

FRANCHISING THE CANDY
STORE: SPLIT-RUN
MAGAZINES AND A NEW
INTERNATIONAL REGIME
FOR TRADE IN CULTURE

TED
MAGDER

I. INTRODUCTION

In early April 1993, baseball enthusiasts across Canada were treated to an unusual sight. Larry Walker, the Montreal Expo's gold-glove, left-fielder graced the cover of U.S.-based *Sports Illustrated* magazine. While Walker himself may have enough star power to merit a cover shot, this was *Sports Illustrated's* baseball preview issue and the Expos are hardly a popular draw in most U.S. baseball markets. Walker was in one of those familiar baseball poses: right hand grasping the belt above his pinstripe pants, left arm raised to the shoulder, a Rawling's glove slung over the butt end of his Louisville slugger ... hockey stick. As it happens, Walker is Canadian: born in Maple Ridge, British Columbia, about 35 kilometres (or 20 miles) outside of Vancouver. An aspiring goaltender for his hometown hockey team, Walker realized at the age of sixteen that he had no future as a professional hockey player. He turned to baseball and saw his first quality curveball play-

*A list of acronyms used in this article is provided on page 51.

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ing for the Utica Blue Sox, an independent baseball team in upstate New York. The Expos signed him for \$1,500. The same edition of *Sports Illustrated* contains a profile of Cito Gaston, the Toronto Blue Jay's manager, and an article on the possibility of an all-Canadian baseball World Series. The issue begins with a lengthy feature on American college basketball and ends with two profiles of European hockey players now playing for Canadian teams in the National Hockey League. One of the profiles bears the easily translatable title "Pas de Problème."

This was the first of six special issues to be published in 1993 by Time Canada, a subsidiary of U.S.-based Time Warner, the world's largest media conglomerate. These issues would bear the name *Sports Illustrated Canada* (*SI Canada*) and would replace the regular, weekly issues of *Sports Illustrated* that have a circulation in Canada of roughly 150,000. The April 5th issue contained about 30 percent Canadian content and scooped up 40 pages of Canadian advertising worth roughly \$250,000.¹ It included full-page placements for Canadian Airlines, Sony Canada, Tourism Quebec, Black Velvet Canadian Whisky, and Volkswagen's new Golf ("In Canada, we briefly considered calling it the Hockey"). Although one of the profiles was written by a Canadian journalist, all of the editorial content was assembled at Time Inc.'s New York office and then transferred electronically via a Crosfield page fax system to a printing plant north of Toronto owned by Quebecor Printing, a Canadian company.

Time Inc., the magazine publishing arm of Time Warner, leads all U.S.-based magazine publishers in terms of both circulation and revenue. In 1996 its top three publications, *People*, *Sports Illustrated* and *Time*, helped Time Inc. earn more than \$500 million in operating income on more than \$4 billion in revenue.² Magazines account for close to 25 percent of Time Warner's total revenue stream; they provide the company with a reliable source of income as it under-

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takes new acquisitions and new media ventures. Indeed, while the magazine industry's share of total advertising in the U.S. has remained fairly constant over the past decade (at roughly 8 percent), Time Inc. is on something of a roll, reporting annual double-digit growth between 1991 and 1997. Some of Time Inc.'s recent success can be attributed to a general increase in advertising expenditures during the 1990s, but Time Inc., like other magazine publishers, has also aggressively pursued new revenue streams. The introduction of new magazines is one of the tactics employed. In 1996, over 900 new magazines were pitched to American readers; that year, Time Inc. published 28 titles, up from 12 a decade before. For publishers of already successful magazines such as *Sports Illustrated*, other tactics can reap dividends. In 1996, for example, Time Inc. began publication of *Sports Illustrated for Kids*. A separate edition of *Sports Illustrated for Women* is in the works. *Sports Illustrated Classics*, on the other hand, recycles and repackages old editorial material into special annual issues and commemoratives. In a partnership with CNN (itself part of the Time Warner stable) since December, 1996, the magazine has operated CNN/SI, a 24 hour sports-news cable channel. Spin-off publications and broadcasting ventures such as these are part of a more general strategy to use established magazines as brand-names for a host of consumer goods and services. 'Brand extension' includes everything from clothing and calendars to plumbing supplies and cake-decorating kits, marketed under a magazine's moniker. Brand extension now accounts for more than 10 percent of total industry earnings and some analysts believe it may be the industry's most lucrative growth market.³

No less important, new printing and distribution techniques have made it possible for publishers to expand the production of regional editions. These offer advertisers the opportunity to reach a more precisely targeted audience; they either use the same editorial content or, in some cases, modify some of the content to reach a well-defined set of readers. The region can be the size of a neighborhood, a city, or the whole of the American northwest. Whatever the case, geography is less of a variable than demographics and markets. The objective is to maximize readership and, more precisely, to maximize the value of readers to advertisers. For example, advertisers that might balk at the price of reaching a nation-wide audience (or have no interest in doing so) might be attracted by the opportunity to reach readers in the San Francisco Bay area only. The trend is evident

in Canada as well: *Maclean's*, the country's leading current-affairs weekly, offers advertisers 21 distinct editions, including a "platinum" edition directed at more than 80,000 readers who earn more than \$75,000 a year.⁴

And in the search for readers that can be sold to advertisers, national borders too have become anachronistic. On this front *Time* magazine has led the way: it has been inserting a modest amount of Canadian content into its standard U.S. edition since the 1950s to service Canadian advertisers and readers. But for most magazines and most publishers, the possibility of maximizing sales in foreign markets is a rather new phenomenon. "As recently as a decade ago, only a handful of U.S. titles had a significant publishing presence abroad."⁵ But now, as an editorial in the Magazine Publishers of America 1996 annual report noted, everyone is "going global," applying the same publishing techniques and business logic that have made domestic regional editions so popular in the international marketplace. And *SI Canada* nicely illustrates the emerging strategy: to produce just enough local (or national) content to attract new readers and new advertisers -- a regional edition with global ambitions. It is also perfectly situated to capitalize on the staggering growth of sports as a global media product.

In introducing *SI Canada*, Donald Elliman, its president and publisher, noted that since the 1976 Olympics in Montreal, Canada has attained a newfound prominence in sports. As evidence he pointed to the recent expansion of the Canadian Football League into the United States, the World Series victory by the Toronto Blue Jays, and the expansion franchises of the National Basketball Association in Toronto and Vancouver. Prominence, for Elliman, is measured in terms of a North American presence, and undoubtedly an end to hockey's dominance as Canada's national pastime. What Elliman didn't mention was that there was no general-interest Canadian sports magazine being published. *SI Canada* would neatly fill a gap in the marketplace. What possible objections could there be to its publication? Elliman concluded: "We hope you'll find a lot to cheer in the newest kid on the North American block, *SI Canada*."⁶

Canada's magazine industry could find nothing to cheer about. Even before the first issue hit the newsstands, the Canadian Magazine Publishers Association (CMPA) made a compelling case that the publication of *SI Canada* violated the spirit of a 28-year-old federal regulation banning the importation of magazines of its type. For the

CMPA and most other Canadian observers, *SI Canada* was a classic example of a 'split-run' magazine: a spin-off edition that recycles content from its parent edition, adds some original content that appeals to a new market, and then sells new advertising space at a price often substantially lower than in the parent edition. The prohibition against such magazines is designed to ensure that Canadian advertising expenditures support Canadian magazines. The measure, known as Tariff Code 9958, is one of the crucial support mechanisms for Canadian magazines. A postal subsidy, and section 19 of the Income Tax Act which makes expenditures for advertising in non-Canadian magazines ineligible as a tax deduction, round out the basic instruments used to shore up the publication of Canadian magazines.⁷ Even with these supports in place, most Canadian magazines eek out a precarious existence. Only six percent of Canadian magazine copies in circulation are sold on newsstands. And seven of ten Canadian magazines don't show up on Canadian newsstands at all. Dependent upon subscription sales, Canadian magazines have an average pre-tax profit of less than 3 percent.⁸ For the CMPA, the publication of *SI Canada* jeopardized the economic foundations of Canada's magazine industry, because it would set a precedent that as many as 50 foreign (mostly American) titles might follow. The potential outflow of advertising revenues would decimate the Canadian magazine industry. Canada's cultural marketplace, always a precarious entity, was yet again under siege.

Almost immediately the federal government commissioned a task force to investigate the issue, and in December, 1995, legislation was passed to prevent further publication of *SI Canada* or any other similar split-run magazine. The legislation, and other government measures designed to promote Canadian magazine industry, became the subject of a legal challenge by the United States under the terms of the General Agreement on Trade and Tariffs (GATT) 1994.

And so at a time when so much public attention was focused on the promise of new information technologies and services, Canada and the United States went to war over magazines. The conflict over the regulation of the international trade in magazines has all the appearances of a quaint, even anachronistic squabble, surely a backwater issue in an age bristling with new forms of electronic and computer-mediated communication - the late twentieth century equivalent of worrying about the rules governing the craft of hand-copied manuscripts shortly after the invention of Gutenberg's

press. Nothing could be further from the truth. The conflict raises issues that are as pertinent today as they were in the halcyon days of snail-mail. As is often the case, the specifics of *SI Canada's* publication became far less relevant as the issue worked its way toward a hearing at the World Trade Organization (WTO). Indeed, the case itself has consequences and implications that go far beyond magazines.

The WTO has ruled that most of the measures adopted by Canada to protect and promote its magazine industry violate international trade law. The decision is a staggering blow to Canada and many other countries who have argued that cultural products, such as magazines, films, and television programs, should not be subject to the same principles of liberalized international trade that govern most goods. It is a stunning victory for the United States and its decade-long campaign to have cultural issues inserted into the language and logic of international trade. While information services and telecommunication liberalization grab headlines, this decision is an equally significant harbinger of a new regime for the exchange and expression of culture. The WTO's ruling lays the foundation for a fundamental realignment of the ground rules governing the global production and distribution of culture. It comes at a time when transnational media corporations are feverishly pursuing new products and markets around the world and it is almost in synchrony with the most ambitious corporate strategies. The increasingly intrusive nature of international trade regimes may place substantial limits on the ability of particular states to influence the production and distribution of cultural goods and services within their borders. Can public interventions that limit the flow of certain cultural goods be justified? What impact might the liberalized trade in cultural products have on the status and vitality of national cultures? Is culture just another issue on the trade agenda? These are some of the more trenchant questions that emerge from an examination of the clash over magazines between Canada and the United States.

II. CANADIAN MAGAZINES, FOREIGN COMPETITION, AND STATE INTERVENTION: A HISTORY

Competition from foreign publications has been a source of concern for Canadian magazine publishers since the turn of the century. As their counterparts in the United States adopted the same strategies that revolutionized the newspaper business - lowering prices, introducing illustrations, and tailoring editorial content to

reach mass audiences - economies of scale tipped the Canadian marketplace in their favor. In 1894, Goldwin Smith, one of Canada's more prominent magazine editors, noted: "In the field of periodical literature, what chance can our Canadian publishers have against an American magazine with a circulation of a hundred and fifty thousand, and a splendor of illustration such as only a profuse expenditure can support?"⁹ By 1925, as five- and ten-cent U.S. publications proliferated, sales of U.S. magazines north of the border outnumbered Canadian magazines eight to one.¹⁰

Though steeped in the tradition of a press free from government interference, Canadian publishers requested government assistance to support their industry.¹¹ Like virtually every argument since made by Canadian enterprises in the cultural industries, the newly formed Magazine Publishers' Association of Canada (MPAC) fashioned an appeal that was part economics, part culture, and part politics. The MPAC urged action on two fronts. In the early 1920s it began to lobby for a tariff on imported magazines, especially on those publications that contained a high ratio of advertising to editorial content or those whose content did little to advance the arts, letters and sciences.¹² Tariff protection itself was justifiable as a means of bolstering the economic prospects of the magazine industry; certainly, at the time, tariffs were the chosen instrument by which governments everywhere provided support for local industry (as well as earning revenue). But magazine publishers did not make a tariffs-for-tariffs' sake argument. Instead, they characterized the tariff as a means to protect Canadians from the pernicious effects of foreign magazines, especially from some of the more unseemly American titles, and to promote a Canadian cultural sensibility. In other words, they were recommending the adoption of an economic measure that would promote cultural and political objectives. In a *Saturday Night* editorial ominously titled "National Periodicals or Annexation," Frederick Paul made the case most eloquently:

National periodicals allow people in the different parts of the country to understand one another's viewpoints, which is the first step towards co-operation and the removal of grievances. If national periodicals are put out of business, New York and Philadelphia become automatically the centers from which all Canadians draw their information - and opinions....

Without the slightest notion of flag-waving or sloppy patriotism, it must be apparent that if we depend on these United States centres for our reading matter we might as well move our government to Washington, for under such conditions it will go there in the end. The press is a stronger cohesive agent than Parliament.¹³

The publishers association did not find an entirely receptive audience to its proposals. The Consumers' League of Canada and the Canadian Wholesale Newspaper Association, for example, opposed the tariff proposal on the grounds that it would raise the price of popular American magazines and thus permit domestic producers to do likewise. More notably, Liberal Party governments of the 1920s were committed to lower tariffs and a free trade agreement with the United States.

Opposition to the tariff convinced the MPAC to make a second proposal: it requested relief from Canadian customs duties on imported paper and printing materials (such as ink and engravings) to bring overhead production costs closer in line with their U.S. counterparts.¹⁴ Many of the materials were simply unavailable in Canada. Some were more costly. In effect, the MPAC was now making an argument in favor of freer trade focused specifically on Canadian import duties; not surprisingly, opposition to this proposal came from Canada's paper manufacturers. By the end of the decade the Liberal government did lower the customs duties on paper and some printing materials and reaffirmed its commitment to subsidized postal rates for newspaper and magazine publishers, but it took no action on an import tariff.

Within the emerging Canadian cultural industries, there was virtually no precedent for the publishers' protectionist argument. Radio broadcasting in Canada in the 1920s was still privately-owned and operated, and by the end of the decade many Canadian stations had signed affiliate agreements with the emerging American networks, CBS and NBC.¹⁵ Canada's movie industry was likewise becoming a significant export market for Hollywood films.¹⁶ Though the Canadian government did provide financial support for film production through its sponsorship of the Canadian Motion Picture Bureau, the Bureau's mandate was limited to making films that would encourage immigration and foreign investment. It was a propaganda arm of government policy. To date, there had been no

significant attempt to coordinate government policy to encourage the expression of Canada art or popular culture.

A change in government in 1930 gave Canadian magazine publishers some basis for optimism. The Conservative government imposed a tariff calculated according to the amount of advertising a magazine contained: magazines with 20 percent or less advertising content were allowed free entry; magazines with between 20 and 30 percent advertising content paid two cents a copy; and those with advertising content greater than 30 percent paid five cents a copy.¹⁷ Fiction, feature and/or comic magazines were assessed at 15 cents per pound. Religious, educational, scientific, philanthropic, agricultural, labor, and fraternal publications were tariff exempt. But the tariff was not justified solely in terms of its impact on magazines or Canadian culture. The Conservative government argued that the tariff would reduce losses suffered by Canadian manufacturers caused by magazine advertising for American goods. Whether it did is difficult to say, but the effect of the tariff on Canada's magazine industry was dramatic. Between 1931 and 1935, the circulation of U.S. magazines in Canada decreased by close to 60 percent and Canadian magazines picked up most of the slack.¹⁸ The tariff also encouraged some fifty American magazines to begin printing in Canada the copies intended for the Canadian market - a branch-plant side-effect altogether consistent with Canadian economic policy at the time.¹⁹ In 1935 the returning Liberal government abolished the tariff as part of its effort to secure a free trade agreement with the United States. By the end of the decade the circulation of American magazines in Canada had tripled.

For the next twenty years, Canadian magazine publishers seemed resigned to the vicissitudes of an open border. During its presentation in 1951 before the government's omnibus Royal Commission on National Development in the Arts, Letters and Sciences (Massey Commission), the publishers association declined to raise the tariff issue. The commission itself concluded that tariffs would present a barrier to the free flow of ideas and that subsidies and subventions to magazine publishers would be politically suspect.²⁰ By 1954, U.S. magazines occupied 80 percent of the Canadian market. The Canadian editions of *Time* and *Readers Digest* (published in Canada with a minimal amount of Canadian content) accounted for close to 40 percent of advertising revenues for general-interest magazines in Canada.²¹ Before the end of the decade, *Family Circle*, *Woman's Day*,

TV Guide, *The Saturday Evening Post*, and *Life Magazine* also began to publish Canadian editions. In a brief flurry of economic and cultural nationalism, the Liberal government imposed a 20 percent tax on all advertising in Canadian editions of foreign periodicals in 1956. This time, it was the Tories who repealed the tax the following year. Shortly thereafter, the Tories established a royal commission to look into the matter.

Headed by Gratton O'Leary, a former Ottawa newspaper editor, the Royal Commission on Publications was a watershed document not so much in terms of its underlying argument as in the manner with which the argument was presented and the conclusions it drew. The O'Leary Commission linked the health and vibrancy of Canada's magazine industry directly to foreign competition. But unlike the Massey Commission, and unlike even the Magazine Publishers' Association itself, the O'Leary Commission did not shy away from gathering economic data to support its claim. It noted, for example, that since two U.S. companies and a consortium of five U.S. magazine publishers controlled nearly 40 percent of the distribution of magazines sold on Canadian newsstands, Canadian magazines were structurally impeded from accessing their own market. The Commission determined that Canadian magazines obtained between 10 and 25 percent of their sales through newsstands, compared to 50 percent for U.S. magazines sold in Canada. O'Leary paid special attention to the Canadian editions, or split-runs, of American magazines such as *Time* and *Reader's Digest*, noting: "A substantial amount of editorial material used in the parent edition is re-used in the "Canadian" edition. It is this re-use which gives the publisher a decided cost advantage, because the profit on the sale of advertising space is greater when editorial space can be used again, instead of purchased anew."²²

Since these "Canadian" editions attracted more than 40 percent of total magazine advertising revenues, the commission inferred that the editorial material was being "dumped" into Canada. The report concluded that "a nation's domestic advertising expenditures should be devoted to the support of its own media of communications," and that "a genuinely Canadian periodical press can only exist by assuring for Canadian publications, under equitable conditions, a fair share of advertising revenue."²³ Its two most important recommendations were as follows:

a) That the deduction from income by a taxpayer of expenditures incurred for advertising directed at the Canadian market in a foreign periodical, wherever printed, be disallowed;

b) That the entry into Canada from abroad of a periodical containing Canadian domestic advertising be excluded under Schedule C of the Customs Act.²⁴

The Canadian government's response to the commission was uncharacteristically swift. In early 1962, Prime Minister John Diefenbaker announced that the Progressive Conservative government would implement the main recommendations with one modification: expenditures incurred for advertising directed to the Canadian market in a periodical already established in Canada (that is *Time* and *Reader's Digest*) would be 50 percent deductible. Diefenbaker's comments in the House of Commons made it clear that he did not consider the import restriction on foreign periodicals containing Canadian domestic advertising a violation of Canada's GATT obligations. "The commission establishes very clearly that the issues at stake... are not essentially of a commercial nature but go into the very fabric of our culture."²⁵ Six months later the proposals died on the parliamentary order paper with the calling of a general election. Diefenbaker returned to office with a minority government and though the proposals were again introduced in the House, no legislation was tabled.

The federal election of 1963 ushered in a new Liberal government under Lester Pearson, a government that would preside over a significant number of policy innovations in the cultural field, including a new Broadcasting Act and the establishment of the Canadian Film Development Corporation, a crown corporation with a mandate to provide loans and grants to support the development of a Canadian feature film industry.²⁶ The Liberal government's finance minister, Walter Gordon, announced the fundamentals of its periodicals legislation in April, 1965. The Customs Act would be amended to prevent the entry into Canada of split-runs containing advertising specifically directed at the Canadian market, and the Income Tax Act would also be amended to prohibit a taxpayer from deducting the costs of advertising in non-Canadian periodicals. But the income tax amendments would not apply to foreign periodicals that before

April, 1965, were being edited in whole or in part in Canada and printed and published in Canada. Remarkably, the legislation as such made *Time* and *Reader's Digest* honorary Canadian citizens and provided them with a customs wall that prevented the entry of new foreign competitors.²⁷

In his memoirs, Gordon shed some light on the decision to exempt *Time* and *Reader's Digest*. He revealed that the U.S. state department had lobbied aggressively on behalf of the magazines, threatening repeatedly to retaliate against Canadian exports if punitive legislation was enacted.²⁸ Gordon also provided an insight into what has been called the "quiet diplomacy" that characterizes the Canada-American relationship.²⁹ At the time of the proposed legislation Canada and the United States were in the midst of negotiating an automotive agreement that was to provide significant economic benefits to Canadian industry. Honorary Canadian citizenship for *Time* and *Reader's Digest* seems to have been one of the prices paid for the U.S.'s signature on an Automobile Production Sharing Agreement.

A year after the Income Tax Amendment became law, *Reader's Digest* spearheaded the founding of the Magazine Advertising Bureau to promote advertising expenditures in Canadian publications. It was joined by *Time* and most of the leading Canadian magazines the time: *Maclean's*, *Saturday Night*, *Chatelaine*, *Actualité*. Perhaps exhausted by a decade of policy intrigue, Canada's major publishers seemed ready to make peace with their American competitors. When a senate committee examined the ownership and control of the media in 1970, Canada's major publishers defended *Time's* and *Reader's Digest's* exemption from the income tax measures, arguing that if the exemption were removed advertisers would simply reduce their expenditures in other Canadian magazines to absorb the increased costs of advertising in *Time* and *Reader's Digest*.³⁰

It wasn't as if the economic prospects of Canada's magazines had substantially improved. Over the course of the 1960s advertising expenditures in magazines generally had dropped from 4.2 percent of total advertising expenditures in 1954 to 2.4 percent in 1968.³¹ While television was an obvious new source of competition for advertising revenue (its share had risen from 2.5 percent in 1954 to 12.9 percent in 1969), billboard advertising expenditures had risen threefold over the same period. Magazine readership was down by more than 10 percent from the late 1950s. Of the roughly 160 million

copies of magazines sold in Canada in 1969, 130 million were American publications. *Time* and *Reader's Digest* were still doing well. Their combined per-issue circulation had increased from 1.3 million in 1960 to 2 million in 1969; their share of advertising revenues spent in the major consumer magazines had risen to 56 percent in 1969 as compared to 43 percent in 1956. "There can't be many industries in this country where the odds are stacked so heavily against success," concluded the senate committee. "We deeply regret that *Time* and *Reader's Digest* were exempted from the O'Leary legislation. It was a bad decision."³²

Fours year after the Davey committee had published its findings, Pierre Trudeau's Liberal government acted on its recommendations. Bill C-58 eliminated the tax exemption for *Time* and *Reader's Digest*. In an effort to boost the revenues of Canada's private television broadcasters, it also eliminated the tax deduction for advertising placed on U.S. border stations. *Time* closed its Canadian operation a few weeks later, though it continued legally to publish a Canadian edition out of its New York office in which ads placed by Canadians were not eligible for a tax deduction. *Reader's Digest* reorganized its corporate structure to create a Canadian foundation that published an edition eligible for the tax deduction. For the Canadian magazine industry, Bill C-58 was a boon. *Macleans*' revenues increased enough to warrant a weekly edition by 1978; the advertising revenues for general Canadian magazines went from 1.5 million in 1976 to slightly less than 2.5 million in 1980.³³ Though other factors undoubtedly intervened, Bill C-58 also helped to precipitate a significant increase in the circulation of Canadian magazines: in 1971, the year of the Davey committee, Canadian magazines accounted for 29.9 percent of total circulation; this increased to 39.4 percent by 1981; in 1992, Canadian magazines accounted for 67.6 percent of all magazines circulated in Canada. By 1987, only one of the 12 largest magazines sold in Canada, *National Geographic*, was U.S.-owned, and the circulation of *Macleans* was about double that of *Time* in Canada.³⁴

The U.S. government took great exception to Bill C-58. Lobbying by U.S. border broadcasters convinced the Carter administration to amend Section 301 of the U.S. Trade Act to include information services, in large part to make possible retaliation against Bill C-58. The broadcasters then filed a complaint before the Section 301 committee of the office of the special trade representative in Washington,

arguing that the Canadian legislation constituted "an unreasonable form of tax discrimination."³⁵ Congress responded by proposing to make the cost of attending conventions in Canada non-deductible, a potentially \$100 million blow to Canada's tourism industry, roughly four times the value of Canadian advertising on U.S. border stations. The measure was eventually withdrawn, as were other efforts at retaliation (including an attempt to impose a 100 percent tariff on the use of Telidon, a first generation Canadian-made computer display system).

With hindsight it seems fair to say that Bill C-58 represented the high-water mark for Canadian cultural nationalism: no measure undertaken since then has so aggressively challenged entrenched American interests in the cultural sector. The long history of efforts to establish public measures to support Canadian magazines makes plain that the Canadian government did not act with undue haste. Far from it. Until 1960, the on-again, off-again application of a tariff on imported magazines underscores the Canadian state's reluctance to support Canada's cultural industries or to jeopardize its cosy relationship with the United States. Moreover, the history reveals an industry unsure of its priorities; both with respect to the tariff itself and the elimination of the tax exemption for *Time* and *Reader's Digest*, Canadian magazine publishers rarely spoke with a unified voice. The U.S. reaction to the O'Leary recommendations and the 1966 legislation is no less intriguing. While the state department and the White House did raise objections to the proposed tariff on split-run magazines, the measure was not challenged under GATT. Perhaps the exemptions for *Time* and *Reader's Digest* were enough to placate American concerns. But in the context of current dispute between Canada and the United States, it seems reasonable to conclude that the U.S. government has adopted a far more active and interventionist role with respect to cultural trade issues. Indeed, the amendment to the U.S. Trade Act to include information services in response to Bill C-58 was one of the first indications of a new, more assertive and coordinated, American strategy toward culture and international trade.

III. CULTURE AND INTERNATIONAL TRADE: A NEW REGIME?

Over the last decade the United States has waged an intensive campaign to focus international trade negotiations on issues concerning cultural goods and information services. For U.S. negotiators, the litmus test of trade liberalization can no longer be measured in terms of agricultural products or manufactured goods. Culture has become a trade issue. Not in the sense that trading relationships have an impact on local or national cultures as a way of life, though they most certainly do, but in the sense that some of the material forms of culture (such as films and video recordings, television programs, music recordings, and magazines) appear prominently on the balance sheets and ledgers that calculate global market penetration and future growth. Canada, among other nations, has fought a defensive campaign to insulate cultural goods from consideration as just another commodity amidst the general trend toward trade liberalization. On paper, it would appear that U.S. efforts have met with only marginal success: the exemption for cultural industries in the Canada-United States Free Trade Agreement is often cited as reaffirmation of culture's special status. The WTO's decision on split-run magazines suggests a very different conclusion. A new international regime for trade in cultural goods is emerging: culture is increasingly being defined as a tradeable good, just another piece of data, subject to market-inspired rules for its tabulation and sale.

A. From UNESCO to GATT

The United States has been at the forefront of trade liberalization since the 1930s when President Roosevelt convinced Congress to approve the Reciprocal Trade Agreements Act, giving the White House sweeping powers to reduce tariffs and pursue an unconditional most-favored-nation policy with its trading partners.³⁶ Before the Second World War the U.S. signed 29 agreements to secure easier access to foreign markets. One of those agreements was initialed with Canada in 1936, a year after the Liberal Party of Canada, itself predisposed to freer trade, began its long run as Canada's governing party. These agreements formed the backbone of the multilateral General Agreement on Tariffs and Trade (GATT) first signed in 1947.

Despite a focus on the traditional items of international trade, such as agricultural products and textiles, the original GATT contained one clause that pertained explicitly to cultural issues.³⁷ Article

IV permitted contracting parties to set theatrical “screen quotas” to protect domestic film industries from foreign competition and reduce the outflow of currency to Hollywood studios in the immediate postwar period.³⁸ In 1961, the United States raised the issue of GATT’s applicability to increasing trade restrictions on television programming. The U.S. asserted that the exemption for motion pictures did not set a precedent for other cultural products and that television programming was just another ‘product’ within the meaning of GATT. In response, leading GATT signatories argued either that Article IV should be extended to cover television programming, or that television programming bore more resemblance to a service than trade in a physical commodity and therefore fell outside of GATT completely. The parties agreed to disagree. The matter was dropped until 1990 when an audio-visual working group was established as part of the Uruguay Round GATT negotiations.

If the original GATT was relatively silent on cultural issues, it was not because they were unimportant to the postwar settlement. Instead, in the institutional matrix that regulated postwar *Pax Americana*, the United Nations Educational, Scientific and Cultural Organization (UNESCO) became the primary site for the working out of international cultural policy issues. UNESCO’s constitution articulates some of the most cherished principles of neo-liberal approaches to international relations. Working from the premise that ‘wars begin in the minds of men,’ UNESCO sought to institutionalize a global dialogue that would enhance “peace and security by promoting collaboration among the nations.”³⁹ One of UNESCO’s principal goals was to “collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of communication, and to that end recommend such international agreements as might be necessary to promote the free flow of ideas by word and image.”⁴⁰ But the ‘free flow’ doctrine, as it came to be known, provided support for another liberal principle, this one having less to do with human understanding and perpetual peace and more to do with economics, markets and trade. For the United States, the UNESCO charter and the ‘free flow’ doctrine provided a platform on which it could exploit its comparative advantage in the cultural industries. In 1946 William Benton, then assistant secretary of state, explained that his department would:

do everything within its power along political and diplomatic lines to help break down the artificial barriers to the expansion of private American news agencies, magazines, motion pictures, and other media of communications throughout the world... Freedom of the press - and freedom of exchange of information generally - is an integral part of our foreign policy.⁴¹

Benton's remarks contain an element of hyperbole. They certainly overstate the extent to which the U.S. government, as opposed to private American companies, used the 'free flow' doctrine to chip away at tariff and non-tariff barriers to the export of American media products during the 1950s and 1960s. No doubt the hegemonic clout of the U.S. government made overseas forays by private American companies, such as the Hollywood studios, easier to contemplate. Equally, there is no doubt that 'making the world safe for democracy' meant, in part, ensuring that foreign media systems were open for business. But for the most part during this period the U.S. government adopted a flanking posture, ready to defend private American interests abroad when necessary (as with *Time* and *Reader's Digest* in Canada), but not necessarily taking the lead in negotiating international agreements on their behalf.⁴²

In the early 1970s member states in UNESCO, particularly those affiliated with the non-aligned movement (mostly nation-states and liberation movements in Asia, Africa and Latin America), began formally to raise concerns regarding the global flow of media goods and services. They pointed to gross imbalances and inequities in the exchange between first- and third-world countries of such items as television programming and news items, to the control exercised by large transnational companies over that flow, and increasingly to questions about the impact of both on the culture and identity of those in (predominately) receiving countries.⁴³ UNESCO became the focal point for an intense debate about cultural and media imperialism. Not surprisingly, the United States was singled out for much of the criticism. Joined at times by first world countries such as Canada and France, UNESCO members pushed for the adoption a New World Information and Communication Order and a fundamental revision of the free flow of information principle under which UNESCO operated. While some member states took a position that bordered on a rejection of freedom of expression as a principle of

public life, a consensus emerged around the notion of a "free and balanced flow of information." The balance would come via state measures to protect and promote indigenous expression in an effort to diversify the representation and exchange of ideas. The Mass Media Declaration of 1978 reflected this fundamental shift in UNESCO. It read in part:

"With a view to strengthening peace and international understanding, to promoting human rights and counter-ing racism, apartheid and enticement to war, the mass media throughout the world, ...contribute to promoting human rights, in particular by giving expression to oppressed peoples who struggle against colonialism, neo-colonialism, foreign occupation, and all forms of racial discrimination and oppression and who are unable to make their voices heard within their own territories."⁴⁴

The Mass Media Declaration was signed unanimously, but the consensus was more apparent than real. The United States grew increasingly intemperate over this politicization of cultural issues, rightly seeing some of the proposals as a threat to the stability and expansion of the global marketplace for American cultural goods and services. Western news agencies railed against proposals to regulate news content and license journalists. The Americans pulled out of UNESCO in 1984, arguing in part that the New World Information and Communication Order "embodies elements threatening to a free press and a free market."⁴⁵

The U.S. withdrawal from UNESCO was an admission of defeat: it had failed to preserve the 'free flow' doctrine. But the decision to withdraw from UNESCO also had strategic implications that may not have been obvious (or even conscious) at the time. As long as UNESCO remained the leading international body for discussion concerning cultural issues, it encouraged an understanding of those issues in anthropological, sociological and literary terms. UNESCO concerned itself with culture as a way of life, with culture as the source of shared values and attitudes, and with culture as an extension of human creativity and expression. By removing itself from UNESCO, the United States helped to marginalize this discussion; to make it, in effect, academic. But the U.S. was not about to let cultural issues slip from the agenda on international relations. Instead, over

the course of the 1980s an alternative strategy emerged: to focus on culture as a tradeable good or service that should fall under the auspices of GATT and international trade law. Communications scholars would be replaced by economists and trade lawyers as the new experts. The free flow doctrine would be replaced by the doctrine of free trade.

By the early 1980s the United States had grown impatient with the GATT process. There seems little doubt that structural changes to the U.S. economy and its growing indebtedness were the motivating factors for a change in the tactics and strategy of American trade policy. By 1980 more than 50 percent of the U.S. economy, and certainly the most dynamic sectors, were classified as service industries. Services had not been a part of the original GATT agreement and, though some developed countries were also interested in adding services to the list of GATT issues, the Tokyo round of GATT (completed in 1979) did not include language on services. While economists cannot agree on a standard definition of services, U.S. trade negotiators did not have haircuts and dry-cleaning in mind. Instead they hoped to push for liberalized trade in finance (including banking and insurance), telecommunications, and the cultural industries, precisely those areas in which the United States holds a clear comparative advantage in international trade. U.S. negotiators were also increasingly concerned about international violations of intellectual property rights, including everything from scientific innovations in patent medicines and bio-engineering to video-cassette recordings and the retransmission of broadcasting signals. American criticism of the international body entrusted with monitoring adherence to the intellectual property agreements, the World Intellectual Property Organization (WIPO), mounted throughout the 1980s. One study estimated that American companies lost \$25 billion in 1986 as a result of piracy in intellectual property, a figure equal to 15 percent of the U.S. trade deficit that year.⁴⁶ In 1990, losses to American video producers due to illegal copying in France and Germany alone were estimated to be \$45 million.⁴⁷

Notwithstanding the momentary bravado of the Gulf War, there seems little doubt that the flow of goods and services and the international trade agreements that regulate such flows are the new battlegrounds that define American foreign policy. The office of the United States trade representative signaled as much in 1996, noting: "Trade is the new connecting link between nations and has taken a

place of prominence on the foreign policy agenda. National security and national economic security cannot be separated."⁴⁸ By almost any measure, foreign trade is now crucial to the American economy: in 1970, the value of trade equaled just 13 percent of GDP, in 1992 that figure was closer to 25 percent, and in 1996 it was nearly 30 percent; moreover, in recent years the growth of trade has more than doubled the growth in U.S. GDP.⁴⁹ And despite the growing importance of trade to the American economy, the U.S. continues to experience a sizable trade deficit. The total deficit on trade in goods and services rose from \$105 billion in 1995 to \$110 billion in 1996. Calculated separately, U.S. trade in goods produced a deficit of \$183 billion in 1996, partially offset by a surplus on trade in services of \$74 billion.

If the United States is to reduce these massive trade deficits, it must expand the trade opportunities in areas for which it holds a comparative advantage, including, of course, the cultural industries. Although the dollar value of cultural exports is difficult to measure precisely, the Motion Picture Association of America (MPAA) reported a doubling of revenues from television and film exports, from \$3.5 billion to \$7 billion, between 1987 and 1991.⁵⁰ Imports of film and television products into the U.S. were valued at less than \$100 million in 1991. Exports of records, tapes, and other recorded media rose 47 percent, from \$286 million to \$419 million between 1989 to 1991; imports during this same period went from \$101 million to \$137 million.⁵¹ A recent report for the National Telecommunications and Information Association, entitled *Globalization of the Mass Media*, concluded:

We believe that markets should be open for competition among all firms, regardless of national origin. At the same time, U.S. policymakers should seek to remove regulatory policies that inhibit the efficient participation of U.S.-based firms in the global marketplace. ... An open international marketplace not only serves U.S. trade goals, ...but is fundamental to the continued vitality and diversity of the domestic mass media industry, a major goal of U.S. communications policy. An open international marketplace, in which the electronic mass media industry ties the nations of the world together, also can foster the growth of freedom and democracy worldwide.⁵²

There is fairly widespread agreement among scholars that the United States has pursued an open international marketplace with consider vigor. In a recent review of international trade policy, Michael Trebilcock and Robert Howse used the phrase "aggressive unilateralism" to describe the current posture of U.S. trade negotiators and Congress.⁵³ Between 1978 and 1988 the United States initiated 371 countervailing duty actions against imports that purportedly cause harm to domestic industries due to subsidies from foreign governments. In the same period, all other GATT signatories initiated only 58 such actions.⁵⁴

Even more noteworthy is the so-called Special 301 provision of the Omnibus Trade and Competitiveness Act of 1988, which provides that trade sanctions may be taken against countries named as engaging in 'unfair' trade.⁵⁵ The Special '301' provisions have been used primarily to enforce intellectual property rights. The link between intellectual property rights and international trade is a recent phenomenon.⁵⁶ It reflects the emergence of a powerful lobby from the technology and knowledge-producing industries, notably pharmaceuticals, computer software, bio-genetics, media industries such as film, television, and sound recording, and the growing importance of these industries to the leading industrialized countries, especially the United States. While developing countries remained satisfied with the ability of the World Intellectual Property Organization (WIPO) to protect intellectual property rights, OECD countries, led by the U.S., have come to see the WIPO as something of a liability, given the lack of enforcement provisions and a mechanism for dispute resolution. Under the auspices of the Special 301 provisions, the USTR took up the task of annually identifying those countries that did not "adequately" or "effectively" protect intellectual property rights or that denied fair market access to intellectual property rights holders. Brazil was the first country to face retaliatory measures, a 100 percent *ad valorem* tax on certain imports, after it failed in 1988 to provide adequate protection for American pharmaceutical products. India, Thailand and Taiwan have also been targeted by the U.S. for intellectual property violations. In 1994, the United States trade representative announced a list of close to \$1 billion worth of imports that would be targeted if China did not toughen enforcement of property rights for computer software and music recordings.⁵⁷ Undoubtedly, the use of the Special 301 provision - what has been called "status quo reciprocity" - prodded

developing countries into accepting a multilateral agreement on intellectual property rights during the Uruguay Round.⁵⁸

Though the Uruguay Round incorporated both services and intellectual property into the regulatory framework that governs international trade, American attempts to liberalize trade in the cultural industries met with stiff resistance. In the last months of negotiations, the U.S. team sought to include both films and television programs in the final agreement. As we have seen, this dispute dates back to early 1960s. It became even more pronounced after the passage in 1989 of the European Community's "Television Without Frontiers" directive.⁵⁹ The directive instructs broadcasters from member states to reserve a "majority proportion of their transmission time" for "European works."⁶⁰ At the time, the U.S. trade representative denounced the directive as "blatantly protectionist and unjustifiable."⁶¹ As the Uruguay Round came to a close, the rhetorical pitch of the battle, especially between French negotiators and officials and lobbyists for the Motion Picture Association of America, was vitriolic. With the deadline for fast-track approval in the Congress approaching, U.S. negotiators decided to table the issue rather than to risk scuttling the entire deal.

Despite the failure to incorporate specific language on international trade in film and television products, American negotiators have had remarkable success in advancing the following proposition: for the purposes of international exchange, culture should be treated as a tangible medium, as a product and as property whose trade should be subject to few restrictions. As Edward Comor argues, the U.S. government is now committed to "securing America's long-standing free flow of information aspirations through the institutionalization of free trade."⁶² Comor presents a compelling case that the office of the United States trade representative has taken the lead in the effort to advance the global interests of what he calls the "the information-based commodity producers."⁶³

B. Canada, the FTA and NAFTA

The first attempt by American officials to incorporate cultural products and information services into an international trade agreement came during negotiations with Canada over the Free Trade Agreement (FTA), and later with the inclusion of Mexico in the North American Free Trade Agreement (NAFTA). By any measure, the trading relationship between Canada and the United States is inti-

mate. Each country is the other's most important trading partner: in 1996, slightly more than 21 percent of American goods exports went to Canada, greater than the combined total of all U.S. exports to the European Union; more than 80 percent of all Canadian exports are destined for the U.S., and more than 75 percent of all imports come from the U.S. Trade between the two countries accounts for roughly 25 percent of Canada's GDP. The province of Ontario alone, with a population of 10 million, buys more U.S. goods than does Japan.⁶⁴ In 1995, Canada ran a surplus on trade in goods with the U.S. of roughly \$41 billion, and a deficit on trade in services of about \$9 billion.⁶⁵ Of the Group of Seven countries, Canada is easily the most trade-dependent. Overall, exports of goods and services reached 37 percent of gross domestic product in 1995, up sharply from 24 percent in 1991. By comparison, despite the growing importance of trade to the U.S. economy, U.S. exports represent roughly ten percent of total gross domestic product.⁶⁶ Though each other's largest trading partners, there is little doubt that access to the American economy is more vital to Canada than is U.S. access to the Canadian economy. There seems little doubt that Canada's interest in the Free Trade Agreement was motivated by a desire to protect Canadian businesses from American protectionist sentiment. Stephen Clarkson, for one, has made a convincing case that the Free Trade Agreement *de facto* 'constitutionalized' Canada's economic dependency on the United States.⁶⁷

Our interest here is principally with that portion of the FTA that deals with culture. Throughout the negotiations, Canadian officials and government leaders were adamant that culture was not on the table and that nothing in the deal would threaten cultural sovereignty. While negotiations were in progress, Secretary of State for External Affairs Joe Clark had this to say in an advertisement taken out by the Canadian government in the *New York Times*:

The protection of our distinct cultural identity is of singular importance to Canada. The government's intention to promote culture in Canada through direct financial support is not one of the things at issue in a trade negotiation. The question of whether or not specific Canadian cultural industries require special measures to assist them is a domestic issue that falls outside this sphere. Nor do we expect that the extensive framework of government sup-

port for similar institutions in the United States will be considered either in these negotiations.⁶⁸

After the FTA was signed, government ministers and trade negotiators proudly pointed to Article 2005 (1) which states that "cultural industries are exempt from the provisions of this agreement." The Canadian government has interpreted this clause to mean that the FTA does "nothing to prevent present and future measures to protect and promote Canadian culture."⁶⁹

While American officials may have had trouble understanding the Canadian concern for "cultural sovereignty," they certainly understood the need to protect and augment a most lucrative market for cultural goods. At the outset of negotiations William Merkin, then deputy assistant U.S. trade representative, warned that the U.S. would insist upon "Canadian cultural industries not being protected from ordinary commerce in a free-trade environment."⁷⁰ Canada had come in for special mention in a 1984 report, co-authored by the USTR and CBS, which concluded that the U.S. had failed "to voice effectively its objections to trade barriers that are imposed by foreign governments under the guise of political or cultural concerns."⁷¹ American negotiators had set their sites on a number of irritants: Section 19 of the Income Tax Act, which does not permit Canadian firms to deduct advertising expenses incurred in foreign magazines and broadcasts; postal rates that discriminate against foreign publications; postal subsidies that benefit Canadian magazines and newspapers; the lack of copyright provisions for retransmission of American signals by Canadian cable companies; the simultaneous substitution rules that require Canadian cable companies to replace American broadcasts of a particular program with the Canadian version if they are scheduled at the same time; and on-going proposals to reduce the clout of American motion picture distributors in Canada.

It is too easy to claim that Article 2005 (1) represents a failure on the part of American negotiators. The FTA has a more significant impact on Canadian cultural policy than the exemption clause and the remarks of Canadian government officials imply. In the first place, the deal includes some specific references to cultural issues, and in every instance forces the Canadian government to make adjustments that favor the U.S.⁷² Article 2004 commits both countries to pursuing intellectual property protection through the Uruguay

Round, while Article 2006 mandates Canadian cable companies to pay copyright fees for retransmission of foreign broadcasts.⁷³ Article 1607 (4) contains instructions on how Canada can handle the forced divestiture of an American business engaged in the cultural industries to Canadian investors. Article 2007 repeals the print-in-Canada requirements for magazines and newspapers from the list of items to be met before advertising expenses can be deducted by a Canadian firm. There is more. Annex 1404(C) commits both parties to facilitate liberalized cross-border telecommunications and information flow. Finally, there is what has come to be known as the "retaliation clause." Although Article 2005 (1) nominally exempts cultural industries from the provisions of the agreement, Article 2005 (2) states: "Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this agreement but for paragraph one." This "notwithstanding clause" authorizes either party to take unilateral retaliatory measures if the other party takes action on behalf of a cultural industry.

The net effect of these provisions is anything but a cultural exemption: at the very least, they codify the *status quo ante* with regard to the impact of cultural policies on trade. Cultural industries are accorded no more "protection" than they had before the deal was signed. But more than that, the language of the FTA concedes much to the U.S. view that culture is a viable trade issue. This is most obvious in the retaliation clause where "measures of equivalent commercial effect" link cultural activity to other economic activities. It is also apparent in the definition of cultural industries as "business enterprises" in Article 1607. Moreover, by including separate provisions for telecommunications and information services, the agreement potentially removes the applicability of the term 'cultural industries' from emerging forms of computer-mediated cultural production and distribution. Since the very term 'culture' is inherently ambiguous, there seems little doubt that American negotiators would prefer the more connotatively neutral term 'information services'. Graham Carr's conclusions regarding the FTA are worth quoting:

By establishing the principle that culture is a commodity, by associating culture exclusively with industry, by formalizing a commitment to international trade in knowl-

edge, by liberalizing trade in information and cultural services, and by initiating the process for a comprehensive undertaking on intellectual property, the United States has furthered its global cultural interests through both direct and indirect means.⁷⁴

C. *SI Canada* and the Task Force on the Canadian Magazine Industry

"This, in the end, is a cultural sovereignty issue."⁷⁵ That was how Catherine Keachie, the executive director of the Canadian Magazine Publishers Association (CMPA), characterized the news that *Time Canada* would begin publishing *SI Canada* in April of 1993. *Time Canada*, the subsidiary of Time Warner, announced in January that it would publish six special editions featuring expanded coverage of sports and teams in Canada. What was news to Canadian magazine publishers was not news to the Canadian government - at least one wing of it. In 1990 *Time Canada* submitted an outline of its business plan to Investment Canada to determine the legal status of such a venture. *Time Canada* claimed that *Time* magazine's exemption from Tariff Code 9958 prohibiting the importation of foreign split-runs should be extended to *Sports Illustrated*, since both magazines were owned by the same company.⁷⁶ Investment Canada concurred. Apparently, there was no discussion with the department of communication, the government agency that presides over cultural policy. This lack of consultation itself is a possible consequence of the shifting framework for the treatment of cultural issues. *Time Canada's* application was treated as a business issue pure and simple by an agency within the federal government ill-suited to evaluate the cultural impact of its decisions.

The CMPA quickly mounted a counter-offensive with support from the Canadian Advertising Foundation, the Institute of Canadian Advertising and the Periodical Writers' Association of Canada. Among other things, it asked Revenue Canada, which is responsible for administering Canada customs, to pronounce the proposed magazine a violation of the tariff code. But Revenue Canada's hands were tied. It was impossible for Canada Customs to issue a ruling before it held a copy of the magazine to examine; moreover, if the magazine was transmitted electronically and then printed in Canada (as Time Warner proposed to do), it would effectively by-pass the jurisdiction of Canada Customs. Fearful that this was precisely *Time Canada's*

intention, the CMPA joined with senior officials from the department of communications, revenue Canada, external affairs, and investment Canada to see if other measures could be applied to protect Canada's magazine industry from an onslaught of split-run magazines.⁷⁷

Even before the first issue of *SI Canada* was released, the Canadian government was in a quandary. Investment Canada's rash judgment, coupled with Revenue Canada's administrative limbo, meant that a government measure almost 30 years old was about to be violated. Two weeks after Time Canada's public announcement, the minister of communications, Perrin Beatty, declared that the government was "determined to ensure that the Canadian magazine industry is able to survive in this country."⁷⁸ "We're waiting," said Revenue Canada Minister Otto Jelinek, "for someone to break the law."⁷⁹ Indeed, in February the Hearst Corporation shipped to Canada an edition of *Country Living* identical to its U.S. version with a special eight-page Canadian advertising supplement -- a classic violation of Tariff Code 9958. *Country Living's* publisher apologized for the mistake and said that it wouldn't happen again.⁸⁰ But Time Canada was in a less conciliatory mood.

By the end of March the federal government had announced the establishment of a task force "to propose measures that will enable the Government to effectively carry out its policy objective of ensuring that Canadians have access to Canadian information and ideas through genuinely Canadian magazines."⁸¹ "What we don't want," said Perrin Beatty, "is a situation where people through new technology are able to circumvent the policy."⁸² Unfortunately, the various departments and agencies of Canadian government were still not entirely on the same page. In the second issue of *SI Canada*, the Royal Canadian Mint took out an advertisement for its limited edition, Stanley Cup centenary silver dollar. Revenue Canada Minister Otto Jelinek rather lamely defended the Mint's decision, saying *SI Canada* "is not doing anything illegal."⁸³

Like the O'Leary Commission before it, the Task Force on the Canadian Magazine Industry concentrated on the economic underpinnings of Canada's magazine industry and the availability of an adequate flow of advertising revenues. It provided solid evidence that government measures to support the growth of a Canadian magazine industry had worked. Not only had the number of titles more than doubled since the late 1950s, from 661 in 1956 to 1,440 in

1992, but the circulation of Canadian magazines in Canada had increased from 25 percent of total circulation in 1961 to slightly more than 50 percent by 1994. Roughly 90 percent of the editorial content, illustrations and photography in Canadian magazines was produced in-house or by freelance Canadians.⁸⁴

Despite this apparent success, Canadian magazines still face serious obstacles. English-language publications, for example, account for less than 20 percent of the magazines displayed at newsstands, yet newsstand sales remain the most important source of potential subscribers.⁸⁵ Moreover, smaller overall circulation figures for Canadian, as compared to U.S., consumer magazines mean that a larger percentage of revenue is spent on fixed costs (i.e., editorial and administrative expenses). The task force calculated that the circulation per issue of the top 10 U.S. consumer magazines was nearly 20 times greater than the circulation of the top 10 Canadian consumer magazines.⁸⁶ Total revenue figures also illustrate the disparity in economies of scale: in 1993, the American magazine industry earned roughly \$22.0 billion in revenues, while the Canadian industry generated total revenues of roughly \$850 million in 1992.⁸⁷ In 1992-3 U.S. exports of magazines exceeded \$800 million, of which 78 percent went to Canada. Canadian exports totaled \$22 million in 1991, of which 78 percent went to the U.S.⁸⁸ Market size has its advantages: according to the task force, U.S. magazines spend a smaller proportion of their overall budget on fixed costs (30 percent as opposed to 36 percent for Canadian magazines) and earn average operating profits that are 12 percent of total revenues as opposed to 2.5 percent for Canadian magazines.

Not surprisingly, the task force speculated on the potential long-term impact of split-run magazines. Assuming that foreign magazines with a Canadian circulation per issue of over 20,000 were potential candidates for the split-run format, the task force concluded that as many as 53 English-language consumer magazines might follow *SI Canada's* example. Published advertising rate cards for magazines highlighted the dilemma that might face Canada's industry. A full-page ad in *SI Canada* cost \$6,250 (Cdn), roughly half of what *Sports Illustrated* charges for regional editions with the same circulation in the U.S.⁸⁹ In other words, because American publishers can cover the fixed costs of production in their home market, they can undercut the standard Canadian advertising rate and thus compensate Canadian advertisers for the inability to deduct advertising

expenditures in such magazines. The task force reasoned that the Canadian magazine industry could lose close to 40 percent of current advertising revenues and that average operating profits would drop by 85 percent.⁹⁰ Some Canadian magazines would be driven out of business; others would inevitably reduce the quality and amount of their editorial content, which would only further a downward spiral in circulation. In other words, split-run magazines that avoided Tariff Code 9958 would have a potentially devastating effect on the availability and quality of Canadian magazines.

At the end of May 1993, almost a full year before its final report was released, the task force issued an interim report with a recommendation designed to forestall the easy entry into Canada of more split-run magazines. Under the Investment Canada Act, the government of Canada can review new ventures to ensure "the compatibility of the investment with national industrial, economic and cultural policies enunciated by government..."⁹¹ Investment Canada presumably ruled that *SI Canada* was not a new business activity, but rather an extension of an existing business -- the publication in Canada of magazines by Time Warner. Time Warner alone published over 20 magazines that might follow *SI Canada's* lead. The task force recommended that the act be amended so that any magazine or periodical not already published in Canada be regarded as a new business venture. The government of Canada accepted the recommendation and clarified the guidelines of the Investment Canada Act in July. Despite considerable pressure from the Canadian Magazine Publishers Association, the guidelines were not made retroactive and did not apply to the publication of *SI Canada*.⁹²

The final report of the task force was released in March, 1994, a few months after the Liberal Party ended the ten-year reign of the Progressive Conservatives. Its principal recommendation was an 80 percent 'dis-incentive' excise tax to be levied on the gross advertising revenue of split-run magazines.⁹³ While the recommended tax would virtually eliminate the prospect of further split-run magazines, *SI Canada* would be permitted to continue publishing six editions a year. Roger Tassé, co-chair of the task force, defended the *SI Canada* exemption, noting: "We don't need a major battle with our most important trading partner." It was not an opinion shared by all members of the task force. Lynn Cunningham, for example, remarked at the same press conference that the "decision rewards a company that knew when it launched its split-run edition that it was

challenging Canadian policy." The CMPA was adamant that *SI Canada* should not be given any special status. Jeffrey Shearer, publisher of *Saturday Night* magazine remarked: "*Sports Illustrated* played chicken with us, and we blinked."⁹⁴

The six-issue-a-year exemption for *SI Canada* did nothing to appease Time Canada. Sandra Berry described the proposal as "irresponsible and unfair," arguing that it "would amount to an impairment and confiscation of our business."⁹⁵ Berry now claimed that Time Canada had received "prior permission" from Investment Canada to publish a weekly split-run issue. For its part, the U.S. trade representative had already stepped up complaints about the revision to the Investment Canada Act that closed the loophole used by Time Canada to get *SI Canada's* original approval.⁹⁶ As the waiting began to see how the federal government would respond to the task force report, Sandra Berry remarked: "We do not believe the government will act on any recommendations that would amount to a confiscation of our business."⁹⁷

IV. OTHER ISSUES ON THE CULTURE FRONT

A. Ginn Publishing and the Demise of the Baie-Comeau Policy

A month before release of the task force's final report, the Liberal government seemingly fumbled the ball on another, long-standing, issue in the cultural industries portfolio. In February, 1994, the federal government announced it had approved the sale of the Ginn Publishing Canada Inc. to U.S.-based Paramount Communications.⁹⁸ The decision made a mockery of the government's ten-year-old policy for Canadianization of the book publishing industry, known as the Baie-Comeau policy. Ginn, a mid-sized educational publisher, had been purchased by U.S.-owned Gulf & Western in 1985.

The year before, Gulf & Western had purchased a more prominent Canadian publisher, Prentice-Hall. After the Ginn deal, pressure had intensified on the Tory government to make Canadian ownership of the book publishing industry a policy issue. With great fanfare, the Tories had announced in July of 1985 that by forcing foreign firms that acquired Canadian-based publishers, either directly or indirectly, to sell a controlling interest to Canadians at fair market value within two years, Canadian ownership in the industry

could increase to more than 50 percent. Canadian publishers had hailed the decision, even as external affairs officials had warned that there was a serious conflict between the government's desire to promote cultural sovereignty and on-going efforts to negotiate the Free Trade Agreement.⁹⁹ Gulf & Western had reluctantly agreed to part with Ginn if it could keep Prentice-Hall. But over the next eight years, several potential Canadian investors had been rebuffed by Gulf & Western. Finally, in 1989 the federal government's Canadian Investment Development Corporation (CIDC) had purchased a majority position in Ginn at what was widely regarded as a grossly inflated selling price. Curiously, over the next five years the CIDC did not release a prospectus for Ginn and at least five Canadian publishers claimed that repeated inquiries about Ginn were ignored. Then, in February of 1994, came the Liberal government decision to sell Ginn back to Paramount, which had since acquired Gulf & Western, because of a verbal agreement between the Tories and Paramount.¹⁰⁰ The announcement was a major blow to the Liberal government's claim that it placed a high priority on protecting and promoting Canadian culture.

B. Country Music Television and Canadian Broadcasting

A few months later, in June of 1994, a ruling by the Canadian Radio-Television and Telecommunications Commission (CRTC) brought Canada and the U.S. closer to the brink of an all-out diplomatic war over cultural issues. After a new round of hearings for specialty cable channel applications, the CRTC granted a license to New Country Network (NCN), a country and western music video service owned jointly by Maclean Hunter and Rawlco Communications.¹⁰¹ A competitor specialty channel, Country Music Television (CMT), jointly owned by two American companies, Gaylord Entertainment and Group W Satellite Communications, a subsidiary of Westinghouse Electric, had been in operation in Canada since 1984. In its application NCN requested that the commission drop CMT from the list of eligible specialty channels on Canadian cable systems. The CRTC granted the request and announced that as of January 1, 1995, CMT would no longer be eligible for carriage on any Canadian cable system. The commission's decision reflected a decade-long policy of giving preference to Canadian-owned specialty cable services.¹⁰² CMT should not have been caught unawares. The CRTC's approval notice for CMT's original license read in part: "should the

Commission license, in the future, a Canadian service in a format competitive to an authorized Canadian service, the latter would be replaced by the Canadian service."¹⁰³

CMT did not go quietly into the night. It first appealed the CRTC's decision in the Canadian courts, arguing that it had been denied the opportunity to appear before the commission to plead its case. On December 20, 1994, the federal court of appeals ruled in the CRTC's favor and, shortly thereafter, the Supreme Court of Canada refused to hear a further appeal. CMT began to wage a campaign on two fronts: on the one hand it threatened to drop Canadian artists from its playlist in the U.S and elsewhere, hoping that Canadian performers themselves would rally to its defense; on the other hand, it filed a Section 301 complaint with the U.S. trade representative. Both tactics got results. The Canadian Country Music Association took up CMT's case, arguing that, at the very least, there was room on Canadian cable systems for both specialty channels.¹⁰⁴ Though no more than one percent of CMT's playlist consisted of Canadian performers, the threat of a boycott in foreign markets where CMT reached over 34 million households was a real concern.¹⁰⁵ The U.S. trade representative took up CMT's cause with a vengeance. *The Wall Street Journal* reported that the USTR had drawn up a list of targets for retaliation, including: Teleglobe Inc., Canada's supplier of international telecommunications; Cineplex Odeon, a theatrical exhibitor with extensive holdings in the U.S.; Much Music, a Canadian music video service carried by DirecTv on its American satellite service; as well as imports of Canadian bacon, maple syrup, fur coats, and phonographic records.¹⁰⁶ U.S. trade representative Mickey Kantor informed the Canadian government that the deadline for resolving the issue was June 21, 1995.

The possibility of all-out trade war was averted at the twelfth hour. On June 23rd, CMT announced that it was acquiring a 20 percent share of NCN for an undisclosed amount, with the option of increasing its share to 33 percent pending a change in regulations limiting foreign investment in Canadian broadcasting entities.¹⁰⁷ Without knowing the sale price, the deal itself is difficult to assess. Yet, it is hard to imagine that CMT lost on the deal, at least in the short-run. As a premium speciality channel CMT's subscriber base in Canada had been 1.9 million; NCN, on the other hand, was a basic speciality channel with an initial subscriber base of 6 million. Of course, access to subscribers isn't everything. CMT is in the process

of establishing itself as a world-wide brand. To that end the deal also worked in its favor. NCN changed its name to CMT Canada.¹⁰⁸

C. Canada's Response

It is altogether likely that the sale of Ginn Publishing to Paramount and the corporate machinations that settled the CMT dispute played a role in steeling the Canadian government's resolve on the split-run magazine issue. To recover a sense of credibility on cultural trade issues, the Liberal government could not afford to back down or compromise. After all, the introduction of *SI Canada* violated the spirit (if not the letter) of Canadian legislation that dated back to the 1960s. If the government of Canada was going to make a stand on cultural issues, this would be the place to do it.

Heritage Minister Michael Dupuy announced in December of 1995 that the government intention to proceed with the excise tax as outlined by the task force. But when Bill C-103 was introduced in the House of Commons in mid-June 1996, there was one substantial change to the task force's recommendation: the 80 percent excise tax would apply to *all* future editions of *SI Canada*, as well as any new split-run magazines. The six-issue per year exemption for *SI Canada* would not apply.¹⁰⁹ Remarkably, the government's stance was tougher than that recommended by the task force.

The legislation had another interesting twist. The wording was carefully crafted to avoid a legal challenge under NAFTA or GATT. The excise tax would apply to *any* magazine distributed outside of Canada that, when distributed in Canada, contained less than 80 percent original content and one or more advertisement directed at Canadians. In other words, the tax would potentially apply to split-run magazines produced and distributed by Canadian firms. At least one such magazine, *Harrowsmith*, published by Telemedia, already existed. Under the proposed legislation it, too, would be subject to the tax. The task force had urged such an approach and its judgment is worth quoting at length:

The new tax is consistent with Canada's trade international trade obligations. By focusing on original content, the tax does not violate the national treatment provisions for goods in the GATT, FTA, or NAFTA. ... Nor does the proposed tax impose a domestic content requirement in violation of the FTA and NAFTA. It promotes original

content, regardless of country of origin. ...

The Task Force is of the view that, on balance, it is better to aim wide and comply with trade obligations by promoting original content than to target a narrow field and end up in protracted disputes with Canada's trading partners by promoting Canadian content alone.¹¹⁰

That interpretation wasn't shared by Time Canada. A parliamentary hearing into the bill in October was told that the proposed law was "unfair, discriminatory, and represents the effective compensation of a commercial enterprise that was legitimately established in Canada."¹¹¹ Time Canada's legal representative, Ron Atkey, who had been a minister in the Mulroney government, made repeated claims that as a tax measure the proposal was illegal because it appeared to be aimed at an individual firm and was designed to be punitive rather than revenue-generating.¹¹² Even as the legislation worked its way through committee hearings, Time Canada acted as if its exemption would be reinstated. A letter sent November 9, 1996, informed potential Canadian advertisers that *SI Canada* was planning to go to 18 issues a year.¹¹³

Initially, Time Canada's optimism was not entirely misplaced. After its presentation to the Canadian senate's standing committee on banking, trade and commerce, the committee proposed an amendment to grandfather *SI Canada*. For some senators, Bill C-103 was a classic example of retroactive legislation: it denied Time Canada the opportunity to continue to pursue a business that was, at the time of its inception, perfectly legal. On the other hand, Senator Davey, who had chaired the Senate Committee on the Mass Media in 1970, claimed that the bill was not retroactive because no company would pay the excise tax for split-runs produced prior to passage of the bill. Instead, the excise tax would apply to all future split-runs, no matter the source. Davey argued that an exemption for *SI Canada* would provide Time Canada with a "special privilege" and reward a company for what could best be described as cavalier behavior.¹¹⁴

The senate amendment was defeated. *SI Canada* would not be exempt from the provisions of Bill C-103. Before the year was out, the federal government had notified Time Canada that the law would go into effect with the next issue of the magazine.¹¹⁵

V. THE WORLD TRADE ORGANIZATION WEIGHS IN

The U.S. trade representative responded quickly to passage of Bill C-103. In a tersely worded statement, Mickey Kantor claimed that Ottawa was guilty of “evicting a U.S. business enterprise which was established in Canada consistent with Canadian law.”¹¹⁶ Earlier, Time Canada had intimated that it would challenge the excise tax on the grounds of “improper purpose,” that is, argue that the real purpose of the tax was not to raise revenue but to drive a particular enterprise out of business.¹¹⁷ Time Canada never got to test its case in court. Despite Bill C-103’s careful wording on the issue of national treatment, despite the apparent inclusion of Tariff Code 9958 under the FTA and NAFTA, and despite a postal subsidy that had been around almost as long as Canada itself, the office of the USTR decided to bring each of these measures forward to the World Trade Organization (WTO) on the grounds that they “unfairly protected Canada’s domestic magazine industry.” Kantor intended to have the matter addressed in the broadest possible forum. “We want to say to the world - this is not to be tolerated. We want the same access to other’s markets that others enjoy to this market and we’re going to continue to push for that in every available forum.”¹¹⁸ Because the U.S. claimed that the bill violated Canada’s commitments under the GATT, Canada could not invoke the cultural industries exemption clause under NAFTA. Culture was now most definitely on the table.

The Uruguay Round of the GATT is notable not only for the incorporation of services into an international trade agreement, but also for the establishment of a new, more binding, dispute settlement mechanism under the auspices of the WTO.¹¹⁹ Modeled after the dispute settlement mechanism employed by the NAFTA, the WTO’s procedures are designed to be both more timely and more procedurally predictable than under the old GATT. After a mandatory period of consultation between the parties has failed to produce an agreement, the WTO establishes a panel of three to five members chosen from ‘neutral’ countries in consultation with the parties in dispute. The panel’s final report can be appealed: normal appeals should last no more than 60 days with an absolute maximum of ninety days. The whole process is designed to take no more than 15 months. Under the previous GATT procedure, rulings could only be enforced by consensus. Under the WTO’s procedures, it is impossible for the country losing a case to block the adoption of the ruling. If a country rejects a ruling and refuses to follow the recommendations of the panel

report or the appeals report or to negotiate mutually acceptable compensation with the complainant, the complainant may ask the WTO for permission to impose limited trade sanctions.

The formal consultation period between the two parties began on March 11, 1996. No agreement was reached. A panel was struck in June and the initial submissions were made in September, 1996. The panel's final report was circulated to members of the WTO on March 14, 1997. Canada appealed the initial ruling. The appellate body submitted its findings on June 30, 1997.

A. Issues and Arguments

This section will examine in detail the arguments of both parties and the decisions of the NAFTA panel and the appellate body. They involve Tariff Code 9958, Part V.I of the Excise Tax Act (Bill C-103), the applicability of GATT, and Canadian postal rates.

Tariff Code 9958, enacted in 1965, prohibits the importation into Canada of split-run or regional editions that contain an advertisement primarily directed to a market in Canada that does not appear in all identical forms of that periodical in its country of origin, or any periodical in which more than five percent of the advertising content is primarily directed to the Canadian market. For the purpose of assessing whether an advertisement is 'primarily directed at the Canadian market,' such factors as listing a Canadian address, special invitations to Canadian consumers, and references to the goods and services tax are considered. The tariff does not apply to periodicals whose principal function is the encouragement, promotion, or development of the fine arts, letters, scholarship or religion.¹²⁰ It is worth emphasizing that the tariff code does not in any way restrict the importation into Canada of foreign magazines *per se*. Its intent is to prevent foreign magazines with no Canadian content or foreign magazines with limited Canadian content (ie. split-runs) from attracting advertising specifically directed to Canadian readers.

The United States argued that by targeting specific publications, Tariff Code 9958 violated Article XI:I of GATT 1994 which prohibits quantitative restrictions on imports.¹²¹ Moreover, the tariff provisions effectively grant Canadian magazines a monopoly over local (i.e. Canadian) advertising. Since advertising is an important source of revenue for magazine publishers, Canadian magazines are afforded a significant competitive advantage in the marketplace. Canada responded by noting that 'spillover' advertising, whereby

advertisements for generally available products reach the Canadian public through wide-circulation U.S. magazines (such as *Sports Illustrated* itself), is enough to nullify this supposed monopoly effect. Canada noted further that Tariff Code 9958 is part of a package of measures designed to secure the attainment of a single public policy: to ensure that Canadian magazines have access to sufficient advertising revenues to provide the Canadian public with a distinctive vehicle for the expression of their own interests and ideas. To this end, the tariff code, like section 19 of the Income Tax Act, which allows a deduction for advertising only in Canadian magazines, is consistent with Article XX(d) of GATT 1994 which permits members to adopt policy measures that are necessary to secure compliance with laws and regulations that are not inconsistent with GATT.¹²² The U.S., Canada noted, did not challenge the legality of section 19 of the Income Tax Act. Without Tariff Code 9958 the overall effectiveness of section 19 would be greatly diminished. Indeed, given the economics of magazine publishing, the elimination of the tariff code would destroy the effectiveness of the policy measures in place.¹²³ Finally, given the preponderance of foreign magazines in Canada, it simply cannot be claimed that Tariff Code 9958 constitutes a disguised restriction to international trade.

The U.S. response dwelt on the applicability of an earlier WTO panel ruling regarding Article XX(d). In *United States-Standards for Reformulated and Conventional Gasoline*, the panel ruled that measures for which exceptions are invoked must be *necessary* to secure compliance with laws or regulations which themselves are not inconsistent with GATT.¹²⁴ The U.S. argued that Canada could only show how the two measures advanced the same policy objective, but could not show how the tariff code secured compliance with section 19 of the Income Tax Act.

The panel endorsed the U.S. position on Article XX(d) of GATT 1994. It pointed specifically to an earlier GATT ruling which interpreted the phrase "to secure compliance with laws and regulations" to mean "enforce obligations under laws and obligations" as opposed to "ensure the attainment" of the objectives of the laws and regulations.¹²⁵ According to the panel, section 19 of the Income Tax Act is designed "to give an incentive for placing advertisements in Canadian, as opposed to foreign, periodicals." The tariff code, on the other hand, makes it "almost impossible for an enterprise to place an advertisement in a foreign periodical because there would be virtu-

ally no foreign periodicals available in which to place it."¹²⁶ The tariff, concluded the panel, is thus a prohibitive measure distinct from section 19. If Canada's interpretation of Article XX(d) had been accepted, it would open the door to a whole host of policy measures that might further a given policy objective but would otherwise violate GATT.¹²⁷ Given the panel's reasoning, perhaps the only domestic law or regulation that would make Tariff Code 9958 "GATT-able" would be an outright ban on the sale or use of magazines in Canada. In its appeal of the panel's report, Canada raised no objections to the ruling that Tariff Code 9958 violated GATT.

Bill C -103 added Part V.I (Tax on Split-Run Periodicals) to the Excise Tax Act in December, 1995. The amendment calls for the imposition, levy and collection of a tax equal to 80 percent of the gross fees of all advertisements contained in a split-run edition. A split-run is defined as an edition of a periodical a) that is distributed in Canada; b) in which more than 20 percent of editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals; and c) that contains an advertisement that does not appear in identical form in all the excluded editions.¹²⁸

The United States argued that the excise tax was inconsistent with Article III:2 of GATT 1994 which protects imported products from internal taxes or charges that are in excess of those applied to like domestic products. The excise tax, the U.S. claimed, creates an artificial distinction between 'split-run' magazines and all other types of magazines, and then applies a higher tax on the former. The American position can be summarized as follows: a magazine is a magazine. Because they are "like products," any form of taxation not applied uniformly is discriminatory and a violation of GATT. Canada vehemently disagreed with the claim that split-run magazines and domestic magazines are "like products." The notion of "like products" became central to the dispute between the two parties. But before we examine this issue in detail, a prior Canadian claim must be reviewed.

Canada argued that GATT 1994 was simply not applicable to the excise tax, since the tax pertains to advertising services and thus falls within the purview of the General Agreement on Trade in Services (GATS).¹²⁹ Because Canada has chosen not to include advertising services among its commitments under GATS, the United

States should not be allowed to “obtain benefits under a covered agreement that have been expressly precluded by another covered agreement.”¹³⁰ In other words, “Canada is not bound, nor in any way obliged, to provide national treatment to Members of the WTO in respect of the provision of advertising services in the Canadian market.”¹³¹ The U.S. responded that GATS did not have primacy over GATT, and that Canada’s argument would lead to a situation where all manner of service-related measures could be used to discriminate against imported goods. The U.S. noted further that both the Task Force on Magazine Publishing and the minister of Canadian heritage, Michael Dupuy, consistently referred to the tax as something imposed on split-run magazines or periodicals, in other words, a tax on imported goods: “It is only in the context of this panel proceeding, and in light of U.S. claims that the tax is inconsistent with Article III of GATT 1994, that Canada has advanced the claim that the tax is really a tax on advertising services and not a tax on split-run magazines.”¹³²

In the event that the panel ruled that the excise tax falls under Article III, Canada argued that there was still no incompatibility. Article III:2 of GATT protects imported products from internal taxes or charges that are in excess of those applied to like domestic products. Canada maintained that imported ‘split-run’ periodicals and domestic non ‘split-run’ periodicals were substantially different by virtue of their editorial content: “Content is what the reader is looking for - the message not the medium.”¹³³ Canada’s argument here is worth quoting at length:

Magazines are distinct from ordinary articles of trade. Magazines are intended, by their very nature, for intellectual consumption as opposed to physical use (like a bicycle) or physical consumption (like food). It follows that the intellectual content of a cultural good such as a magazine must be considered its prime characteristic. ... Editorial material developed for the Canadian market reflects a Canadian perspective and contains specific information of interest to Canadians. The content is qualitatively different from editorial material copied from foreign publications. What has been said of the essential properties of magazines is equally applicable to their end-use. The end-use of a magazine is not simply reading: it is transmission and acquisition of specific information.¹³⁴

As evidence, Canada pointed to the example of three general interest newsmagazines: *Time U.S.*, *Time Canada* (a split-run that would be taxable without the grandfathering provisions of Bill C-103), and *Maclean's*. Almost every article in *Maclean's* deals with Canada or covers international events from a Canadian perspective. *Time Canada*, on the other hand, looks much more like its parent than a magazine devoted to Canadian issues. Canada argued: "Even where the topics covered are the same, the perspectives will be different. ...People are preoccupied with their own affairs and communities. Periodicals are the mirror image of those communities."¹³⁵

The U.S. responded that editorial content was only one of the distinguishing characteristics of magazines. On the matter of what makes a magazine a magazine, it argued:

The type, texture, color, thickness, and even the perfume of the paper can be important factors to market appeal. The dimensions of a magazine, the manner in which its pages are bound, the typesetting, and the appearance of the ink, can also be significant. The type, appearance, and frequency of advertisements may be a factor in a consumer's purchasing decisions as well. All of these attributes - including editorial content - combine to form an *overall package*.... For the Canadian and U.S. magazine industries, editorial content generally represents substantially less than 20 percent of the cost of producing a consumer magazine.¹³⁶

The U.S. highlighted the fact that, despite differences in editorial content, *Time Canada* and *Maclean's* were still direct competitors in the marketplace. Moreover, the U.S. pointed to the language of the excise tax itself, noting that it "does not differentiate between content based on its Canadian focus or perspective." For example, "a magazine could avoid the tax, but still be identical to what is sold abroad, as long as the publisher did not advertise to Canadians."¹³⁷ The excise tax, argued the U.S., applies based on factors related to whether a magazine is produced for more than one market and its advertising content; editorial content is not the pivotal issue. As we have seen, this was precisely the way the task force on Canadian magazines had characterized the proposed legislation.

The panel was not fully convinced by Canada's argument that the excise tax was a measure intended to regulate trade in advertising services, because "of the fact there is no comparable regulation of advertisements through other media, and the fact that the tax is imposed on a "per issue" basis."¹³⁸ More important, the panel did not accept Canada's argument that there can be no overlap between GATT and GATS. "Overlaps," it concluded, "are inevitable, and will further increase with the progress of technology and the globalization of economic activities."¹³⁹ To be legal, the excise tax would have to be compatible with GATT.

Given the applicability of GATT, if it could be shown that imported split-runs and domestic non split-runs are 'like products,' and that when the former are subject to an excessive tax, then the excise tax violates the rules of international trade. The panel emphasized that it did not need to rule on the likeness of periodicals in general, but only on the likeness of imported split-runs and domestic non-split-runs. The panel did not comment on Canada's comparison of *Time US*, *Time Canada*, and *Maclean's*. Instead, it concocted a hypothetical scenario involving a Canadian-produced split-run, *Harrowsmith Country Life* (which ceased publication in the U.S. after passage of Bill C-103), to come to the conclusion that imported split-run magazines and domestic non-split-run magazines can be like products. The panel also referred favorably to the American argument that the excise tax nowhere defines magazines in terms of original Canadian content. Having found that the magazines in question could be 'like products,' the panel also ruled that the tax on imported split-run magazines was in excess of the taxes applied to domestic non-split runs. Part V.I of the Excise Tax Act thus violated Canada's commitments under GATT 1994.

The Canadian government provides two measures to help reduce the cost of mail delivery for eligible Canadian magazines. First, the Publications Assistance Program (PAP) provides funds to Canadian-owned and controlled, paid-circulation magazines that meet certain editorial and advertising requirements.¹⁴⁰ The funds and eligibility requirements are managed by Heritage Canada, and Canada Post is obligated to accept all eligible publications for distribution. Second, Canada Post offers a discounted bulk rate for publications that meet certain eligibility requirements. While both Canadian and international publications may be eligible for the discounted rates, the discount is lower for international publications.¹⁴¹

The U.S. argued that because Canada's postal rates for magazines amount to "regulations" or "requirements" affecting their internal sale, transportation, or distribution, and because they provide less favorable treatment to imported magazines than like domestic magazines, they violate Article III:4 of GATT. "Canada Post's divergent postal rates," noted the U.S., "are not based on neutral economic considerations, but explicitly discriminatory criteria - namely, whether the magazine is Canadian or foreign in origin."¹⁴²

Canada responded by drawing a sharp distinction between the two measures affecting postal rates. With respect to the PAP funds administered by Heritage Canada, Canada argued that they were in essence a subsidy designed to assist eligible Canadian publishers, and that such subsidies are permitted under GATT. On the other hand, the commercial rates set by Canada Post reflect that corporation's business plan. As a crown corporation Canada Post is legally distinct from the Canadian government, and it must compete in an open competitive market for its share of the publications delivery market.¹⁴³ While the rates for letter carriage are set by government regulation, the commercial rates for magazines are set by market forces and by negotiations between Canada Post and large volume domestic and international customers.

The United States responded that as a factual matter the claim that the disparity in commercial rates reflects market forces is dubious. First, there appear to be no exceptions to the rule that international commercial rates are higher than domestic rates; second, the disparity itself can easily be characterized as another example of Canadian measures to benefit Canadian magazines. With respect to the funded rates, the U.S. noted that since publishers receive no direct payments (the money is transferred from Heritage to Canada Post), the Postal Assistance Program does not qualify as a subsidy under GATT. In response, Canada maintained that the transfer of funds from Heritage to Canada Post merely reflected administrative expediency. "The method of payment is merely the subsidy's technical, administrative aspect. It does not reveal who benefits from the subsidy."¹⁴⁴ In Canada's view, the American position was overly formalistic. While the panel conceded that Canada Post is legally distinct from the Canadian government, it concluded on the basis of the evidence presented that it "generally operates under governmental instructions." Therefore, Canada Post's pricing policy "can be regarded as governmental regulations or

requirements within the meaning" of GATT; moreover, the panel determined that the rate structure is applied "so as to afford protection to the domestic production of periodicals."¹⁴⁵ The panel ruled that Canada Post's commercial rates violated GATT.

The funded rates under the Periodical Assistance Program (PAP) were a different case. The panel agreed with Canada's argument that even though the funds were not transferred directly to publishers, the PAP did fall within the provisions of GATT that permit "the payment of subsidies directly to domestic producers."¹⁴⁶ The U.S. had been unable to convince the panel that Canada Post derived any economic benefits from the PAP; indeed, the American argument that Canada Post is still *de facto* a government agency was consistent with Canada's claim that the PAP was merely an internal transfer of resources. Of all the Canadian measures challenged by the U.S., the PAP was the only one determined by the panel to be justifiable under GATT.

B. The Appeal Process

Canada's appeal conceded much. It was silent on the matter of Tariff Code 9958 and differential commercial postal rates, both of which had been found to violate GATT. On the matter of the excise tax, however, Canada maintained that the original ruling had erred for the following reasons: first, it reiterated its case that the excise tax is a tax on advertising, not magazines *per se*, and that as such the appropriate international agreement governing the tax is the General Agreement on Trade and Services (GATS), not GATT;¹⁴⁷ second, Canada reiterated the claim that the original report erred in its determination that split-run magazines and non-split-run magazines are 'like products,' voicing strong objections to the fact that the panel did not consider the factual evidence that Canada had submitted with respect to this issue (the editions of *Time Canada* (a grandfathered split-run magazine) and *Maclean's*)¹⁴⁸; finally, Canada maintained that the excise tax does not discriminate against imported products because the legislation makes no distinction between domestic and imported products.¹⁴⁹

The United States responded by noting that although the excise tax is a tax on advertising, its effect is to alter the competitive environment for trade in goods. Despite the fact that the legislation does not single out imported split-run magazines, the intent of the legislation is clearly to ensure that imported split-run magazines are

eliminated from the Canadian marketplace.¹⁵⁰ The American submission was not simply defensive. Instead, it also included an argument that the panel had erred in ruling that the postal subsidy program was permissible under GATT. The U.S. reiterated the claim that GATT only covers government subsidies that flow directly to domestic producers. By ruling in favor of a program that involves the transfer of funds from one government department to another (from Heritage Canada to Canada Post), the panel left open the possibility that WTO members might use "a wide range of reduced-price governmental services and tax measures to confer advantages exclusively on domestic-produced goods."¹⁵¹

The appellate body of the WTO made short shrift of Canada's argument regarding the non-applicability of the GATT to the excise tax. It noted that the title of the excise tax acts reads "Tax on Split-run Periodicals," not "tax on advertising," and that the tax itself was originally conceived as a companion to Tariff Code 9958, which Canada now agrees was a measure affecting trade in goods. Moreover, the appellate body noted that the tax is applied on a "per-issue basis," and that of those potentially liable to pay the tax, only the advertiser (as opposed to publisher, distributor, printer, etc.) is not mentioned.¹⁵²

However, the appellate body was more sympathetic to Canada's argument regarding the matter of whether split-run magazines and domestic split-run magazines are "like products." It concluded that the panel had erred in not giving proper consideration to the evidence presented by Canada and the United States. The appellate body therefore reversed the ruling of the panel regarding 'like products' and left the matter open for further debate.

But the appellate body did not conclude that the issue of 'likeness' was pivotal. Instead, it turned to the question of whether imported split-runs and domestic non-split-run periodicals were "directly competitive or substitutable products."¹⁵³ The appellate body rejected Canada's claim that these magazines are, at best, "imperfectly substitutable" because they contain different editorial content. Canada's argument rests on competition for readership. But the appellate body noted that magazines also compete for advertising revenue. Indeed, The Task Force on the Canadian Magazine Industry had concluded that more than 60 per cent of all magazine revenue came from advertising.¹⁵⁴ The appellate body came to the following conclusion:

The competitive relationship between imported split-run periodicals [eg. *SI Canada*] destined for the Canadian market is even closer to domestic non-split runs periodicals than the competitive relationship between imported non-split-runs periodicals [eg. *Sports Illustrated*] and domestic non-split-run periodicals. Imported split-run periodicals contain advertisements targeted specifically at the Canadian market, while non-split-run periodicals do not carry such advertisements.¹⁵⁵

Given the magnitude of the excise tax, and the stated intention of the government of Canada to discourage the establishment of split-run magazines, the appellate body upheld the panel's conclusion that Part V.I of the Excise Tax Act violated GATT.

The *coup de grace* was delivered speedily. The appellate body ruled that the American appeal on the matter of postal subsidies had merit. It took issue with the mechanism by which the postal subsidy was administered, arguing that without direct payment to Canadian magazine publishers the program was similar in kind to preferential tax treatment.¹⁵⁶ The postal subsidy also violated GATT. Under WTO rules Canada has fifteen months to comply with the ruling. It can either modify its legislation or maintain the current measures and bear the brunt of U.S. retaliation.

VI. CONCLUSION

Recent advances in communication technologies, most especially the computer-mediated transmission of digitalized information, have annihilated space as a barrier to long-distance communication: the end of a process begun in earnest more than a century ago with the advent of the telegraph. As we have seen, the excise tax itself was a measure made necessary by technological changes in media production. The publication of *SI Canada* via electronic transmission to a printing house in Canada meant there was nothing for Canada Customs to stop and seize at the border. Once again, some might say, technology trumps the nation-state. But to characterize the publication of *SI Canada* and the events that followed as yet another example of how technology is changing the world would be less than the whole truth. The transmission (or export) of culture and cultural goods across national borders is not, in and itself, a new phenom-

enon: all empires have depended on it and it has been a feature of the cultural industries for all of this century. What *is* new is the extent to which foreign markets have become crucial to the business strategy of the culture industries. When asked in 1975 why his magazine was struggling to preserve its Canadian operations, a *Time* executive replied: "they don't call Canada the candy store for nothing."¹⁵⁷ As everyone knows, while you can't live on candy, it makes a nice treat. Twenty years later, foreign markets have become the bread and butter of corporate planning for media enterprises. Going global has become a necessity.

At the very least, we need to take account of Time Warner's willingness to bypass Tariff Code 9958. *Time* magazine has had a notable presence in Canada since the 1950s. When Tariff Code 9958 was enacted in 1965, *Time*, along with *Reader's Digest*, were the only magazines granted exemptions and permitted to continue publishing split-run editions. But over the course of the last two decades, *Time's* share of the Canadian market has dropped. That drop surely had something to do with changes in the preferences of Canadian readers, but there seems no denying the effectiveness of the 1976 amendments to section 19 of the Canadian Income Tax Act, which removed the deduction for advertising expenditures in foreign media, in boosting the competitiveness of alternative Canadian publications. *Maclean's*, for example, *Time's* closest Canadian counterpart, was able to increase publication from a monthly to a weekly and mirror *Time's* publication schedule. In response, *Time* closed its Canadian editorial bureau and reduced its efforts to produce original Canadian content.

For a company such as Time Inc., these events went against the grain of current business strategy. Since then, the 'go-global' mantra has been even tougher to keep in check. As we have seen, magazines are still a crucial source of revenue for Time Warner, accounting for roughly 25 percent of its total revenues. The U.S. market for magazines is nearly saturated. New markets beckon. The decision to create *SI Canada* was tactically astute. No Canadian firm publishes a general interest sports magazine, even though sports generally have become a massive consumer industry and a major focus of marketing campaigns for a whole host of goods and services.¹⁵⁸ By contrast, it was easy to see how Canadians might object to a frontal challenge of *Maclean's*, with its focus on Canadian current events and politics and a Canadian perspective on world events. A renewed commitment to

Time Canada was a risk; *SI Canada* seemed a safer bet. No single Canadian magazine would feel any immediate threat. Just as important, it was hard to imagine that anyone could make a case that the publication of *SI Canada* might threaten Canadian culture. And, if *SI Canada* worked, *People* magazine might be next. There is nothing similar to it in Canada and a touch of local content would be easy to generate. After that, *Entertainment Weekly*, and after that, *Fortune*. Taken on their own, each magazine poses no significant threat to current Canadian publications.

Businesses do what markets and regulations encourage. If this is not just a story of technology, it is also not just a story of corporate expansion. Time Warner did what it had to do to start *SI Canada*. It sought an advance ruling from Investment Canada on the legality of its venture. Discussions between the two parties began in 1990; it wasn't until early in 1993 that they became public knowledge. We can only speculate as to the sequence of events had Investment Canada ruled against the introduction of *SI Canada*. In any event, the meetings between the two parties are not a matter of public record. One of the lessons here (an old lesson, surely) is that bureaucracies, whether public and private, are never as unified as they seem from the outside. Investment Canada apparently never sought the advice of officials from the department of communication. But the lesson here goes far beyond the lack of coordination across complex bureaucratic institutions. The cultural industries portfolio sits outside the central loop of the Canadian state. If anything, for agencies and departments that have business and economics as their focus, the cultural industries portfolio is a confusing, even irritating, mixture of policy measures that muddy the marketplace transparency so much in vogue. Even more, the protectionism that characterizes much of the cultural industries portfolio flies in the face of the Canadian state's now abiding commitment to trade liberalization and neo-liberal economics. This is not to say that the Canadian state, or elements within it, wanted *SI Canada* to begin publication or wanted the WTO to rule as it did. It is to say that the political matrix within Canada and within the Canadian state helped make *SI Canada* possible, and that there are probably those within the policy apparatus of the Canadian state who welcome the WTO decision.

And here is some evidence. In a speech at Osgoode Hall Law School early in 1997, the minister for international trade, Art Eggleton, called into question the basic strategy that has underlined Canadian

cultural policy to date. The speech took as its point of departure the fact of globalization, by which Eggleton meant the current expansion of international trade. Eggleton depicted globalization more as an opportunity than a threat even for Canada's cultural industries. Referring to Statistics Canada figures indicating that Canadian cultural exports had grown by more than 80 percent between 1990 and 1995 alone, he argued:

Canada's artists, writers and performers have always known that the domestic market for their work is small, which is one reason they have fought to secure their fair share of it. But their ability to survive in the long term will depend on their ability to find an international audience for their works. Yet many of the federal government's cultural policies and programs were designed three decades ago. The national concern wasn't access to world markets, but Canadian access to the Canadian market.¹⁵⁹

Eggleton wondered aloud about the continuing value of restrictions on foreign ownership in the cultural industries, and Canadian content regulations for television and radio. He concluded: "the coming-of-age of Canadian culture may not depend on our ability to protect it at home, but to project it on to the world's stage."¹⁶⁰

Eggleton's argument borrowed heavily from the work of Keith Acheson and Christopher Maule. Acheson and Maule have argued that "by including culture in more formal arrangements with other countries, Canada will lessen the chances of generating an escalating trade war."¹⁶¹ Acheson and Maule are on firm ground when they call for a policy "in which the state creates an open environment for individual and group creativity, in which cultural support is separated from industrial policy, [and] in which specific commercial, communal or governmental failures are targeted."¹⁶² But it is not at all clear how an international agreement on culture would ensure that these ends are met. Like the minister himself, Acheson and Maule are notably silent on the objectives that should inform an international agreement on culture except to say that it should provide a more formal mechanism for dispute resolution. What would these agreements entail? To be sure, anything short of unlimited market access and national treatment for all direct subsidies would be unacceptable to the United States. The U.S. submissions to the WTO on Canadian

periodicals makes this plain. And the decision of the WTO, as formal a process as one could imagine, profoundly circumscribes the Canadian state's ability to support Canadian magazines according to the objectives Acheson and Maule have outlined. It is worth pointing out that of all the Canadian cultural policies named by the U.S. as trade irritants in 1984, only two still exist.¹⁶³

In its closing remarks the panel report of the WTO tried valiantly to downplay the repercussions of its decision. "We would like to stress," the panel noted, "that the ability of any Member to take measures to protect its cultural industries was not at issue in the present case. The only task entrusted to this Panel was to examine whether the treatment accorded to imported periodicals under specific measures in the complainants claim is compatible with the rules of GATT 1994."¹⁶⁴ Language such as this is cold comfort to Canadian policymakers and Canadian magazine publishers. There is absolutely no doubt that the WTO decision is the most dramatic single blow ever leveled against Canadian cultural policy. What is most remarkable is that the WTO overturned policy measures, such as Tariff Code 9958 and postal subsidies for Canadian magazines, that had been in existence for decades. And though the excise tax was a new measure, it was designed to maintain an existing policy, a policy that predated the Canada-United States Free Trade Agreement. As an extension of the underlying principle of Tariff Code 9958, the excise tax aimed to prevent the sale in Canada of foreign magazines that would siphon away Canadian advertising revenue from Canadian magazines.

There should be no misunderstanding in this regard. None of the Canadian measures were designed to block the entry into Canada of foreign magazines with foreign content. Canadian readers have always been free to choose between foreign and Canadian publications. The measures against split-run magazines were designed to reduce competition within Canada over the advertising revenue that accounts for more than sixty percent of the industry's earnings. The benefits that accrue to Time Warner from the publication of *SI Canada*, for example, have virtually nothing to do with an increase in circulation revenue; split-run magazines are about capturing advertising revenue that would otherwise flow to domestic magazines.

After all the legal arguments are cleared away, the crucial policy issue concerns the distinction between magazines as tradable commodities and magazines as a form of cultural expression and their

relationship to advertising. No one would disagree that magazines compete for advertising revenue in Canada. As the WTO appellate body rightly noted, given the importance of advertising to the economic well-being of Canadian magazines, split-run magazines represent a more significant form of competition than foreign magazines that do not sell space to Canadian advertisers. If magazines are regarded solely as a tradable commodity, then government measures that eliminate split-run magazines are certainly a form of economic protectionism. But magazines do more than sell readers to advertisers; they are an important forum for the expression of the ideas, attitudes and values of the reading communities they represent. Of course, some magazines perform this task better than others. And some magazines are no more than thinly-veiled vehicles for advertising content. To its credit, Canadian magazine policy has been designed to give some preference to magazines with a strong commitment to editorial content. It has also been designed with a view to the economic dynamics of the industry as a whole. Canadian policymakers made a choice: to promote magazines with original Canadian editorial content by channeling Canadian advertising expenditures to that end. Canadian advertisers have not opposed this strategy; neither have Canadian readers complained that the diversity of magazines has somehow been diminished. Put another way, the Canadian government made a choice between the speech rights of Canadian magazine publishers addressing Canadian readers, and the speech rights of Canadian advertisers. This distinction only makes sense if magazines are seen, first and foremost, as vehicles for cultural expression through their editorial content. The WTO's decision that these policies violate GATT is a decision that reduces magazines to tradable goods with no special cultural status; indeed, it places competition for advertising revenue ahead of editorial expression as the *sine qua non* of magazine publishing.

The lesson of the last few years is that in so many ways culture has already been incorporated into the new international trade agreements. It is now time to put the issue squarely on the table. Negotiations should begin on something like a general agreement on trade in culture, or perhaps, a general agreement on cultural exchange. And the 'free flow of words and images,' as the UNESCO charter put it some time ago, should be a fundamental principle of any such agreement. But at the same time, all states should have the right to regulate the marketplace to promote indigenous cultural

expression without placing undue restrictions on the circulation of foreign cultural goods. Most important, the agreement would have to recognize that culture and cultural expression cannot be treated as economic goods for which efficiency is measured by some neo-Ricardian law of comparative advantage. Culture cannot be treated as simply another trade issue.

ACRONYMS

CBS	Columbia Broadcasting System
CIDC	Canadian Investment Development Corporation
CMPA	Canadian Magazine Publishers Association
CMT	Country Music Television
CNN	Cable News Network
CRTC	Canadian Radio-Television Commission
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
MPA	Motion Picture Association of America
MPAC	Magazine Publishers' Association of Canada
NAFTA	North American Free Trade Agreement
NBC	National Broadcasting Company
NCN	New Country Network
PAP	Periodicals Assistance Program
<i>SI Canada</i>	Sports Illustrated Canada
OECD	Organization for Economic cooperation and Development
UNESCO	United Nations Economic, Social, and Cultural Org.
USTR	United States trade re[resem]atove
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

NOTES

¹ Ottawa checks if 'Canadian' issue of Sports Illustrated breaks law," *Toronto Star*, April 1 1993, C3.

² See "At Struggling Time Warner, Time Inc. Is Money," *New York Times*, 3 February, 1997, D1. And, Standards & Poor's Industry Surveys, *Publishing*, 6 February 1997, 8 and *passim*.

³ "What's in a Name? Money." *New York Times*, 18 November 1996, D1.

⁴ "Going mago a mago," *The Globe and Mail*, 12 July 1997, C1 & 6.

⁵ Magazine Publishers of America, *Annual Report*, 1996, 3 .

⁶ *Sports Illustrated Canada*, 5 April , 1993, 4.

⁷ *Time* magazine's Canadian edition is exempt from the provisions of Tariff Code 9958 but not Section 19 of the Income Tax Act.

⁸ see Catherine Keachie and Kim Pettaway (1994), "Federal Policy and Canadian Magazines," *Policy Options*, January /February, 14-18. See also, Carol Martin (1994), "The Invisible World of Canadian Magazines," *The Canadian Forum*, March, 9-14.

⁹ Peter Desbarats (1995), "The Special Role of Magazines in the History of Canadian Mass Media and National Development," in B. Singer (ed). *Communications in Canadian Society*. (Nelson: Toronto), 77

¹⁰ Mary Vipond (1989), *The Mass Media in Canada*. (Lorimer: Toronto), 24.

¹¹ See especially, Isaiah Litvak and Christopher Maule (1984), *Cultural Sovereignty: the Time and Reader's Digest Case in Canada*. (Praeger: New York).

¹² The exception for periodicals that focused on the arts, letters and sciences reflects a long-standing (and sometimes dubious) distinction between elite or high culture and mass or low culture. See for example, Ted Magder (1993), *Canada's Hollywood: the Canadian State and Feature Films*. (University of Toronto Press: Toronto), 81-5.

¹³ Vipond (1989), 26, 27.

¹⁴ *Maclean's* magazine calculated that by printing its issues in the U.S. it could save close to \$40,000 a year, with the bulk of the saving in paper costs. Interestingly, imports of newspaper presses were exempt from the prevailing duties. See Vipond (1977), "Canadian Nationalism and the Plight of Canadian Magazines." *The Canadian Historical Review*. Vol. LVIII, no.1, March. 48-9.

¹⁵ See Frank Peers (1969), *The Politics of Canadian Broadcasting: 1920-51*. (University of Toronto Press, Toronto).

¹⁶ See Ted Magder (1993) .

¹⁷ Litvak and Maule (1984), 24; Vipond (1977), 59.

¹⁸ Mary Vipond (1989), 28.

¹⁹ See Glen Williams (1982), *Not for Export*. (McClelland and Stewart, Toronto).

²⁰ Government of Canada (1951), Royal Commission on National Development in the Arts, Letters and Sciences. *Report..* (Ottawa: Queen's Printer), chapter 5.

²¹ Litvak and Maule (1984), 30-1.

²² Government of Canada (1961). Royal Commission on Publications. *Report* (Queen's Printer: Ottawa), 13.

²³ *Ibid.*, 16, 76.

²⁴ *Ibid.*, 74.

²⁵ Litvak and Maule (1984), 66.

²⁶ Magder (1993), Chapter 6 .

²⁷ For purposes of postal subsidies, *Time* and *Reader's Digest* were classified as foreign periodicals in 1968, a ruling that increased mailing costs for each publication by a little more than 10 percent. see Litvak and Maule (1984), 77.

²⁸ It was not the first time that the U.S. government had intervened on behalf of *Time* and *Reader's Digest*. President Eisenhower had taken up the issue at summit meetings with Prime Ministers St. Laurent and Diefenbaker in the late 1950s. See Roger Swanson (1977), "Canadian Cultural Nationalism and the U.S. Public Interest," in Janice Murray (ed.) *Canadian Cultural Nationalism..* (New York University Press, New York), 64-8.

²⁹ See for example, Stephen Clarkson (1982), *Canada and the Reagan Challenge*. (Lorimer: Toronto), especially chapter 1. In an endnote, Clarkson quotes a U.S. State Department Bulletin from 1965, the Merchant-Heeney Report, as follows: "In consultation with the United States, Canadian authorities must have confidence that the practice of quiet diplomacy is not only neighborly and convenient for the United States but that it is in fact more effective than the alternative of raising a row and being unpleasant in public." 336. See also Roger Swanson (1977), "Canadian Cultural nationalism and the U.S. Public Interest," in J. Murray, ed., *Canadian Cultural Nationalism*, (NY University Press).

³⁰ See Litvak and Maule (1984), 88. A number of the editors of the aforementioned magazines took a very different view of *Time* and *Reader's Digest* in Canada, arguing that their presence militated against a vibrant Canadian magazine industry.

³¹ Senate of Canada (1970). Special Senate Committee on Mass Media, *Report*, 156.

³² *Ibid*, 155, 163-4.

³³ Government of Canada (1994), Task Force on the Canadian Magazine Industry, *A Question of Balance*. Minister of Supply and Services. 34.

³⁴ Desbarats (1995), 84. As of 1996, *Time's* circulation in Canada was roughly 300,000, while *Maclean's* had a circulation of roughly 500,000. See, "Going mago a mago," *The Globe and Mail*, 12 July 1997, C1.

³⁵ Clarkson (1984), 235.

³⁶ Nigel Grimwade (1996), *International Trade Policy: A Contemporary Analysis*, 5.

³⁷ See Filipek (1992), "'Culture Quotas': The Trade Controversy over the European Community's Broadcasting Directive" *Stanford Journal of International Law*, Spring; and Michael Braun and Leigh Parker (1993), "Trade in Culture: Consumable product or Cherished Articulation of a Nation's Soul," *Denver Journal of International Law and Policy*. Vol. 22, no.1, Fall.

³⁸ See Ian Jarvie (1992). *Hollywood's Overseas Campaign: the North Atlantic Movie Trade, 1920-50*. Cambridge University Press.

³⁹ Article 1 (1), as quoted in Mark Alleyne (1995), *International Power and International Communication*, (St. Martin's, London), 39.

⁴⁰ Article 1(2), in *Ibid.*, 40.

⁴¹ Herbert Schiller (1976), *Communication and Cultural Domination* (White Plains, NY: International Arts and Science Press), 29.

⁴² See, *inter alia*, Thomas Guback (1969), *The International Film Industry* (Bloomington: Indiana University Press); Jeremy Tunstall (1977), *The Media are American* (London: Constable); A. Mattelart (1979), *Multinational Corporations and the Control of Culture* (Brighton: Harvester Press). For a rejoinder see M. Tracey (1985), "The Poisoned Chalice: International Television and the Idea of Dominance." *Daedalus*, vol.114 (4).

⁴³ See, *inter alia*, Smith (1980); Alleyne (1995).

⁴⁴ Howard Frederick (1993), *Global Communication and International Relations*, (New York: Harcourt Brace) 166. See also, Alleyne (1995), chapter 6.

⁴⁵ *Ibid*, 174.

⁴⁶ Alleyne, (1995) 56.

⁴⁷ *Ibid*, 45.

⁴⁸ United States Trade Representative (1996), 1996 Trade Policy Agenda and 1995 Annual Report, 1.

⁴⁹ United States Trade Representative (1997), 1997 Trade Policy Agenda and 1996 Annual Report, 15 and *passim*.

⁵⁰ Department of Commerce (1993), *Globalization of the Mass Media*, 20.

⁵¹ *Ibid*, 21.

⁵² *Ibid*, 3, 4.

⁵³ Michael Trebilcock and Robert Howse (1995). *The Regulation of International Trade*. (Routledge: London), 259.

⁵⁴ *Ibid*, 125.

⁵⁵ *Ibid*, 260.

⁵⁶ Myra Tawfik (1994). "The Secret of Transforming Art into Gold: Intellectual Property Issues in Canada-U.S. Relations," *Canadian-American Public Policy*. no. 20.

⁵⁷ Grimwade (1996), 315.

⁵⁸ Avrind Subramanian, in *Ibid.*, 315. See Grimwade (1996) chapter 8, and Trebilcock and Howse (1995) chapter 10.

⁵⁹ See Koningsberg (1994), "Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of Broadcast Ownership Laws," *Cardozo Arts & Entertainment* . vol. 12, 281-320.

⁶⁰ *Ibid*, 302.

⁶¹ *Ibid*, 306.

⁶² Edward Comor (1997). "The re-tooling of American hegemony: U.S. foreign communication policy from free flow to free trade" in A. Sreberny-Mohammadi, et al. (eds). *Media in Global Context*. London: Edward Arnold, 194. See also, E. Comor (1997). "The U.S. and the Global Information Infrastructure: Orchestrator, Functionary, or mediator?" *Prometheus*. vol. 15, no. 3. Comor is quite rightly eager to show that the state remains an important and powerful actor in the context of globalization.

⁶³ *Ibid*, 195. The International Intellectual Property Alliance likes to refer to this sector as the "core" copyright industries which encompasses those industries that create copyrighted material as their primary product. These include: the motion picture industry (televi-

sion, theatrical and home video), the music and recording industry (music publishing, records, tapes and CDs), the book, journal and newspaper publishing industry, the computer software industry (including data processing business applications and interactive software on all platforms), legitimate theater, advertising, and radio, television, and cable broadcasters.

⁶⁴ Canada, Department of Foreign Affairs and International Trade: <http://www.dfait-maeci.gc.ca/english/geo/usa/cdaus-e.htm>.

⁶⁵ *Ibid.* The USTR reported a trade deficit with Canada of \$18.2 billion for 1995, and 23.9 billion for 1996. See <http://www.ustr.gov/reports/nte/1997/canada.pdf>.

⁶⁶ Statscan figures, in "Canada Exports lead G7," *The Globe and Mail*, 22 April 1996, B1,9.

⁶⁷ Stephen Clarkson (1993), "Constitutionalizing the Canadian-American Relationship," in D. Cameron and M. Watkins, eds. *Canada Under Free Trade*. James Lorimer, Toronto. The United States gained concessions on energy, foreign investment, agriculture, financial and other services, and reserved for itself the right to invoke the Special 301 measures and pass new laws that could supersede the agreement.

⁶⁸ See "Canada: Economic Update," *The New York Times*, 10 December 1985, D17.

⁶⁹ Graham Carr (1991) "Trade Liberalization and the Political Economy of Culture: An International Perspective on FTA." (*Canadian-American Public Policy* No. 6, Canadian-American Center, University of Maine), 7.

⁷⁰ See Steve Globerman and Aidan Vining (1996). "Canadian Culture under Free Trade," *Canadian Business Review*, Summer, 18.

⁷¹ *Ibid.*, 19. Services Policy Advisory Committee of the United States Trade Representative and CBS Inc: *Trade Barriers to the US. Motion Pictures and Television, Prerecorded Entertainment, Publishing and Advertising Industries*. September 1994.

⁷² See for example, Carr (1991) and W. Northcote (1992) "The Treatment of Culture and Cultural Industries Under the CUSFTA and in

the European Community," *Media & Communication Law Review*, vol. 2.

⁷³ The recognition of a retransmission right resulted in a decision by the Canadian Copyright Board ordering Canadian copyright holders to pay copyright holders \$50 million, of which more than \$42 million go to the US. see Tawfik (1994), 16.

⁷⁴ Carr, (1991) 29. See also, Graham Carr (1993), "Culture." in D. Cameron and Mel Watkins eds., *Canada Under Free Trade*. (James Lorimer: Toronto); and Edward Comor (1991), "The Department of Communications Under the Free Trade Regime." *Canadian Journal of Communication*, vol. 16, no. 2.

⁷⁵ "Ottawa checks if 'Canadian' issue of Sports Illustrated breaks law," *Toronto Star*, 1 April 1993, C3.

⁷⁶ The details of Investment Canada's decision are not public. But newspaper reports, including remarks by Time Canada's managing director. Sandra Berry. and Sports Illustrated's general manager, Alvaro Saralegui, are consistent on this point. See, Val Ross, "A bungee jump into culture's abyss," *Toronto Star*, 5 June 1993, C1; "Magazine cools to Canada," *The Globe and Mail*, 23 January, 1996, B1. See also, Task Force, 88.

⁷⁷ "Keeping Up With Time," *Masthead*, March 1993, 9.

⁷⁸ "Beatty to protect magazines from American 'split' editions," *Toronto Star*, 3 February 1993, D6; and see "Magazine industry urges laws to stem foreign competitors," *Toronto Star*, 9 February 1993, C1.

⁷⁹ "SI move brings calls for new law," *The Globe and Mail*, 16 March 1993, B5.

⁸⁰ See "Sports Illustrated Sets Canadian Edition, But Magazine Publishers There Call foul," *Wall Street Journal*, 26 March 1993, B7; and "Keeping Up With Time," *Masthead*, March 1993, 9.

⁸¹ Task Force (1994), 83.

⁸² "Sports Illustrated not off the hook in what may be end-run of policy," *Toronto Star*, 20 April 1993, D3.

⁸³ "Fill-page ad violates policy, critics say," *Toronto Star*, 12 May 1993.

⁸⁴ Task Force (1994), 2 and table 14, 34 .

⁸⁵ The Task Force did not examine in detail the mechanics of magazines distribution on newsstands. Here too, economies of scale play a role. Magazine racks in corner-stores in supermarkets are often leased. Three-quarters of women's magazines, for example, are sold at supermarkets and they charge up to \$25 per pocket for a three-year deal. Multiply that figure by ten pockets per store and 2,000 stores across the country and the cost becomes prohibitive for magazines that operate close to the margin. See "We publish 1,300 magazines, why can't we buy them," *Toronto Star*, 8 March 1997, K1.

⁸⁶ Task Force (1994), 13.

⁸⁷ *Ibid*, 21.

⁸⁸ *Ibid*, 22.

⁸⁹ A full page in the San Francisco area edition of *Sports Illustrated* would cost \$14,035 (Cdn) with a circulation of 142,000. Task Force (1994), 44-5.

⁹⁰ *Ibid*, 51-5.

⁹¹ Section 20 (e), Investment Canada Act, Task Force (1994), 87 .

⁹² *Ibid*, 91-6.

⁹³ *Ibid*. Other recommendations included: 1) requiring publishers to submit annual reports describing ownership and editorial content; b) encouraging the Departments of National Revenue and Canadian Heritage to compile and monitor a list of magazines that comply with Section 19 of the Income Tax Act (Bill C-58); c) eliminating federal sales tax (the Goods and Services Tax) on all reading material; d) maintaining the postal subsidy for eligible magazines; and e) encouraging the Federal government (the largest advertiser in Canada) to purchase space in Canadian magazines.

⁹⁴ "Task force has some magazine insiders crying fowl," *Globe and Mail*, 25 March 1994, C6.

⁹⁵ *Ibid*, C6; "Gauntlet Tossed to Liberals," *Masthead*, April 1994, 6.

⁹⁶ "US. trade report targets Canada for discriminating against magazines," *The Gazette*, 2 April 1994, C4.

⁹⁷ "The Issues at Stake," *Maclean's*, 4 April 1994, 63.

⁹⁸ "Ginn Tonic," *The Canadian Forum*, May 1994, 12-19.

⁹⁹ Canada's ambassador to Washington, Allan Gotlieb, warned that the Baie-Comeau policy would undermine Canada's image abroad as "one of the best countries in the world to invest," and that Gulf & Western would pursue a "scorched-earth policy in Canada if forced to divest holdings in Canadian publishers. *Ibid*.

¹⁰⁰ Shortly thereafter Paramount was overtaken by Viacom. Viacom struck a deal with the federal government permitting it to keep all of Paramount's holdings in Canada (including Ginn Publishing, Famous Players Theatres and Canada's Wonderland) in exchange for the promise to invest close to \$400 million in film and television production in Canada. Most of the commitment involved productions to be undertaken in Canada by Paramount Pictures, Showtime Network, and Spelling Television, all part of Viacom's holdings. See Magder (1996), "Film and Video Production." in M. Dorland ed., *The Cultural Industries in Canada: Problems, Policies and Prospects*. (Lorimer: Toronto), 172.

¹⁰¹ CRTC, *Public Notice, 1994-284*, 6 June 1994.

¹⁰² See CRTC, *Public Notice, 1994-61*, 6 June 1994. For example, US.-based ESPN is not available on Canadian cable systems because of Canadian-owned TSN (The Sports Network) holds a license as a specialty cable channel. The decision to make foreign specialty cable channels ineligible is reached in consultation with the Canadian channel. CBC's Newsworld, for example, has not requested the removal of CNN from the list of eligible cable channels.

¹⁰³ CRTC, *Public Notice, 1984-18*: 13.

¹⁰⁴ "CMA Asks Canada to Keep US. Country Show on TV," *Billboard*, 12 November 1994, 30; "Canada Country Assn. Pulled Into CMT Fight," *Billboard*, 23 November, 1994.

¹⁰⁵ "The Border War Over Country Music," 23 October 1994, Section 3, 7. "Country Music Channel Extends Coverage to Asia," *The Wall Street Journal*, 12 August 1994. Shortly after the CRTC's decision, CMT announced that it had signed a satellite deal that would put it in place to reach just over 90% of homes worldwide.

¹⁰⁶ "US. Pressed Canada to Change Tune, Let Music-Video Channel Return to Air," *Wall Street Journal*, 19 May 1995, B12.

¹⁰⁷ "US. Firm, Canada Set Tentative Pact on Country Music," *The Wall Street Journal*, 23 June 1995, B3.

¹⁰⁸ The final deal was not consummated for another eight months. See, *International Trade Reporter*. 13 March 1996, 421. (Bureau of National Affairs: Washington).

¹⁰⁹ Bill C-103, An Act to Amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c.46.

¹¹⁰ Task Force (1994), 66.

¹¹¹ "'Split-run' bill unfair; Time Inc. tells MPs," *Toronto Star*, 19 October 1995, A16 .

¹¹² see *Ibid.*

¹¹³ "Magazine to expand despite tax bill," *Globe and Mail*, 23 November 1995, E1.

¹¹⁴ Canada, *Senate Debates*, 7 December 1995, 2451.

¹¹⁵ There was at least one other problem with the way the tax was designed. The tax was to be payable by a "responsible person," meaning a Canadian-resident publisher, distributor, printer or wholesaler. In cases where the publisher was not a Canadian resident, Canadian printers, distributors or wholesalers would be required to pay a tax on advertising revenue they themselves did not collect. In all likelihood it would difficult to determine who the "responsible" party was and even more difficult to determine the amount of the tax. See "Magazine rules smell of censorship," *The Financial Post*, 24 October 1995, 36.

¹¹⁶ "U.S. threatens retaliation for magazine tax," *Toronto Star*, 16 December 1995, A11.

¹¹⁷ "Sports Illustrated vows to fight tax," *The Globe and Mail*, 18 December 1995, B1.

¹¹⁸ *International Trade Reporter*, 13 March 1996, 420.

¹¹⁹ Aside from managing the Dispute Settlement mechanism for the GATT, the WTO also plays a proactive role in monitoring the trade activities of GATT signatories. See, M. Trebilcock and R. Howse (1995) for a review of dispute resolution in international trade. See also the WTO's homepage: <http://www.wto.org>

¹²⁰ R.S.C. 1985, c.41 (3rd Suppl.) as amended to 30 April 1996, s.114, Sch.VII, Item 9958 (1996 Customs Tariff: Departmental Consolidation) Ottawa: Minister of Supply and Services, Canada, 1996.

¹²¹ Article XI:I reads in relevant part as follows: "No prohibitions other than duties, taxes, or other charges... shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member]..."

¹²² The relevant section of Article XX(d) of GATT 1994 reads as follows: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures: ...(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement, including those related to Customs enforcement, the enforcement of monopolies..., the protection of patents, trade marks and copyright, and the prevention of deceptive practices..."

¹²³ Wt/DS31/R. para. 3.8.

¹²⁴ *Ibid.*, para.3.6.

¹²⁵ WT/DS31/R, para. 5.9.

¹²⁶ *Ibid.*, para. 5.10.

¹²⁷ The Panel provided the following analogy: “An import ban under these circumstances is rather likely to be an enforcement measure in respect of a ban on possession or sale of a product. An import ban on alcoholic beverages might share the same objective as a criminal statute against drunk driving, but if alcoholic drinks are not banned or their sale prohibited domestically, the import ban could not be considered as an enforcement measure of the criminal statute.” *Ibid.*, para.5.11, fn. 126.

¹²⁸ An Act to Amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c.46.

¹²⁹ The General Agreement on Trade in Services (GATS) was negotiated under the umbrella of the Uruguay Round but is a legally distinct accord. See Trebilcock and Howse (1995), chapter 9.

¹³⁰ WTO, para. 3.35.

¹³¹ *Ibid.*, para. 3.34.

¹³² *Ibid.*, para. 3.47.

¹³³ *Ibid.*, para. 3.68.

¹³⁴ *Ibid.*, para. 3.61, 3.63.

¹³⁵ *Ibid.*, para. 3.69.

¹³⁶ *Ibid.*, para. 3.78.

¹³⁷ *Ibid.*, para. 3.81, 3.72.

¹³⁸ *Ibid.*, para. 5.15.

¹³⁹ *Ibid.*, para. 5.17.

¹⁴⁰ *Inter alia*, eligible publications must be published for the dissemination to the public consisting of either news, comment and analysis of news and articles on topics of current interest; of articles on religion, the sciences, agriculture, forestry, the fisheries, social or literary criticism, reviews of literature or the arts, or be an academic or scholarly journal; or articles promoting health and published by a

non-profit organization.... No less than 50 of total circulation must be paid circulation. No more than 70 per cent of the space may be devoted to advertising.

¹⁴¹ For example, the commercial "international" rate for foreign magazines mailed in Canada is \$0.436, while the commercial "Canadian" rate for local urban distribution is \$0.231.

¹⁴² WTO, para. 3.149. The relevant part of Article III:4 reads as follows: "4. The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not the nationality of the product."

¹⁴³ WTO, para. 3.150 - 3.153.

¹⁴⁴ *Ibid.*, para. 3.209.

¹⁴⁵ *Ibid.* para. 5.35, 5.38.

¹⁴⁶ GATT Article III:8(b), cf. *Ibid.* para. 5.40 -5.44.

¹⁴⁷ WTO, Appellate Body, WT/DS/AB/R, 30 June 1997, 3-4.

¹⁴⁸ *Ibid.*, 5-6.

¹⁴⁹ *Ibid.*, 6.

¹⁵⁰ *Ibid.*, 8-11.

¹⁵¹ *Ibid.*, 16.

¹⁵² *Ibid.*, 17-19.

¹⁵³ *Ibid.*, 26.

¹⁵⁴ Task Force (1994), 12.

¹⁵⁵ *Ibid.*, 31.

¹⁵⁶ *Ibid.*, 34-7. Presumably, because Canada Post is a government agency (Crown Corporation), the transfer of funds from Heritage Canada in the end represents money (postage) not collected by the government. Thus, the transfer of funds is similar to a tax expenditure. The appellate body concluded that GATT only permits the payments of subsidies that involve the direct expenditure of revenue by a government.

¹⁵⁷ *Business Week*, 20 October 1975, 52, as quoted in John Herd Thompson (1995), "Canada's Quest for Cultural Sovereignty: Protection, Promotion, and Popular Culture." in S. Randall and H. Konrad, eds., *NAFTA in Transition*. (University of Calgary).

¹⁵⁸ Rupert Murdoch's News Corporation now sees sports (along with movies) as the two products driving its world-wide TV ventures. Peter Chernin, president and C.O.O. of the News Corporation has said that of the two, "sports is more important." Aside from its commercial value, sports provides an opportunity for expression of local or national (perhaps even tribal) sentiment, even as sports itself is globalized. See, Connie Bruck, "The Big Hitter," *The New Yorker*, 8 December 1997, 86. See also, Alan Tomlinson (1996), "Olympic Spectacle: opening ceremonies and some paradoxes of globalization," *Media, Culture and Society*, Vol. 18, no. 4.

¹⁵⁹ Department of Foreign Affairs and International Trade, "Notes for an Address by the Honorable Art Eggleton, Minister of International Trade, on the Occasion of a Panel Discussion: "Can Canada Maintain its Cultural Identity in the Face of Globalization," Osgoode Hall Law School, York University, 27 January, 1997, 1-2. The Statistics Canada figures Eggleton quoted might lead to a less confident conclusion. Of the \$3 billion, very little represents exports of Canadian content. Almost one-third of the figure came from tourism and recreation, and another third came from the export of foreign books, magazines, and CD's manufactured in Canada and shipped abroad. The StatsCan figures also included money spent on transportation, food and accomodation, to service people working on film and television shoots. See "U.S. officials use Eggleton to back culture stand," *The Globe and Mail*, 22 May 1997, B3.

¹⁶⁰ *Ibid.*, 4.

¹⁶¹ Keith Acheson and Christopher Maule (1996). *International Agreements and Cultural Industries*. (Centre for Trade Policy and Law: Carleton University), 27.

¹⁶² *Ibid.*, 28. For a like-minded analysis of the policy objectives underlying Canadian cultural policy, see Daniel Schwanen (1997) *A Matter of Choice: Toward a More Creative Canadian Policy on Culture*. C.D. Institute Commentary, no. 91.

¹⁶³ See endnote 71. The two are: Section 19 of the Income Tax Act and Simultaneous Substitution.

¹⁶⁴ WT/DS31/R. para. 5.45.

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