

The Culture of Protection and the Protection of Culture - A Canadian Perspective in 1998

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Introduction

For the past seventy years, Canada's cultural industries have been the object of official inquiries and private studies. The Aird Commission of 1929 examined Canada's radio broadcasting needs leading to the passage of the first Broadcasting Act in 1932, and the establishment of the publicly owned Canadian Broadcasting Corporation in 1936. A major inquiry, the Royal Commission on National Development in the Arts, Letters and Sciences reported in 1951, followed some years later by The Report of the Federal Cultural Policy Review Committee in 1982. In addition, there have been numerous federal and provincial inquiries into broadcasting, cable and satellite television services, book, newspaper and periodical publishing, film and sound recording production and distribution.¹

The outcome of these reports and other political influences has been an array of government policies aimed at promoting Canada's cultural industries through public ownership, restrictions on foreign ownership, tax and tariff measures, subsidies, copyright laws, Canadian content (Cancon) rules as well as policies regarding pornography, language, violence and hate. At the same time, Canada has made a series of commitments in international agreements affecting trade in cultural goods and services, investment, spectrum use, and intellectual property rights.

The domestic policies have been protectionist in the sense that they have sought to promote the production of Canadian material and its distribution through Canadian owned and controlled channels. Some have pursued these goals directly through government production or subsidies. Others have restricted the inflow of foreign material. Although Canadians have had access to a wide assortment of foreign books, magazines, newspapers, films, sound recordings and broadcast signals, the policies have either made this access more costly or limited it by imposing quotas or prohibitions. The overall rationale for the policies has been that without them Canadian voices would not be heard. Canadians would not be able to communicate to each other and that this would be detrimental to national unity and identity. The policy debate is littered with statements such as "...if Canada stops supporting its culture, it will be endangering its survival as an independent nation (Henighan, 1996 p.3)."

While exceptions exist,² the application of economic analysis to this area of policy has generally not been welcomed in political circles. The line of criticism which is acceptable in the official political discourse is that any deficiencies arise from inadequate funding of the current policies and from the adverse effect of American influences on the Canadian cultural industries. All political parties have been

¹ Canada (1929), Canada (1951), Canada (1982). A listing of other reports and studies can be found in Dorland, (1996).

² Professors Steven Globerman, Colin Hoskins and Stuart McFadyen have critically applied economic analysis to the policies.

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supportive of current policy. Only recently, have cracks in this political solidarity appeared and the public debate become more open. Muted dissent or at least a willingness to debate the thrust of policy has surfaced within the government. While the Department of Canadian Heritage and the Canadian Radio-television and Telecommunications Commission (CRTC) have not broken ranks, two federal Ministers of International Trade have questioned the desirability of the policies, the Hon. Arthur Eggleton in January 1997 and the Hon. Sergio Marchi in December 1997. Industry Canada has also shown a willingness to reexamine existing approaches.³

In this paper, we examine the factors which are bringing about the change in thinking on Canada's approach to supporting the cultural industries. In our view, there are three factors at work. First, technology is altering the way in which cultural content is produced and distributed. The advent of satellite broadcasting, the Internet (web TV and radio), videos and digital video discs (DVD), have increased the political and economic costs of a democratic government enforcing controls on what consumers watch or listen. Canadian content rules become increasingly ineffective if audiences can turn to unregulated sources of content.

Second, interesting stories, images and good music have always traveled well. The recent spate of technological developments in communication reinforce the importance of international markets by reducing the costs of existing international distribution systems and introducing new ones. This extension of the market for cultural products allows producers from small countries to support development and marketing budgets comparable to those available to their counterparts from large countries.

While the preference of a Canadian producer may be for a protected domestic and an open foreign market, this is not a viable strategy in international trade negotiations. The efforts of the Canadian government to maintain access abroad for Canadian cultural products while restricting access to foreigners at home is reflected in its widely publicized resolve to keep "culture off the table" in the Canada - United States Free Trade Agreement (CUSFTA), the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO) and now the Multilateral Agreement on Investment (MAI). In reality, the emerging commercial interests of segments of the Canadian cultural industries, particularly television and film production, are such that they would lose more from having their existing access to foreign markets restricted than from some relaxation of domestic protection. Canada has made significant but unpublicized commitments in the international agreements in particular

³ Minister Eggleton made his remarks in a speech at Osgoode hall Law School, York University, Toronto, January 27, 1997. Minister Marchi's remarks were published in the *Globe and Mail*, December 17, 1997. Bill Roberts, Secretary-General of the North American National Broadcasters Association, has noted the lack of a consistent policy approach by the Canadian government. His remarks appeared in conference materials for the Insight Conference, *Broadcast Summit on the New Specialty Channels*, September 26-27, 1996, Metro Toronto Convention Center.

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with respect to international trade in goods. The expectation was that much of the protection given to domestic producers and distributors could be maintained through continuing to control investment and service transactions. As a result of a series of disputes, which have either more precisely defined the current international regimes or, in the case of disputes settled outside these regimes, revealed the growing importance of the area in American and European diplomacy, this belief has been brought into question.

Third, questions are now being raised about whether the protectionist policies have delivered on their stated aims. Canadian cultural policy is based on the premise that the government can shape “new and better” Canadians by altering the menu of cultural products. In practice, that objective has been confounded with industrial policy goals. At each level, some gnawing doubts are emerging from Canadian experiences. There is general agreement about the importance of culture but there is doubt about whether cultures are better nurtured from the top or, in a higgledy-piggledy fashion, from below.⁴ After experiencing a half century of cultural industry policies designed, at least in part, to foster Canadian national culture and unity, Canada is arguably closer to separating than it has ever been. The actual policies have encouraged not a change in content menu but resulted in a substitution of Canadian production of “international” or “American” type content for foreign production. At the industrial level, there are also questions about the viability and creativity of industries hothoused into existence by subsidies. In the European Union (EU), for example, there is growing support for the view that the subsidy regime for film and television production has been responsible for the weakness of the film industries in member countries. Similar concerns are emerging in Canada.

In the remainder of the paper, we examine the interaction of these three factors in defining the changing international environment in which domestic cultural policies operate and indicate the way in which those domestic policies are being relaxed and revised in response.

Existing policies and international obligations

Under the CUSFTA, Article 2005(1) exempts the cultural industries from the obligations of the

⁴ Few would quarrel with the following description:

“Culture, however we define it, is central to everything we do and think. It is what we do and the reason why we do it, what we wish and why we imagine it, what we perceive and how we express it, how we live and in what manner we approach death. It is our environment and the patterns of our adaptation to it. It is the world we have created and are still creating; it is the way we see that world and the motives that urge us to change it. It is the way we know ourselves and each other; it is our web of personal relationships, it is the images and abstractions that allow us to live together in communities and nations. It is the element in which we live.” Bernard Ostry Address to CTPL Conference, Carleton University, October 9, 1997.
The connection between this objective and existing policies is less clear and open to debate.

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agreement, but makes certain commitments including the removal of tariffs on cultural products and the assurance that American owners forced to divest assets in Canada because of ownership restrictions in the cultural industries will receive fair market value for those assets. Article 2005(2) permits either country to “take measures of equivalent effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.” This ambiguous pair of articles was carried over into the NAFTA with respect to Canada’s obligations with the United States and Mexico. The last two countries took no such exemption in their relationship with each other. At the time the CUSFTA was signed there were differing interpretations of the circumstances under which retaliation could occur. Subsequent disputes have not resolved these differences because neither the United States nor Canada has chosen to use the NAFTA dispute resolution process for cultural trade disputes between the two countries.

In the WTO, member countries are able to exempt their cultural industries from the obligations of the agreement as long as they are considered to involve trade in services and fall under the General Agreement on Trade in Services (GATS) and not trade in goods subject to the General Agreement on Tariffs and Trade (GATT). Canada did not make any commitments for its cultural industries under the GATS and took a most-favored-nation (MFN) exemption for its film and television coproduction treaties.

The NAFTA and the WTO also have obligations regarding investment. The NAFTA exemption means that Canada has undertaken no commitments regarding the cultural industries but is committed to the WTO provisions of the Trade Related Investment Measures (TRIMs) as they may affect investment in the cultural industries. Currently, negotiations are taking place among 29 OECD countries for a MAI which would bind countries to non-discriminatory treatment for foreign investment requiring adherence to national treatment and MFN principles. As we discuss below, proposals have been put forward to exempt the cultural industries from the provisions of this agreement.

That Canada was to a significant degree not able to protect its protectionist policies from international response is apparent from a series of international disputes that have arisen.⁵ To illustrate the complicated dynamics of these interactions, we will draw brief lessons from the disputes.

One case concerned the removal by the CRTC of Country Music Television (CMT) from a list of American services ruled to be eligible for carriage by Canadian cable companies and its replacement by a new Canadian service providing a like country music service. As we have provided a detailed account of this dispute elsewhere, we emphasize here the background to this decision and the features that reflect evolving international and domestic policy (Acheson and Maule, 1997).

⁵ Some of the cases are discussed in greater detail in Acheson and Maule (1996a, 1997).

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With respect to the antecedents, we note that Canadians demand a sophisticated menu of television viewing options and use what is available elsewhere, particularly from the United States, as benchmarks from which to judge their options. This constraint on Canadian television policy, which again is seldom mentioned in the public debate, but is clearly understood by the policy makers, translates into allowing some access by American broadcasting services to Canadian cable companies. None of the political parties which are unanimous in decrying the corrupting influence of American programming and in creating “shelf space” for Canadian content, as well as subsidizing its production, advocates stemming the inflow of American television shows to the extent allowable under current international obligations.

When cable services were first developing in cities like Toronto, in which households could receive American television channels over-the-air, the decision to allow the cable companies to retransmit these American channels was a policy decision. The Canadian authorities could not legally prevent the over-the-air reception of Buffalo stations but it could prevent their retransmission on cable. Under indirect pressure from viewers and direct pressure from Canadian cable companies retransmission was allowed. The CRTC then were criticized by residents of cities like Calgary who could not receive American signals over the air and whose cable companies were not allowed to transport the signals to their headends. In response, the CRTC initiated its 3 + 1 policy which allowed all Canadian cable companies to carry and have transported to their headends NBC, CBS, ABC and the American public network, PBS.

Subsequently, specialized cable channels, which were not available over-the-air and were delivered to cable systems by satellite, developed and prospered in the United States and with an imitative lag, in Canada. In 1983, Canada licensed both a music-video and a sports specialty channel, but the breadth of Canadian offerings was narrow compared to the United States. The CRTC allowed the cable companies to add American cable channels to their basic and discretionary tiers to flesh out a package which could be marketed to subscribers. Control was exerted by limiting the cable companies from a list of approved American channels and requiring them to link the number of American offerings to the number of Canadian channels in a prescribed ratio. Since American channels cannot be licensed in Canada because of ownership restrictions, the CRTC implemented its policy by distinguishing between licensing, which is necessary for all Canadian broadcasters, and declaring a channel eligible for carriage on cable. CRTC policy towards the eligible American channels, usually articulated as *obiter dicta* in a decision directed at licensing Canadian services, evolved over time from requiring delisting of the American channel, if a like Canadian channel were licensed, to delisting only if requested by a newly licensed Canadian channel. CMT which had been delivered on Canadian cable companies for ten years was the first American service to be removed from the eligibility list because of the request of a Canadian clone.

After being delisted and finding no solace in the Canadian courts, CMT complained to the office of the United States Trade Representative (USTR) which mobilized American governmental resources in its

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support. The case was not channeled through the formal dispute resolution process of either the NAFTA or the WTO but through informal bilateral political channels, where as the larger trading partner the United States had more levers to obtain a favorable outcome. We speculate that the USTR's office did not want to test NAFTA, because of uncertainty about the circumstances under which retaliation is permitted. Nor did it want to try the resolution mechanism of the then new WTO, because the CMT case involved a service, the legal status of the plaintiff's rights in Canada were unclear, and there was limited benefit from setting a precedent for dealings with other countries.

This case illustrates that the exemption of culture from a trade agreement, when effective, does not mean that disputes do not occur, but rather that they are handled in a negotiating arena governed by informal rules in which the smaller country often tends to be in the weaker position. It also reveals that culture or any interdependent matter of value is always on the diplomatic table, and the meal on the bilateral table may be less appetizing than on the multilateral one.

Most cultural activities involve both trade in goods and services. Since the CMT case involved trade in a television signal, the goods component of the service was small or non-existent. The trade agreements were more likely to play a role in a dispute involving an activity in which a good was clearly involved in the delivery of content. A dispute involving Canadian policies toward foreign magazines had this characteristic and resulted in the USTR initiating a WTO complaint.

For over 40 years, Canada has developed an array of policies to assist domestic periodical publishers. Measures have focused on diverting advertising revenues to Canadian and away from foreign, primarily American, publishers. In the 1960s and 1970s, split-run Canadian editions of Time and Reader's Digest were the issue.⁶ In the 1990s, the dispute was reignited by the decision of Time's parent company, Time Warner to publish a split-run edition of Sports Illustrated with the common content delivered to Canada by satellite. To prevent this and to discourage others from expanding into Canada by this route, the original policies were reinforced with measures designed to cope with new technologies and international agreements. One element in this reformulation was a prohibitive 80 percent excise tax on advertising revenue in split-run or regional editions of magazines.⁷ The USTR

⁶ A split-run is an edition of a magazine which uses the same editorial content as another edition of the same magazine but includes different advertising content. Thus a magazine publisher can customize its publications for different regional markets. For a history of this dispute see Litvak and Maule (1974).

⁷ Bill C-103 amending the Excise Tax Act became law on December 15, 1995. Ironically Time was exempted from the tax. A "loophole" in Canada's investment constraints in the cultural industries was also closed as a result of the Sports Illustrated initiative. The "Related business guidelines" of the Investment Canada Act were changed to require permission for any investment by a foreign concern to publish a magazine in Canada regardless of whether or not it already published another magazine in Canada. Sports Illustrated was not exempted from the excise tax but was from the change in the investment guidelines.

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complaint maintained that a prohibitive tariff item which had been part of the earlier response to the Time/Reader's Digest dispute, the excise tax and a set of postal subsidies for Canadian magazines were inconsistent with Canada's WTO obligations.⁸

Canada argued that the excise tax on advertising was a tax on advertising services rather than a tax on goods (periodicals). Since it had made no commitments for cultural services under the GATS, it was viewed as an allowable tax. The United States contended that the excise tax affected the sale of a good and therefore Canada could not use the provisions of the GATS to exempt this measure. The dispute panel agreed that both a tradeable good and service were involved so that provisions of both the GATT and the GATS were applicable, but that one agreement did not take precedence over the other. Since trade in periodical goods was adversely affected by the tax on advertising services, the tax was contrary to Canada's obligations under the WTO (World Trade Organization 1997a, 1997b). The protection offered by the GATS for the protectionist cultural policies of WTO members appears to have been weakened by this decision.⁹

The decision also reveals that for trade in cultural goods the provisions of the GATT have applied since 1947. Published material such as newspapers, periodicals and books in hard copy formats are all goods. Films, television programs and sound recordings can be traded in tangible and intangible forms. Will they be considered as goods in one case and services in the other? If so, for the countries with protective policies, the most economical form may be bypassed in search of a form that lies outside the domain of the WTO rules. These boundary problems and the perverse incentives created by them are multiplying as different regimes cover interrelated areas of international commerce, as some sectors are carved out of the agreements altogether and still others receive special treatment. Another example affecting the cultural industries is the less than bright line dividing trade in services generated by intellectual property rights and investment in or exchanges in ownership of those rights. An analogy is

⁸ At the time the dispute occurred, the following policies were aimed at assisting Canadian periodicals:

- a tariff item which prevented the importation of copies of split-run editions into Canada,
- an 80 percent excise tax on advertising contained in split-run editions (this applied to Canadian-owned and foreign-owned split-runs),
- a postal subsidy arrangement which permitted lower postal rates for Canadian than foreign periodicals
- a provision of the Income Tax Act which disallowed for income tax purposes the deductibility of advertising expenditures placed in split-run editions of magazines.

All but the last measure was claimed by the United States to be in contravention of Canada's WTO obligations since they restricted the sale of foreign periodicals in Canada. This case illustrates a number of the emerging issues that will have to be addressed in the handling of culture in trade disputes and in future trade negotiations.

⁹ More generally, the issue is that where a policy measure is applied to a service but also affects a tradeable good will provisions of the GATT or GATS apply. Thus if a country places a special tax on restaurant meals using imported foods or a tax on the lease of foreign cars would this be handled as a measure affecting a good or a service.

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the impact on tenancy arrangements domestically if national tax and legal regimes treated a long-term lease of a building with an option to renew very differently than owning the building.

Another issue revealing the difficulties of dealing with the promise of new technologies within a protectionist framework is the Canadian response to the arrival of the new era of direct broadcasting satellites. Since the inception of service to American customers by DirecTv and USSB in 1994 and the launch of other American services, Canada has concentrated on clarifying its legal right to block the marketing of American direct-to-home (DTH) broadcasters in Canada. The weight of Canadian court opinion has shifted as cases were decided in different jurisdictions. It now appears that both the sale or ownership of equipment designed to receive an unauthorized encrypted broadcasting signal are illegal, although the legal dance may not yet be over. In the interim, the American small antenna services are estimated to have gained some 300,000 grey market Canadian subscribers. Measured against the 5.8 million estimated American subscribers to these services and taking account of the regulatory and legal environment in which this subscriber base was developed, this penetration is an impressive testimony to their popularity.¹⁰

After the legal tide turned in their favor, the Canadian parties pressing the civil cases have announced an intention to sue commercial subscribers such as taverns as well as the suppliers of equipment and services. They are unlikely to sue individual non-commercial grey market subscribers. Some level of grey market activity will persist with equipment bought in the United States.

More than two years after the launch of the American services, two licensed Canadian services-- ExpressVu, majority-owned and controlled by Bell Canada Enterprises and Star Choice--a vehicle of Shaw Communications Ltd., a large Canadian cable company have begun to deliver Canadian alternatives.¹¹ The Canadian services face a formidable marketing challenge, because they do not offer as diverse a set of viewing alternatives as their American counterparts and because of the overhang of the grey market subscribers. The latter is being addressed at considerable cost by offering grey market subscribers both "amnesty" and special deals when they turn in the hardware from a US service. The *Toronto Globe and Mail* (Dec 17, 1997, B7) recently reported:

¹⁰ Canada with a population of 30 million, of which about 22 million is English-speaking, is approximately one-tenth the size of the United States. This suggests limited opportunities for licensed Canadian services with about 1.3% of the English-speaking Canadian population already hooked up to grey market dishes compared with 2% of the United States population linked to licensed dishes.

¹¹ Shaw's interest in Star Choice will amount to between 49.3% and 60.9% of the voting shares, depending on the number of outstanding warrants and options that are exercised by other shareholders. Control resides with the service's board of directors, with Shaw having the ability to nominate 50% of its members. See CRTC Decision 97-677, Ottawa, 22 December 1997.

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When someone buys a \$599 ExpressVu dish and box, they get \$599 worth of free programming when they hand over the U.S. product. For ExpressVu's higher-end \$749 receiver, they get \$749 of free programming in exchange for the DirecTV or EchoStar dish."

The American DTH services have a larger channel capacity than the typical cable system. In competing with American cable systems, they have been surprisingly successful in marketing pay-per-view (ppv) movie and sports packages. The Canadian companies cannot match these services in the short run because they do not have the rights and in the long run unless they are allowed to show plenty of foreign content. The latter problem may be masked, as it has in the past, by defining a very wide array of sports activities as Canadian.

The Canadian market is substantially smaller than that of the United States and has the added characteristic of greater linguistic diversity. It is unlikely to support one, let alone two, Canadian DTH broadcasters handicapped by a protectionist regulatory policy. From an economic perspective, the technology of satellite broadcasting creates an imperative for continentally integrated delivery of diverse services. Working out such an arrangement requires a new conceptual framework. In its absence Canada may end up with a stubbornly large grey market and two economically marginal domestic services.

The absence of disputes involving newspapers illustrates inconsistencies that apply between media. Promotion of the use of Canadian content is undertaken via Cancon rules for television and radio. Similar policies do not apply to publishing. There are no requirements that Canadian libraries and bookstores carry a certain amount of Canadian content or that Canadian book, periodical and newspaper publishers carry a certain percentage of Canadian content even though these may be an important way in which Canadians talk to other Canadians. There are provisions in the income tax act that encourage Canadian advertisers to advertise in Canadian owned magazines. To the extent that these publications are more likely to carry Canadian content, whatever that is, then these policies may have some effects similar to Cancon rules for broadcasting.

What is noteworthy in newspaper publishing is that the non-advertising content is often made up of stories acquired from foreign wire services and foreign newspapers. The business section of the Globe and Mail contains a daily page from the Wall Street Journal as well as articles from Bloomberg Business service and financial news from foreign sources. At year end, the Globe's Report on Business produced a joint publication with the Economist (*The World in 1998*) carrying advertising aimed at the Canadian market. This publication uses a split-run format (it publishes in 12 languages and 80 countries) which is disallowed in the case of other foreign publications. The content policy towards the print media tends to deviate from the same policy applied to broadcasting. This inconsistency is seldom noted in discussions of cultural policy but is at odds with the view that Canadian content is necessary to promote unity and identity.

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Technology was an issue in the periodical case since Sports Illustrated transmitted its editorial content electronically to Canada in a manner that evaded the tariff provision which blocked the transmission of physical copies of publications into Canada. A more pervasive force is the operation of the Internet which provides a means of communication for any content that can be converted to an analogue or digital signal. Newspapers and periodicals are available for downloading from the Internet. Experiments are being undertaken with real audio and web TV as well as use of the net for telephone conversations. None of these services or use of the Internet coincides with national boundaries or the regulations that can be applied to entities within those boundaries. Consequently the protective walls of domestic policies are being invaded by the onslaught of technology as well as the frictions between domestic policies and international agreements which successive Canadian governments have entered into. These invasive forces are also evident in the way existing policies have been modified

Managed foreign entry, grandfathering and the bounded ability to regulate

A persistent aspect of Canadian cultural policy has been the unpublicized concession to viewer preference through granting selectively and partially access to foreign media (Acheson and Maule, 1996). Historically, this policy is reflected in granting the traditional American networks implicit tenure on the basic tier of Canadian cable when cable was being established in Canada. Later, the eligibility lists, discussed above, designated some American cable networks as fit for Canadian consumption. Those excluded were presumably not fit. A more ironical manifestation of the strategy of discriminatory treatment among foreign firms occurs in the magazine industry in which Reader's Digest has become the "Canadian" magazine with the largest national circulation. Grandfathering at the time of a policy change has a similar discriminating effect to arbitrarily deciding that some foreign concern is really Canadian. For example, the Hollywood studios were exempted from the effects of a 1988 Investment Canada directive denying foreign firms the right to distribute films in Canada unless they had proprietary rights to the film. This grandfathering was granted despite the fact that the new directive was implemented in response to investigations commissioned by the government, which were critical of those distribution companies.

From the perspective of Canadian policy makers, allowing selective entry has a strategic advantage in that it divides the foreign interests. By granting some foreign players entry and denying it to others, the chosen not only gain access but freedom from competition by the excluded firms in the Canadian market. The chosen firms are unlikely to join the excluded in rallying their home governments to pressure the Canadian government to change its policies. Through this policy, the Canadian government not only offers some relief to consumers but also gains lobbying allies in foreign capitals.

A downside of this strategy for the policy maker is the continued opposition of the excluded and the tension created among domestic players who face some increased competition from those allowed to

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provide the service in Canada. Another negative is the dissonance between the complex reality of cultural policies and the simple mantra of “creating a public space for Canadian voices to tell Canadian stories” through which those policies are justified to consumers and voters. A third problem is the difficulty of managing this intricate political process, particularly in a period of rapid technological and organizational change.

Our thesis is that the negatives are becoming a more important factor. The CRTC’s 3 + 1 broadcasting policy, for example, was originally formulated in response to the popularity of American stations received in border towns and cities in the late 1970s. By the 1990s, the Fox Network sprang from nowhere to challenge the incumbent trio of commercial networks. Fox has been particularly successful with younger American viewers. Adding to the pressure on the Canadian regulator to include Fox with the other three was the fact that Fox shoots segments of its popular show, the X-Files, in Vancouver and one of its stars lived for a time in the city. In 1994, the policy was changed to allow on the basic tier:

any three of the four conventional commercial U.S. network services in addition to the non-commercial PBS network service, and allowing the distribution, on either an encrypted or unencrypted discretionary tier, of a fourth conventional commercial U.S. network service, subject to the Commission's existing linkage rules in relation to the distribution of Canadian specialty and pay television services (CRTC Public Notice 1994-107).

Of the five networks, PBS is now the only one assured of being carried on the basic tier. It receives about two per cent of the viewership which is about one-sixth of the viewership of the Canadian English language public broadcaster, the CBC. The emerging contradictions of Canadian cultural policy are well illustrated by trying to disentangle the logic of a policy that has the following characteristics. It is designed, according to the Minister of Canadian Heritage, to counter U.S. “domination of the world culture community.”¹² A decline in both viewership and budgetary support of the Canadian public television network has mobilized a number of nationalist groups to rally to the defense of the CBC. The regulator which sympathizes publicly with the nationalist groups assures the American public network, presumably a close competitor of CBC, a position on the basic tier of every major Canadian cable system while delisting an American country and western channel so as to protect a new Canadian clone.

As an aftermath of the CMT dispute, the CRTC announced a change in its policy with respect to the status of American channels on its eligibility lists and declared that

...it will not be disposed to remove a non-Canadian service from the lists, even should it license, in

¹² This statement was attributed to the Minister of Heritage Canada, Sheila Copps, in a story appearing in the *Los Angeles Times*, March 30, 1997 D1, D12.

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the future, a Canadian service in a competitive format (CRTC Public Notice 1997-96, July 22, 1997).

The Commission has also significantly increased the number of American services on the eligibility lists.

In the print media, the “Baie Comeau” policy of 1985 which was intended to place the control of publishing in Canada in Canadian hands was amended in 1992 and now permits foreign ownership of Canadian book publishing and distribution in certain circumstances. The amendment came about after the Canadian government was unable to find Canadian investors for the Ginn Canadian Publishing Company which had become owned by the Paramount Corporation.¹³

B.C. Telephone and Quebec Telephone are two Canadian telephone service providers that are owned and controlled by an American firm, GTE, through a Canadian holding company. This arrangement, which is not in compliance with the foreign ownership regulations for telecommunication firms, is permitted as a result of a grandfathering arrangement. Recently, the government was asked to extend their exemption from foreign ownership restrictions to also cover their cable activities. It complied. As a result of technological convergence, the Canadian telephone companies are expected to be a significant source of competition to the cable franchisees and vice versa in the new, more open, Canadian regulatory structures for broadcasting and telecommunications, although to date little actual competition has materialized.

Since the decision to extend the exemption, Rogers Communications, which owns large cable systems in British Columbia, has filed a lawsuit challenging the federal Cabinet’s authority to exempt these companies. Without the companies receiving the cable exemption, the affected cable subscribers will not be able to buy cable services from their current local telephone company. With it, the cable companies serving these areas will face competition from a foreign-owned concern while its counterparts in other areas of Canada will only face competition from firms with more limited access to foreign capital. In either case, an inadvertent discrimination emerges which has its roots in the Canadian policy of preferential treatment among foreign suppliers.¹⁴

The grandfathering provisions for the Hollywood majors has generated a dispute from an unexpected direction. Polygram, a large well financed European firm has been expanding its international production

¹³ The circumstances surrounding this case are responsible for the wording in Article 2005(1) of the CUSFTA regarding receipt of fair market value for the forced divestiture of assets in Canada.

¹⁴ A further issue that is inherent in grandfathering arrangements is the pressure to make the grandfathering transferable. The *Globe and Mail*’s telecommunications reporter has recently noted:

BC Tel’s current owner, Stamford, Conn.-based GTE Corp., is courting the sale of its local phone companies and is widely rumored to be in talks with AT&T (Jan. 3, 1998 B1, B3).

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and distribution capabilities in a number of media. In film distribution, it has sought the same status within Canada as the Hollywood firms have. This request has been turned down and the European Union (EU) has lodged a formal complaint with the WTO on this matter. The irony is that the Canadian government has publicly declared that it is looking for allies in Europe to ensure the exemption of culture from future trade and investment negotiations as a defense against American cultural imperialism. The ultimate incidence of the grandfathering is difficult to assess. As multinationals today live up to their names, in many instances, it is difficult to associate them with particular countries. To the extent that one can do that with the grandfathered firms, the current policy benefits studios owned and controlled by a Japanese firm, Sony, an Australian firm, News Corp., a Canadian firm, Seagrams, and an American firm, Time Warner. Polygram may well wonder what cultural benefit is derived from keeping an Anglo-Dutch firm on the outside of this group.¹⁵

In the 1960s grandfathering arrangements were used to exempt Time and Reader's Digest from certain restrictive Canadian policies. Reader's Digest remains a beneficiary of these arrangements today. Time's original grandfathering was removed, but its status has also grown more secure, more "Canadian," over time as is evidenced by its being grandfathered in the excise tax legislation.

In book distribution, restrictions on foreign ownership have led to a policy that barred entry for Borders Books but permitted entry for Barnes and Noble into book retailing in Canada. The policy of determining when minority foreign investment constitutes control by the minority investor is responsible for the differential treatment of these two American firms, a policy that requires administrative discretion in making fine distinctions about when and how control is exercised.

A step towards abandoning discretionary and discriminating elements with respect to investment, as is illustrated in the foregoing examples, is to negotiate an international agreement based on the mutual exchange of non-discriminatory access. As the following section makes clear, including culture in such a framework will be a formidable challenge.

The Multilateral Agreement on Investment (MAI)

The twenty-nine member countries of the OECD are currently negotiating an international agreement on investment that will parallel in many ways the provisions of the WTO regarding trade in goods and services. Although at present there is only draft wording, the negotiations are scheduled to conclude in

¹⁵ A domestic dispute has arisen within Canada as the government of the province of Quebec is disallowing a Canadian firm, Alliance Communications Corp. from distributing films in the province because it does not have a major presence there. This means that a Canadian distributor is receiving less favorable treatment than the American major film distributors. See *Globe and Mail*, Jan.8, 1997, B1.

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the Spring of 1998. The principle provisions of the MAI are for non-discrimination through most-favored-nation and national treatment principles for international investment, and for measures to protect property in the event of expropriation and compensation. Similar to the GATS provisions of the WTO, and the NAFTA, the MAI will contain means for countries to reserve particular industries or activities from the obligations of the agreement. Protecting the cultural industries is one area that is of interest to the governments of Canada, France, Australia and other countries.¹⁶

At present, France has proposed the following wording:¹⁷

Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity.

The aim of this wording is to exempt culture from all the obligations of the agreement. As of January 1998, Canada supports the French approach but has indicated that if a general exemption is not achieved, it will take a country specific reservation for culture. In a legal sense the two approaches are the same. Politically they differ. An exemption would apply to all 29 countries. A country specific reservation would be identifiable to Canada as well as to those countries that listed a reservation for culture. In future rounds of negotiations, even if it was an unbound reservation, there could be some political pressure for Canada to change its position on culture in return for something Canada wanted.¹⁸ This would be less likely to occur if there was a general exemption for culture.

Other aspects of the French approach are of interest. Culture is defined in terms of “cultural and linguistic diversity.” This is seen by some to be a broad self-defining view of culture, but for others it is limiting because of its reference to cultural and linguistic diversity. Promoting the diversity of cultures might be more self-defining wording. We note these semantic issues since ultimately it becomes the

¹⁶ Details of the background to the MAI and the representations made by Canadian interest groups in hearings before a parliamentary committee can be found in “Canada and the Multilateral Agreement on Investment,” First Report of the Sub-Committee on International Trade, Trade Disputes and Investment, House of Commons, Ottawa, December 1997.

¹⁷ See OECD, Introduction of an Exception Clause for Cultural Industries in the MAI, DAF/MAI/RD(96)26, OLIS 25 April 1996.

¹⁸ There are likely to be two types of reservations permitted, *bound* and *unbound* reservations. A *bound* reservation is one where a country agrees to “standstill” such that it will not amend the measure in a way that is more restrictive but it can be made less restrictive. In future rounds of negotiations, *bound* reservations are likely to be the subject of “rollback” or amendments that make the measure less restrictive. An *unbound* reservation is one that a country makes no commitment either to “standstill” or “rollback.”

interpretation of words that will be important in resolving disputes.

Another definitional matter relates to investment. The proposed wording in the MAI is broader than that contained in the Investment Chapter (11) of NAFTA. Canada has argued that it wants to replicate the investment provisions of the NAFTA in the MAI. If the definition is broader in the MAI, the two agreements will differ in an important respect. Does this matter for culture? It may, especially with regards to the inclusion of intellectual property as investment in the MAI. If it is treated differently in the two agreements then for investment disputes between Canada and the United States a decision will have to be made as to which agreement takes precedence.

The treatment of intellectual property raises another issue. Commercial transactions involving films and television programs involve the financing of programs by way of equity investment and presale of distribution rights. The former is investment in intellectual property, while the latter involves a financial transaction for a tradeable service, the distribution rights. If there is a dispute over intellectual property it may be possible to deal with it under an investment agreement or a trade agreement providing the parties with the opportunity to forum shop. In general, as the number of agreements proliferate and the boundaries between them overlap, uncertainty is created for investors and governments.

A Canadian group representing music composers and publishers (SOCAN) has proposed alternative wording for defining culture in a MAI exception. The preamble is as follows:¹⁹

Cultural sovereignty means that a nation has the right to define and defend what it means by culture, which, broadly understood, encompasses the intellectual and creative side of civilization.

For Canadians, culture includes:

- the nurturing of creativity and artistic excellence
- the preservation of heritage
- the accessibility of all citizens to a nation's traditions, creative content and expressions of identity

A nation has the right to develop and implement public institutions and policy instruments at all levels of government in order to assure the continued creation, preservation, promotion and accessibility of culture to all its citizens.

¹⁹ The original wording submitted by SOCAN for a cultural exemption to the MAI was presented in SOCAN's brief to the Standing Committee studying the MAI on November 20, 1997. The revised wording was contained in a letter sent by Keith Kelly, National Director of the Canadian Conference of the Arts to Minister Marchi, dated December 12, 1997.

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The proposal then goes on to use the general approach of NAFTA to the definition of cultural industries with one important difference. The definition includes the words “communication by telecommunication” in connection with each cultural subsector. The purpose is, in the words of SOCAN, to make the definition technologically neutral. What it does is to permit transmissions over the Internet to be considered part of the cultural industries and therefore subject to both domestic broadcasting-type policies as well as a cultural exemption. In contrast, those providing Internet services, telecommunication, cable and computer companies are lobbying to prevent the Internet from being regulated under broadcasting regimes which would limit the material that could be carried due to content regulations. How culture becomes ultimately defined in the MAI is important for these activities regardless of whether a general exception or a country-specific reservation is negotiated.

Another aspect of the MAI relates to taxation which is carved out of the proposed agreement except as it relates to expropriation by taxation. This means that while a country will be able to offer subsidies providing they respect national treatment, no similar constraints are placed on tax incentives as they apply to investment. This provides a gaping loophole in the treaty, supported by departments of finance everywhere which do not appreciate interference in tax matters by other government departments.²⁰ In future rounds of negotiations on the MAI, some remedies could be introduced. If the present wording is sustained, countries will be free to assist the cultural industries through tax incentives that affect investments. We believe that the subsidy issue should be addressed in an international forum to focus on the legitimate role of subsidies for cultural purposes as compared to their mutually destructive use as beggar-thy-neighbor policies.

The American response to the French proposal has been to state its objection to a broad cultural exception from the obligations of the MAI, and its preference that countries propose specific exceptions if they wish to protect their cultural industries. Should this occur, some of the same uncertainties that have arisen from the treatment of culture in trade agreements will reappear in an investment agreement.²¹

The Image and the Reality

Industry lobbyists in support of Canada’s cultural policies have to date retained a united front in representations to government. They argued for a strong stance in the MAI negotiations to ensure that culture is exempted from the obligations of the agreement. For them failure to get the necessary

²⁰ Another omission from the MAI is consideration of antitrust issues.

²¹ See <http://www.state.gov/www/issues/economic/multilateral.html/>

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protection should be a deal breaker for Canada regardless of the benefits to other industry groups. In parallel hearings before the parliamentary Standing Committee on Canadian Heritage, the same interest groups have aggressively argued their case before a group of sympathetic Members of Parliament who have recorded their lack of interest in hearing from persons who might present alternative views on the appropriateness of Canadian policies.²²

The continuing strength of the cultural lobby, similar to that of farmers' support for agricultural protection is worthy of note. Both groups argue the uniqueness of their industries as justification for support as do other industries such as pharmaceuticals and petroleum. Unfortunately if each is unique, this trait loses its value in persuading governments to retain protectionist measures. As a character in T.S.Eliot's *Cocktail Party* remarked, "All cases are unique, and very similar to others."

Why then has culture been so successful in sustaining protectionist policies and can this position be maintained? Governments of all political stripes, democratically elected and other are always sensitive to the media and related cultural interest groups. This is because of the importance of ideas and opinions in the political process. Concern with the media is tied to the fact that, while producing another model of car or flavor of popcorn will not shatter a government's support at the polls, a new idea or criticism transmitted by the media can. Thus authors, playwrights, singers, film directors and publishers can act in a way that can be deeply disturbing to governments and affect their chances of reelection in a way that producers of automobiles and popcorn cannot. Governments react in a number of ways.

Censorship is a time-honored way of trying to prevent the spread of unwanted views, as the Chinese government is attempting to do today by controlling use of the Internet. Provision of government subsidies is another technique. If, by handing out money, the authorities can condition what is about to be produced there is less need to censor what has been produced.

In Canada, the political sensitivity of the cultural industries is reflected in the numerous official inquiries and policy instruments noted above, as well as in concern expressed over the control exercised by different levels of government on education, one of the most cultural of industries to which the cultural lobbyists pay little attention.

One stated rationale for Canadian policies is that Canadian programs should be made by Canadians for Canadian audiences as though there were stories that would be of interest only to Canadians. This condemns Canadian productions to the small linguistically divided domestic market and necessitates the

²² In Committee hearings on November 26, 1997, Members were asked if they wanted to hear from experts whose views are that "...Canada really doesn't need to protect its culture...and that we shouldn't be setting up obstacles to counter the globalization of trade....We should not be attempting to thwart this trend through cultural exemptions." No member expressed an interest in hearing such a viewpoint.

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provision of subsidies. We can think of few stories that are of interest only to Canadians and contend that it is counterproductive to encourage our creative talent to target such narrow markets. In late 1997, two Canadian films, *The Sweet Hereafter* and *The Hanging Garden* are drawing well in Canadian cinemas. Both feature stories set in Canada. Both have received international recognition and will sell well abroad. These films follow two obviously British films *The Full Monty* and *Bean* into the cinemas which are also experiencing impressive international box-office success.

Despite the strength of the cultural lobby, there are signs of change brought about not only by technology and the friction between domestic and international policies, but by the economic imperatives of these industries. Increasingly there are examples of Canadian firms that are successfully penetrating foreign markets, and of commercial producers recognizing that opportunities exist in the wider market. A comment by a Canadian producer is revealing in this regard. In planning the production of a TV mini-series on the history of the Hudson Bay Company based on a book by Canadian author Peter Newman, entertainment lawyer Michael Levine commented:

Now, we could take it and we could plant the entire story in Montreal and on Hudson's Bay and in Winnipeg, and we could tell it from a Canadian viewpoint in a way that I could guarantee that absolutely nobody would have bought it. But the Hudson's Bay story - that's a Canadian story ...that has universal appeal. The way to do it is to focus on the Orkneys and the Scots and the money men in London and the British Royal Family, so you see it is an international story (Globe and Mail, January 25, 1997, C1).

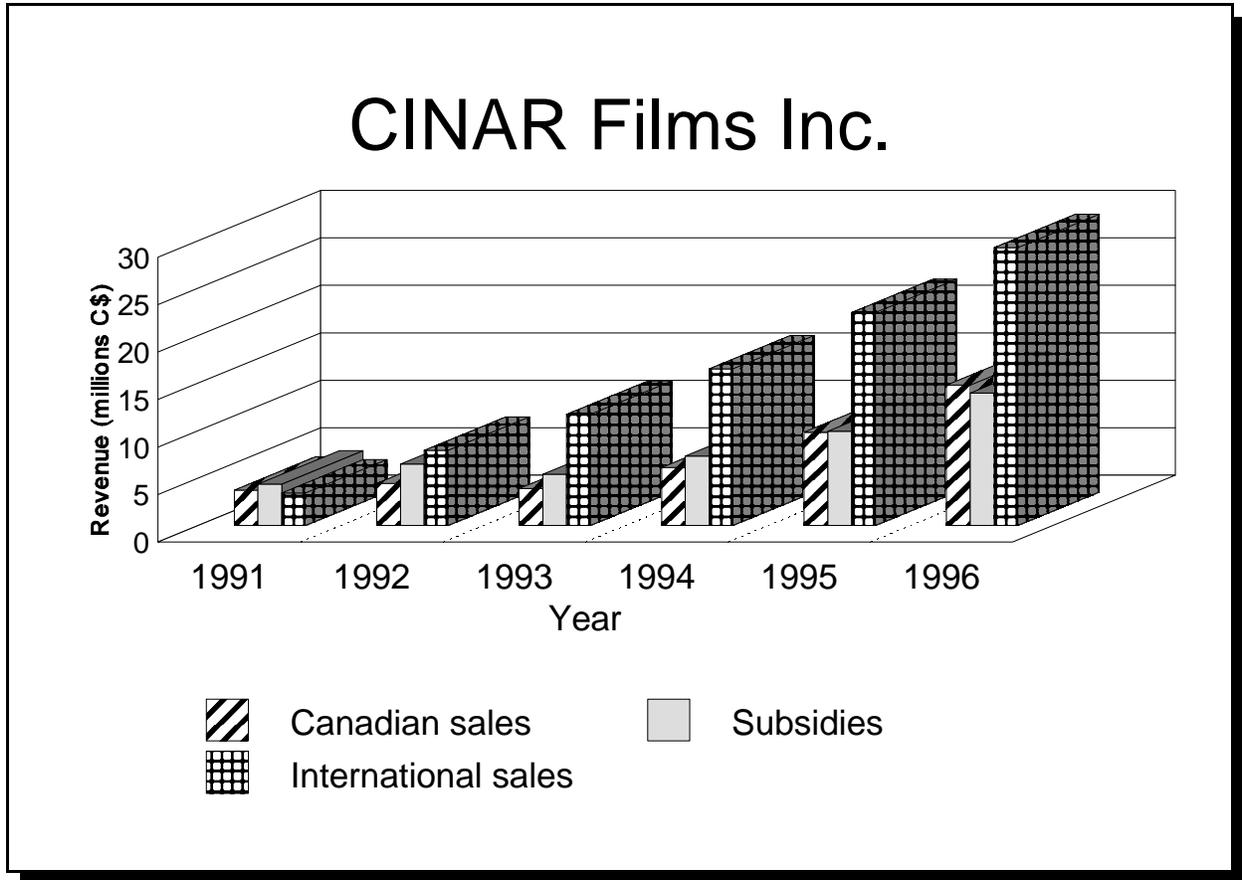
Evidence that an outward approach is the preferred strategy is found in the annual reports of Canadian production companies:

"...our goal to build a Canadian-based filmed entertainment company with a global platform."
(Alliance Annual Report, 1996, 2).

"Atlantis is significantly an export company. In 1995, approximately 86% of our program license fee came from outside Canada." (Atlantis Annual Report, 1995, 5).

The relative importance of revenues from international sales, sales in Canada and subsidies shown in Chart 1 is derived from the annual reports of Cinar for the period 1991 to 1996. By 1996, revenues from international sales were more important than those from Canadian sales and Canadian subsidies combined. If the choice is between retaining protectionist policies as represented by subsidies and access to international markets as represented by international sales, then for Cinar the choice is clearly for the latter.

Chart 1



Another aspect of the importance of foreign markets for the Canadian industry is the use made by foreign firms of Canadian locations for offshore shooting. The California Entertainment Industry Development Corporation (CEIDC) estimates that Canada has lured about US\$1 Billion of business from the United States, US\$507 million to Toronto and US\$537 million to British Columbia. This is small compared to the US\$20 billion brought in by Los Angeles but compares to New York \$2.2 billion, Florida \$414 million, North Carolina \$391 million and Chicago \$101 million.²³ By building a strong industry base in Canada, opportunities and financing will be created for products that have a more Canadian focus.

²³ The number of feature films made were Los Angeles 537; New York 201, Toronto 36 and B.C. 34. (*Globe and Mail*, December 23, 1997, p. A14,A15).

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Evidence that an imperfectly structured subsidy system for the support of cultural industries may actually be harmful to their development can be found in European experience. In 1960, annual cinema admissions of what is now the European Union was 3 billion compared to 1.2 billion in the United States. By 1995, the figures were 0.7 billion for Europe and 1.2 billion in the United States. Within Europe “American films have maintained a constant box office in Europe (\$2.5 billion in real terms) since 1960, while box office for European films in the same period has fallen from \$4 billion to \$0.5 billion (Dale, 1997, 173).” The subsidy system for financing films in Europe is widely attributed even by those in the industry with the declining commercial success of films made in Europe. Martin Dale notes:

The state now decides the cultural agenda of the nation and appoints the key commissioning editors whose editorial remits make it very difficult for them to make popular films.

At best, commissioners are excellent film professionals who do their best to make good films within the limits that have been placed on them. At worst, commissioning is the result of bribery and corruption and the films that are made are mediocre (Dale, 1997, 183).

Mike Figgis, a British director, commented more directly on the financing system in the U.K.:

It’s so inundated with class and snobbery and nepotism that all the talent that is waiting there to be used, waiting to be involved, waiting to be creative - and I have no doubt that it is there, it’s there in spades - is not welcome, is not brought in. No one’s really looking for new talent, real new talent, they just hop off to Cambridge or Oxford and find some bright young thing who might make a film or two because it’s a fairly interesting thing to do. It’s fucked up. It’s the problem of Britain [and it won’t change] until they can separate talent from class, which I have to say in America they can - they really do not give a toss unless you can make a film which a) will sell and b) will be interesting, and they’re often the same thing (Quoted in Dale, 1997, 117).

The European Commission set up an audiovisual Think-tank which reported in 1994 on the Audiovisual Policy in the European Union. It concluded that the financing system used in Europe had been in large part responsible for the commercial failure of European product. Amongst others, it noted a study by Hans Gerd Prodehl on film-making policy in Germany. Prodehl’s study of the woes of the German cinema is “a merciless analysis of the atomization of aid systems in his country through the policies of the Lander and the catastrophic results on the situation of the film industry in Germany (European Communities, 1994, 22).”

In Europe there is now recognition that government directed financing of films and television programs tends to produce a type of product that does not have the commercial appeal of American productions.

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Canadian policy is still based on the view that subsidies and protection are necessary to promote the industry in Canada even though this has not worked to date in that the industry still clamors for subsidies and the preservation of measures like Canadian content rules for television and the banning of split-run editions of magazines. The lessons from the European experience are not that subsidies should not be used but that, if their rationale is cultural, careful thought be put into their design. Otherwise the cultural argument depreciates in value and becomes a Trojan horse for an industrial policy which would not receive approval in any other sector.

Conclusion

Our take on Canada's cultural policies is that there remains strong political and industry support for the existing policies, but that there are signs of change brought about by altered economic imperatives for at least some sectors of the cultural industries and a growing reluctance of other countries to permit access without reciprocity.

Attempts to insulate the cultural industries from the liberalizing commitments accepted in other industries have not succeeded. The United States has successfully pursued its cultural interests in disputes with Canada within existing international agreements and through informal bilateral channels. The Canadian policy of selective and discriminatory granting of access creates disparities of treatment among American interests and between those American companies, which have received access, and similar companies from other countries. These disparities are a breeding ground for trade disputes. Similar challenges will arise if a MAI is negotiated and culture is exempted from the obligations of the agreement.

Although the new technologies have broadened the market for the content of all the cultural industries, some sectors have been affected more than others. As a result, the calculus of whether the sector will gain more from a policy of openness or protection varies across sectors. In an earlier period of development, all of the sectors were probably net beneficiaries of protection. We predict that the unanimous support for protection will disappear if a hard choice is faced between reducing protection at home and maintaining access to foreign markets.

The domestic and international success of Canadians such as recording artists Celine Dion, Alanis Morissette, and Bryan Adams, directors Atom Egoyan, James Cameron and Norman Jewison, authors Margaret Atwood, Mavis Gallant, Mordechai Richler and Timothy Findlay and programs such as *Due South* and *DeGrassi High* are a testimony to the emerging Canadian professional, technical and business creativity in the cultural industries. In less high profile but equally important fields are composers such as Howard Shore whose work includes the musical scores for *Philadelphia* and eight Cronenberg films. Similar international successes are increasingly common, albeit less visible, in niche music, television and

film markets.

Songs and stories that are popular in Canada travel well to other countries - Anne of Green Gables is a continuing hit with Japanese audiences. The spinners of television stories and makers of films are also traveling to Canada. The depth of professional and technical talent, the sophistication of film and television production and post-production facilities and the favorable exchange rate are attracting many foreign productions to locate in Toronto, Montreal and Vancouver.

In every area of the Canadian cultural industries, there are not only creative personnel but new and innovative organizations. To sustain that success a similar creativity needs to be exercised with respect to designing domestic cultural policies and international arrangements appropriate to a small country.

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