics of cultural industries also call for special rules of competition to be developed and internationally agreed upon.

Dennis Browne, "Canada's cultural trade quandary: How do we resolve the impasse?" *CTPL International Journal* (Summer 1999).

As noted earlier, existing rules within the WTO do provide guidance and possibility insofar as the treatment of cultural products. This would require a number of fleshed out legal opinions, but there is potential in two areas: 1) In the section on subsidies within the GATT, there is a possibility that we could define acceptable cultural subsidies. The treatment of cultural goods under the section on countervailing measures could be an important one for cultural products and would likely not pose a problem for the Americans provided that the domestic subsidy would not displace imports. 2) Content rules could be defined as is the case in Article IV on film quotas.

In certain circumstances, subsidies are acceptable to the U.S. and Canadian content quotas have survived. Content quotas may be eroded with technology, however, as noted earlier and content will be market driven. The other option, noted earlier, surrounds the potential for adoption by the WTO of a convention on culture as was the case with the *Berne Convention* and the Trade-Related Aspects of Intellectual Property (TRIPS) agreement.

The overriding trend we can note within the WTO is that there has been a tendency to find, in every measure, a GATT and a GATS argument so both disciplines can be engaged simultaneously. Examples are split-run magazines and, more recently, the auto pact. It would therefore be a useful exercise to determine whether we could fit cultural definitions within the rules of both GATT and GATS.

Comment: This suggested option of pursuit, inspired by Dennis Browne, is an insightful approach to the problem and could also be combined with another option in the search for a

solution to the impasse.

e) Two-tier approach (Y): 1) Canada-U.S. agreement on rules; 2) Canada-U.S. Model to serve as a precedent for agreement within the WTO framework

1) Canada-U.S. agreement on rules

Negotiating any instrument requires an advocacy strategy. The negotiating team has to identify clear objectives and desired results. Having the “influencers” on side is fundamental to the success of the exercise. The perspectives of all parties, but particularly the people who can make a difference, have to be taken into consideration. A bilateral agreement with the United States certainly has the potential to resolve some of the issues surrounding the culture and trade quandary. This bilateral solution is examined in option (c) above.

Assuming some success with a bilateral model, tier two follows:

2) Canada-U.S. Model to serve as precedent for agreement within the WTO framework

Whether the United States would be interested and willing to take the lead in developing a MAC using this as the benchmark is the next issue in this scenario. One might assume that if the U.S., being the biggest stakeholder, has the biggest to gain or to lose in the world context, the U.S. might wish to take the lead. The U.S. is very powerful in trade negotiations and obliged to respect rules-based trade in this context. The premise for this option follows:

- a) The U.S. position, rank and file figure prominently.
- b) The U.S. wants to maintain its position in the marketplace and there are uncertainties in the global environment surrounding the issues discussed and where cooperation with the rest of the

world is not assured, e.g. copyright and competition, ownership and investment issues.

- c) The U.S. would be seen taking the lead in recognizing cultural diversity and cultural principles in a world forum. Politically this would resonate for them.
- d) The U.S. stands a better chance at winning the support of other partner countries.
- e) As other countries, like Canada, look to the U.S. for investment and opportunity, they might be willing to cooperate in the right circumstances.

In assessing all the options, a hybrid might be the preferred course of action.

Conclusions and recommendation

The last of the recommended options is likeliest to succeed insofar as concluding a *global* agreement, assuming option (c) would come first. Option (e) assumes a rifle, rather than a shotgun, approach. Rather than attempting to engage all parties, including those with whom Canada has no particular problem in the area, it proposes the negotiation of a viable solution with the only party with whom Canada seems to have a problem surrounding cultural identity. It is a part of the reality which Canada faces in the cultural area that the cultural products of most other countries, whether by virtue of their distinctiveness from ours or their language, pose no threat of overwhelming the Canadian marketplace. American cultural products, on the other hand, as illustrated in the thesis, are not differentiated and have historically dominated the Canadian market.

In Minister Pettigrew's recent statement to Parliament on Canada's position on "culture" prior to

the WTO Seattle Ministerial Conference (November 30 - December 3, 1999), he stated that Canada would do two things: 1) seek recognition of the importance of preserving and promoting cultural diversity; and 2) pursue a new international instrument to set out clear ground rules that would enable all countries to maintain policies that promote their culture. What does the second point really mean? Is it simply a herald of more protectionist policies or can it reasonably be understood to open the door to Canada's pursuit of new methods of co-operation in the interests of preserving culture and cultural diversity?

The only way to achieve Minister Pettigrew's objective is by engaging in open discussion with the United States as the first step. It would, after all, be futile to negotiate a text which the Americans would not sign on to. How would this resolve the impasse? Even if it is agreed that it is not in Canada's interest, as has been suggested, to attempt to shield industry from international competition, it is futile, in the context of time and technology, to engage in dialogue with other countries unless together they can solve the Canada-U.S. culture and trade quandary.

Option (e) offers a potential solution. If the Canadian Government is able to engage the United States Government in bilateral negotiations with the objective of finding common ground (mutual interests to be satisfied in the global context), it will undoubtedly open up co-operation, creativity and room for development and growth in the global market ... an extension of what is going on and will continue to grow with or without rules. Canada and the U.S. both stand to benefit by developing useful standards and rules in areas of mutual concern.

Option (e) is based on the following premises:

- 1) Cultural industries are international and will increasingly be subject to trade disputes.
- 2) Trade disputes in the cultural sector are growing.
- 3) Canada's core cultural issue is the dominance of American product on Canadian shelves and its desire to reserve some *shelf space* for Canadian cultural product.
- 4) Canada needs to trade with the U.S. to survive. Canada needs rules-based trade with the U.S. Enhanced co-operation in a Canada-U.S. rules-based context might be the only way Canada can be assured of access to the global market including sufficient shelf space for Canadian product at home and on the international stage. Canada-U.S. co-operation is the vehicle - the opportunity.
- 5) A new international instrument or multilateral agreement on culture with countries other than the U.S. will not in and of itself achieve rules-based trade with the U.S.
- 6) The critical path offered in Option (e) is practical and potentially viable.

A chart follows which rates the options, noted above, using the success criteria discussed.

RATING THE OPTIONS FOR SUCCESS

	NII ON CULTURAL PRINCIPLES/ DIVERSITY (BIG MAC)	SECTORAL AGMT USING WTO FRAMEWRK	CDA-U.S. BILATERAL AGMT	TWO-TIER APPROACH (X): 1) OECD UNDER- STANDING 2) WTO RULES	TWO-TIER APPROACH (Y): 1) CDA-U.S. AGREEMNT ON RULES 2) CDA-U.S. MODEL AS PRECEDENT FOR AGMT/WTO
Timeframe	3	0	4	2	2
U.S. concurrence	2	1	4	3	4
WTO consistent	0	5	5	5	5
Balanced representation	5	5	0	2.5	5
Political will	2	2	3.5	3	3.5
SCORE	12	13	16.5	15.5	19.5

Framework for grading options (weighted on a scale of 1-5)

Timeframe within 24 months

U.S. concurrence

WTO consistent

Balanced representation

Political will