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# Canada and International Trade in Culture: Beyond National Interests

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## INTRODUCTION

The United States and Canada trade with each other more than any two other countries on earth.<sup>1</sup> Part of this trade involves cultural products, an important export industry for the United States.<sup>2</sup> Unlike the United States, Canada is primarily an importer of cultural products. Seventy-five percent of Canadian cultural products are imported, and the vast majority comes from the United States.<sup>3</sup> Foreign products in Canada account for 45% of book sales, 81% of English language magazines on newsstands, 85% of film distribution revenue, and 94 to 97% of theater screen time.<sup>4</sup> This market dominance by the United States troubles Canadians, who feel that their national culture

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1. Canada Border Services Agency, *Canada-U.S. Trade Statistics*, at <http://www.cbsa-asfc.gc.ca/newsroom/factsheets/2002/sep/stats-e.html> (Sept. 2002). "Canada is the largest trading partner of the United States, with US\$411 billion in two-way merchandise trade in 2000, representing over US\$1.1 billion/day. US\$179 billion in merchandise was imported into Canada from the United States during that year. Six ports-of-entry process 70% of all U.S.-Canada trade." *Id.*

2. Michael Braun & Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?*, 22 *DENV. J. INT'L L. & POL'Y* 155, 157-58 (1993); see Andrew M. Carlson, Note, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 *MINN. J. GLOBAL TRADE* 585, 585 (1997). "While imported films accounted for only 2% of the domestic box office take in 1990, U.S. films accounted for at least four of the top five films in 13 European countries and six Latin American countries, plus Japan, Australia, and South Africa." Gene Koretz, *Services Are the Engine Pulling the Trade Express . . . And a Boffo U.S. Box Office Abroad Rakes in Billions*, *BUS. WEEK*, Sept. 21, 1992, at 22.

3. Braun & Parker, *supra* note 2, at 159.

4. Krista Boryskavich & Aaron Bowler, *Hollywood North: Tax Incentives and the Film Industry in Canada*, 2 *ASPER REV. INT'L BUS. & TRADE L.* 25, 27 (2002).

is being eroded.<sup>5</sup> Canadians consider their culture to be particularly susceptible to U.S. influence, due to similarities with the United States in language and heritage, as well as geographic proximity.<sup>6</sup> In response to this situation, Canada has adopted various measures meant to protect its national culture.<sup>7</sup> It has also negotiated cultural exemptions in the two major trade agreements covering North America.<sup>8</sup>

The Canadian-U.S. tension over cultural products is part of a wider controversy involving international trade and culture.<sup>9</sup> Difficulties have arisen in recent trade talks because of a widespread unwillingness to entrust cultural preservation and development to the international trading regime, and many countries have expressed the same desire as Canada to carve out an exemption that will protect their distinct national heritage and voice.<sup>10</sup>

This Note suggests that culture should be kept separate from the standard international trading rules. The paradigmatic ideas of competition and comparative advantage that underlie the liberalization of the world market in goods and services do not apply to the different structure and incentives of the cultural "market." Moreover, the national interest paradigm espoused by those looking to preserve culture may also be ill-suited to the particularities of cultural production. Cultural production is often unrelated to national concerns or identity, so a preservation movement focusing on national identity will necessarily ignore or distort large portions of that which it seeks to protect. Nonetheless, the format of international trade negotiations and obligations, including the legal structure of the World Trade Organization (WTO), recognizes only these national con-

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5. See Braun & Parker, *supra* note 2, at 162-64.

6. *Id.*

7. See discussion *infra* Part I.A.

8. See discussion *infra* Part I.C.

9. See generally Braun & Parker, *supra* note 2; Bryan Schwartz, *Canadian Cultural Policy in a World Context*, 2 ASPER REV. INT'L BUS. & TRADE L. 1 (2002); William Echikson, *Europe's Film Industry Could Use a Dose of Realism*, BUS. WEEK INT'L EDITION, Mar. 9, 1998, at 17, available at 1998 WL 8131079; Jeffrey E. Garten, *'Cultural Imperialism' Is No Joke*, BUS. WEEK, Nov. 30, 1998, at 26; Paul Magnusson, *What a GATT Deal Won't Do*, BUS. WEEK, Dec. 20, 1993, at 38; Joan Oleck, *A Tantrum over Kidvid*, BUS. WEEK, Dec. 11, 2000, at 16; Blanca Riemer et al., *Europe May Slap a Quota on General Hospital*, BUS. WEEK, Mar. 27, 1989, at 46; *France, Take Down the Barricades*, BUS. WEEK INT'L EDITION, June 26, 2000, at 100, available at 2000 WL 7827405.

10. See Braun & Parker, *supra* note 2, at 167-75, 177-78; Garten, *supra* note 9; David Dodwell, *U.S. Filmmakers Focus on Uruguay Round: The Audio-Visual Trade Tussle Has Come to a Head in Geneva*, FIN. TIMES (London), Jan. 7, 1993, at 4.

cerns. Therefore, national desire for cultural preservation will have to serve as a second-best method for preserving commercially vulnerable cultural productions in the face of increasing international trade pressures.

Part I of this Note presents the history of Canadian preservation measures, with reference to the U.S. response. Part II discusses the differences between the basic economic theories of trade and the nature of cultural production and trade. In addition, it presents the "national identity" argument for cultural preservation, suggesting some shortcomings of this view. This Note concludes by suggesting that the national interest in cultural preservation, in spite of its shortcomings, can and should provide the basis for recognizing the need for cultural protection in a world of increased trade liberalization.

## I. THE HISTORY OF TRADE IN CULTURAL COMMODITIES BETWEEN CANADA AND THE UNITED STATES

### A. CANADIAN CULTURAL PROTECTIONS

Concerns about Canadian cultural dissolution and assimilation into U.S. culture are not new. As early as the 1920s, the United States had established dominance in the English-language magazine market, and Canadians objected to this state of affairs.<sup>11</sup> In the post-World War II period, the Massey Report<sup>12</sup> detailed the Canadian view of the danger to its culture, and provided justification for an array of subsidies for Canadian cultural industries.<sup>13</sup> These subsidies were meant to counteract the impact of "the enormous sums spent on the arts by wealthy U.S. business interests."<sup>14</sup>

With the advent and explosion of television broadcasting in

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11. Richard L. Matheny, III, *In the Wake of the Flood: "Like Products" and Cultural Products after the World Trade Organization's Decision in Canada: Certain Measures Concerning Periodicals*, 147 U. PA. L. REV. 245, 254-55 (1998).

12. REPORT OF THE ROYAL COMMISSION ON NATIONAL DEVELOPMENT IN THE ARTS, LETTERS AND SCIENCES (1949-1951) (Can.) [hereinafter the Massey Report]. The Massey Report grew out of concerns about the increasing Americanization of English Canada, and called for increased government intervention in limiting this phenomenon. See Claude Be'langer, *Readings in Quebec History: Massey Report*, at <http://www2.marianopolis.edu/quebechistory/readings/massey.htm> (1998). The Massey Report was released in 1949, and advocated the creation of a Canadian Council for the Arts. See Carlson, *supra* note 2, at 587.

13. Matheny, *supra* note 11, at 255.

14. *Id.*

the 1950s and 1960s, these concerns became even more urgent for Canadians.<sup>15</sup> Reacting to the growth of U.S. media imports, Canada passed the Broadcasting Act of 1968.<sup>16</sup> The Act created a federal agency, the Canadian Radio Television and Telecommunications Commission (CRTC), which today issues broadcast licenses and oversees Canada's centralized communications network, the Canadian Broadcasting Corporation (CBC).<sup>17</sup> The CRTC also implements the measures meant to preserve the viability of the Canadian television industry, including national content requirements.<sup>18</sup>

These measures have provoked negative reactions from the United States, including public statements that the measures are economic protectionism masquerading as cultural preservation.<sup>19</sup> Perhaps the most contentious dispute in regard to these policies involved the CRTC's choice not to include Country Music Television (CMT), a U.S. channel on Canadian cable, instead choosing New Country Network (NCN), a Canadian country music channel.<sup>20</sup> CMT had been broadcasting in Canada for some time, but this decision meant that it was required to stop completely.<sup>21</sup> CMT was allowed to appeal the decision, but the court said that it had been on notice that its Canadian operation could end if a Canadian entity was directly competitive with it.<sup>22</sup> After losing the appeal, CMT complained to the U.S. Trade Representative and boycotted Canadian country musicians in its

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15. See Carlson, *supra* note 2, at 587-88.

16. *Id.* at 586-88. As of 1992, 80% of the Canadian population lived less than 100 kilometers from the United States border, easily within reach of U.S. television and radio. John Herd Thompson, *Canada's Quest for Cultural Sovereignty: Protection, Promotion, and Popular Culture, in NORTH AMERICA WITHOUT BORDERS? INTEGRATING CANADA, THE UNITED STATES, AND MEXICO* 271 (Stephen J. Randall ed., 1992).

17. *Id.*

18. Broadcasting Act, R.S.C., ch. 11 (1991) (Can.). Currently, these measures require 60% Canadian content for television programs broadcast from 6 a.m. to midnight, and the 6 p.m. to midnight segment must be at least 50% Canadian. Schwartz, *supra* note 9, at 10. Restrictions on radio programming require 35% Canadian songs, a minimum percentage that has been continually increased over the years. Joseph Weber, *Does Canadian Culture Need This Much Protection?*, BUS. WEEK, June 8, 1998, at 37.

19. See Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203, 207 (1998). Mickey Kantor, while serving as U.S. Trade Representative, suggested that Canadian cultural concerns were an "excuse to protect the financial and economic viability of the Canadian industry." *Id.*

20. See Carlson, *supra* note 2, at 592-95.

21. *Id.* at 593-94.

22. *Id.* at 594-95.

broadcasts.<sup>23</sup> The U.S. Trade Representative complained to Canada about the situation, and there were threats of retaliation that some believed could lead to an all-out trade war.<sup>24</sup> However, CMT and NCN agreed to a joint venture, with CMT owning 20% of the channel, the maximum under Canadian law at that time.<sup>25</sup> The agreement also called for CMT to eventually control 33% of the channel, provided that the Canadian government increased the foreign ownership allowance, which it later did.<sup>26</sup>

Canada also imposes other restrictions on the importation of cultural products. One of these is a restriction on foreign ownership of cultural industries.<sup>27</sup> The Investment Canada Act has covered foreign cultural investment since 1985.<sup>28</sup> Investments in cultural industries of five million Canadian dollars or more are scrutinized and will be turned down if they do not benefit Canada.<sup>29</sup> This restriction has led to some high profile disputes. For example, the U.S. bookseller Borders, Inc. was not allowed to open a superstore in Toronto.<sup>30</sup> Although there was some concern about the type of books that would be chosen for such a store, the main issue was that Canadian booksellers could not match the economies of scale of such a large retailer, and would be edged out of the market.<sup>31</sup>

Canada's restrictions are not used solely against the United States. In March 1997, Canada used its investment restrictions to prevent a European firm from distributing foreign films in Canada.<sup>32</sup> The Europeans objected, pointing out that U.S. firms had been distributing films on a much larger scale due to grand-

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23. *Id.* at 595. It defined "Canadian" as any artist who did not have an U.S. recording contract, so CMT could continue to play videos of already popular Canadian musicians. *Id.*

24. *Id.* at 595-96.

25. *Id.* at 596.

26. See Carlson, *supra* note 2, at 596-97.

27. Goodenough, *supra* note 19, at 214-16.

28. Investment Canada Act, R.S.C., ch. 28 (1985), amended by ch. 56, 1988 S.C. 2094, ch. 35, 1993 S.C. 1, ch. 44, 1993 S.C. 130 (Can.). This regulatory regime represents a liberalization from the previous restrictions. Hale E. Hedley, Note, *Canadian Cultural Policy and the NAFTA: Problems Facing the U.S. Copyright Industries*, 28 GEO. WASH. J. INT'L L. & ECON. 655, 662 (1995); see also Goodenough, *supra* note 19, at 214.

29. Goodenough, *supra* note 19, at 214-15; see Hedley, *supra* note 28, at 661-65.

30. Goodenough, *supra* note 19, at 215.

31. *Id.*

32. *Id.* at 215-16 (describing the situation in detail).

father clauses in trade agreements.<sup>33</sup> Unpersuaded, Canada did not lift the restriction.<sup>34</sup>

## B. INTERNATIONAL AGREEMENTS AND CANADIAN CULTURAL MEASURES

Wishing to liberalize the huge volume of trade between Canada and the United States, the two countries signed the Canada-United States Free Trade Agreement (FTA) in 1988.<sup>35</sup> One of the most notable features of this agreement was an exemption for Canadian cultural industries.<sup>36</sup> This exemption covered:

[A]n enterprise engaged in any of the following activities:

- a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,
- b) the production, distribution, sale or exhibition of film or video recordings,
- c) the publication, distribution or sale of audio or video music recordings,
- d) the publication, distribution or sale of music in print or machine readable form, or
- e) radio communication in which transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.<sup>37</sup>

Canada's freedom to protect its cultural industries, however, was not as clear as this language seems to suggest. In exchange for this concession, the United States was given a right of retaliation under Article 2005(2) of the FTA.<sup>38</sup> Retaliation is not limited to cultural products, which would be of limited use since the United States imports few such products compared to

33. *Id.*

34. *Id.*

35. Free Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 [hereinafter FTA].

36. *Id.* art. 2005; see Braun & Parker, *supra* note 2, at 157-60; Goodenough, *supra* note 19, at 216-17.

37. Canada-United States Free Trade Agreement Implementation Act, R.S.C. ch. 65, Part VII, art. 2012 (1988) (Can.), 1988 S.C. 1999.

38. FTA, *supra* note 35, art. 2005(2); see Schwartz, *supra* note 9, at 1-2.

its large exports to Canada.<sup>39</sup> Instead, if Canada discriminates against U.S. cultural industries, the United States may retaliate with "measures of equivalent commercial effect."<sup>40</sup> Though this retaliation provision has never been used, the threat of its use was significant in the CMT dispute.<sup>41</sup> Despite the possibility of retaliation, the Canadian government has used the FTA cultural exemption to continue to protect its native cultural industries, largely with impunity.<sup>42</sup>

On Canada's insistence, the North American Free Trade Agreement (NAFTA), between Canada, the United States, and Mexico, incorporated Canada's cultural exemption.<sup>43</sup> It also incorporated the retaliation provision.<sup>44</sup> Although there was little or no threat of an inundation of Canada with Mexican culture, and hence the NAFTA exemption has had little practical effect, inclusion of the exemption in one of the most important regional trade agreements has lent credibility and momentum to the argument for a similar exemption in the General Agreement on Tariffs and Trade (GATT).<sup>45</sup>

The status of cultural industries and products under the WTO is much more complex. Aside from an exemption for films under Article IV,<sup>46</sup> GATT does not mention cultural industries.<sup>47</sup> France and other countries have taken the position that cultural industries are services, not goods, and therefore not covered by GATT.<sup>48</sup> A working party studied this question in 1961, but left it unresolved.<sup>49</sup> After much negotiation, it was decided that the new General Agreement on Trade in Services (GATS)<sup>50</sup> would not liberalize trade in radio and broadcast/cable television pro-

39. Canada imports 75% of its cultural products, most of those from the United States. Braun & Parker, *supra* note 2, at 159.

40. FTA, *supra* note 35, at art. 2005(2); *see also* Braun & Parker, *supra* note 2, at 159.

41. *See* Carlson, *supra* note 2, at 595-96; *supra* notes 20-26 and accompanying text.

42. *See generally* Schwartz, *supra* note 9.

43. North American Free Trade Agreement, Dec. 17, 1992, art. 2106, Annex 2106, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; *see also* Braun & Parker, *supra* note 2, at 166-67.

44. NAFTA, *supra* note 43, at art. 2106, Annex 2106.

45. Braun & Parker, *supra* note 2, at 166-67.

46. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. IV, 61 Stat. A3, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

47. Culture is not listed as one of the exceptions under Article XX. *Id.*

48. Braun & Parker, *supra* note 2, at 179; Goodenough, *supra* note 19, at 218.

49. Goodenough, *supra* note 19, at 218.

50. General Agreement on Trade in Services, Annex on Telecommunications, § 2(b), Oct. 30, 1947, 61 Stat. 43 (1947).



duction.<sup>51</sup>

The question of coverage by the WTO is very important for the United States and Europe. The United States runs a trade deficit with Europe in many economic sectors, but in entertainment industries it has a surplus of eight billion U.S. dollars.<sup>52</sup> Although the U.S. entertainment presence in European markets has not reached the saturation level found in Canada, concern for the situation has led to various protective measures.<sup>53</sup> The most important of these is the European Union's "Television without Frontiers" directive, which was adopted in 1989, shortly after Canada was granted the cultural exemption in the FTA.<sup>54</sup> The directive requires that 50.1% of member-state television programming be of European Union origin.<sup>55</sup> Although there is still a possibility of enforcement against this kind of measure through the WTO's dispute settlement process, such an eventuality is unlikely given the long history of non-enforcement and the inevitable uproar that would result.<sup>56</sup>

However, the WTO Dispute Settlement Body has made an important decision in this area, and has come down squarely in favor of free trade over national cultural interests.<sup>57</sup> In *Canada—Certain Measures Concerning Periodicals*, first a WTO panel and then its appellate body found Canadian protective measures for its magazine industry inconsistent with its obligations under GATT.<sup>58</sup> The measures at issue were meant to protect the domestic magazine industry, which at the time controlled only 18.6% of Canada's English-language market.<sup>59</sup> The rules restricted the importation of split-run periodicals, which are magazines that have the same editorial content as the U.S.

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51. Lisa L. Garret, *Commerce versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C. J. INT'L L. & COM. REG. 553 (1994). This decision allowed foreign content restrictions and other cultural protective measures to remain in place. *Id.* at 554.

52. Braun & Parker, *supra* note 2, at 168.

53. *Id.* at 169–70.

54. *Id.*

55. *Id.* at 169. The quota does not include news, sports, game shows or advertising. *Id.*

56. See Goodenough, *supra* note 19, at 218–19.

57. WTO Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, June 30, 1997, WT/DS31/AB/R, 1997 WL 398913 [hereinafter *Periodicals AB Report*]; WTO Report of the Panel, *Canada—Certain Measures Concerning Periodicals*, March 14, 1997, WT/DS31/R, 1997 WL 371097 [hereinafter *Periodicals Panel Report*].

58. *Periodicals AB Report* § VIII; *Periodicals Panel Report* paras. 5.29, 5.39, 6.1.

59. Matheny, *supra* note 11, at 247.

editions, but contain Canadian advertising.<sup>60</sup> The Canadian Magazine Publishers Association claimed that allowing foreign advertisers to infiltrate the Canadian advertising market could have a devastating impact on the Canadian magazine industry.<sup>61</sup> Tariff Code 9958 created a barrier to foreign split-run editions, but Time Warner found a way around the border restriction by sending the editorial content of *Sports Illustrated* into Canada via satellite and then combining it with the Canadian advertising.<sup>62</sup> In response, the Canadian government passed Bill C-103, which attempted to close this loophole by imposing an 80% tax on Canadian advertising in publications with foreign content.<sup>63</sup> The United States then complained to the WTO, and eventually the panel and the appellate body decided against Canada.<sup>64</sup> Although the decision dealt a blow to the assumption that GATT would not be used to enforce free trade in cultural industries, there has been no rush to establish panels questioning broadcast quotas and other cultural measures.<sup>65</sup> This may be because magazines are a more tangible product than broadcasts, so the appellate body had no problem classifying them as goods rather than services.<sup>66</sup> Also, given the importance of these cultural issues to many countries, there may be political

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60. Customs Tariff, R.S.C., ch. 41 (3d Supp.), § 114, sched. VII, item 9958 (1996) (Can.) [hereinafter Tariff Code 9958]; Act to Amend the Excise Tax Act and the Income Tax Act, ch. 46, 1995 S.C. (Can.) [hereinafter Bill C-103]; Matheny, *supra* note 11, at 255–56.

61. Matheny, *supra* note 11, at 256–57. The Canadian Magazine Publishers Association points out that the U.S. magazines, such as *Sports Illustrated*, have already recovered production costs in the United States, which means that producing an edition in Canada costs almost nothing. *Id.* This is a huge competitive advantage. *Id.* Robert Lewis, editor-in-chief of the Canadian magazine, *Maclean's*, suggests that such competition will force Canadian publications to spend less money on generating Canadian-specific content. *Id.* at 257.

62. *Id.* at 259.

63. Bill C-103, *supra* note 59; Matheny, *supra* note 11, at 259.

64. Periodicals AB Report § VIII; Periodicals Panel Report paras. 5.29, 5.39, 6.1. Indirect postal subsidies, which were also part of the legislative scheme, were struck down as well. *Id.*; Canada Post Corporation Act, R.S.C., ch. C-10, § 5 (1985) (Can.). The appellate body decided against Canada on all three issues considered. Periodicals AB Report §VIII. First, the measures were viewed as a quantitative restriction that violated GATT Article III. Matheny, *supra* note 11, at 260. Second, the postal subsidies were also found to violate Article III because of their indirectness and non-transparency. Goodenough, *supra* note 19, at 221. Finally, the measures were also found to be in violation of Article III:2, since the products in question were “directly competitive or substitutable.” Matheny, *supra* note 11, at 262.

65. Goodenough, *supra* note 19, at 219. However, for a discussion of the threat of further challenges to other cultural industries, see Matheny, *supra* note 11, at 267–68.

66. Periodicals AB Report § IV; see Goodenough, *supra* note 19, at 219–20.

considerations at work in the choice to avoid disputes. The Canadian response to the decision has been to shift its support for its magazine industry to a domestic subsidy format, thus avoiding censure under GATT.<sup>67</sup>

### C. RECENT DEVELOPMENTS IN CULTURAL TRADE BETWEEN CANADA AND THE UNITED STATES

Important changes have occurred in the past few years in the relationship in cultural trade between Canada and the United States.<sup>68</sup> One of the most striking and important changes has been the rapid expansion of Canada's film and video production industry.<sup>69</sup> As two commentators have explained, "Vancouver currently ranks third behind Hollywood and New York City as a North American film production centre. As a result of the recent production boom, Montreal has gone from four local film crews to 28 in the space of a decade."<sup>70</sup> In a turnaround from the situation prompting the cultural protection measures, this increased economic activity is coming at the expense of the U.S. video production industry.<sup>71</sup> Many of the productions are what the U.S. industry calls "economic run-aways"—films and television programs that move to Vancouver, Canada's "Hollywood of the North," to save money.<sup>72</sup> Popular U.S. television shows, such as the *X-Files*, and well-known films, such as *Good Will Hunting* and *Murder at 1600*, have taken advantage of less expensive Canadian production costs.<sup>73</sup> The Canadian federal government and the governments of provinces such as Manitoba have created generous tax incentives to spur

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67. Schwartz, *supra* note 9, at 2. In addition to the expense, it has been suggested that this solution might lead to the magazine industry developing dependency on the government. See Matheny, *supra* note 11, at 267. Although the industry was already dependent on the government for continuation of the protective measures, a direct subsidy, which can be easily increased or decreased each year, might make that dependency more controlling. *Id.*

68. See generally Boryskavich & Bowler, *supra* note 4; Bonnie J. K. Richardson, *Technological Change and Canada/U.S. Regulatory Models for Filmed Entertainment*, 25 CAN.-U.S. L.J. 353 (1999).

69. Boryskavich & Bowler, *supra* note 4, at 30-31. A similar, although not as dramatic, development has been reported in the European and Mexican film industries. Echikson, *supra* note 9; Elisabeth Makin, *Movie Cameras Are Rolling Again . . . with Some Help from the State*, BUS. WEEK INT'L EDITION, June 12, 2000 at 4.

70. Boryskavich & Bowler, *supra* note 4, at 31.

71. *Id.* at 34.

72. *Id.*

73. *Id.* at 30-31.

this development.<sup>74</sup> It is not clear, however, how much of the increased activity in Canada is caused by these governmental measures and how much by the cheap Canadian dollar, as well as quality locations and infrastructure.<sup>75</sup>

This change in the Canadian video industry has been seen as part of a larger change in the Canadian view of cultural industries.<sup>76</sup> One commentator has noted that “[i]n recent years . . . Canadian government at all levels has undergone an attitudinal shift in regard to the cultural industries and has adopted the U.S. view of cultural products as tradable economic commodities that have the potential for generating substantial revenues for the state.”<sup>77</sup> One important example of this new viewpoint is the *Tomorrow Starts Today* program, which provides five hundred million Canadian dollars in funding for the arts,<sup>78</sup> partly to promote cultural exports.<sup>79</sup> However, this new view has not eliminated the previous justification for, or interest in, cultural preservation.<sup>80</sup> For example, Canadian productions of U.S. subjects do not contribute to Canadian culture in the way that a production on a Canadian subject would. In addition, since the Manitoban video production tax cut was passed in 1997, foreign production has doubled, but domestic production has actually declined.<sup>81</sup>

In spite of changed attitudes about cultural industries and trade, the Canadian government still sees cultural protection as a high priority, but now seeks to pursue that goal in tandem

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74. *Id.* The likelihood of objections to these measures under Canada’s international agreements depends on which measure is being looked at. The federal incentives are open to foreign corporations, so there is no violation of national treatment obligations. *Id.* at 37–39. National treatment requires countries to treat imports the same as domestic products. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 479–81 (4th ed. 2002). However, some provinces’ tax plans are only open to domestic corporations. In Manitoba, for example, foreign companies must either create a Manitoban subsidiary or work with a local company. Boryskavich & Bowler, *supra* note 4, at 38. Both options make production more cumbersome and costly than it is for domestic companies. *Id.* Boryskavich and Bowler provide useful appendices detailing the Canadian and U.S. tax incentives available for video production. *Id.* at App. A & B.

75. Boryskavich & Bowler, *supra* note 4, at 36.

76. *Id.* at 25.

77. *Id.*

78. *Tomorrow Starts Today*, at <http://www.canadianheritage.gc.ca/special/tomorrowstartstoday/en-intro.html> (last visited Sept. 26, 2004).

79. Schwartz, *supra* note 9, at 2.

80. Boryskavich & Bowler, *supra* note 4, at 40; Schwartz, *supra* note 9, at 1–2.

81. Boryskavich & Bowler, *supra* note 4, at 33.

with promoting its own cultural trade.<sup>82</sup> The shift in policy can most clearly be seen in the recommendations of the Cultural Industries Sectoral Advisory Group on International Trade (Advisory Group).<sup>83</sup> The Advisory Group suggested that the government could follow two distinct paths: (1) continued use of the “cultural exemption strategy used in the past, which takes culture ‘off the table’ in international trade talks”; or (2) promotion of “a new strategy that would involve negotiating a new international instrument that would specifically address cultural diversity, and acknowledge the legitimate role of domestic cultural policies in ensuring cultural diversity.”<sup>84</sup>

This “new international instrument”<sup>85</sup> is similar to what is often referred to as a General Agreement on Trade in Culture (GATC).<sup>86</sup> The creation of a GATC is seen as addressing the concerns of both sides in this trade debate.<sup>87</sup> Cultural preservation would be allowed where it is necessary, but industries that have developed sufficient competitiveness would not be protected. “By accepting that culture is unique and addressing it in its own forum, the fears of cultural imperialism on the one side and blatant protectionism on the other will be eradicated.”<sup>88</sup>

The future of the Canada-U.S. trade relationship in this area is uncertain. In addition to the possibility of a future GATC agreement, some commentators have suggested that continuing technological advancement will make protectionism increasingly difficult and even futile.<sup>89</sup> There is also the possibil-

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82. Schwartz, *supra* note 9, at 2–3; Boryskavich & Bowler, *supra* note 4, at 39–40.

83. *New Strategies for Culture and Trade: Canadian Culture in a Global World*, February, 1999, Cultural Industries Sectoral Advisory Group on International Trade (Can.), available at <http://www.dfait-maeci.gc.ca/tna-nac/canculture-en.asp> (last visited Sept. 19, 2004) [hereinafter *New Strategies*]; see Boryskavich & Bowler, *supra* note 4, at 40.

84. *New Strategies*, *supra* note 83, available at <http://www.dfait-maeci.gc.ca/tna-nac/canculture-en.asp> (last visited Sept. 19, 2004).

85. *Id.*

86. See Braun & Parker, *supra* note 2, at 188–91.

87. *Id.*

88. *Id.* at 191.

89. See, e.g., Richardson, *supra* note 67, at 353; Lisa Jeffrey, *The Impact of Technological Change on Canada's Affirmative Policy Model in the Cultural Industry and New Media Sectors*, 25 CAN.-U.S. L.J. 379 (1999). A good example of this phenomenon can be seen in the facts of the Canadian Periodicals case. *Sports Illustrated* used satellite technology to send the editorial content into Canada and then combined it with the Canadian advertising. Matheny, *supra* note 11, at 255–56. This technique circumvented the Canadian border controls on the importation of split-run periodicals. *Id.*

ity of increased enforcement under the existing international agreements.<sup>90</sup> The one certainty is that this issue will continue to create problems between Canada and the United States until a resolution is reached.

## II. INTERNATIONAL TRADE AND CULTURAL PRESERVATION: STRUCTURAL DIFFICULTIES

### A. COMPARATIVE ADVANTAGE AND ECONOMIC EFFICIENCY: INAPPROPRIATE PARADIGMS FOR FOSTERING CULTURAL PRESERVATION AND DEVELOPMENT

Some scholars have suggested that the economic theory of comparative advantage, which provides the primary rationale for continuing trade liberalization, does not provide a suitable means for furthering the goals of cultural preservation and development.<sup>91</sup> These scholars would likely agree with Canadian Minister of International Trade Art Eggleston's assessment that a magazine "should not [be] looked at . . . like a widget."<sup>92</sup> However, none of these scholars have explained fully why standard economic theory does not encompass the priorities and incentives involved in cultural productions.<sup>93</sup>

Scholar David Ricardo's theory of comparative advantage, the backbone of the free trade rationale, assumes the international interchangeability of the goods produced,<sup>94</sup> but this inter-

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90. The *Tomorrow Starts Today* program, for example, could be seen by the WTO as using an impermissible export subsidy. See GATT *supra* note 50, at art. XVI(1).

91. Braun & Parker, *supra* note 2, at 174; Matheny, *supra* note 11, at 273-74. Developed more than 150 years ago by David Ricardo, the theory of comparative advantage holds that a nation should manufacture those goods that it can produce efficiently compared to other goods, and then can trade with other nations to obtain the goods that it is comparatively inefficient at producing. See JACKSON ET. AL., *supra* note 73, at 7-14.

92. Matheny, *supra* note 11, at 271. Eggleston made this comment in regard to the Periodicals case. *Id.*

93. See *supra* note 90. In fact, scholars have begun to question the accuracy of the comparative advantage model for any products, claiming that the international mobility of capital undercuts its assumptions. See Sara Dillon, *A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87, 112-13 (2002). But since comparative advantage is the underlying justification for the international trading system, this Note begins with this concept. It argues that regardless of whether comparative advantage holds for widgets, it does not explain Walt Whitman.

94. See DAVID RICARDO, *On Foreign Trade*, in THE PRINCIPLES OF POLITICAL

changeability is noticeably absent in cultural production. A textile can be woven in any country. The raw material may be site-specific, but the textile factory can be located anywhere, and the entrepreneur arranging the work will choose location based on comparative advantages in labor and infrastructure.<sup>95</sup> However, there is no way that a German novelist can exploit a comparative advantage in Norwegian fiction. Leaving aside linguistic difficulties, which are themselves a significant factor, cultural productions are rooted in the culture that produces them. Occasionally, an artist is able to cross cultures sufficiently to produce meaningful work in a different tradition.<sup>96</sup> But these examples always involve individuals who actually become part of the culture they are expressing. A composer who lives her entire life in New Jersey is not going to write a great Russian opera.<sup>97</sup> In order to understand the issues, concerns, and predilections of a culture, it is necessary to dwell inside it. Thus, one of the key assumptions underlying the international trade regime—internationalism of production—is inapplicable to the cultural realm.

This dichotomy of rootedness versus internationalism can be useful in understanding the implications of the recent boom in the Canadian film and television industry.<sup>98</sup> Referring to Vancouver as the “Hollywood of the North” is even more accurate than it first appears. The “economic runaway” productions are not Canadian in the sense of their cultural content. Some Canadian cultural influence may seep in, but these are still Hollywood productions with Hollywood scripts, Hollywood producers, and Hollywood directors.<sup>99</sup> Thus, a portion of such a cultural product may be internationally tradable, but there remains an irreducible creative component that is linked to its place of origin. And even as the video production industry in Canada is thriving, productions of Canadian subjects have actually declined.<sup>100</sup> This disconnect between the Canadian industry

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ECONOMY AND TAXATION ch. VII (3d ed. 1821).

95. See JACKSON, ET. AL., *supra* note 73, at 7–14.

96. Samuel Beckett and Eugene Ionesco, an Irishman and Romanian who became exceptional French playwrights, are notable examples. Another example would be Vladimir Nabokov, a major Russian novelist who became a major U.S. novelist.

97. Or, if she does, the amazement with which such a feat will be greeted will prove the point.

98. Boryskavich & Bowler, *supra* note 4, at 30–31.

99. See *id.*

100. *Id.* at 33.

and Canadian subject matter illustrates that the economic goals furthered by free trade are not the same as the cultural goals that Canada and other nations claim to be pursuing. Given the political importance of economic prosperity, countries may settle for preservation that is more financial than cultural.

In addition to the problems with comparative advantage, it has been suggested that consumer choices with regard to culture do not fit the rational actor assumption—another central tenet of the economics underlying the international trading system and all free markets.<sup>101</sup> However, this view misunderstands the special meaning that economists give to the term “rational.”<sup>102</sup> Consumers are never assumed to be acting rationally in the sense of acting reasonably.<sup>103</sup>

A person who pays sixty thousand dollars for a military vehicle to drive to the grocery store is arguably not acting reasonably. However, such a consumer may be acting rationally in regard to personal attitudes, desires, and beliefs.<sup>104</sup> The fact that those attitudes, desires, and beliefs may not themselves be rational is not the economist’s concern. So when a consumer buys a ticket for the remake of *The Texas Chainsaw Massacre*<sup>105</sup> instead of going to see a subsidized showing of *Children of Paradise*,<sup>106</sup> this is perfectly rational behavior, in economic terms. However, the rational actor assumption as played out in momentary consumer gratification cannot serve as an adequate pricing mechanism for cultural worth.<sup>107</sup>

Even though the rational actor assumption does explain consumer choices in regard to culture, that does not mean that those “rational” choices should be the only decisions determining which cultural products should be preserved and supported. Even *Chainsaw Massacre* fans, as well as purchasers of commercially popular culture involving fewer dismemberments, may want to have other forms of entertainment available, even if they do not patronize them often enough to ensure commercial

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101. See Carlson, *supra* note 2, at 614–15. The rational actor concept assumes that individuals will act rationally in any economic situation in order to maximize benefits for themselves. This is sometimes referred to as “economizing behavior.” JAMES D. GWARTNEY, RICHARD L. STROUP & RUSSELL S. SOBEL, *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 11 (9th ed. 2000).

102. See GWARTNEY, STROUP & SOBEL, *supra* note 101, at 15.

103. See *id.*

104. *Id.*

105. *THE TEXAS CHAINSAW MASSACRE* (New Line Cinema 2003).

106. *LES ENFANTS DU PARADIS* (Pathe 1945). This film is widely considered one of the classics of world cinema.

107. See Braun & Parker, *supra* note 2, at 174.



viability.

Thus, the argument that the market can be trusted to choose those forms of culture that people want, making any non-market support unnecessary,<sup>108</sup> ignores the possibility that a community may have other priorities besides immediate gratification in its choice of cultural productions. To put it in economic terms, culture can be viewed as a long-run activity that will not be optimally developed if it is forced to compete on a short-run basis.<sup>109</sup> Cultural history is full of examples of artists whose contributions were not considered economically worthwhile during their lifetimes.<sup>110</sup> In the international trade context, Canadian television could produce meaningful and lasting work, but not if it is forced off the air and out of production by the same U.S. shows that are seen worldwide.<sup>111</sup> Television is a particularly apt example of this issue, since the problem of immediate gratification versus quality has been commented on for some time in regard to television programming.<sup>112</sup> The struggle to present quality programming on an intra-national basis is akin to the international trade issue. Both involve the concept that the dictates of the market cannot be allowed to exclusively control what viewers see.

This is not to say that Canadian or other national work will be superior to the productions that the world market favors in the short term. Questions of aesthetic worth are notoriously subjective, and one person's formulaic genre picture is another

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108. See Schwartz, *supra* note 9, at 4-5.

109. One of the generally recognized complications to market economics involves short-run versus long-run outcomes. GWARTNEY, STROUP & SOBEL, *supra* note 101, at 70. For example, a firm that creates inferior quality products and cuts prices may prosper in the short-run, but in time consumers will become aware of the problem and switch to other brands. However, if the other brands have gone out of business in the meantime, then the market has not priced the goods accurately, due to lack of information. This problem undercuts the assumption that free markets are always efficient.

110. Some good examples would be Vincent Van Gogh, Gerard Manley Hopkins, and practically any poet who lived before 1950. Additionally, although influential and well-known among the ruling elite, Geoffrey Chaucer could never have made a living off his poetry, and so relied on the English Crown for support. See Martin M. Crow & Virginia E. Leland, *Chaucer's Life*, in THE RIVERSIDE CHAUCER xv-xxvi (3d ed. 1987).

111. According to some estimates, 70% of television entertainment shows in Europe are of U.S. origin. Steven Greenhouse, *Europe Reaches TV Compromise; U.S. Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at D20.

112. See, e.g., JOHN O'NEILL, PLATO'S CAVE: TELEVISION & ITS DISCONTENTS (Rev. ed. 2002); EYSENCK, H. J., SEX, VIOLENCE AND THE MEDIA (1978).

person's classic.<sup>113</sup> The point is not to protect the "good" culture from the crass U.S. onslaught, as some commentators have characterized it,<sup>114</sup> but to preserve different sources of culture. The situation can be analogized to one of the standard justifications for the U.S. system of federalism. The states are seen as having partial autonomy as a way of allowing for separate "laboratories" for policy innovations.<sup>115</sup> Whether or not public policy innovation benefits from this honeycomb configuration, cultural innovation certainly does, as evidenced by Samuel Beckett's *Waiting for Godot*.<sup>116</sup>

One can look at cultural preservation not as a method for combating U.S. culture or mass culture in general, but as a way to ensure that U.S. or mass culture is not the only option. If it were to become so, the cultural consumers of the world would be immeasurably poorer. This consideration should be kept in mind in relation to the *Canadian Periodicals* case.<sup>117</sup> Even casual reading matter, such as a magazine, is a part of the unique

113. See, e.g., *THE TEXAS CHAINSAW MASSACRE* (Vortex 1974). This is the original version of the film, and some people consider it to be a classic of the horror genre.

114. See Goodenough, *supra* note 19, at 207–08; see also *BARBARIAN INVASIONS* (Miramax Films 2003). There may be objectionable aspects to U.S. mass culture, particularly intellectual vacuity and the glorification of violence, but those can be viewed as aspects of its immediate gratification appeal, and do not have to be considered as unique to the United States. The same pressures have been imposed on non-U.S. productions; consequently, those productions have also gone down this road. See, e.g., *ANATOMIE* (Sony Pictures Entertainment 2000) (a graphic thriller involving human dissection); *LE PACTE DES LOUPS* (Universal Focus 2002) (a graphically violent monster/adventure tale). In addition, it is important to remember that reality television was originally a European idea. The recognition that this kind of cultural change is an economic process, and hence not necessarily tied to any nationality, is key to understanding how to manage it.

115. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Sandra Day O'Connor, *Testing Government Action: The Promise of Federalism*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW* 35, 41 (Stephen E. Gottlieb ed. 1993).

116. The play was written by an Irishman whose family's ancestry was British, and was first performed in Paris. It is now a classic of French, British, and Irish drama. MARTIN ESSLIN, *THE THEATRE OF THE ABSURD* 20–21 (Rev. ed. 1969). If there were not different British, French, and Irish cultural milieus, this would not have happened. In fact, the small and culturally distinct Irish nation produced an inordinately large proportion of important English language playwrights and writers in the twentieth century. See, e.g., BEN FORKNER, *MODERN IRISH SHORT STORIES*, at 21 (1980). If earlier British attempts to stamp Ireland with its own cultural image had been more successful, eventual consumer choice in fiction, poetry and drama would have been severely curtailed. See R. F. FOSTER, *MODERN IRELAND: 1600-1972* (1988).

117. Periodicals AB Report; Periodicals Panel Report.

context of a separate cultural reality, and universal sameness of input will lead to universal sameness of output.<sup>118</sup> The issue can be thought of in economic terms as an example of positive externalities that the immediate market does not recognize. Individual Canadians are not thinking of future cultural production when they choose a magazine, but distinctive cultural expression can be prospectively affected by such decisions.

The assumption that consumer preference will fail to support the "right" culture could be seen as judgmental and elitist, but every country with sufficient financial wherewithal pursues policies motivated by this very assumption.<sup>119</sup> The near universal existence of governmental entities such as the National Endowment for the Humanities and the National Endowment for the Arts demonstrates that almost every developed country views commercially vulnerable cultural productions as an area of human endeavor that cannot be trusted entirely to the market. And the fact that such entities exist in the United States, the country that is most vocal in insisting on the tradability of culture, proves the point even more strongly. Even the United States does not behave as though culture is merely a tradable commodity, and does not trust its own culture to the vagaries of the market.<sup>120</sup>

In addition to U.S. governmental support, there are numerous private foundations and endowments.<sup>121</sup> In fact, Canadian governmental support for the arts was originally justified as

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118. The question of whether the Canadian protective measures were really necessary to preserve the Canadian magazine industry is a separate issue. See Goodenough, *supra* note 19, at 244–48. The type and efficacy of government policies aimed at cultural preservation is a question for determination by a nation's officials and voters. The issue here is Canada's power to impose measures, not the wisdom of individual measures imposed.

119. The National Endowment for the Humanities and the National Endowment for the Arts are U.S. examples of institutions created on the basis of this assumption. See National Endowment for the Humanities, at <http://www.neh.fed.us>; National Endowment for the Arts, at <http://www.arts.endow.gov>. Examples overseas include the Arts Council of Great Britain and the Danish Arts Foundation, as well as many more. *E.g.*, Arts Council of England, at <http://www.arts.council.org.uk>; Danish Arts Agency, at <http://www.kunststyrelsen.dk/d000c/GSID/210614>.

120. Although the United States does subsidize culture in certain areas, Bonnie Richardson points out that there are many "untold stories of Hispanic Americans or Asian Americans or African Americans. . . . Canadians have the benefits of government subsidies to help insure that such local and regional stories are told. U.S. filmmakers who want to tell these stories do not benefit from U.S. government subsidies." Richardson, *supra* note 67, at 355.

121. The MacArthur Foundation, the Ford Foundation, the Carnegie-Mellon Fund, and the Pew Charitable Trust are all good examples of this.

balancing the large U.S. private support.<sup>122</sup> Although some might view private support as more consonant with free market principles, the motivations involved have nothing to do with standard consumer behavior and are much closer to the reasons that governments support culture. In both situations, a determination is made that short-term purchasing behavior and its economic results will not perform the desired function of adequately supporting commercially vulnerable cultural activity. Therefore, non-market support is provided.

Omnipresent government programs and widespread private giving for non-market support of cultural activity show that this activity is a standard priority for societies around the globe. The international trading regime should recognize this priority and thus reduce the resistance to trade liberalization.<sup>123</sup>

#### B. NATIONALIST CONCERNS AND THE PRESERVATION OF CULTURE

The structure and procedures of the WTO ensure that the only cultural interests that will be addressed are those tied to national interests. The WTO is a gathering of States, not people. Individuals and companies do not have access to its adjudicative body, and can only become involved through their national governments.<sup>124</sup> The successive rounds of negotiations that have led to the current regime were carried on by representatives of national governments, and the next round will be as well.<sup>125</sup> For these reasons, the WTO is not cognizant of interests not directly connected to national concerns. Although this would seem to be stating the obvious, it is important to recognize the structure of the primary regulatory body involved in this dispute, and understand whether the processes and incentives built into that structure are likely to yield the desired outcome: cultural preservation.

As an addition to the nation-centered legal debates about the international trading regime, this Note also has focused on a national issue, cultural preservation measures in Canada. The Canadian measures themselves are primarily nationalistic in purpose.<sup>126</sup> The Canadian government officials who propose and implement such measures do not justify them on any other ba-

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122. Matheny, *supra* note 11, at 255.

123. See Braun & Parker, *supra* note 2, at 189–91.

124. See generally JACKSON ET. AL., *supra* note 73.

125. See *id.* at 226–31.

126. Braun & Parker, *supra* note 2, at 160–64.

sis.<sup>127</sup> Scholars who discuss the issue and support Canada's position also invariably do so by reference to nationalistic concerns.<sup>128</sup> The entire debate occurs within a conceptual framework bound by the assumption that culture is primarily a national concern, and that the boundaries of what we recognize as separate and distinct "cultures" are the same as the boundaries of nations.<sup>129</sup> Such an idea is preposterous, as even a cursory glance at the cultural reality of Canada itself reveals.<sup>130</sup> And recognition of the cultural existence of separate ethnic enclaves does not encompass the phenomenon either, since culture, broadly understood, is not synonymous with ethnicity.<sup>131</sup> A circle of talented graphic novelists who meet in a local bar to talk shop can be a cultural grouping, and if their voices are lost due to the inundation of international mass culture, it does not matter whether they are in Toronto or Tarrytown.

Some of the Canadian measures meant to support and protect culture provide good examples of this problem. The exclusion of European films from Canadian screens in the name of national culture arguably did not serve the interests of Canadian consumers or Canadian culture.<sup>132</sup> The issue is not whether the European films were better or worse than their U.S. competition, but simply that they were different from the omnipresent U.S. fare.<sup>133</sup> In this case, the national government may have been concerned about its most important trading relationship—with the United States—so it did not choose to deal with the problem by reducing U.S. screen time.<sup>134</sup> So these national concerns were not cultural concerns, though they claimed to be.

Another example of this disconnect between national and

127. *Id.*

128. See Matheny, *supra* note 11, at 257–59; Braun & Parker, *supra* note 2, at 188–91.

129. See *supra* notes 123–27.

130. The province of Quebec forms a strongly distinctive cultural canton within the Canadian nation, as do many Native American groups. See generally ALLAN SMITH, CANADIAN CULTURE, THE CANADIAN STATE, AND THE NEW CONTINENTALISM (1990).

131. Ethnicity has an inescapable hereditary aspect, but culture is not so limited. See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 444, 628 (2nd ed. 1983).

132. If one of the main purposes of protecting Canadian culture is to reduce the influence of U.S. culture, then barring European influences, which would otherwise complicate and broaden the overall cultural environment, is actually counterproductive.

133. See *supra* note 110.

134. See Goodenough, *supra* note 19, at 215–16.

cultural interests is the changing attitude among some Canadian officials about cultural industries.<sup>135</sup> The increasing tendency to see cultural productions as potential sources of profit in international trade will probably have some positive consequences, but it demonstrates the existence of a primary government motivation that can be at odds with cultural preservation.<sup>136</sup> Governments will likely choose jobs and income over culture.<sup>137</sup> Indeed, their tenure in office would probably be rather short if they did not. One main reason why cultural protection is so popular with governments is that it is usually also a form of economic protection. But when profit and cultural preservation are at odds, such as when the Vancouver video industry makes a pile of money by creating U.S. products, cultural protection will not interfere with the ability to make that money. Thus, assuming that national governments are stakeholders whose interests are completely aligned with the worldwide interest in the preservation of culture would be a mistake.

## CONCLUSION

Ultimately, protection of culture can be viewed as furthering one of the primary goals of ongoing liberalization of trade in other sectors—presenting the world's consumers with more and better choices. As with liberalization, this goal is partly at odds with the national sovereignty of the member states charged with its achievement. Nationalistically motivated preservation will sometimes fail to yield positive results for either domestic or international consumers of culture, in the short or long run. This is why international negotiations on this subject, whether or not they are meant to result in a General Agreement on Trade in Culture, should only be undertaken with an understanding that the structure of the system involved is inadequate to encompass the externalities involved.

Although the nation-state is not an entirely trustworthy advocate for the preservation of commercially vulnerable culture in world trade, it is the only stakeholder that has standing in relation to the WTO. Therefore, it must serve as a second-best option in avoiding the increasing uniformity of mass culture by protecting all that is counter, spare, original, and strange. Any

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135. See discussion *supra* Part I.C.

136. See discussion *supra* Part II.B.

137. See discussion *supra* Part I.C.

negotiations on trade in culture should recognize the limitations of nation-based preservation. Such negotiations must not only involve government officials and experts on trade, but also experts on culture. Otherwise, we will not only have a Hollywood in California and Vancouver, but everywhere on earth.