# THE SECRET OF TRANSFORMING ART INTO GOLD: INTELLECTUAL PROPERTY ISSUES IN CANADA-U.S. RELATIONS

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The term "intellectual property" denotes categories of legally recognized intangible expressions of human creative endeavor.* The most common forms of such property include patents (rights over useful inventions), copyright (rights over original literary, artistic, musical and dramatic expressions) and trademarks (rights over distinguishing names or marks used in association with a business). The legal protection conferred on intellectual property takes the form of a monopoly right of limited duration generally granted by statute.[1] This monopoly right permits creators and right holders of intellectual property to profit from their efforts by collecting royalty payments for the use and exploitation of the protected creations.

All intellectual property regimes reflect a need to balance competing interests. A period of exclusive right to exploit a creation is granted because it is generally believed that without some system of

*A list of acronyms used in this article is provided on page 28.

reward the incentive for continued human creative expression and innovation will cease.[2] Nevertheless, social, cultural and economic development will only be advanced if timely disclosure to the public of innovations and ideas is encouraged. As such, the duration of the intellectual property monopoly right must be no more than would be necessary to foster the incentive for continued innovation, weighed against the competing interest of providing ready and inexpensive public access to information and ideas.

Since the mid-1980s intellectual property as a concept has shifted from relative obscurity to center stage due in large part to new technologies and the growth of trade in information. Over the last decade there has been an aggressive campaign by those countries that are major exporters of such property, with the United States clearly at the forefront, to include comprehensive standards of intellectual property protection and enforcement within international trade agreements. This move has forever transformed the discourse surrounding this area of law in the most absolute and unequivocal way. Whereas, in the past, intellectual property and international trade matters were seen as unrelated legal and policy issues, they have now become inextricably intertwined. Seen by industrialized countries, most notably the U.S., as a panacea for their economic ills, and by less-developed nations as a deceptively benign form of foreign domination, intellectual property as a tool of international trade will continue to be the subject of much controversy well into the next century.

This essay explores the impact of the link between intellectual property law and international trade law as it affects Canada-U.S. trade relations. More specifically, it argues that Canada is directly harmed by this recent shift in the legal treatment of intellectual property rights. In order to advance this position, a discussion of the history behind the push by the U.S. to place intellectual property on the trade agenda will be undertaken. An outline of the international trade regimes that now govern intellectual property, most notably

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the *General Agreement on Tariffs and Trade* (GATT)[3], the *North American Free Trade Agreement* (NAFTA)[4] and, less directly, the *Canada-US Free Trade Agreement* (FTA)[5] and their impact on Canada will be presented. The analysis will focus upon two quite distinct areas of impact, namely: 1) the financial cost to Canada of complying with U.S. standards of intellectual property protection (In this regard, a detailed study will be presented of one of the critical issues that has plagued Canada-U.S. trade relations, namely, the compulsory licensing of pharmaceutical patents); 2) the social cost to Canada of complying with U.S. standards of intellectual property protection. This will emerge from a discussion about whether international trade regimes purporting to liberalize trade in intellectual property actually encroach in an unacceptable manner on a nation's cultural sovereignty.

## I. THE LINK BETWEEN INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE

### A. U.S. position on international trade and intellectual property

The link between intellectual property and international trade, spearheaded by the U.S., is a recent phenomenon. Dating from the early 1980s, this connection emerged as a result of the congruence of two pivotal factors: a) the general decline in competitiveness that had been plaguing the leading industrialized nations, coupled with b) major advances in the development of and demand for intellectual property. These factors set the stage for the emergence of a powerful lobby from the technology-producing industries to define intellectual property as an integral part of U.S. trade policy, which policy the U.S., with its industrialized allies, brought to the international trade forum. As one commentator has observed,

> [t]he idea that intellectual property should be treated as a trade issue was fairly radical when it was first raised, about 1984...With the government's encouragement, some of the principal United States companies that had an interest in intellectual property organized themselves into a coalition, with the aim of advancing the negotiation of a new intellectual property agreement in the context of trade negotiations.[6]

(1) *Decline in competitiveness.* The structure of global trade is changing at a rapid rate. Industrialized nations which had up until now relied on their traditional mainstay, trade in manufactured

goods, as the predominant means of ensuring their continued economic prosperity have had to confront a decline in market share in the face of major industrial advances among developing and newly industrialized nations.[7] Nevertheless, the swift transformation in industrial production from an entirely domestic activity to a globalized one and the expansion of trade to include trade in services as well as in goods have offered new trade possibilities for the industrialized world. Therefore, countries such as the U.S., seeking to retain their economic position, have made a deliberate shift of attention towards areas of trade in which only a restricted number of nations would be able to compete with them directly. The area of choice has become the trade in ideas, the very "stuff" of intellectual property law.[8]

(2) *Major advances in the development of and demand for intellectual property.* We are living in the "information age." The U.S. is a world leader in the development of information technologies and entertainment products such as computer software (and related technologies like semiconductor chips), films and television programs. As the demand for and value of such property increases, trade in intellectual property becomes increasingly attractive. The U.S. government has determined that, as a heavy exporter of intellectual property, the nation could benefit considerably from strengthened international protection.[9] Thus the "new economic world order" (to borrow the words of former U.S. President George Bush), for a superpower in information technology, is to dominate the global market in exports of intellectual property.[10] Two observers note that

> [t]he economic developments underlying intellectual property protection concerns are quite straightforward. The established industrialized economies are losing comparative advantage in some traditional sectors and are consciously shifting their attention and resources into areas of greater comparative advantage—activities that are creativity-research and knowledge-intensive, and therefore intellectual property intensive.[11]

The formula for success advanced by U.S. intellectual property industries and accepted by the U.S. government involves the continued development of new technologies and intellectual property coupled with the broadest and most complete legal environment to guarantee the best possible returns to intellectual property rights holders. Intellectual property law has become the legal environment of choice to foster the new economic world order, and international

trade is the forum thought best to ensure the highest possible return on investment.

(3) *The push to place intellectual property within the international trade agenda.* Technological innovation and the proliferation of new ideas have brought with them the development of mechanisms to copy or reproduce intellectual property without the prior authorization of intellectual property rights holders. Any nation that is a strong producer of intellectual property, seeing its potential export revenues severely curtailed by acts of intellectual property "piracy", would seek to redress this situation, given the perception that such activities undermine incentives for further investment in research and development. In order for intellectual property-generating industries and their national economies to achieve the benefits sought, international agreements are necessary to provide proper safeguards against the activities of unauthorized copiers and users. As Hartridge and Subramanian note,

> [e]conomically established countries have perceived these imitations as creating significant and growing economic losses for corporations operating internationally. Concerned private sector groups, notable in areas particularly vulnerable to imitation, such as pharmaceuticals, chemicals and computer software, have sought action by their governments to improve the protection and enforcement of IPRs abroad.[12]

U.S. government officials have consistently argued both in domestic and international arenas that American intellectual property industries were suffering considerably as a result of "piracy."[13] By raising the argument that American industries were suffering grievous losses at the hands of intellectual property "pirates," the U.S. government fueled a bid to get the international trade community to adopt its position on intellectual property protection and enforcement.

While the estimates of losses suggested by the U.S. were found to have been highly exaggerated,[14] such representations evidenced, at the very least, the official American position that its mission was justified. The "enemies" of U.S. prosperity, then, are those countries that do not offer the breadth and depth of intellectual property protection that the U.S. corporate lobbyists favor. While there can be no doubt that its economic troubles are exacerbated by inadequate international intellectual property protection, the need for the United States to examine internal factors contributing to a decline in com-

petitiveness and a growing trade deficit has been largely disregarded.[15]

To pursue its objectives the United States government identified a series of "minimum standards" of international intellectual property protection and enforcement that it deemed to be "adequate" and "effective."[16] The U.S. sought to have this code of minimum standards included within international trade arrangements, particularly the GATT and NAFTA. They include, *inter alia*, establishing intellectual property protection over subject matter not otherwise dealt with comprehensively in the international forum (for example, computer software, trade secrets, biotechnology), seeking the abolition of compulsory licenses for all forms of intellectual property save in extremely narrow circumstances (except in the case of trademarks in which no compulsory licensing is to be permitted at all),[17] defining the length of term of each recognized form of intellectual property (for example, a twenty-year term in the case of patents),[18] and providing for strong enforcement mechanisms, including expeditious border enforcement measures.

This model of protection and enforcement confers heightened monopoly rights over intellectual property. Increased protection increases costs to the consumer and, in the international trade context, to an importing nation. While this may seem just at first blush, it must be stressed that the merits of awarding increased protection to intellectual property rights holders is not at all clear, and the theoretical underpinnings for increased breadth and depth of protection are not universally accepted. Ted L. McDorman asserts that

> [m]oral suasion, that failure to adequately protect intellectual property amounts to theft, has been countered with the view that the concept of intellectual property varies from state to state (what is protected and how), that intellectual property is culturally and socially determined, and that the countries trumpeting intellectual property today have benefited in the past from "theft."[19]

Setting "minimum standards" for the protection and enforcement of intellectual property rights is very much dependent on who defines what a "minimum" standard would consist of. What might constitute a "minimum standard" to an "old" industrialized nation may, in fact, be an unacceptably high standard to a newly industrialized or developing nation. International intellectual property protection is very much influenced by the relative position of those

countries or groups of nations that are the most powerful. They set the tone and establish the objectives of the agreements in their favor. The U.S.-defined "minimum standards," designed to be incorporated into the international trade system, were ostensibly restricted to the trade-related aspects of intellectual property protection and enforcement.[20] But what "are trade-related" intellectual property rights? How does one determine what is "trade-related" from "non-trade related"? Firstly, the mere identification of intellectual property as an international trade issue represents a conceptual shift in thought about the economics of art which inevitably spills over into the "non-trade" areas. As well, the setting out of standards for the scope and extent of protection for all recognized forms of intellectual property goes beyond the dictates of a narrow construction of the term "trade-related." For example, in seeking a twenty-year term for patent protection and in defining copyright protection to include computer software, the U.S. model is setting the substantive parameters of each form of intellectual property and not merely its trade-related dimensions. At present, then, the discourse surrounding this area of law focuses almost entirely on intellectual property as a commodity to be traded on the international market and so, for all intents and purposes, renders obsolete the very idea of "non-trade related" intellectual property rights.

In the absence of a comprehensive intellectual property and trade regime, the world would not be without global intellectual property protection. In fact, the regulation of intellectual property is achieved through a series of multilateral treaties, including the *Berne Convention for the Protection of Literary and Artistic Works*[21] (the Berne Convention), the *Paris Convention for the Protection of Industrial Property*[22] (the Paris Convention) and the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*[23] (the Rome Convention), administered by the World Intellectual Property Organization (WIPO). Nevertheless, these treaties only provide for generalized sets of principles and, in their present form, do not attempt to address the difficulties associated with the enforcement of intellectual property rights, having no specific obligations placed on signatories in this regard and having no mechanism for dispute resolution. The U.S. chose to pursue its intellectual property agenda outside of the purview of these treaties because it perceived them to be inadequate for the task, most notably in not having any effective framework for the enforcement of the obligations they

imposed.[24] More importantly perhaps, the likelihood, politically, of the U.S. garnering support within WIPO for its intellectual property standards was precarious given the widespread perception that this organization was dominated by an ideology differing from the American viewpoint.[25]

The United States aggressively and successfully pursued its intellectual property interests along three parallel international trade channels: 1) through unilateral action, 2) through multilateral trade negotiations under the Uruguay Round of the GATT, and 3) through bilateral and trilateral trade negotiations under the FTA and NAFTA.

(a) *Unilateral action: Section 337, Section 301 and Special 301.*
U.S. trade laws provide for a number of strong measures to protect domestic intellectual property producers from the effects of "inadequate" and "ineffective" international intellectual property standards. The protectionist provision of Section 337 of the *U.S. Tariff Act 1930*,[26] for example, allows American intellectual property rights holders to stop imports of foreign intellectual property at the border when it can be established that the nation's intellectual property rights have been infringed. While this measure would only seem appropriate because it targets infringing imports, the problem with Section 337 is that it discriminates against foreign competitors by forcing them into a more onerous, costly and "less independent" process under the jurisdiction of the International Trade Commission, as opposed to domestic competitors whose recourse is to the U.S. civil courts.[27] According to one Canadian intellectual property lawyer, recourse to Section 337 by U.S. intellectual property rights holders has had a certain chilling effect on some Canadian exporters.

> Many of us are aware of instances in which Canadian companies have ceased exports to the United States rather than contest a s. 337 action, even when the perception is that the plaintiff is wrong.[28]

Whereas Section 337 is limited to preventing the importation of goods that infringe American intellectual property rights, the broader and more extreme form of U.S. unilateral action is to be found in Section 301 of the *U.S. Trade Act 1970* [29] and its adjunct, the so-called Special 301. The former stipulates that the president of the United States can take all "appropriate and feasible" action against foreign practices and policies that restrict U.S. commerce. It expressly includes the right to pursue, by way of trade sanctions, any nation that

denies "adequate" and "effective" protection of American intellectual property rights.

While the dictates of Section 301 are controversial in and of themselves, by far the most invasive form of American unilateral action can be found in Special 301 under *The Omnibus Trade and Competitiveness Act of 1988*.[30] This provision complements Section 301 by imposing upon the office of the United States trade representative (USTR) the obligation of identifying, on an annual basis, those countries that do not "adequately" or "effectively" protect intellectual property rights or that deny fair market access to American intellectual property rights holders. In particular, the USTR is obligated to list those nations deemed to be "priority foreign countries" having "the most onerous or egregious acts, policies or practices that deny adequate or effective intellectual property rights or deny fair and equitable market access...or whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant United States products" and are not attempting to remedy them through bilateral or multilateral negotiations.

Pursuant to its obligations the USTR annually publishes two lists, a "Priority Watch List" and a "Watch List." The former identifies "priority foreign countries" with the reasons for their inclusion. Countries placed on the "Priority Watch List" face the possibility of an investigation under Section 301 which could result ultimately in the imposition of trade sanctions. "Watch List" countries, on the other hand, are those whose intellectual property standards, while unsatisfactory, are less deficient than those of "priority foreign countries" and might be amenable to a negotiated settlement with the U.S. Canada was placed on the American "Watch List" because of its compulsory licensing of pharmaceutical patents, an issue which will be discussed in greater detail in Part II of this essay. Most recently, the U.S. has included another list under Special 301— a "Special Mention" list of countries which need to make "greater effort or further improvement" in their intellectual property protection. These nations are expected to comply without any further need for action on the part of the American government.[31] It must be emphasized that the exercise of Section 301 and Special 301 depends solely upon the determination that the intellectual property laws of a foreign nation are deficient because they do not meet American standards. There is no requirement for the alleged offender to be in breach of any express obligations owed to the U.S.

What is most striking about the use of Section 301 and Special 301 is how they have been transformed into weapons with which to force acceptance of the American intellectual property and international trade agenda. As Judith Bello observes,

> [t]he object of section 301 is not to retaliate, but rather to provide additional leverage in negotiations seeking to improve access to foreign markets for U.S. products and services and to improve conditions there for investment and protection of intellectual property rights.[32]

Such heavy-handed action by any one nation constitutes not only undesirable bullying of the international community, but is also a breach of the principle of territoriality in international law which stipulates that the laws, policies and practices of a sovereign nation are limited to that nation's territory and cannot be exercised within or against foreign nations. In spite of this principle, it would appear that both Section 301 and Special 301 have been effective in achieving their goal, since strengthened standards of intellectual property protection have been incorporated recently into the GATT and NAFTA.

(b) *Multilateral action: the Uruguay Round of the GATT.* The GATT is an international treaty, established in 1948, designed to liberalize world trade by reducing or eliminating trade barriers and other forms of protectionist measures hindering global competition. The GATT is the pre-eminent code to regulate international trade among the more than one hundred signatories.

The theory underlying the GATT is that uninhibited world trade will ensure that every country will prosper by virtue of its comparative advantage.[33] It implies that protectionist measures designed to block international trade ultimately will harm even the country that they were designed to benefit. Since its inception, there have been eight rounds of negotiations under the GATT, each round amending the agreement to reflect new trade realities. The latest, the so-called Uruguay Round, was successfully completed in December, 1993, after arduous negotiations. Begun in 1986, the Uruguay Round had a very ambitious agenda, extending GATT jurisdiction to include a landmark code on the trade-related aspects of intellectual property rights (TRIPs) along the lines suggested by the U.S. and its industrialized allies.[34]

It is clear that the GATT was the forum of choice for the United States because it already contained a powerful dispute resolution

mechanism that would be a necessary adjunct to any effective attempt to enforce intellectual property standards world-wide. Furthermore, the concluded GATT/TRIPs agreement generally conforms to the American model with one notable exception. Trade in audiovisual works (films, television programs and the like) has been excluded from the GATT/TRIPS for the moment as a result of strong opposition by France with the support of the European Union (EU). The controversy surrounding the issue of trade in audiovisual works relates to the argument that open trade in such goods would threaten France's cultural identity. This objection to free trade in cultural products mirrors the position taken by Canada not only at the GATT but in the FTA and NAFTA as well, an issue that will be discussed in more detail in Part II of this paper.

Outside of the issue of trade and culture, Canada's general position on the GATT/TRIPs code was closely aligned to that of the United States. Canada had expressly agreed in Article 2004 of the FTA (which had been concluded while the Uruguay Round was on-going) to "cooperate in the Uruguay Round of multilateral trade negotiations ...to improve the protection of intellectual property" even though, in the intellectual property and trade debate, Canada found itself in an awkward position. As an industrialized nation as well as a strong ally of the U.S., Canada speaks the language of strong protection and enforcement of intellectual property rights internationally. But as an importer of vast amounts of intellectual property its interests may reflect, in reality, the position of the developing world more closely.

The developing world was vociferous in its opposition to the GATT as the forum for an international code on intellectual property protection and enforcement. For example, India and Brazil firmly maintained that any international regulation of intellectual property rights ought to fall under the auspices of WIPO, and that the GATT should not be permitted to usurp WIPO's functions.[35] Further, the developing world was highly critical of the GATT/TRIPs proposals themselves, since they had emanated from the technology-producing nations and called for enhanced intellectual property protection. Brazil, India, Thailand, Peru and Korea, among others, asserted that intellectual property laws by their very nature restricted access to innovations, particularly pharmaceutical medicines and information technologies. Increased protection accorded to intellectual property would seriously undermine their ability to develop economi-

cally and would entrench their present dependency on foreign technology. Hence they advocated a flexible, more balanced approach which would take into account the different levels of development within the global trading community.[36]

Why then did the developing world, given its strong opposition to the GATT/TRIPs code, finally agree to adopt it? Certainly by the mid-round review of the GATT held in Montreal in late 1988, the spectre of unilateralism hung over dissenting nations like a sword of Damocles. As Ted L. McDorman notes,

> [t]he effect of possible trade retaliation by the United States under Section 301 for allegedly inadequate intellectual property laws and the creation by Special 301 of the watch list and priority country system has been to pressure other countries, specifically developing countries to comply with US dictated standards on intellectual property protection and to accept the need for and contents of the TRIPs Agreement including acceptance within the TRIPs agreement of the GATT dispute settlement process.[37]

Nevertheless, aside from the fear of American unilateral action, there were persuasive, if not compelling, arguments concerning the benefits generally of liberalized world trade, and specifically of strengthened and harmonized intellectual property protection. The general belief in the doctrine of comparative advantage and the hope that all will prosper when trade tensions are removed offer some comfort to those nations who will now have to pay more for the intellectual property they import. Further, the prospects of access to new technologies in exchange for cooperation were positive incentives for most nations to agree to the GATT/TRIPs regime.[38] And so, with the successful conclusion of the Uruguay Round of the GATT, the international harmonization of intellectual property protection is presently under way, despite of the fact that it is still not at all clear what the appropriate international standards should be or whether, in fact, there *ought* to be international harmonization at all.

**B. Canada's position on international trade and intellectual property**

(1) *Decline in competitiveness.* In the early 1980s, Canada, for its part, was emerging from a recession that had shaken the nation's

very foundation. Canada's record during this period was dismal. According to Philip H. Tresize,

> [i]n the immediate background...was the 1981-1982 recession, which had hit Canada harder than any other industrial nation, with real gross national expenditure falling over a period of six quarters by no less than 6.5 percent. That experience could not fail to call into question some of the premises of existing economic policy.[39]

As well, Canada's economy had become increasingly integrated with that of the U.S.[40] and, like the United States, found itself losing its competitive edge in exports of manufactured goods. Exports of natural resources, which Canada relies upon heavily to fuel its economy, could not sustain continued economic growth indefinitely. Finally, Canada's poor economic showing was aggravated by its ever-present internal political and constitutional problems, most notably the threat of secession by the province of Quebec.[41]

(2) *Net importer of intellectual property*. Most significant for the purposes of this discussion is Canada's position vis-à-vis the development of new technologies and intellectual property. In the "new economic world order," where the survival of the fittest appears to be the governing principle, the survivors are those countries that are heavy producers and exporters of intellectual property.

Canada sits in an uncomfortable middle-ground in relation to the intellectual property and trade debate. Although an industrialized nation, Canada is a *net importer* of intellectual products, so that any increase in protection afforded to intellectual property rights holders and any resulting increase in costs will affect Canada detrimentally. David B. Watters observes that

> ...Canada is a net importer of technology and other goods, services and cultural and entertainment products with a significant intellectual property right component. We rely heavily on the innovation activities of others and our external deficits in all these areas appear to be growing. Canadian producers contribute a comparatively small share (less than 4%) to world trade in R&D-intensive products and Canada has trade deficits across the full range of technology, products and services protected by intellectual property.[42]

It is this key aspect--Canada's reliance on foreign technology--that significantly impairs the nation's ability to benefit from the intellec-

tual property and trade link in the same manner as the United States or the other technology-producing nations. Canada's future economic growth hinges, among other things, upon the technology it imports from abroad, mostly from south of the 49th parallel. In order to secure continued access to innovation and to benefit indirectly from the prosperity that is expected from strengthened international intellectual property protection, one of the more obvious solutions for Canada would be to align itself closely with a powerful technology-producing nation, particularly where that nation offers the possibility of a huge, open market for Canadian exports generally.

(3) *The push to form a trading alliance with the U.S.* Economic decline and weakening international competitiveness were strong incentives for Canada to form a trading alliance with the United States. The prevailing view was that Canada could not continue to stand on its own in the face of globalization.[43] Tresize notes that

> [t]he Canadian economy is small, heavily dependent on exports and increasingly dependent on exports of manufactures. For many Canadian industries the domestic market cannot provide the economies of scale and the benefits of specialization that are needed to be fully competitive abroad. The one potentially realistic route to the requisite larger market is to have better and—of prime importance—more assured access to the $4 trillion U.S. economy to which the preponderant share of Canadian exports already is directed.[44]

In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada, commissioned by the federal government, presented a report strongly recommending that Canada undertake free trade negotiations with the U.S.[45] While the concept of free trade was not new on either side of the border, its time had now come. The panel considered negotiations with the U.S.

> as neither panacea nor disaster, but as a prudent course which will help to make us richer and, by making us richer, strengthen the fabric of our country and increase our self-confidence. While this course may initially make Canada more dependent on the U.S. market, it will offer our nation a more secure relationship and thus make us less vulnerable. Ultimately, it should strengthen and diversity our economy, achieving for us goals that we have

long sought, but which have eluded us because our domestic manufacturing sector has been too weak to attain it.[46]

For both Canada and the U.S., the major incentive to form a free trade alliance was to expand their respective markets. The FTA created a trading zone of approximately 275 million consumers and later NAFTA expanded it to approximately 360 million consumers.

Throughout subsequent discussions, the U.S. policy on intellectual property and trade was not far from the negotiating table. But Canada's interests in free trade with the U.S. had very little to do with pushing for strengthened international intellectual property protection. In fact, it is estimated that Canada loses only one percent of its total exports due to inadequate protection of intellectual property.[47] It was, rather, with the expressed aims of ensuring unfettered access to the U.S. market and encouraging foreign investment that Canada embarked on free trade negotiations which were successfully concluded and came into force on January 1, 1989.

The FTA dealt only minimally with intellectual property issues in spite of numerous attempts at reaching agreement on this matter. Negotiations broke down in large part due to Canada's unwillingness to abolish its pharmaceutical patent legislation (an issue that will be revisited in this paper) and the American refusal to exempt Canada from the purview of Section 337.[48] Nevertheless, some key intellectual property and trade issues were addressed. Under Article 2006 of the FTA, Canada agreed to amend its *Copyright Act* to include a retransmission provision which recognized, broadly speaking, the right of a copyright holder in one country to authorize and receive royalties for broadcasts of television programs retransmitted in the other country. Further, Article 2007 of the FTA led to the abolition of Canada's practice of granting indirect subsidies to Canadian newspapers and magazines through favorable tax treatment.

With the completion of the FTA and taking advantage of the momentum that it generated, the U.S., in an effort to pursue a "free trade zone of the Americas," began negotiations with Mexico. Fearing the erosion of the gains it had made under the FTA, Canada joined in the discussions as a full partner. Once again the intellectual property and trade issue was a major U.S. priority. This time, though, unlike in the case of the FTA, the United States prevailed in its efforts and NAFTA, complete with a comprehensive intellectual property code, was ratified by Canada, the U.S. and Mexico and took effect on

January 1, 1994. The code contained in Chapter 17 of NAFTA is virtually identical to the terms of the GATT/TRIPs agreement. Obviously, there were compelling reasons for Canada to enter into trade talks with the U.S. and to pursue the free trade ideology from the FTA into NAFTA. In order to achieve the goals Canada sought under both the bilateral and trilateral trade agreements, including open access to the American market and relief from unilateral action,[49] Canada agreed to support the U.S. in its view of intellectual property and international trade at the GATT and in NAFTA, even though the adoption of such a position would have a direct and deleterious impact. Canada's acceptance was the *quid pro quo* for an on-going free trade partnership with its neighbor.

## II. THE TRADE-OFF: IMPACT ON CANADA OF INTELLECTUAL PROPERTY AND THE FTA AND NAFTA

### A. The financial costs to Canada

The direct impact on Canada of adopting the American approach to intellectual property and international trade lies in the financial costs of compliance. For example, the recognition of a retransmission right agreed to in the FTA resulted in a decision by the Canadian Copyright Board ordering Canadian cable companies to pay to copyright holders approximately $50 million annually. Since the vast majority of these copyright holders are based in the U.S., Canada's recognition of a retransmission right for cable broadcasts resulted in a $42.5 million deficit in its balance of trade.[50] The case of retransmission rights in respect to cable broadcasts is but one example of how the broadening and strengthening of intellectual property rights exerts a negative impact on a heavy importer of such property.

Another example that will be addressed in more detail relates to an intellectual property issue that, throughout the free trade negotiations, stood out as being an acute source of conflict between Canada and the United States. Specifically, the U.S. challenged Canada's provisions regarding the compulsory licensing of pharmaceutical patents as inconsistent with its standards for "adequate" and "effective" intellectual property protection.[51]

Canada's desire to find an optimal balance between intellectual property rights holders and consumers fostered a unique policy regarding patents for pharmaceutical medicines. It was based on the premise that the social value of offering less costly medication to

consumers by encouraging competition between patent holders and generic drug manufacturers was a desirable objective. It found its most potent expression in the amendments to the *Patent Act*[52] which were adopted in 1969 with a view to fostering Canada's universal health care system. Jennifer Horton notes that

> [t]hroughout the 1950s and 1960s, rising drug prices concerned the federal government particularly because Canada was establishing a socialized medical system. Pharmaceutical patents were perceived to be one of the major expenses for this type of system.[53]

The system adopted by Canada to meet its public policy goals involved granting compulsory licenses of pharmaceutical patents virtually of right to generic drug manufacturers at a very low royalty rate. Without a significant period of exclusivity, the pharmaceutical developer would have to compete with generic drug companies for a share of the market. In this way the potential of a monopoly right holder charging usurious prices for pharmaceutical products was minimized in favor of open market competition.

Predictably, patent holders of pharmaceutical products, mostly U.S. companies, complained. Whereas most patent laws in the industrialized world offered a period of exclusivity for all patents (generally, 17 or 20 years with the latter now being the accepted norm), the absence of such a period of exclusivity under Canadian law was perceived to be an unjustifiable denial of the fruits of innovation and a hindrance to increased research and development.[54]

Still, Canada's policy goals had been achieved. A report commissioned by the federal government assessing the impact of the *Patent Act* on the pharmaceutical industry (the Eastman Report) found that the "consequence of compulsory licensing is that Canadian consumers and taxpayers paid $211 million less in 1983 than they would have done for the same drugs in its absence."[55] Given a finding that the adverse effect of compulsory licenses on the pharmaceutical industry was negligible, in spite of representations to the contrary,[56] the Eastman Report recommended that the Canadian system ought to be retained with some modifications. But recommendations contained in the Eastman Report were never adopted because negotiations on a free trade agreement with the U.S. had already begun.

Canada's system of compulsory licensing of pharmaceutical patents became an on-going thorn in the side of the free trade talks and could not withstand the increasing political pressure. The issue was a key stumbling block in the attempt to agree to an intellectual property code within the FTA and was not resolved with finality at the time of the ratification. Nevertheless, in 1987 Canada amended the *Patent Act* (Bill C-22)[57] to grant periods of exclusivity to pharmaceutical patent holders during which they could exercise monopoly control over their patented medicines. Bill C-22 was designed to "... strike a more acceptable balance between domestic and international intellectual property rights, industrial benefits, Canada's health care system and consumer interests."[58] The new legislation provided for deferrals of compulsory licenses for periods varying from seven years to the full life of the patent (i.e., twenty years), depending on whether the patented medicine was invented and/or manufactured in Canada. Very generally, Bill C-22 allowed a patented medicine invented and developed in Canada to enjoy twenty years of monopoly protection, whereas those medicines invented, developed and/or manufactured outside of Canada could never benefit from the full twenty-year term. In an effort to exert some control over the price of medicine in Canada, the legislation set up a Patent Medicine Prices Review Board (PMPRB). Finally, to mitigate against the full impact of Bill C-22, the Canadian government exacted a promise from the pharmaceutical industry that it would invest in research and development and would increase employment in Canada at least until 1996.[59]

Bill C-22 was intended on the one hand to placate patent holders, and on the other to maintain control over pharmaceutical prices in Canada. Nevertheless, Bill C-22 was challenged on the basis that it discriminated against pharmaceuticals developed and manufactured outside of Canada. As a result, Canada became the subject of an attack by the U.S. under Special 301, and it was placed on the USTR "Watch List" in 1989, 1990 and again in 1991.[60] The possibility of trade retaliation by the U.S. and the expected successful outcomes of both NAFTA and the Uruguay Round of the GATT resulted in Canada having to take another close look at the compulsory licensing provisions, for they would violate the principle of national treatment anticipated in both treaties.[61] The principle of national treatment requires that each member nation provide to citizens of other member nations the same intellectual property protection that it grants to

its own citizens. The compulsory licensing provisions in the *Patent Act* would be inconsistent with this principle because they restricted the rights of foreign pharmaceutical patent holders while allowing Canadian pharmaceutical patent holders the potential for full enjoyment of their patent rights. In 1993, amid much public outcry forecasting major increases in drug prices, Canada abolished the "offensive" compulsory licensing provisions in favor of an international consensus shaped by the United States that leans heavily in favor of patent holders.[62] Nevertheless, these last amendments[63] (Bill C-91) retained or in fact increased the powers of the PMPRB in an attempt to continue to monitor drug prices in Canada.[64]

At this early date it is difficult to assess with any finality the actual impact of the changes to the Canadian pharmaceutical patent system. Canada is only just feeling the full brunt of the changes under Bill C-22, and the estimates of increased costs to consumers by virtue of Bill C-91 range from minimal[65] to substantial[66]. Nevertheless, if one considers the findings of the Eastman Report that, due to compulsory licensing, Canadians saved $211 million annually on the price of drugs, it seems reasonable to assume that these savings will disappear with the abolition of compulsory licensing. If the cost to consumers was not going to increase dramatically with the changes, the government probably would not have created a body to monitor prices in Bill C-22. When it abolished compulsory licenses altogether in Bill C-91, it would not have conferred greater powers on the PMPRB. Without some concern over the likelihood of dwindling investments in the Canadian drug sector, the federal government would not have seen fit to exact a political promise from the pharmaceutical industry that it would promote and invest in research and development in Canada at least until 1996. While this promise is generally being fulfilled by the pharmaceutical industry, what will happen after 1996 remains unclear. Finally, the generic drug industry in Canada, believed to have thrived as a result of Canada's patent policies, could now be at risk. This industry had been lauded in the Eastman Report as having generated competition that resulted in lower drug prices to consumers. It is feared that, without such vigorous competition, the incentives which had encouraged patent holders to keep pharmaceutical prices competitive will be undermined.[67]

It seems, then, that compliance by Canada with the pharmaceutical patent standard set by the United States will substantially

increase costs to Canadian consumers with little clear direct benefit or return to them, to the generic drug industry or to the economy generally. But the costs to Canada may not be just financial, because the various trade arrangements to which Canada now belongs relate very specifically to the ability of Canadians to preserve sufficient control over their own destiny. While global trade arrangements have removed the ability to chart its own destiny from every sovereign state, it cannot be denied that the inherent power imbalances among nation states may result in a Great Power defining the rules of the game in ways that serve its own interests. Keith E. Maskus observes that

> [a] country's view of the adequacy of international IP [intellectual property] standards depends on its attitude toward the inherent rights in creative activity. Thus, for example, a system of compulsory licenses in the pharmaceutical sector may be deplored as an unwarranted intrusion on an inventor's natural right to trade and price his product or technology as he sees fit. Alternatively, it may be defended as an effective counter to trade distortions associated with monopoly patents and as a means of securing any spillover economies from new drug or manufacturing process. It is unclear that an internationally harmonized IP regime, providing protection at a level near that of the more protective TECs [technology exporting countries], would minimize distortions to trade, given that agreement is lacking about what features a truly undistorted system would entail.[68]

It will be a shame if, in the name of free trade and comparative advantage, Canadians eschew other considerations that may be equally or more important, such as, for example, affordable health care.[69] Canadians must ask themselves how far they can allow the notion of "trade" to completely override other considerations. At what point must the concepts of "trade" and "national community" co-exist?

**B. The social costs to Canada: trade and culture**

Perhaps the most emotionally charged issue for Canada throughout the FTA and NAFTA negotiations involved the extent to which the link between intellectual property law and international trade affects a nation's ability to define, protect and promote its own culture, and the extent to which an incursion should be permitted in

the name of free trade. It is in respect to the notion of trade in cultural products that the American position challenged the viability of the entire intellectual property and trade model. The protection of intellectual property, and copyright in particular, has long been viewed by legislators and policy decision-makers as an important vehicle with which to foster a national cultural identity. This has certainly been the position of the Canadian government. A 1985 report notes that

> [f]rom an economic perspective, the copyright system helps reinforce and sustain those who develop and nurture the cultural goods that the nation approves of and enjoys. These cultural goods are as varied as the tastes present in the communities making up the nation. No single person or group is the arbiter of taste. Copyright is the non-bureaucratic, non-technocratic tool of cultural policy. It does not stand alone - but it is indispensable to any cultural policy that is based on diversity, freedom of expression and the creation of works which express our culture.[70]

Intellectual property as a concept embodies a duality that highlights the difficulty in characterizing it exclusively in trade terms. Ideas and innovations are expressed in tangible forms. Such manifestations of ideas and artistic expressions as books, films, computer software and the like can be traded on the international market just like any other commodity. Nevertheless, these same products are imbued with the ideas, imagination and vision of the individuals who created them, people themselves defined by a particular culture. Once ideas are put into tangible form, they express the distinct voice of a nation, its aspirations, and its unique identity. It is this unique dimension that gives to such products an intangible value which intellectual property legislation, most notably copyright law, seeks to reward in the marketplace.

But intellectual property regimes cannot accomplish this task alone. Countries including Canada have formulated a number of devices to promote and encourage the arts and innovation in order to foster national culture. Such mechanisms take the form of subsidies, tax incentives, barriers to foreign-controlled media services, and domestic content legislation. These devices work in conjunction with intellectual property legislation to articulate a national cultural iden-

tity by bringing to the public eye the fruits of their citizens' creative work.

Assuming that admittedly protectionist laws, viewed as a whole, can achieve national cultural goals, how can they co-exist with a stannch free trade philosophy that seeks to abolish all cultural barriers? Canadians and Americans differ on the nature of culture and its place on the international market. Should culture be defined as a commodity like any other? Some Canadians fear that the United States will overwhelm its more vulnerable trading partner with a pervasive cultural ideology which Canadians do not always share.

> [T]his issue will not cease being a thorny one so long as there is a lack of acceptance on the US side that the cultural issue is anything but a disguised protectionism. The Canadian view is rooted in the fundamentally unequal nature of the economies of and the relationship between the two countries. The American view is rooted in the understandable perspective of the world's largest exporter of cultural services, *viz.* that culture is not culture, it is big business, and if it is big business for the US, then naturally anyone trying to characterize it differently must be devious at best, and probably also guilty of the worst sin of all, an opponent of reciprocity.[71]

Cultural issues have shaped Canada's relationship with the United States in recent years and provided an important context for the free trade negotiations. Canada has long protected its publishing, broadcasting and film industries which, it is argued, help to preserve a fragile and fragmented national identity. And yet, in spite of such protective measures, the U.S. still enjoys a significant share of the Canadian market in entertainment and cultural products.[72]

> There is in Canada great pride in our nation and a belief that the world should be able to appreciate our unique good fortune. We are however constantly exposed to strength and vibrancy of the American presence in our lives. Canada has a population of twenty-five million. Over 80% of that population lives within two hundred miles of [the] mutual border. As a spin off of [U.S.] communications strength in television, radio, records, films and media, we are constantly awash with what may certainly be perceived to be commercial products in the

U.S. which are perceived to have a significant cultural impact in Canada.[73]

Throughout the FTA and NAFTA negotiations the Canadian government argued that cultural issues should be exempt from free trade considerations. Ottawa's negotiators adamantly maintained that "free trade" with the U.S. could not be sold to Canadians without some cultural safeguards. For Canada, it was never a question of excluding American culture from the Canadian market. Throughout the free trade negotiations Canadian negotiators attempted to preserve only a small market share for domestic cultural products. As Braun and Parker have noted,

> [i]n light of the pervasive nature of American culture in every aspect of Canadian society, it is generally accepted that state intervention is necessary "to create and support a countervailing cultural force to the unrelenting flow of Americana across the border."[74]

As a result, Canada successfully negotiated an exemption of its "cultural industries" in the FTA which was later carried over into NAFTA despite strong opposition from the U.S. The exemption contained in Article 2005 of the FTA stipulates that:

> 1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided...
> 2. Notwithstanding any other provision of this Agreement, a Party may take the measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.[75]

The "cultural industries" protected by this provision are those thought to be instrumental in providing public access to Canadian intellectual property and include, among others, the radio and television broadcasting industry and the publishing industry.[76]

Since an intellectual property code was left off the bargaining table during the FTA negotiations, it was perhaps easy enough for the United States to agree, albeit grudgingly, that cultural industries would not form part of a free trade alliance. In this way the exemption only postponed consideration of trade in intellectual property until another day. It is under NAFTA that full consideration of the cultural industries exemption and its effect on trade in intellectual property arises. An intellectual property code was included in NAFTA. Yet how can NAFTA recognize free trade in intellectual property on the one hand and exclude cultural industries, no matter

how restrictively defined, on the other? U.S. trade negotiator Carla Hills concluded that "Canada has exempted all of the intellectual property because of their [*sic*] being mesmerized by the culture issue."[77]

The idea that Canada is "mesmerized" by this item is not unjustified. Canada's entire international copyright policy appears to rest on this single issue. In fact, Canada does not have a strongly articulated international position on intellectual property that would reflect its own particular needs and interests and has chosen instead to follow, for political and economic reasons, the policy set down by its more powerful neighbor to the South.[78] An intellectual property code was included within the NAFTA agreement. Yet how can NAFTA recognize free trade in intellectual property on the one hand and exclude cultural industries, no matter how restrictively defined, on the other?

The impact of a cultural industries exemption in the context of trade in intellectual property has not yet been tested. Canada has not invoked its rights under the cultural industries exemption, and one may question whether the cultural industries exemption Ottawa worked so hard to obtain is anything more than symbolic. An analysis of Article 2005 of the FTA makes clear that Canada's exercise of the cultural industries exemption will come at a heavy price, because the U.S. can "take measures of equivalent commercial effect" against Canada should it invoke an exemption. Such retaliatory action would be devastating to Canada given the profound disparity in economic power between the two countries. Thus Canada is inhibited from invoking the cultural industries exemption except as a means of preserving the *status quo ante*.[79]

A test case may be brewing. On June 6, 1994, the Canadian Radio-Television and Telecommunications Commission (CRTC), the regulatory body that oversees Canada's broadcasting and telecommunications industries, rendered a decision removing the U.S.-based Country Music Television channel from Canadian cable networks and replacing it with a newly formed competitor, the Canadian Country Network.[80] Country Music Television had enjoyed access to the Canadian market for ten years and had developed a certain following among Canadian country music enthusiasts. The American channel is seeking judicial review of this decision by the Federal Court of Canada on the basis that the CRTC breached the principles of "natural justice." The case was heard on November 22,

1994 and the court reserved its decision. Surely the tension between the cultural industries exemption (which would serve as a *prima facie* legitimation of the CRTC's decision in the free trade context) and the free trade principles embodied in NAFTA will figure prominently in the court's ruling.[81] Any exemption for "cultural industries" threatens to undermine the American goal of harmonizing the protection of intellectual property under the international trade framework. From the U.S. perspective, the cultural industries exemption set a dangerous precedent that could undermine not only the intellectual property rights provisions of NAFTA but also could be invoked during the course of the GATT/TRIPs negotiations. In fact, this concern proved to be prescient.

During the final weeks of the GATT negotiations in 1994 the "trade in culture" debate arose with passion. With the general support of the other members of the EU, France objected to the proposed inclusion within the GATT of trade in audiovisual works. France argued that its distinct cultural identity was being swallowed up in a wave of foreign films and television programs emanating mostly from the U.S.[82] It sought a cultural industries exemption similar to what Canada had obtained under the FTA and NAFTA. In order to prevent the collapse of the Uruguay Round, the parties agreed "not to agree." At present, then, international trade in audiovisual works is excluded from the GATT and is to form the subject of separate bilateral trade negotiations with the United States.[83] In this way the issue has been diffused for the moment but will, most assuredly, form a principal part of the agenda for the next round of GATT talks.

An exemption for cultural industries, particularly within the GATT/TRIPS context, is unacceptable to the U.S. because of its potential to limit the free flow of American-made intellectual property. Such an express exemption is an impediment to the total "commodification" of intellectual property and its complete integration into the international trade forum. It will be this issue, more than any other, that will thwart America's attempt to reach agreement in the future on a fully comprehensive trade regime incorporating intellectual property.

What must be clear at this stage is that any successful resolution of the issue of culture and trade will involve impassioned soul-searching and heated disagreement. Culture may not be a commodity like any other and may require rules that are somewhat

different from the free trade regulations applicable to goods and services. In the name of global cooperation and harmony, accommodation may have to be made for this difference. Sociologist Todd Gitlin believes that

> [i]t's an important question for every country, how to guarantee that the local traditions and local creativities aren't squashed...I'm not an absolute protectionist but I do think that culture is not just another commodity, I think that it is lifeblood and that there are certain things whose value should not be left to the market place...[84]

For the United States, international trade in intellectual property requires open access to foreign markets and continued international cooperation. If nations such as Canada and the EU feel unduly pressured on the cultural issue, they may "dig their heels in" and refuse to cooperate with the U.S. on other trade issues. In spite of the existence of international trade treaties containing intellectual property codes, the effectiveness of these obligations must surely depend as much on the spirit in which they are undertaken as on the terms appearing on their face.

## III. CONCLUSION

The development and protection of intellectual property will remain a paramount consideration in shaping the economic policies of the industrialized world. Canada has been and will continue to be very much influenced by the actions of its free trade partners, particularly by the United States. The relations between Canada and the U.S. in the intellectual property and trade framework reflect a microcosm of the larger global context. In them can be found the interests of a heavy intellectual property exporter versus that of a heavy importer, and thus far the interests of the exporter have generally prevailed. This has been accepted by Canada, in spite of financial repercussions, in so far as it has focused on setting harmonized standards for the protection of intellectual property as in the case of pharmaceutical patents. Harmonized standards are the burden that Canada has chosen to bear in exchange for the benefits it believes will accrue generally as a result of liberalized international trade.

More profoundly, one can find reflected in these two disparate free trade partners the interests of a dominant cultural force conflicting with those of a smaller, more vulnerable nation. In this regard, the

shape of the "new economic world order" has yet to play itself out. A thorough and comprehensive assessment by the international community of the issue of culture and trade will involve considerations that go to the very essence of the nature of intellectual property. Perhaps the way in which Canada and the United States interact as free trade partners in relation to this sensitive issue could serve as a model for the future of global trade in much the same way that the Canadian cultural industries exemption has already served as a template for the GATT/TRIPs negotiations.

Nations are beginning to recognize the need to accommodate the aspirations of those groups within a society that have been traditionally disenfranchised. They are also beginning to understand that the need to preserve and sustain the environment is very much dependent on global cooperation and collaboration. Surely, national cultural differences, if they are valued at all, are deserving of similar consideration. Without a spirit of generosity in international trade relations, prosperity through enhanced intellectual property protection may prove more elusive than would first appear. After all, there can only be trade in intellectual property as long as nations harbor consumers both *willing* and *able* to pay the price.

***The Alchemist***

*The sheet of writing paper*
*Slowly became a leaf of gold*
*Changing under my hand.*
*I looked up,*
*And close about the window*
*Saw soft mallets of fog*
*Thudding upon the sun;*
*Saw him cool from fire to bronze,*
*To aluminium,*
*To water,*
*And vanish.*

**Richard Church**[85]

## GLOSSARY

| | | |
|---|---|---|
| CRTC | = | Canadian Radio-Television and Telecommunications Commission |
| EU | = | European Union |
| FTA | = | Free Trade Agreement |
| GATT | = | General Agreement on Tariffs and Trade |
| NAFTA | = | North American Free Trade Agreement |
| PMPRB | = | Patent Medicine Prices Review Board |
| TEC | = | technology exporting country |
| TRIPS | = | trade-related international property rights |
| USTR | = | United States trade representative |
| WIPO | = | World Intellectual Property Organization |

## NOTES

[1] For example, in Canada, *The Copyright Act* R.S.C 1985 c. P-4; *The Patent Act* R.S.C 1985 c. C-42 and *The Trade Marks Act* R.S.C 1985 c. T-13. Similar statutes exist in the U.S.

[2] The assumptions underlying intellectual property protection are generally accepted although unproven. For a general critique of these assumptions see, for example, David Vaver, "Intellectual Property Today: Of Myths and Paradoxes," *Canadian Bar Review*, 69 (1990): 98-128; Christopher Lind, "The Idea of Capitalism or the Capitalism of Ideas? A Moral Critique of the *Copyright Act*," *Intellectual Property Journal*, 7 (1991): 65-74.

[3] *General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 I.L.M. 1 (1994).

[4] *North American Free Trade Agreement* between Canada, Mexico and the United States signed by the three countries on December 17, 1992 and ratified by the three respective legislatures. NAFTA was brought into force on January 1, 1994 in Canada by virtue of *An Act to Implement the North American Free Trade Agreement*, 1993 S.C., c. 23.

[5] *Canada-United States Free Trade Agreement* brought into force on January 1, 1989 in Canada by virtue of the *Canada-United States Free Trade Agreement Implementation Act*, 1988 S.C. c. 65.

[6] Geza Feketekuty, "Intellectual Property - The Major Shifts that are Taking Place in the World Economy" in Murray G. Smith, ed., *Global Rivalry & Intellectual Property - Developing Canadian Strategies* (Halifax: The Institute for Research on Public Policy, 1991): 60-63, 60. In the early 198Os President Ronald Reagan met with a select group of intellectual property producing industries, drawn heavily though not exclusively from the pharmaceutical and computer software sectors. These 12 corporations were asked to identify their major international trade concerns. The concerns they shared related to inadequate international intellectual property protection. It was this small but powerful corporate lobby that has forever transformed the face of intellectual property. As the "Intellectual Property Committee," the members of this group had direct input throughout the

GATT negotiations. The members were Bristol Myers, DuPont, FMC Corporation, General Electric, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International and Warner Communications. See Carol J. Bilzi, "Towards an Intellectual Property Agreement in the GATT: View from the Private Sector" and Peter C. Richardson, "The Need for Adequate and Effective Protection of Intellectual Property: Perspective of the Private Sector - Patents," *Georgia Journal of International & Comparative Law* 19 (1989): 343-351; 352-357 respectively.

[7] For further discussion on the decline in comparative advantage of industrialized nations in goods-based trade and strategies for U.S. economic growth, see Lester B. Thurow, *Head to Head: The Coming Economic Battle among Japan, Europe and America* (N.Y: Morrow, 1992); Robert Reich, *Next American Frontier* (N.Y: Penguin Books, 1984).

[8] See Francis W. Rushing and Carole Ganz Brown, eds., *Intellectual Property Rights in Science, Technology, and Economic Performance* (Boulder: Westview Press, 1990) and Mitchel B. Wallerstein, Mary Ellen Mogee and Roberta A. Shoen, eds., *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington: Office of International Affairs, National Research Council, National Academy Press, 1993).

[9] In 1988, then Commerce Secretary C. William Verity, speaking to the Senate Judiciary Committee on Patents, Copyright and Trademarks, asserted that U.S. copyright and related industries accounted for more than five percent of the U.S. Gross National Product and generated a trade surplus of over $1 billion. See "Administration Officials Cite Trade Benefits of Adherence to Berne Copyright Convention," *International Trade Reporter (BNA)*, 5 No.8 (February 24, 1988): 257. Again, in 1990, in a report entitled *Copyright Industries in the US Economy*, it was asserted that U.S. copyright industries generated sales of $22.3 billion in 1989 and accounted for $173 billion in the U.S. GNP. See "Copyright Group Assails EC's Stance in GATT Talks: Calls Prospects Bleak," *International Trade Reporter (BNA)*, 7 No. 44 (November 7, 1990): 1711.

[10] Of course, this same analysis is applicable in the cases of the other superpowers in technology and innovation; namely, the European Union and Japan. For further discussion see Ambassador Bunroku

Yoshino, "The Japanese Approach to Technology and Innovation" and Gilles Y. Bertin, "A European Perspective on the Evolving Intellectual Property System," in Smith, *supra* note 6: 29-32, 161-165 respectively.

[11] David Hartridge and Arvind Subramanian, "Intellectual Property Rights: The Issues in GATT," in Lonnie T. Brown and Eric A. Szweda, eds., *Trade-Related Aspects of Intellectual Property* (Buffalo: William S. Hein and Co. Inc., (Vanderbilt Journal of Transnational Law, 1990, 3-18, 3.

[12] Hartridge and Subramanian, *supra* note 11, 3-4.

[13] For example in 1988, the U.S. International Trade Commission produced a report in which it estimated that in 1986 U.S. industries were losing between $43 and $61 billion as the direct result of the activities of intellectual property "pirates" and "counterfeiters." See *U.S. International Trade Commission, Pub. No. 2065, Foreign Protection of Intellectual Property Rights and the Effect on US Industry and Trade* (1988). According to Clayton Yeutter, former United States Trade Representative, the U.S. could reduce its "...$170 billion trade deficit appreciably simply by adding proper protection for [its] intellectual property rights around the world." See "Intellectual Property and Trade Deficit," *International Trade Reporter (BNA)* 5, No.3 (February 10, 1988), 71. Similarly, in 1988 then Commerce Secretary C. William Verity, speaking to the Senate Judiciary Committee on Patents, Copyright and Trademarks, stressed that the substantial economic benefits generated by copyright industries were being threatened by acts of international "piracy." See "Administration Officials Cite Trade Benefits of Adherence to Berne Copyright Convention," *supra* note 9. See as well, general discussions in Robert A. Morford, "Intellectual Property Protection: A United States Priority," *Georgia Journal of International and Comparative Law* 19 (1989): 336-342; Deborah Mall, "The Inclusion of a Trade Related Intellectual Property Code under the General Agreement on Tariffs and Trade (GATT)," *Santa Clara Law Review* 30 (1990): 265-291.

[14] See, for example, the critique of Robert Feinberg and Donald Roussland, "The Economic Effects of Intellectual Property Rights Infringements," *Journal of Business*, 63 (1990): 79-90.

[15] In the words of David Crane in "Industrial Strategy for an Ideas-Based Economy," *Canada-United States Law Journal* 19 (1993): 357:

> It is easy but simplistic to use aggressive trade policy as industrial policy. It is also appealing. It assumes that all of our own problems are the fault of someone else so that by adopting unilateral, protectionist policies we will, by the stroke of a pen, restore competitiveness. But it is also wrong-headed and dangerous - wrong-headed because it is based on a false assumption that the main cause of our economic problems are trade barriers and policies of other countries rather than poor policies and business mismanagement at home, and dangerous because it threatens to destroy the international trading system and precipitate costly trade wars that no one would win.

[16] See "Comprehensive United States Proposal for a GATT Agreement on TRIPs," May 14, 1990, United States Trade Representative Press Release; *The Intellectual Property Committee, Keidanren and U.N.I.C.E., Basic Framework of GATT Provisions on Intellectual Property - A Statement of Views of the European, Japanese and United States Business Communities* 18 (June 1988); U.S. Trade Representative Carla Hills had characterized the American proposals as a "bill of rights" for intellectual property. See "U.S. Proposal on Intellectual Property is Presented to GATT, Gets Mixed Reviews" *International Trade Reporter (BNA)*, Vol. 7, No. 20 (May 16, 1990): 680; Congressman Robert W. Kastenmeier and David Beier, "International Trade and Intellectual Property: Promise, Risks and Reality," in Brown and Szweda, *supra* note 11, 285-307.

[17] A compulsory license is a mandatory grant, by statute, of a license for the use and exploitation of intellectual property at a fixed royalty rate, regardless of whether the intellectual property rights holder has consented to the grant.

[18] Countries that produce intellectual property would generally favor a long term of protection.

[19] Ted L. McDorman, "Unilateralism (Section 301) to Multilateralism (GATT): Settlement of International Intellectual Property Disputes

after the Uruguay Round," in George R. Stewart, Myra J. Tawfik, Maureen Irish, eds., *International Trade and Intellectual Property: The Search for a Balanced System* (Boulder: Westview Press, 1994), 119-139, 121. See as well references *supra*, note 2. Ironically, the US itself had been, early on in its history, "guilty" of "theft" of intellectual property, as aptly stated by James J. Barnes in *Authors, Publishers and Politicians - The Quest for an Anglo-American Copyright Agreement 1815-1854* (Ohio: Ohio State University Press, 1974), 49-50:

> As a country, nineteenth-century America was akin to a present-day underdeveloped nation which recognizes its dependence on those more commercially and technologically advanced, and desires the fruits of civilization in the cheapest and most convenient ways. Reprinting English literature seemed easy and inexpensive, and so America borrowed voraciously.

[20] See, for example, the *Ministerial Declaration on the Uruguay Round: Declaration of 20 September 1986*, 25 I.L.M. 1623, 1626 (1986).

[21] Berne Convention (signed on 9 September 1886) as revised, 1 L.T.S 217, reprinted in 28 I.L.M 1005 (1989).

[22] Paris Convention (signed on 20 March 1883) as revised, 21 U.S.T 1583, T.I.A.S No. 6923, 828 U.N.T.S.

[23] Rome Convention (signed on October 26 1961) 496 U.N.T.S 43.

[24] See in this regard, Hans Peter Kunz-Hallstein, "The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property" in Brown and Szweda, *supra* note 11: 265-284; Mall, *supra* note 12.

[25] See in this regard, Donald DeKieffer, "US Trade Policy Regarding Intellectual Property Matters," in Stewart, Tawfik and Irish, *supra* note 19: 97-118.

[26] 19 U.S.C.§1337 (1982).

[27] The legality of s.337 has been challenged successfully under GATT and its present status is questionable. See GATT, *United States - Section 337 of the Tariff Act of 1930: Report by the Panel* L/6439 (16 January, 1989).

[28] Robert H. Barrigar, Q.C., as cited by Christopher Kent, "The Uruguay Round *GATT TRIPs Agreement* & Chapter 17 of the *NAFTA*: A New Era in International Patent Protection," *Canadian Intellectual Property Review* 10 (1994): 711-744, 715.

[29] 19 U.S.C. §2411-2420 (1992).

[30] 19 U.S.C. §2242 (1992).

[31] See "USTR Announcement and Fact Sheets on Decisions Affecting Foreign Government Procurement, Intellectual Property Protection and US-Japan Supercomputer Pact," *International Trade Reporter (BNA)* 11 No. 18 (May 4, 1994): 722. The USTR identified 6 "Priority Watch List" countries including the European Union and Japan and 19 countries on the "Watch List". Canada has been placed on the "Special Mention" list in respect of its practice of discriminating against non-Canadian periodicals.

[32] Judith Bello, "*US Trade & Policy Series #13* Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises" *International Lawyer* 22 (1988): 1197-1206, 1205-1206.

[33] As per Ronald A. Brand in "GATT and the Evolution of United States Trade Law," *Brooklyn Journal of International Law* 18 (1992): 101-142, 104: the economic theory of comparative advantage "...tells us that even if one country is more productive than another in all lines of production, both can benefit from trade." For a comprehensive general discussion of GATT see Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, (Salem: Butterworths, 1993); John H. Jackson, "GATT and the Future of International Trade Institutions" *Brooklyn Journal of International Law* 18 (1992): 11-29.

[34] *GATT - Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods*, 33 I.L.M. 81 (1994). As of this writing the GATT has yet to be ratified by the legislature of the Canada, although the lame-duck session of Congress did so on 1 December 1994. In Canada, *An Act to Implement the Agreement Establishing the World Trade Organization (WTO)* was tabled for first reading in the House of Commons on October 25, 1994, and it is fully expected to pass.

[35] For further discussion see, generally, Mall *supra* note 12 as well as references in *supra* note 8. The final GATT/TRIPs agreement includes express undertakings by GATT members to abide by the dictates of the major international intellectual property treaties including the Berne, Paris and Rome Conventions. In this way, then, the GATT/TRIPs has potentially usurped the function of WIPO by incorporating the terms of these independent treaties within its particular framework. One may then question the extent to which WIPO would have any further role to play in the future development of international intellectual property, and the extent to which the overarching GATT/TRIPs framework might diminish the importance of these other international intellectual property treaties.

[36] See Edward Slavko Yambrusic, *Trade-Based Approaches to the Protection of Intellectual Property* (New York: Oceana Publications Inc., 1992) for summaries of the various GATT/TRIPs positions. As well, "US, Japan Support EC Draft Agreement for Trade-Related Intellectual Property," *International Trade Reporter (BNA)*, 7, No. 15 (April 11, 1990): 513. For further discussion on the position of the developing world see Peter Gakunu, "Intellectual Property: Perspective of the Developing World" *Georgia Journal of International & Comparative Law* 19 (1989): 358-365; David Silverstein, "Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization," in Stewart, Tawfik and Irish, *supra* note 19: 155-179. Similarly, Maureen Irish, "Intellectual Property and North-South Relations," in Stewart, Tawfik and Irish, *supra* note 19: 181-187; Graham Flack, "The Development of an International Patent Regime: Sound Legal Theory or Misguided Leap of Faith?", *Dalhousie Journal of Legal Studies* 2 (1993): 1-57. For a similar view from the developed world see A.A.Keyes, "What is Canada's International Copyright Policy?" *Intellectual Property Journal* 7 (1993): 299-319.

[37] McDorman, *supra* note 19, 123. Ironically, neither Section 301 nor Special 301 have been repealed in spite of the successful conclusion of the Uruguay Round, although these measures may have more legitimacy at this time than they had pre-GATT in that they now seek to enforce obligations that have been expressly undertaken by GATT members. In fact, the U.S. has recently stated its intention to use these recourses in order to accelerate compliance of the TRIPs code by

recalcitrant GATT members. See for example "USTR Delays Citing China, India, Argentina under Special 301 Law" *International Trade Reporter (BNA)* 11, No. 18 (May 4, 1994): 690.

[38] T. Mesevage, "The Carrot and the Stick: Protecting US Intellectual Property in Developing Countries," *Rutgers Computer and Technology Law Journal* 17 (1991): 421-450; Carlos Alberto Primo Braga, "The Economics of Intellectual Property Rights and the GATT: A View from the South" in Brown and Szweda, *supra* note 11: 243-284; Gunda Schumann, "Economic Development and Intellectual Property Protection in Southeast Asia" in Rushing and Ganz Brown, *supra* note 8: 157-202.

[39] Philip H. Tresize, "US- Canada Free Trade: An Idea Whose Time has Come?" in Robert M. Stern, Philip H. Tresize, John Walley eds., *Perspectives on a US-Canadian Free Trade Agreement*, (Washington: the Brookings Institution, 1987): 4-10, 4.

[40] See Sperry Lea, "A Historical Perspective," in Stern and Tresize, *supra* note 39: 22-29.

[41] This threat is once again very much alive. On September 12, 1994, the separatist Parti Québécois won the Québec provincial election and has promised to hold a referendum on sovereignty within the next twelve months. As well, the Bloc Québécois, a separatist federal party, sits in the federal Parliament as the official opposition to the majority Liberal Party led by Prime Minister Jean Chrétien.

[42] David B. Watters, "Innovation and Intellectual Property: A Canadian Perspective", *Canada-US Law Journal* 15 (1989): 281-293, 287.

[43] In September 1994, Canada ranked 16th out of 20 overall among industrialized countries in world competitiveness according to the World Competitiveness Report. In 1989, Canada had ranked 4th. See "Canada Slips in World Rankings," *The Globe and Mail*, September 7, 1994. For general perspectives on Canadian competitiveness see Michael Hart, *Trade Why Bother?* (Ottawa: Centre for Trade Policy and Law, 1992); Marcel Massé, "International Economic Environment and Structural Adjustments," and Ted Shrecker, "Facing the Risks of Decline: Can Canada Prosper in the Global Economy?" *Canadian Issues: Global Restructuring: Canada in the 1990s* 13 (1992):11-18,

19-47 respectively; Gordon W. Gow, "The Importance of Innovation to Canada in the World Competitive Context," *Canada-US Law Journal* 15 (1989): 13-17.

[44] Tresize, *supra* note 39, 4.

[45] *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Donald S. Macdonald, Chair, (Ottawa: Supply and Services Canada, 1985).

[46] *Ibid.*, 417.

[47] Study conducted by Consumer and Corporate Affairs Canada, *Intellectual Property and Canada's Commercial Interests* (Ottawa: Supply and Services Canada, 1990), discussed in Christopher Kent, "The Uruguay Round *GATT TRIPs Agreement* & Chapter 17 of the *NAFTA*: A New Era in International Patent Protection," *Canadian Intellectual Property Review* 10 (1994): 711-744.

[48] Donald DeKieffer, "U.S. Trade Policy Regarding Intellectual Property Matters," in Stewart, Tawfik and Irish, *supra* note 19: 97-118, 106.

[49] The hope was that the FTA and NAFTA, by providing for an entrenched dispute resolution mechanism, would also require that the U.S. repeal or at least exempt Canada from the application of Sections 337, 301 and Special 301. This has not proven to be the case and Canada remains on a U.S. "Special Mention" list.

[50] See *Re Royalties for Retransmission Rights of Distant Radio and Television Signals* (1990), 32 C.P.R. (3d) 96 and Keyes, *supra* note 36.

[51] See Shelley P. Battram and W. Lee Webster, "The Canada/United States Free Trade Agreement," *Canadian Intellectual Property Review* 4 (1988): 267-277.

[52] R.S.C. 1985, C. P-4.

[53] Jennifer Horton, "Pharmaceuticals, Patents and Bill C-91: The Historical Perspective", *Canadian Intellectual Property Review* 10 (1993): 145-158, 161.

[54] See for example, A.J. Manson, "The Impact of Compulsory Licensing on Pharmaceutical Research" *Canadian Intellectual Property Re-*

*view* 1 (1984): 164-170. Cf. George A. Seaby, "Drug Licensing Should Section 41(4) be Retained?" *Canadian Intellectual Property Review* 1 (1984): 37-53.

[55] *Report of the Commission of Inquiry on the Pharmaceutical Industry*, H.C. Eastman Commissioner (Ottawa: Supply and Services Canada, 1985), xviii.

[56] See *Submission to the Commission of Inquiry on the Pharmaceutical Industry - Presented by the Pharmaceutical Manufacturer's Association of Canada*, August 1984, and Alan D. Lourie, "Comment on Canada's Pharmaceutical Compulsory Licensing Provisions," *Canadian Intellectual Property Review* 3 (1987): 21-26. Given that Canada does not have a significant research and development base to begin with, its comparative advantage, the Eastman Report concluded, does not lie in seeking to stimulate one, but rather to maintain its strength in clinical research. Further, studies have shown that the pharmaceutical industry enjoyed 80 percent of drug sales in Canada in 1980 whereas generic drug manufacturers had only a 4.4 percent share of the market and this has remained virtually constant for a decade (83.1 percent in 1990 versus 9.3 percent). Eighty-three percent of pharmaceutical companies in Canada are foreign owned, 49.2 percent being U.S. based. See Abraham Rotstein, "Intellectual Property and the Canada-US Free Trade Agreement: The Case of Pharmaceuticals," *Intellectual Property Journal* 8 (1993):121-137, 124.

[57] R.S.C. 1985 (3rd Supp.), C. 33. Even though not expressly stated by the government, it would seem clear that this change was the result of U.S. pressure on Canada to 'liberalize' the compulsory licensing provisions of the *Patent Act*. 'Liberalizing' in this context ultimately meant 'abolishing'. See Battram and Webster, *supra* note 51.

[58] Randy Marusyk and Dr. Margaret Swain, "Price Control of Patented Medicines in Canada," *Canadian Intellectual Property Review* 10 (1993): 159-174, 162. See generally, Milan Chromecek, "The Amended Canadian Patent Act: General Amendments and Pharmaceutical Patents Compulsory Licensing Provisions," *Fordham International Law Journal* 11 (1988): 504-548; Emma Hill and Jane Steinberg, "Bill C-22 and Compulsory Licensing of Pharmaceutical Patents," *Canadian Intellectual Property Review* 4 (1987): 44-62; Kevin P. Murphy, "A

Review of the Pharmaceutical Patent Practice under the Amended Patent Laws," *Canadian Intellectual Property Review* 6 (1989): 38-44.

[59] The pharmaceutical industry promised to increase its spending on research and development in Canada to 8 percent of sales by 1991 and 10 percent by 1996, as well as obliging itself to keep prices in line with inflation.

[60] See *United States Trade Representative, National Trade Estimate Report on Foreign Trade Barriers*, (Washington: U.S. Government Printing Office, 1990). See also, Gary Clyde Hufbauer and Jeffrey J. Schott, *North American Free Trade: Issues and Recommendations* (Washington: Institute for International Economics, 1992).

[61] The principle of national treatment is embodied in the GATT/ TRIPs at Article 3 and in NAFTA in Article 1703.

[62] Or, as some would argue, by the strong pharmaceutical lobby in the US. See Ralph Nader, "Introduction: Free Trade and the Decline of Democracy," in Ralph Nader *et al.*, *The Case Against Free Trade - GATT, NAFTA, and the Globalization of Corporate Power* (San Francisco: Earth Island Press, 1993):1-12, 4.

[63] *An Act to Amend the Patent Act*, S.C.1993, c. C-1 (Bill C-91).

[64] For general discussion and questions as to the constitutionality of the PMPRB, see Marusyk and Swain, *supra* note 58.

[65] According to a 1992 draft study, between 1987 and 1991 drug prices remained constant with inflation. But the same study concluded that the full impact of Bill C-22 would only begin to be felt in 1994. Draft study by the Department of Consumer and Corporate Affairs, *Trends in the Pharmaceutical Industry in Canada in the Post 1987 Environment*, cited in Rotstein, *supra* note 56, 128.

[66] A study conducted by Green Shield Prepaid Services Inc. as cited in Rotstein, *supra* note 56, 129, found that prescription drug prices increased at double the inflation level between 1987-1991. (See Green Shield Prepaid Services Inc., *A Report on Drug Costs* (Willowdale: Green Shield, April 1992). The Ontario Government has estimated an increase of $1 billion over the next ten years in that province alone: "New Drug Law will hike costs by $1 Billion, Lankin Says," *The*

*Toronto Star*, October 24, 1992; According to economist Thea Lee, "Happily Never NAFTA: There's No Such Thing as a Free Trade," in Nader *supra* note 62, 76: "NAFTA could cost Canada an extra $400 million a year in higher drug prices."

[67] Eastman Report, *supra* note 55, 6:"...generic firms have introduced an element of vigorous competition in the market for pharmaceutical products in Canada." See, too, the representations made by the Canadian generic drugs industry at a symposium and news conference held in Washington, D.C. in October, 1992, and summarized in "Argentine, Canada Industries Protest Laws on Compulsory Drug Licensing", *International Trade Reporter (BNA)*, 9 No. 42 (October 21, 1992): 1823.

[68] Keith E. Maskus, "Intellectual Property," in Jeffrey J. Schott, ed., *Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiation* (Washington: Institute for International Economics, September 1990), 164-179, 167.

[69] Another example of the clash between health concerns and intellectual property rights has arisen most recently in the proposal by the Canadian Government to ban all forms of ornamentation and identification on cigarette packaging in an attempt to discourage cigarette smoking. The cigarette manufacturers have claimed a violation of their trademark rights under NAFTA.

[70] *Report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture, A Charter of Rights for Creators* (Ottawa: Supply and Services Canada, 1985), 5.

[71] Richard B. Potter Q.C., "US/Canada Free Trade Agreement and Trade in Services: A Timorous First Step or a Bold New Stroke?" in *American Bar Association, National Institute, Section of International Law and Practice. Proceedings of Conference* (Washington: January 28, 1988), 143-160, 153. A complete exploration of the issue of Canadian cultural identity and cultural sovereignty is, unfortunately, well outside the scope of this paper, but for further discussion see, for example, James Chacko, ed., *Cultural Sovereignty: Myth or Reality*, (Windsor: Proceedings of the 28th Annual Seminar on Canadian-American Relations held at the University of Windsor, Windsor, Ontario, Centre for Canadian-American Studies, 1986); Duncan C. Card, *Canada-US Free*

*Trade Agreement and Canadian Cultural Sovereignty* (Victoria: The Institute for Research on Public Policy, 1987).

[72] Seventy-seven percent of magazines sold in Canada are from foreign sources, a majority from the U.S. Similarly, three out of four books in Canada are published outside of the country, mostly by U.S. publishers. In 1987, 80 percent of the films shown in Canada and 90 percent of all records sold in Canada were produced by U.S. companies. Further, on Canadian television, 75 percent of prime-time programs in English, close to 95 percent of drama programs, 70 percent of all general entertainment programs and 50 percent of news programs emanate from the U.S. See in this regard: William L. Northcote, "The Treatment of Culture and Cultural Industries under the Canada-US Free Trade Agreement and In the European Community," *Media and Communications Law Review* 2 (1991):27-55, and A.W. Johnson, "Free Trade and Cultural Industries," in Mark Gold and David Leyton-Brown, *Trade-Offs on Free Trade: The Canada-US Free Trade Agreement* (Toronto: Carswell, 1988), 350-360.

[73] Graham W.S. Scott, Q.C., "Canadian Cultural Issues," in *American Bar Association, National Institute, Section of International Law and Practice. Proceedings of Conference* (Washington: January 28, 1988), 181-205, 190-191.

[74] Michael Braun and Leigh Parker, "Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?" *Denver Journal of International Law and Policy* 22 (1993):155-191, 162.

[75] Annex 2106 NAFTA:

> Notwithstanding any other provision of this Agreement, as between the United States and Canada, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 301 (Market Access -Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed exclusively in accordance with the terms of the Canada-United States Free Trade Agreement...

This provision does not apply to U.S.-Mexico relations but does bind Mexico to the exemption in respect to Canada.

[76] Article 2012 of the FTA: Definitions

> Cultural industry means an 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 production, distribution, sale or exhibition 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 the 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.

With respect to the publishing industry, see Rowland Lorimer and Eleanor O'Donnell, "Global Restructuring in Publishing; Issues for Canada" *Canadian Issues: Global Restructuring: Canada in the 1990s* 13 (1992): 129-144; Malcolm Lester, "Free Trade and Canadian Book Publishing" in Gold and Leyton-Brown, *supra* note 72: 361-369; Glen M. Secor, "Cultural Industries in United States-Canada Free Trade: The Canadian Book Publishing Industry as a Case Study," *Boston University International Law Journal* 11 (1993): 299-326. In respect of the broadcast industry, see Stephen R. Konigsberg, "Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws," *Cardozo Arts & Entertainment* 12 (1993): 281-320.

[77] See Konigsberg, *supra* note 76, 300.

[78] See Keyes *supra* note 36, in which the author questions whether there exists a truly Canadian international copyright policy or whether it is directed from the outside. On Canada's GATT/TRIPs position see for example, Yambrusic, *supra* note 36, and "Uruguay Round Talks Make Slow Progress as Four Countries Offer Position Papers," *International Trade Reporter (BNA)*, 6 No. 42 (November 1, 1989), 1420.

[79] For an analysis of the cultural industries exemption see Lester, *supra* note 76; Northcote, *supra* note 72; Rick Salutin, "Culture and the Deal: Another Broken Promise," in Gold and Leyton-Brown, *supra* note 72: 365-369; Anthony de Fazekas, "Free Trade and Culture: An Alternative Approach," *Dalhousie Journal of Legal Studies* 2 (1993): 141-162.

[80] See CRTC decision 94-284 regarding eligible specialty services rendered on June 6, 1994.

[81] See "Canada's Federal Court of Appeal Grants CMT an Expedited Hearing Set for Nov. 22," *Reuter Textline Business Wire,* October 5, 1994; "The Border War over Country Music," *The New York Times,* October 23, 1994; "Country and Tantrum," *The Ottawa Citizen,* October 28, 1994; "Canada: Cultural Industries under US Fire Again - Companies Claim Canada has Gone Too Far to Stop Rivals," *Financial Post,* November 3, 1994; "Court ruling could kill U.S. channel in Canada," *Toronto Star,* November 25, 1994, E5.

[82] See in this regard, Braun and Parker, *supra* note 74; Lisa Garrett, "Comment- Commerce versus Culture: The Battle between the United States and the European Union over Audiovisual Trade Policies," *North Carolina Journal of International Law and Commercial Regulation* 19 (1994): 553-577; "France Feels Jurassic Boom," *Globe & Mail,* October 29, 1993; "Canadian Film Sector Pleased with GATT - Industry Breathes Sigh of Relief over Exclusion of Entertainment from World Trade Agreement," *Globe & Mail,* December 16, 1993, in which it is reported that exports to the European Union of U.S. films, TV shows and videocassettes amounted to $3.7 billion (US) in 1992.

[83] See "A Question of Culture: The Canadian Solution Resolves a GATT Standoff," *Maclean's Magazine,* December 27, 1993; "Canadian Film Sector Pleased with GATT - Industry Breathes Sigh of Relief over Exclusion of Entertainment from World Trade Agreement," *supra,* note 82.

[84] Professor Todd Gitlin, University of California at Berkeley, television interview on "Arts Talk," *Canadian Broadcasting Corporation,* Saturday, November 7, 1993.

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