THINK GLOBALLY, ACT LOCALLY: NORTH AMERICAN FREE TRADE, CANADIAN CULTURAL INDUSTRY EXEMPTION, AND THE LIBERALIZATION OF THE BROADCAST OWNERSHIP LAWS*

I. INTRODUCTION

On November 20, 1993, after over a year of intense political debate, the North American Free Trade Agreement ("NAFTA") was passed by the United States Congress.[1] The nearly 2,000 page

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[1] North American Free Trade Agreement, December 17, 1992,, U.S.-Can.-Mex., Pub. L. No. 103-182, 107 Stat. 2057, *reprinted in* 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The Agreement was negotiated by the administrations of former President George Bush, former Canadian Prime Minister Brian Mulroney, and Mexican President Carlos Salinas de Gurtari.

The status of the NAFTA, which is to go into effect on January 1, 1994, in each of the potential member states is as follows:

UNITED STATES OF AMERICA - On November 17, 1993 the U.S. House of Representatives passed the NAFTA by a vote of 243-200. On November 20, 1993 the U.S. Senate approved the NAFTA by a vote of 61-38. President William J. Clinton signed the NAFTA into law on December 8, 1993.

CANADA - On May 27, 1993 the Canadian House of Commons voted 140-124 to approve the NAFTA. On June 23, 1993 the Senate approved the NAFTA by a vote of 47-30. The recently negotiated side agreements require no immediate Parliamentary approval. All that remains before the Agreement becomes law is royal assent, a formal promulgation of a final order by Governor General Ramon J. Hnatyshyn. The Government of Canada will delay this process until the Agreement is ratified by the governments of the United States and Mexico.

On October 25, 1993, the Liberal party, under the leadership of Jean Chrétien, won a majority of seats in the Canadian House of Commons. On November 4, 1993, Mr. Chrétien formally took office as Canada's twentieth prime minister. Prime Minister Chrétien has agreed to have the NAFTA proclaimed as law.

MEXICO - The NAFTA is still in need of approval by the Mexican Government. However, it is considered a formality as the ruling Institutional Revolutionary Party(PRI), under President Salinas de Gurtari, has a majority in both houses of the Mexican Congress.

The preamble of the NAFTA states, in part

PREAMBLE

> The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to;
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> STRENGTHEN the special bonds of friendship and cooperation among their nations;
>
> CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
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> . . .
>
> REDUCE distortions to trade;
>
> . . .
>
> FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;

accord, a product of over a year of intense negotiations by potential member state representatives from the United States, Canada, and Mexico, reflects an agreement reached on August 12, 1992, on a North American free trade zone.[2] The NAFTA, which is to go into effect on January 1, 1994, is a decisive move by the governments of the United States, Canada, and Mexico, to combat the rising trade threats from Asia and the European Community ("EC").[3] By opening borders to free trade, NAFTA would effect six trillion dollars of trade among populations totaling 360 million people, replacing the EC as the largest free trade area in the world.[4] NAFTA was negotiated under the "fast track" procedure,[5] which is designed to allow the President to negotiate such trade agreements that he believes are in the U.S. interest. Once submitted, Congress must vote on the agreement without amendment[6] within ninety days of session.[7] The act does not prohibit side agreements before formal submission to Congress and/or subsequent overriding treaties.[8]

NAFTA is the most recent of the major trade and economic integration schemes that have arisen in the post-World War II era.[9]

. . .

PRESERVE their flexibility to safeguard the public welfare;

. . .

Id.

[2] Former President Bush had formally announced his intention to seek a North American Free Trade Agreement on September 25, 1990 during a visit with Mexican President Carlos Salinas de Gurtari. *Mexico: President Sends Formal Request to Congress to Begin Negotiations With Mexico,* 7 Int'l Trade Rep. (BNA) 1499 (1990). The present trade representatives for these countries are: Trade Secretary Mickey Kantor (formerly Carla A. Hills) (United States), International Trade Minister Roy MacLaren (formerly Thomas Hockin and Michael Wilson) (Canada), and Trade Minister Jaime Serra Puche (Mexico).

[3] *See NAFTA: ABA Meeting looks at NAFTA and Intellectual Property Rights,* 9 Int'l Trade Rep. (BNA) 724 (1992).

[4] *See* John E. O'Grady, *Canada, Mexico, and the United States Agree to Form the World's Largest Common Market - - Political Battle Over Pact Expected,* 5 TAX NOTES INT'L 443 (1992).

[5] Trade Act of 1974, Pub. L. No. 93-618, §§ 101-09, 151, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2111-2119, 2191 (1988)); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1101-1103, 102 Stat. 1107 (codified as amended at 19 U.S.C. §§ 2191, 2901-03 (1988 & Supp. IV 1993)). Fast Track procedures are a mechanism used by Congress to expedite its normal rules of procedure in order to guarantee timely consideration of specified legislation in committee and on the floor. *See* Congressional Research Service, *Fast-Track and the North American Free Trade Agreement* (Jan. 29, 1993).

[6] 19 U.S.C. § 2191(d) (1988).

[7] 19 U.S.C. § 2191 (1988).

[8] The Clinton Administration has completed negotiations concerning side agreements to the NAFTA. These agreements focused mainly on labor and environmental issues. These side agreements were signed by Canada, Mexico and the United States on September 14, 1993. President Clinton was joined by former presidents Gerald R. Ford, Jimmy Carter, and George Bush to show support for the NAFTA. *See* NAFTA Side Agreement Signing Ceremony, FED. NEWS SERV., Sept. 14, 1993, *available in* NEXIS, Fednew File.

[9] These include: TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 4 [hereinafter EEC TREATY]; Convention Establishing the European

NAFTA is the second bilateral free trade agreement between the United States and Canada, the first being the United States-Canada Free Trade Agreement ("FTA"), which came into effect on January 1, 1989.[10]

The United States and Canada share a unique relationship. Not only do they share the longest, unprotected border in the world, but by the end of 1989, only two years after the FTA ratification, $200 billion worth of goods and services flowed between the two nations.[11] In that same year shipments from the U.S. to Canada accounted for more than 20% of the value of all U.S. exports of merchandise and nearly equalled total U.S. exports to the European Community.[12] Moreover, in 1991, Canadian exports accounted for 19% of all U.S. imports, an amount matched only by Japan.[13]

The U.S. and Canada first began free trade negotiations for the FTA in 1986. There were many discussions about which sectors would be ultimately protected or even potentially excluded from free trade. As the respective countries involved negotiated the details of the NAFTA, fears that accompany the establishment of such a vast free trade area surfaced. The idea of bilateral free trade between the U.S. and Canada is not a new one, but U.S. dominance in the cultural industries[14] and markets[15] has raised serious questions concerning sovereignty.[16] Specifically, many people fear that

Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3; Austr.-N.Z.: Closer Economic Relations - Trade Agreement, Mar. 28, 1983, *reprinted in* 22 I.L.M. 945 (1983); U.S.-Isr. Free Trade Area Implementation Act of 1985, Pub. Law No. 99-47, §§ 1-6, 99 Stat. 82 (codified as amended 19 U.S.C. 2112 (1988)).

10 U.S.-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988), *reprinted in* 27 I.L.M. 281 (1988) [hereinafter FTA].

11 United States - Canada Free Trade Agreement Biennial Report, 1991 WL 329550, at *1 (Jan. 1991) [hereinafter Biennial Report].

12 *Id.*

13 *See* U.S. DEP'T OF COMMERCE, 1991 U.S. FOREIGN TRADE HIGHLIGHTS tbl. 12 (1991).

14 Cultural Industries for the purposes of this note are defined as motion picture and video production, distribution, and exhibition; production, distribution and sale of music, audio recordings, and books; radio, television and cable services, and other printed material.

15 Media holds a special place in American society. The products of our cultural industries promote the means by which ideas, thoughts, images and information are disseminated. "In so doing, the mass media industries continuously replenish the 'marketplace of ideas' that is essential to informed self-government." NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEP'T OF COMMERCE, GLOBALIZATION OF THE MASS MEDIA 1 (1993) [hereinafter GLOBALIZATION].

16 The question of cultural sovereignty in the context of a free trade zone has led the European Community to include a chapter on the promotion of culture in its Treaty on European Union, better known as the Maastricht Treaty. *See* Treaty on European Union, Feb. 7, 1992, *reprinted in* 31 I.L.M. 247 (1992).

As the Maastricht Treaty has now been ratified by all twelve member states, the European Union officially came into existence on November 1, 1993, which according to the Treaty's preamble creates "an ever closer union among the peoples of Europe." *Id.* pmbl.

with economic integration, the collapse and demise of individual, political, social, and cultural systems will soon follow.

The Canadian fear of American political and economic domination has become a major issue in the negotiations of previous and current free trade agreements. Particularly, the Canadian fear of both American culture and the domination of its entertainment industry interests prompted Canada to exclude or exempt its own cultural industries from the FTA.[17] In fact, Canadian insistence led to the inclusion of the Cultural Industry Exemption Clause ("Exemption Clause").[18] Furthermore, the Canadians refused to hold any negotiations concerning its repeal.[19] The Exemption Clause has aroused minimal but vociferous controversy since its initial inclusion.[20]

As North America sought to expand the free trade zone to Mexico, however, inevitable talks about the repeal of this provision ensued. Again, Canada refused to negotiate and this provision remains intact in the NAFTA.[21] The goal of the NAFTA, being an agreement to conduct open and free trade between nations and to reduce distortions and inequities of trade, is frustrated by the Exemption Clause. This Clause is a barrier to free trade and is *per se* violative of the goals of the agreement.

While the importance of cultural consumer sovereignty rights—the right to receive and have access to information, cultural or otherwise—is evident, such notions are often abutted by distinguished and unimpeachable positions of national sovereignty and identity.[22] This Orwellian dilemma between freedom and pa-

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[17] FTA, *supra* note 10, art. 2005(1). This article, entitled *Cultural Industries* states: "Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 [Retransmission Rights] and 2007 [Print-In-Canada Requirement] of this Chapter." *Id.*

For a discussion of the history of articles 2006-2007 see *infra* Section II.B.

[18] *Id.*

[19] *See, e.g.*, Rod McQueen, *U.S. Ranting Against Canada's Cultural Rights*, THE FIN. POST, Sept. 18, 1992, at 9.

[20] Letter from Jack Valenti, President and Chief Executive Officer, *Motion Picture Association of America*, to the House Ways and Means Committee's Subcommittee on Trade 3 (Sept. 17, 1992) [hereinafter Valenti Letter].

[21] NAFTA, *supra* note 1, annex 2106. Which states:

> Notwithstanding any other provision of this Agreement, as between the United States and Canada, any measure adopted or maintained with respect to cultural industries, except as, specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed exclusively in accordance with the terms of the *Canada - United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

Id.

[22] The basic constitutional doctrine of the law of nations being that every nation enjoys

ternalism is most evident in the trade issues arising between the U.S. and Canada. The border between these two countries, though friendly, open, and pervious to inter-nation electronic information, does nevertheless divide the two. Each have separate and distinct traditions: historically, politically, and culturally. This dichotomy is the cultural basis for NAFTA's Exemption Clause. It is therefore necessary to examine the concept of sovereignty, in whose name many nations have enacted restrictive cultural regulations, to determine whether and to what degree such regulations may be justified as embodied in the text of a free trade agreement.

This Note will examine the reasoning behind and the effect of the Exemption Clause, found in both the FTA and the NAFTA. Furthermore, it will propose to amend the Communications Act of 1934[23] in favor of increased foreign investment in the broadcast sector with entities of those nations in which we have in effect a bilateral free trade agreement. The author sets forth this proposal in order to further the ultimate goals of the NAFTA—providing for trade free from obstruction.

Part II analyzes the historical and theoretical arguments behind the Clause and its restriction of U.S. access into Canadian cultural industries, from a Canadian perspective. Part II also examines legislation enacted to restrict foreign integration into Canadian cultural industries in order to protect national sovereignty. Part III examines other culture-driven legislation, particularly those found in the European Community. Through an examination of EC legislation, we can better understand the reasons and effect of the NAFTA Exemption Clause. Part IV discusses both the U.S. reaction, in light of past agreements, and the detrimental effect that "cultural protectionism"[24] might have on the U.S. entertainment industry. Part V proposes a solution by which both the United States, Canada, and Mexico may work together in an open market in furtherance of the actual goals specified by the NAFTA.[25] Being that the public good is augmented by the ultimate attainment of free and open trade, the best way to achieve the public good is to facilitate this trade process. With that in mind, one solution to Canada's policy of cultural exemption is for the

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a sovereign right with which no other nation may interfere, to regulate as it pleases its own internal domestic affairs including economic and cultural policies. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (4th ed. 1990).

[23] 47 U.S.C. §§ 1-757 (1988).

[24] This term is used to describe the U.S. reaction, especially that of the U.S. trade representatives and representatives of the U.S. cultural industries, towards the cultural exemption policies of other countries, specifically Canada.

[25] *See supra* note 1 and accompanying text.

U.S. to liberalize its own laws concerning foreign investment in U.S. radio and television broadcast entities. This Note proposes to amend such U.S. broadcast regulations to advance the free trade in culture between the U.S. and Canada. It is this market which is the most restricted in terms of foreign access and thus provides a starting point whereby the U.S. and Canada can further extend and establish free trade, while at the same time maintaining the integrity of their respective cultures and cultural industries.

II. History of an Issue

"Keeping culture off the table was a condition for Canada's participation in [the FTA and] NAFTA talks."[26] The Exemption Clause "reserves for Canada the right to take whatever action regarding cultural materials such as motion pictures, records and books, that it deems in its national interest."[27] In order to fully understand the inclusion of the Exemption Clause, one must understand the history of Canadian trade with the U.S. from a Canadian perspective.

Canada and the United States share many cultural, governmental, business, and professional associations, most of which occur without incident. "Areas of disagreement . . . are remarkably few given the extent of the relationship—they are sometimes referred to as 'irritants' to suggest that, while troublesome, they should not affect the totality of relations."[28] One such *irritant* is the issue of culture and national cultural sovereignty.[29]

The question remains, why does Canada insist upon a cultural industry exemption and what is in its national interest?

A. *Pre-World War II*

1. 1854 Reciprocity Treaty

Free Trade between Canada and the U.S. began in the mid-nineteenth century with the 1854 Reciprocity Treaty.[30] However,

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[26] McQueen, *supra* note 19, at 9.

[27] *NAFTA IP Provisions Called 'Model,' Industry Concerned by Cultural Exemption*, 9 Int'l Trade Rep. (BNA) 1433 (Aug. 19, 1992) [hereinafter *Model*].

[28] Goodwin Cooke, *Introduction*, *in* Cultures in Collision: The Interaction of Canadian and U.S. Television Broadcast Policies ix (Can.-U.S. Conference on Communications Policy 1984) (emphasis added).

[29] "The source of this dispute is not simply protectionism or chauvinism on the Canadian side, nor is it commercial greed or imperialism on the U.S. side. The dispute derives from profound differences, legal, historical, and philosophical, in the two countries' approaches to communications policy." *Id.* The U.S. differs from most other countries in that both TV and radio broadcasting were developed in a wholly commercial environment.

[30] Reciprocity Treaty with United Kingdom, 10 Stat. 1089 (1854). *See also* Denis Stairs, *Free Trade - Another View*, *in* Free Trade vs. Protectionism 148 (Donald Altschiller ed.

the U.S. subsequently abandoned this treaty in 1866 after the Civil War;[31] Canada did not attempt to revive the treaty as they were preoccupied with a drive towards independence and Confederation.[32] On March 29, 1867 the British North America Act ("BNA Act") received royal assent and "One Dominion under the name of Canada" remained only to be proclaimed on July 1st.[33] Pro-Confederate resolutions came from previously Anti-Confederate provinces,[34] and Confederation was officially proclaimed on July 1, 1867.[35]

Although Canada's first Prime Minister, Sir John A. MacDonald, initially supported free trade with the U.S., he later viewed it as a threat to Canadian independence. This view was in direct conflict with the Liberal opposition[36] and no significant headway on trade was to be made until the early twentieth century.

2. Early 20th Century: 1900 - 1945

The early twentieth century was a time of transition for Canada, "characterized by a movement from internal autonomy to full external sovereignty . . . and by a gradual transfer of military, economic and cultural dependence from Britain to the United States."[37] In 1911, the U.S. approached a more receptive Canadian government to negotiate the curtailment of trade barriers.[38] The Liberals, under the direction of Sir Wilfrid Laurier, had gained power and strongly supported new reciprocity agreements with the

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1988) (The Treaty was confined to natural products such as fish, timber, coal and agricultural commodities). *See generally* DONALD C. MASTERS, 1854 RECIPROCITY TREATY (1963).

[31] Stairs, *supra* note 30, at 149.

[32] Great Britain "opted for a less formal version of imperialism and decided to withdraw their garrisons from North America, as earlier they had decided to reduce the role of local governors from constant intervention to a largely symbolic presence." JOHN L. FINLAY AND DOUGLAS N. SPRAGUE, THE STRUCTURE OF CANADIAN HISTORY 185 (1984).

[33] Constitution Act of 1867, 30-31 Vict., ch. 3 (U.K.)(formally British North America Act of 1867).

[34] These included the Maritime Provinces of New Brunswick and Nova Scotia. After Confederation was proclaimed Nova Scotia made a concise move to repeal Confederation stating that "the fundamental law of Nova Scotia derived from a compact between the Crown and the people; therefore, the province could not be confederated without their consent . . . ." FINLAY AND SPRAGUE, *supra* note 32, at 186. A committee, led by Nova Scotia Attorney General, Martin Wilkins, to exempt Nova Scotia from the BNA Act was formed and sent to London. The British Government declared that the "Confederation . . . took place in accordance with the expressed desire of the people of all the Provinces expressed in the only known constitutional mode - through their respective legislatures." *Id.*

[35] *See id.* at 185.

[36] This came "at a time when the opposition Liberals were advocating the negotiation of an unrestricted reciprocity arrangement, and thereby made a particularly inviting target for political attack on nationalist grounds." Stairs, *supra* note 30, at 149.

[37] Secretary of State of External Affairs Mitchell Sharp, *Canadian-U.S. Relations: Options for the Future*, INT'L PERSP., Autumn 1972, at 2.

[38] *See* Maureen A. Farrow and Robert C. York, *Economic, Social, and Cultural Policy Independence in the Post-Free Trade Era*, *in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT 118 (Daniel E. Nolle ed., 1990).

United States. These agreements, however, were soon attacked on nationalist grounds.[39] Consequently, a strong anti-American bloc began to form,[40] leading directly to the Liberals losing their majority in the Canadian Parliament in 1911. This "result thus reflected in large measure the more general and persistent Canadian fear that economic integration with the United States would soon be followed by political, social, and cultural integration as well."[41] The concern for protecting Canadian autonomy, especially their culture, from U.S. invasion, mounted as the years passed.

In 1928, discouraged by its loose regulatory policy in radio broadcasting,[42] the government appointed a royal commission.[43] Chaired by Sir John Aird and known as the Aird Report,[44] the purpose of the Commission was to identify necessary changes needed in the national radio system. The inquiry, taking an example from the British Broadcasting System ("BBC"), concluded that Canada should have a public monopoly in radio rather than a system of private ownership.[45]

The delayed implementation of the Aird Report[46] led to increased public outcry,[47] which inevitably led to legislation in this area, specifically the Canadian Broadcast Acts of 1932 ("1932 Act"),[48] 1936 ("1936 Act"),[49] and 1938.[50] The 1932 Act called for the creation of a Canadian Radio Broadcasting Commission,[51] later

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[39] The attack was "led . . . by business leaders — mainly in central Canada — who feared that the new arrangement, which[, like the 1854 Reciprocity Treaty,] applied only to natural products, would soon be extended to manufactured goods as well, and hence deprive them of their beloved protective tariffs." Stairs, *supra* note 30, at 149.

[40] "The maintenance of the British Empire (widely viewed by Canadians as a force for good), and the survival, as one of its most important parts, of a Canada that was independent of the United States, were portrayed as the principal stakes at issue." *Id.*

[41] *Id.* at 150.

[42] The Radiotelegraph Act, R.S.C., ch. 195 (1927) (Can.).

[43] A form of public inquiry.

[44] The Royal Commission on Radio Broadcasting (Sept. 1929), *reprinted in* DOCUMENTS OF CANADIAN BROADCASTING 41 (Roger Bird ed. 1988).

[45] *Id.* at 52-54. *See* Frank W. Peers, *Canada and the United States: Comparative Origins and Approaches to Broadcast Policy, in* CULTURES IN COLLISION: THE INTERACTION OF CANADIAN AND U.S. TELEVISION BROADCAST POLICIES 15 (Can.-U.S. Conference on Communications Policy 1984). Aird himself stressed that they were truly influenced by the BBC style of public ownership, "but we are told that his decisive change of heart took place when he visited New York and found NBC entirely ready to assume the control and direction of broadcasting in Canada . . . ." *Id.*

[46] The delay was caused most probably by a change in Ottawa from a Liberal to a Conservative government in 1930, under the leadership of R.B. Bennett. *See* Peers, *supra* note 45, at 15.

[47] Led for the most part by a citizens lobby group by the name of the Canadian Radio League. *Id.*

[48] Canadian Radio Broadcasting Act, 22 & 23 Geo. 5, ch. 51 (1932) (Can.).

[49] Canadian Broadcasting Act, 1 Edw. 8, ch. 24, (1936) (repealed 1958) (Can.).

[50] An Act respecting Radio in Canada, R.S.C., ch. 233, (1938) (Can.).

[51] Canadian Radio Broadcasting Act, *supra* note 48, § 3.

known as the Canadian Broadcast Corporation ("CBC"),[52] to monitor and regulate national broadcasting.[53] The Acts being founded on the notion that "[b]roadcasting in Canada was to be federally controlled, partly to protect Canadian identity and sovereignty from the incursion of U.S. interests."[54]

Over time Canada and the U.S. took divergent paths towards broadcast policy. While U.S. interests focused on the commercial aspect of broadcasting,[55] Canadian interests focused primarily on the general needs of the public, carrying both sponsored and unsponsored programming.[56] The CBC, which existed to "ensure that broadcasting should be unmistakably Canadian," required private stations to broadcast programs of the public service.[57]

Canada and the United States did, however, eventually sign two limited bilateral agreements in the 1930s. The agreements, one in 1935[58] and another in 1938,[59] were signed pursuant to the Promotion of Foreign Trade Act[60] which amended the Tariff Act of 1930.[61] These constituted the first commercial trade agreements between the two countries since the 1854 Reciprocity Treaty.[62] However, stronger ties with the U.S. were rejected outright. In

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[52] Canadian Broadcasting Act, *supra* note 49, § 3.

[53] The regulatory system was to be initially controlled by the Canadian Radio Broadcasting Commission, which was later changed to the Canadian Broadcasting Corporation ("CBC") which remained the regulatory body until the late 1950s. In 1958 the CBC continued as a public broadcast service but regulation became the responsibility of the Board of Broadcast Governors ("BBG"), see *infra* notes 73-75 and accompanying text. The BBG control lasted until 1968 when, with the passage of the Broadcasting Act of 1968, see *infra* note 77, control became the responsibility of the Canadian Radio-Television Commission, which was later renamed the Canadian Radio-Television and Telecommunications Commission. *See* C.C. JOHNSTON, THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATION: A STUDY OF ADMINISTRATIVE PROCEDURE IN THE CRTC 4 (1980)

[54] Peers, *supra* note 45, at 15.

[55] Erik Barnouw, the noted broadcast historian, believed that U.S. government regulation favored the commercial broadcaster and that the Communications Act of 1934 "established the commercial system as the official system — even though the new law, like the old, sidestepped the issue, and said nothing about commercial sponsorship." ERIK BARNOUW, THE SPONSOR 31-32 (1978). This symbol of commercial dominance was supported by the fact that programming soon became the responsibility of the advertising agencies. Peers, *supra* note 45, at 17.

[56] These programs were broadcast in both English and French.

[57] Peers, *supra* note 45, at 18. The U.S., on the other hand, followed a different track. Their system was based on the support of advertising in a competitive free enterprise environment, program syndication in favor of monopoly ownership and/or centralized program control, and by various forms of government regulation. *See* SIDNEY HEAD, BROADCASTING IN AMERICA 165 (1972).

[58] Reciprocal Trade Agreement of 1935, 49 Stat. 3960 (1935).

[59] Reciprocal Trade Agreement of 1938, 53 Stat. 2348 (1938).

[60] Act of June 12, 1934, Pub. L. No. 73-316, 48 Stat. 943 (codified as amended at 19 U.S.C. §§ 1351-1366 (1988)).

[61] Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1001-1677 (1988)).

[62] *See supra* Section II.A.1 and accompanying text.

1948, a proposal for a unified customs system was refused by Prime Minister Mackenzie King, mostly as a result of anti-American sentiment throughout the country.[63] The postwar world found the U.S. the dominant superpower. With this distinction, the influence of the U.S. on all cultural things began to be felt in the north.

B. *Post-World War II*

1. Massey Report

In 1951, as a clear and decisive move to protect and promote Canadian culture, the Canadian government appointed the Right Honorable Vincent Massey, Chancellor of the University of Toronto, to chair the Royal Commission on National Development in the Arts, Letters, and Sciences ("Massey Report").[64]

The Massey Report soon became the cornerstone of and the framework for the marriage between Canadian culture and a strong governmental cultural subsidy policy.[65] The Massey Report found that "Canada lacked a strong tradition of royal, aristocratic, and, even private patronage of the arts."[66] The Report strongly urged the need for and the creation of a Canada Council for the

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63 Stairs, *supra* note 30, at 150.

64 *Royal Commission on National Development in the Arts, Letters and Sciences* (1949-1951) (Can.) [hereinafter Massey Report].

The Report by Order of the Committee of the Privy Council on 7th April, 1949, stated in part:

> That it is desirable that the Canadian people should know as much as possible about their country, its history and traditions; and about their national life and common achievements;
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> That it is in the national interest to give encouragement to institutions which express national feeling, promote common understanding and add to the variety and richness of Canadian life, rural as well as urban;
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> . . .
>
> That it is desirable that an examination be conducted into such agencies and activities, with a view to recommending their most effective conduct in the national interest and with full respect for the constitutional jurisdiction of the provinces.
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> . . .
>
> [T]o examine and make recommendations upon:
>
> (a) the principles upon which the policy of Canada should be based, in the fields of radio and television broadcasting;
>
> (b) such agencies and activities of the government of Canada the scope of these agencies; the manner in which they should be conducted, financed and controlled, and other matters relevant thereto;
>
> (c) methods by which the relations of Canada with the United Nations Educational, Scientific and Cultural Organization and with other organizations operating in this field should be conducted
>
> (d) relations of the government of Canada and any of its agencies with various national voluntary bodies . . .

Id. at xi-xii.

65 *See* John Hutcheson, *Culture and Free Trade*, *in* THE FUTURE ON THE TABLE: CANADA AND THE FREE TRADE ISSUE 107-08 (Michael D. Henderson ed., 1987).

66 John Meisel and Jean Van Loon, *Cultivating the Bushgarden: Cultural Policy in Canada*,

Arts ("Council").[67] An act of Parliament in 1957[68] created the Council with the objective that it would "foster and promote the study and enjoyment of, and the production of works in the arts . . . ."[69] The major funding of the Council would be via annual grants from Parliament.[70]

The government's adoption of a system of 'subsidized culture' led some major critics to lambast the government for institutionalizing and nationalizing culture. The most renowned of these critics was the communications theorist Marshall McLuhan who stated: "The Royal Commission is squarely in line with our bureaucrats and Victorian patriarchs in supposing that culture is basically an unpleasant moral duty. According to this view, everything that people do spontaneously and with gusto, everything connected with industry, commerce, sport, and popular entertainment is merely vulgar."[71] In spite of this criticism, the anti-American sentiment endured and the Canadian government continued to fund their cultural industry.[72]

2. Post-Massey

The massive rise in, and export of, American pop culture in the 1950s and 1960s led to a heightened fear of an 'American invasion.' As a result, the Conservative government, voted into power in 1957 under the leadership of John George Diefenbaker, was determined to expand the Canadian broadcast network. The Broadcast Act of 1958 ("1958 Act")[73] established the Board of Broadcast Governors ("BBG")[74] to regulate the newly classified Canadian

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in THE PATRON STATE 279 (Michael C. Cummings and Richard S. Katz eds., 1987). Conversely,

> In the United States the populist and post-colonial legacy was compensated for by lavish private support of the arts by owners of huge fortunes, including the so-called robber barons. Canada, because of its economic dependence and late industrial development, produced almost no financially well-endowed individuals or clans comparable to those of the United States and western Europe who could or would subsidize cultural causes.

Id. at 279.

[67] For details of the creation of the council, *see* BERNARD OSTRY, THE CULTURAL CONNECTION 64-77 (1978), and THE CANADA COUNCIL, THE CANADA COUNCIL 25TH ANNIVERSARY DINNER, CHATEAU LAURIER, OTTAWA, JUNE 14, 1982.

[68] Canada Council Act, R.S.C., ch. C-2 (1957) (Can.).

[69] *Id.* ¶ 8(1).

[70] *See* THE CANADIAN COUNCIL 34TH ANNUAL REPORT 1990/91 30. "These grants are supplemented by income from an Endowment Fund of CDN$50 million[US$67 million] established by Parliament in 1957." *Id.*

[71] Philip Marchand, *Mexico and Canada: A Contrast in Cultural Identity*, TORONTO STAR, Sept. 25, 1992, at A27.

[72] *See, e.g.*, Canadian Film Development Act, *infra* note 85.

[73] An Act Respecting Broadcasting, 7 Eliz. II, ch. 22 (1958) (Can.).

[74] *Id.* ¶ 3(1).

Broadcast Corporation.[75] Early attempts to establish and impose "Canadian content" requirements of 55% failed. The quota provisions were filled with exceptions and never came to complete fruition.[76]

The Liberals, regaining power in 1963 under Lester Bowles Pearson, however, promised to revise the 1958 Act, extending its power to more fully protect Canadian interests. With the Broadcasting Act of 1968,[77] the BBG was replaced by the Canadian Radio-Television Commission ("CRTC").[78] Under the new Act, the CRTC was, for the most part, autonomous. Accordingly, the CRTC had the authority to limit the amount of foreign ownership of broadcast stations as well as the ability to place stringent controls on privately owned stations.[79] The CRTC was able to impose a quota system where the earlier CBC failed.[80] Although these quotas differ according to broadcast times, for the most part, Canadian broadcasters are not responsible for providing more than 60% of their programming from Canadian sources.[81]

By the mid-1960s, anti-American sentiment in Canada reached its peak.[82] During this time, the only major successful negotiation of a bilateral trade agreement was the Canada-U.S. Automotive Products Trade Act of 1965 ("Auto Pact").[83]

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75 *Id.* ¶ 29. The BBG was established to regulate broadcast spectrum, while the CBC was now established for the purpose of operating a national broadcast service.

76 *See* Peers, *supra* note 45, at 22.

77 Broadcasting Act, R.S.C., ch. B-11 (1970) (Can.).

78 *Id.* ¶ 15. "Subject to this Act . . . the [CRTC] shall regulate and supervise all aspects of the Canadian broadcasting system." *Id.* The CRTC was renamed the Canadian Radio-Television and Telecommunications Commission in 1968. A new Act was established to enumerate the powers of the Commission. *See* Canadian Radio-Television and Telecommunications Act, R.S.C., ch. C-22 (1985) (Can.).

79 Peers, *supra* note 45, at 23. "[T]he federal government could limit the amount of foreign ownership in a broadcasting enterprise. . . ." *Id.*

80 *See* Broadcasting Act, *supra* note 77, ¶ 16.

81 Canadian Law presently states that 60% of all programming and 50% of prime time programming must be of Canadian origin. Motion Picture Association of America, *Trade Barriers to Exports of U.S. Filmed Entertainment* 19 (Jan. 1993). *See also* Allan E. Gotlieb, *Words and Space: Culture and Communications in the 1980s*, *in* CULTURES IN COLLISION: THE INTERACTION OF CANADIAN AND U.S. TELEVISION BROADCAST POLICIES 4 (Can.-U.S. Conference on Communications Policy 1984).

These quotas did create some controversy; many broadcasters complained that they did not have sufficient funds to operate as the CRTC required. The government, realizing this dilemma, set about amending the Income Tax Act in 1978. The result was Bill C-58. *See infra* notes 98-101 and accompanying text for a discussion of Bill C-58.

82 *See* CLOSE THE 49TH PARALLEL: THE AMERICANIZATION OF CANADA (Ian Lumsden ed. 1970). This rise in nationalist sentiment was due in part to the fact that in the latter part of the 1960s Canada saw the Centennial of Independence and Confederation, as well as playing host to the World's Fair in 1967.

83 Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (codified as amended at 19 U.S.C. §§ 2001-2033 (1988)). Canada had been hit with an automotive industry crisis in the latter part of the 1950s resulting in price increases as well as a decrease in relative productivity. The Auto Pact effectively removed tariffs on all original

Just a few days before retiring as Prime Minister, the Right Honorable Lester Bowles Pearson, stated "[t]he industrial and economic and financial penetration from the south worries me, but less than the penetration of American ideas, of the flow of information about all things American; American thought and entertainment; the American approach to everything."[84] One writer observed that "Canadians are no longer in the happy position described twenty years ago in the Massey Report when we had the choice for or against a national culture. English-speaking Canadians in particular face a situation in which our culture . . . is completely submerged."[85] Emblematic of a new sense of nationalism, a new flag was adopted in 1964 as a symbol of Canada's patriotic fervor.[86]

3. The 1970s and Economic Hardship

The 1968 general election heralded the ascension of Pierre Trudeau's Liberal government with a euphoria not seen in Canada before.[87] This increasing nationalist attitude, however, was not matched by economic performance[88] and, as is often the case, funding for the arts began to lag.[89]

In 1972 a government *White Paper*, issued by the Department

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auto parts and vehicles. The Pact did include some safeguards ensuring that auto manufacturers would continue to invest in Canada and to supervise vehicle assembly to meet specified targets for Canadian content. *See* GILBERT WINHAM, TRADING WITH CANADA 6 (1988).

[84] *American Infiltration Worrying Me: Pearson*, TORONTO DAILY STAR, May 2, 1968, at 1.

[85] Gail Dexter, *Yes, Cultural Imperialism Too!*, *in* CLOSE THE 49TH PARALLEL ETC.: THE AMERICANIZATION OF CANADA 166 (1970). It was during the late 1960s that Ottawa recognized the challenges ahead in order to compete with the U.S. Legislation, such as the Canadian Film Development Act, was implemented in order "to foster and promote the development of a feature film industry in Canada," via subsidies. Canadian Film Development Act, R.S.C. ch. C-8 (1967) (Can.). These films shall "have a significant Canadian creative, artistic, and technical content." *Id.* ¶ 10(2)(a).

[86] *See* FINLAY AND SPRAGUE, *supra* note 32, at 439.

Caught up in the nationalistic fervor, French Canada and all of Quebec was no stranger to change. The Quiet Revolution of the mid-1960s developed into a move towards autonomy from the rest of Canada. The enthusiasm reached its peak on July 24, 1967. On that day, Charles DeGaulle, President of France and a staunch advocate of closer ties with French Canada, in a speech delivered at the Montreal City Hall, stated *"Vive Montréal! Vive le Québec! Vive le Québec libre!"* *Id.* at 432. This speech prompted Prime Minister Lester Pearson to declare that the "people of Canada are free. Every Province is free. Canadians do not need to be liberated." *Id.* This revolution of sorts "acted as a liberating force on Quebec society," Meisel and Van Loon, *supra* note 66, at 278, and led to a cultural rebirth in Quebec which complemented rather than hindered cultural nationalism in the other Provinces.

[87] Forty-five percent of Canada voted for the Liberals extending to them a majority that Canada had not seen in over a decade. *See* FINLAY AND SPRAGUE, *supra* note 32, at 441.

[88] *See* Peter Morici, *Making the Transition to Free Trade*, *in* 90 CURRENT HIST. 428, 429-30 (1991).

[89] Canadian cultural observers comment that "[t]his is caused in part by the lingering sense among many that the arts are a frill." Meisel and Van Loon, *supra* note 66, at 282.

of External Affairs, envisioned three options open to Canada concerning its continuing relations with the United States.[90] Then Secretary of State of External Affairs, Mitchell Sharp, suggested that present relations were in need of change and stressed that closer ties with the U.S. would have drastic consequences,[91] as "[a] free-trade area or a customs union arrangement with the United States would, to all intents and purposes, be irreversible for Canada once embarked upon . . . . [and free trade] has been rejected in the past because it was judged to be inconsistent with Canada's desire to preserve a maximum degree of independence . . . ."[92] The main thrust of the *White Paper*, known as the "third option," was to develop and pursue comprehensive long-term strategies to strengthen the Canadian economy and thus reduce Canadian vulnerability. Essentially, the *White Paper* recommended that continuing relations with the U.S. must consider a political, cultural, and social agenda rather than relying solely on economic development.[93]

Subsequently, anti-foreign investment legislation was passed by the Canadian Parliament. On April 9, 1979, the Foreign Investment Review Act ("FIR Act") came into force, and targeted foreign direct investment by the U.S.[94] The Canadian government recognized public concern about leading technology firms falling under foreign control, the loss of its cultural entities, and "the growing discomfort brought about by a perhaps too successful trading partner gaining too much influence over the domestic economy . . . ."[95] The government adopted a screening process directed at two types of foreign investment: takeovers and the establishment of new businesses. The FIR Act called for "non-eligible persons," such as for-

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90 *See* Sharp, *supra* note 37.

91 The Study by the Canadian Department of External Affairs set forth three options open to Canada in its continuing relations with the U.S. The three options were:

> 1. Canada can seek to maintain more or less its present relationship with the United States with a minimum of policy adjustments;
>
> 2. Canada can move deliberately toward closer integration with the United States.
>
> 3. Canada can pursue a comprehensive long-term strategy to develop and strengthen the Canadian economy and other aspects of its national life and in the process to reduce the present Canadian vulnerability.

Id. at 1.

92 *Id.* at 15.

93 *See id.* at 2; Stairs, *supra* note 30, at 152. *See also* Seymour Martin Lipset, *Canada and the United States: The Great Divide*, *in* 90 CURRENT HIST. at 432-37 (1991).

94 Foreign Investment Review Act, ch. 56, 1973-74 S.C. 619 (Can.).

95 *Canadian Foreign Direct Investment Screening*, 5 International Merger Law, Jan. 1991, *available in* LEXIS, Intlaw Library, Intmer File [hereinafter International Merger Law]; *see also* Foreign Direct Investment in Canada (1972) (Can.), also known as the Gray Report, which stated that FDI might not be in Canada's best interest.

eign individuals, governments, and foreign-controlled corporations, to be evaluated before any foreign direct investment would be approved.[96] The investment by a foreign entity was "expected to operate in ways that will bring [a] significant benefit to Canada" and, moreover, "support those institutions that are concerned with the intellectual, social, and cultural advancement of the Canadian community."[97]

Moreover, in January 1976, as a result of Canadian broadcasters inability to produce an adequate amount of revenue to keep up with the Canadian content requirement,[98] Ottawa amended the country's Income Tax Act with the passage of Bill C-58.[99] The Bill "effectively denied a tax deduction to Canadian advertisers that bought time on American border stations broadcasting their signals into Canada or that placed advertisements in foreign periodicals directed primarily at a Canadian audience."[100] Thus, after the passage of C-58 only advertisements in the Canadian media by Canadian companies were able to qualify for tax deductions—the goal being to direct more revenues to Canadian broadcasters from indigenous advertisers.[101]

Additionally, U.S. broadcasters were denied retransmission consent[102] by the CRTC for U.S. programming "captured" by Canadian satellites and subsequently broadcast over Canadian cable tel-

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96 *See* H. HEWARD STIKEMANN & R. FRASER ELLIOT, DOING BUSINESS IN CANADA § 3.04(5), at 3-46 (1979).

97 *Id.* § 3.04(5)(d), at 3-51 to 3-52.

98 *See supra* note 81 and accompanying text.

99 An Act to amend the Income Tax Act, 1974-75-76 S.C. 2145 (Can.). The Act was denounced by many and voted against by every Conservative Member of Parliament. The amendment was later repealed by FTA, *supra* note 10, art. 2007.

100 *United States - Canada Free Trade Agreement, Volume II: A Legal Guide* (BNA), at E-107 [hereinafter *Legal Guide*].

101 In 1984, the U.S. eventually passed retaliatory mirror legislation targeting Canada and the passage of Bill C-58 by amending the Internal Revenue Code. The Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 232, 98 Stat. 2948, 2991 (codified as amended at 26 U.S.C. § 162(j) (1988)).

> § 162(j) **Certain Foreign Advertising Expenses**
>
> (1) **In general**—No deduction shall be allowed under subsection (a) for any expenses of an advertisement carried by a foreign broadcast undertaking and directed primarily to a market in the United States. This paragraph shall apply only to foreign broadcast undertakings located in a country which denies a similar deduction for the cost of advertising directed primarily to a market in the foreign country when placed with a United States broadcast undertaking.
>
> (2) **Broadcast Undertaking**—For purposes of paragraph (1), the term "broadcast undertaking" includes (but is not limited to) radio and television stations.

As of January 1, 1988 this law as it pertains to Canada is no longer in effect. *See supra* note 94 and accompanying text. (For the legislative history behind this mirror legislation see 1984 U.S.C.C.A.N. 4910, 4946-49).

102 The notion that if one wants to retransmit anothers broadcast signal, the broadcaster must be paid.

evision systems. It was believed that with the rapid increase and use of cable television,[103] such systems must be integrated into the broadcast laws[104] of the country in order to properly regulate licensing and content. This would ensure that this newest of media would make a positive contribution to Canadian broadcasting.[105] The importation of distant signals from the U.S. was seen as a threat to this positive contribution to Canadian life.[106] The CRTC noted that unlimited penetration by U.S. programming and "[t]he rapid acceleration of such a process throughout Canada would represent the most serious threat to Canadian broadcasting [and] . . . could disrupt the Canadian broadcasting system within a few years."[107] The CRTC believed that there was a need to actively support Canadian programming and that cable operators should pay for the programming they distributed.[108] However, this principle of compensation extended solely to Canadian programming.[109]

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[103] Canadian use of cable as a means to improve rural service began in the 1950s. The extraordinarily rapid growth of cable television industry dwarfed developments in the U.S. By 1975 cable was available to 66% of Canadian households, with 43% actually subscribing. *See* ROBERT E. BABE, CANADIAN TELEVISION BROADCASTING STRUCTURE, PERFORMANCE AND REGULATION 124 (1979).

[104] Until the passage of the Broadcasting Act of 1968, cable television had been regulated by the Canadian Department of Transport. *See* Canadian Radio Television Commission, *Cable Television in Canada,* Jan. 1971, at 9 [hereinafter *Cable TV*].

[105] *See* Theodore Hagelin & Hudson Jansch, *The Border Broadcast Dispute in Context, in* CULTURES IN COLLISION: THE INTERACTION OF CANADIAN AND U.S. TELEVISION BROADCAST POLICIES 44 (Can.-U.S. Conference on Communications Policy 1984) (citing Canadian Radio Television Commission Public Announcement, *The Integration of Cable Television in the Canadian Broadcasting System* (Feb. 6, 1971)).

[106] One observer comments

> [a]s a relatively benign illustration of how American television can undermine the constitutional style of another country, Canadians through the 1970s saw one American police drama after another in which officers read *Miranda* warnings to criminals as they were apprehended (prior to later U.S. Supreme Court rulings watering down the *Miranda* decision), including "you have the right to remain silent; you have the right to counsel." Despite their different constitutional and political system, which had no explicit bill of rights, a great number of Canadians apparently believed that they had "the right to keep silent, the right to counsel," and so forth. Canada did add a bill of rights as part of the final exercise of patriating its Constitution and ending the role of the British Parliament in the amending process. This came about at least in part because the average Canadian already assumed such rights. Television hardly played a negligible role here.

GEORGE H. QUESTER, THE INTERNATIONAL POLITICS OF TELEVISION 109-10 (1990).

[107] Canadian Radio Television Commission Public Announcement, *The Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada by CATV, in Cable TV, supra* note 104, at 14.

[108] *See* Hagelin and Jansch, *supra* note 105, at 46 (citing Canadian Radio Television Commission Public Announcement, *Cable TV: Canadian Broadcasting 'A Single System'* (July 16, 1971))("[T]he basic principle involved is: *one should pay for what he uses to operate his business.*"). The U.S. never implemented a procedure for retransmission consent until the passage of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460 (1992).

[109] *See* Hagelin and Jansch, *supra* note 105, at 46 (citing Canadian Radio Television

The problem was aggravated in 1983 when the CRTC officially authorized the Canadian Satellite Communications, Inc. (CANCOM) to conduct "signal piracy" by distributing, via satellite, U.S. network signals to the cable systems and the remote areas of Canada. U.S. copyright holders of such programming were effectively denied monetary compensation for their programs broadcast in Canada.[110]

4. The 1980s to the Present: Closer Ties with the U.S.

In the decades that followed, Canada's outlook changed as a result of the increasingly competitive international environment.[111] Trudeau, more so than previous prime ministers, believed in a more modest role for Canada in foreign affairs, looking inward rather than outward.[112] This stance spelled disaster for Trudeau and the Liberal Party in the late 1970s.

The Canadian people, faced with economic troubles, sought new direction from the Progressive Conservative Party's ("PC") balanced budget policy and a return of many governmental functions to the public sector. The Conservatives were voted in under the leadership of The Right Honorable Charles Joseph Clark, who remained in office for less than a year. Six months later, Trudeau resigned as the leader of the Liberal party, but within a year he was back as prime minister.[113]

Canada, an amiable partner with the U.S. in its foreign policy in the late 1970s, changed its position with the election of Ronald Reagan in 1980. Reagan's strong anti-Soviet message found less than enthusiastic support in Ottawa, which was theretofore generally supportive of Washington's "traditional moderate and predictable course in East-West relations. . . ."[114] Again Canada looked to the PCs for guidance. By 1983, Liberal support was lagging well

Commission Public Announcement, *Cable TV: Canadian Broadcasting 'A Single System'* (July 16, 1971)).

[110] *Legal Guide*, *supra* note 100, at E-108. Historically, Canada has not provided copyright protection for retransmitted American broadcast programming but the CRTC requirement was subsequently repealed, FTA, *supra* note 10, art. 2006, which stated, in part, that "[e]ach Party's copyright law shall provide . . . equitable and non-discriminatory remuneration for any retransmission to the public of the copyright holder's program . . . intended for free, over-the-air reception by the general public." *Id.*

[111] *See* CAN. DEP'T OF EXTERNAL AFFAIRS, CANADIAN TRADE POLICY FOR THE 80'S (1983).

[112] *See* Adam Bromke and Kim R. Nossle, *Tensions in Canada's Foreign Policy*, 62 FOREIGN AFF. 339 (Winter 1983/84).

[113] At the beginning of the decade in 1980 the polls showed a 20% lead by the Liberals over the Tories. The Liberals wooed Trudeau and on December 18th he declared "It is my duty to accept the draft of the party." FINLAY AND SPRAGUE, *supra* note 32, at 467.

"Mr Trudeau returned to office . . . at a time when Canadian economic nationalism was at a peak." Bromke and Nossle, *supra* note 112, at 346.

[114] Bromke and Nossle, *supra* note 112, at 340.

behind support for the PCs in the polls.[115] The PCs, under new leader Brian Mulroney, advocated a more right wing, aggressive foreign policy not unlike that of President Reagan's.[116] By the 1984 election, the Trudeau-mania of 1968 had deteriorated into Trudeau-phobia. With the massive electoral victory of the Progressive Conservatives came a promised end to the increasingly unpleasant friction between Canada and the U.S.[117]

Subsequently, the Canadian Department of External Affairs began to promote the negotiation of limited, sector-by-sector free trade arrangements with the U.S.[118] One of the Department's studies advocated that a move toward free trade would "strengthen the economic fabric of the country; . . . reduce regional differences on the conduct of trade policy; and . . . reinforce a growing sense of national confidence."[119] The study even went so far as to suggest that "a bilateral treaty could be a better guarantor of our sovereignty than the gradual uncontrolled drift toward integration now taking place. The possible adverse consequences can be managed by pursuing deliberate policies of strengthening cultural and other fields of endeavour which would bolster our national identity."[120] With this change in government and policy, Canada and the U.S. began to openly discuss a bilateral free trade agreement.[121] Prime Minister Mulroney saw this tentative agreement as indispensable to his country's future well-being.[122]

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[115] In September of 1983 polls showed Tory support at 55% compared to 27% for the Liberals. *See id.* at 350.

[116] "In their anti-communist rhetoric . . . .[t]hey advocate[d] closer military and economic ties with the United States." *Id.*

[117] Adam Bromke, *A Turning Point in U.S.-Canadian Relations*, *in* FREE TRADE VS. PROTECTIONISM 139 (Donald Altschiller ed., 1988).

[118] *See* Stairs, *supra* note 30, at 153.

[119] *Canada-United States Trade Negotiations: The Elements Involved*, *in* CAN. DEP'T OF EXTERNAL AFFAIRS, CANADIAN TRADE NEGOTIATIONS: INTRODUCTION, SELECTED DOCUMENTS, FURTHER READING 32 (Dec. 1985) [hereinafter CANADIAN TRADE NEGOTIATIONS].

[120] *Id.* Former Prime Minister, and then Secretary of State of External Affairs, the Rt. Honorable Charles Joe Clark agreed that attempts to exempt culture from free trade would benefit Canada little. *See* Joe Clark, *Trade Negotiations and Cultural Industries*, *in* CANADIAN TRADE NEGOTIATIONS, *supra* note 119, at 83-87.

[121] The talks began in May 1986. Clayton Yeutter, chief U.S. Trade Representative and chief negotiator Peter Murphy were the U.S. representatives and Simon Reisman, the Canadian representative. Free trade was supported in Canada by the Royal Commission on the Economic Union and Development Prospects for Canada: Challenges and Choices (1984) (Can.) ("Macdonald Commission"). The Macdonald Commission noted that "cultural activities" may require special treatment under any bilateral agreement. *Id.* at 308-310.

[122] *See Statement by Prime Minister Brian Mulroney on Canada-USA Trade Negotiations*, *in* CANADIAN TRADE NEGOTIATIONS, *supra* note 119, at 73-76; Bromke, *supra* note 117, at 143-44. "In a world economy increasingly composed of large trading blocs, a free trade agreement would give Canada unrestricted access to the largest and most technologically advanced national economy." *Id.* at 144.

As the Canadian Parliament debated free trade, its members did not agree on an agenda or timetable and as a result, members amassed an ever-expanding list of non-negotiable items. Among these items was the idea for the exemption of Canadian cultural industries from free trade.[123] Ministers in the Canadian government began to view the emerging FTA as one of the last steps toward total assimilation with the U.S. and viewed their cultural industries as the last sector of Canadian life not yet absorbed. In fact, this fear led to the inclusion of the Exemption Clause found in the FTA.[124]

Many believed that the FTA would have ultimately failed without such a clause and the bottom line was that Prime Minister Mulroney had to sell the Treaty to the Canadian people. Many also believed that the FTA did not go far enough in its exemption, likening the agreement to "cultural genocide."[125] It soon became apparent that the old fears of an 'American Invasion' of the Canadian culture were at the forefront of the FTA debate.

This Exemption Clause ultimately made its way into the NAFTA. The FTA concord exiled the U.S. cultural industry from services and investment principal covered by that agreement.[126] But in NAFTA, the FTA has been expanded to include intellectual property as well. This means that, although intellectual property is given substantial protection under the NAFTA,[127] films, television programs, home video, books, and sound recordings have no protection in Canada and are removed from those binding commitments of NAFTA's chapter on intellectual property.[128] This "allows Canada to adopt video levies and/or rental rights and apply Reciprocity - thereby denying to American program owners any compensation for PERFORMERS rights . . . [and] puts to hazard the sanctity of American contractual rights."[129] Trade Ambassador

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[123] Other issues considered non-negotiable included social welfare programs, the 1965 Auto Pact, and the level of the Canadian dollar. Bromke, *supra* note 117, at 145.

[124] FTA, *supra* note 10, art. 2005 (titled: Cultural Industries).

[125] *See* Peter C. Newman, *Defending the Canadian Dream*, MACLEANS, July 8, 1991, at 50 ("Only by standing up to the Yanks can we survive."). *But see* Diane Francis, *Sorting Out Truth From Fiction*, MACLEANS, Jan. 14, 1991, at 11 ("Critics of the free trade deal are intellectually dishonest. The facts show that Canadians have prospered under the agreement.").

[126] "[U]nder NAFTA the [FTA]'s exemption was expanded from services and investment to include intellectual property as well." McQueen, *supra* note 19, at 9.

[127] *See supra* note 1, ch. 17.

[128] *See* Valenti Letter, *supra* note 20, at 3. Mr. Valenti argued that "[t]here is absolutely no objective, born of reason, which would compel our government to bow to Canada's demands for 'cultural exclusion' in the Intellectual Property Section [of the NAFTA], above and beyond what Canada won from our government in the Services Section in the U.S./Canada Free Trade Agreement . . . ." *Id.*

[129] *Id.*

Carla Hills stated in a recent news conference that "[i]n effect, Canada exempted all of the intellectual property because of their being mesmerized by the culture issue."[130]

III. Case In Point: European Community

A. *Legislation*

Canada is not alone in its fear of an "American invasion." The threat of U.S. dominance in the area of culture and cultural industries did not escape European Community legislation. On October 3, 1989, after years of debate, the EC adopted, by a vote of ten to two,[131] the now infamous "Television without Frontiers" Directive ("Directive").[132] The seeds of cultural protection, however, were sown some five years earlier.

In June 1984, the EC Commission released the "Television without Frontiers" Green Paper ("Green Paper").[133] The Green Paper's objectives were

> to demonstrate the importance of broadcasting (radio and television) for European integration and, in particular, for the free democratic structure of the European Communities; to illustrate the significance of the European Economic Community (EEC Treaty) for those responsible for producing, broadcasting, and re-transmitting radio and television programmes and for those receiving such programmes; and to submit for public discussion the Commission's thinking on the approximation of certain aspects of Member States' broadcasting . . . law before formal proposals are sent to the European Parliament and to the Council.[134]

The Green Paper reflected the need for an internal relaxation

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[130] *News Conference with Ambassador Carla Hills, US Trade Representative RE: North American Free Trade Agreement (NAFTA)*, Fed. News Serv., *available in* NEXIS, Fednew File.

Though this conflict between Chapter 17 and Annex 2106 of the NAFTA exemplifies the problems concerning movement and dissemination of TRIPs (Trade Related Intellectual Property) between Canada and the U.S. A section-by-section analysis of the intellectual property section as it applies to the Exemption Clause is beyond the scope of this Note.

[131] Belgium and Denmark voted against the Directive.

[132] Council Directive, of 3 October 1989, on the Coordination of Certain Provisions Laid Down By Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23, *reprinted in* 28 I.L.M. 1492 (1989) [hereinafter TV Directive].

[133] Television Without Frontiers: Green Paper on the establishment of the Common Market for Broadcasting, especially Satellite and Cable, COM(84)300 Final (1984) [hereinafter Green Paper].

[134] *Id.* at 1. In order to effect Community policy, or for that matter any true free trade area, the laws of the respective member states must harmonize with each other. The term used to describe these actions is known as approximation. Community action in this area is set out in EEC Treaty, *supra* note 9, art. 3(g).

of trade barriers between member states in order to ultimately comply with the free movement of trade in services as embodied in the EEC Treaty.[135] The Commission cited many sources for their proposal of a broadcast community without barriers, their basis being the need for full freedom of expression and dissemination of information among the Member States.

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"),[136] was ratified by all Community Member States; the Community itself pledged a common declaration to it on April 2, 1977. It states in Article 10(1): "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas *without interference* by public authority and regardless of frontiers."[137]

The demand for open global exchange is also a particular concern of the United Nations Economic and Social Council ("UNESCO"). The final report of the UNESCO world conference on cultural practices contained a section on international culture cooperation that reads: "Creative human activity and the full development of the individual and society depend upon the *widest possible dissemination* of ideas and knowledge by way of cultural exchange and contacts."[138]

The Green Paper recognized a need to protect European culture from invasion: "Frequent warnings are heard about the dangers of cultural domination of one country by another in the cinema, although this is not a problem between Member States."[139]

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135 The EEC Treaty states as its main object to provide for the establishment of Four Freedoms: The free movement of goods, *services*, workers and capital. *See* EEC TREATY, *supra* note 9, art. 3 (emphasis added). The Green Paper notes that broadcasting is a service within the meaning of the EEC Treaty. The European Court of Justice declared in 1974 that broadcasting is a service of the kind covered by the freedom to provide services. Case 155/73, Sacchi v. Italy, 1974 E.C.R. 409.

136 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950) [hereinafter ECHR].

137 *Id.* art. 10(1) (emphasis added).

138 UNESCO World Conference on Cultural Policies, Mexico City, July 26 - Aug. 6, 1982, Final report, *reprinted in* Green Paper, *supra* note 133, at 32 (emphasis added).

139 Green Paper, *supra* note 133, at 33.

The European Court of Justice recently held that the EEC Treaty rules concerning capital transfers and services—two of the four freedoms—did not preclude a national Member State (The Netherlands) from media regulation which prohibits an indigenous broadcast station (Radio Veronica) from participating in the establishment, in another country (Luxembourg), of a commercial broadcast station which would subsequently transmit back to the host country. Case C-148/91, Vereniging Veronica Omroep Org. v. Commissariat Voor de Media, 1993 E.C.R. ___, 1993 O.J. (C 71) 9.

In the Netherlands, air time is allocated by the *Commissariat Voor De Media [Dutch Media Authority]* to stations which must be associations of listeners as well as viewers established for the purpose of representing the groups particular cultural, religious, social, or spiritual interest. And these stations must, as their primary goal, broadcast and satisfy these articu-

The attack, however, was directed outwards, in particular at the United States dominance of the media. According to the Commission "[t]he creation of a common market for television production is . . . one essential step if the dominance of the big American media corporations is to be counterbalanced."[140]

The general feeling among the Community members according to the Commission is that the "Americanization" of Europe—being *Kentucky Fried* and *Coca-Colonized* out of existence—must be reversed. This is a particularly interesting viewpoint considering that the EC adopted both the ECHR and those ideas espoused by the UNESCO.[141]

The controversy surrounding the Directive involves, in particular, the European quota and content provision in Member State programming.

> Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for *European works*, within the meaning of Article 6,[142] a majority proportion of their transmission time, excluding . . . news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural, and entertainment reponsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.[143]

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lated needs. *See Restrictive TV Policy Approved*, FIN. TIMES, Feb. 9, 1993, at 9. For a further discussion of EC law as it applies to the Netherlands see Willem F. Korthals Altes, *European Law: A Case Study of Changes in National Broadcasting*, 11 CARDOZO ARTS & ENT. L. J. 801 (1993).

[140] Green Paper, *supra* note 133, at 33.

[141] *See supra* notes 136-38 and accompanying text.

[142] Article 6 defines a European work as follows:

> 1. (a) works originating from Member States of the Community . . .
> (b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe [Council of Europe, May 5, 1989, *reprinted in* 28 I.L.M. 857 (1989)] and fulfilling the conditions of paragraph 2;
> (c) works from other European third countries . . .
> 2. The works . . . are works mainly made with authors and workers residing in one or more States referred to in Paragraph 1(a) and 1(b) provided that they comply with one of the following three conditions:
> (a) they are made by one or more producers established in one or more of those States;
> (b) production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or
> (c) the contribution of co-producers of those States to the total co-production is preponderant and the co-production is not controlled by one or more producers established outside those States.

TV Directive, *supra* note 132, art. 6.

[143] TV Directive, *supra* note 132, art. 4(1) (emphasis added). If unable to attain a majority proportion of European Works it is stated that where the majority cannot be attained, "it must not be lower than the average for 1988 in the Member State concerned." *Id.* art. 4(2).

In direct reference to the quota system, Community Vice President Martin

The EC subsequently established incentive programs in an attempt to promote European-wide production and distribution networks.[144] These incentive programs, collectively referred to as the MEDIA program,[145] provide for a wide range of incentives, which include the promotion of business partnerships as well as providing for tax benefits[146] for program producers.[147]

B. *Justifications*

In justifying protection, French President Francois Mitterand warned that all of Europe may soon be watching American programs on Japanese televisions. However, the motivation behind the Community adoption of the Directive is clear from the various debates on the subject in the European Parliament. Representative Schinzel, Socialist party member from the Federal Republic of Germany, stated in the European Parliament that television broadcasting, in particular, is a critical cultural asset of the EC and is "of major significance to our democratic way of life and our cultural and social coexistence within the EC."[148] Representative Kuijpers, a Rainbow Party member from Belgium, noted that the Directive was to be implemented not only to protect Community and European broadcast markets, "but also and above all of protecting Europe's cultural heritage, which—far more than we realize—is the victim of increasing Americanization."[149] Actively supporting the

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Bangemann, in charge of internal markets, made it clear that the Commission did not regard it as a legally enforceable commitment, but a "political obligation." Roy Denman, *Television Without Frontiers*, WASH. POST, Nov. 24, 1989, at A23; Steven Greenhouse, *Europe Reaches TV Compromise-US Officials Fear Protectionism*, N.Y. TIMES, Oct. 4, 1989, at A1.

[144]
> The Commission is convinced that increased activity in the cultural sector is a political and socio-economic necessity given the twin goals of completing the internal market by 1992 and progressing from a people's Europe to European Union. . . . The essential aim of the general guidelines proposed is to facilitate complementary action by the Commission and the Member States within the Community system and coordination and cooperation between the Member States consistent with Treaty rules.

A Fresh Boost for Culture in the EC: Commission Communication to the Council and the Parliament, COM(87)603 final at Summary [hereinafter A Fresh Boost]. *See* Terry Ilott, *Priming the Euro-pipeline*, VARIETY, June 8, 1992, at 37.

[145] The MEDIA program provides training for cinema and television professionals and advocates the formation of a European distribution cooperative to assist in the dissemination of European films throughout the EC. *See* A Fresh Boost, *supra* note 144, at 15. For more information on the audiovisual policy of the EC, see *Audiovisual Communications*, Sept. 23, 1993, *available in* LEXIS, Intlaw Library, Eurscp File.

[146] France is providing monetary incentives for production in the form of tax-exempt investment companies. Ilott, *supra* note 144, at 37.

[147] Films of EC origin qualify for advantages provided they are part of a viable and coherent distribution scheme including cinema, video and television releases. *See id.* at 37, 40.

[148] EUR. PARL. DEB. (No. 4) 113-14 (May 24, 1989).

[149] *Id.* at 120.

implementation of a Community-wide 60% quota of European works, Representative Roelants Du Vivier, Rainbow Party member from France caustically stated:

> [W]e want — to guarantee the diversity of cultures and their identity, to guarantee pluralism of expression, to protect copyright and to avoid an influx of cheap productions primarily from the USA — and I have no hesitation in talking about American cast-offs here. . . . we have to act and provide adequate protection for Community works. Protectionism? . . . who is being protectionist if it isn't the United States, where the market is protected from productions from elsewhere?[150]

The Community further justifies its zealous position by identifying measures within the U.S. legal system. U.S. law forbids any foreign government or their representatives to own broadcast stations.[151] This restriction is extended to any alien or representative, and any alien-affiliated foreign corporation.[152] If an alien or foreign-controlled corporation chooses to buy into the U.S. market, they must first comply with the restrictive provisions imposed by section 310 of the Communications Act of 1934. These restrictions relate to stock ownership, management control and citizenship requirements for foreign individuals and corporations.[153] The policy and underlying justification for this legislation dates back to the

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[150] *Id.* at 122 (statement of Rep. Roelants Du Vivier). Representatives referred in particular to European dependence on imported U.S. productions. Representative Schinzel noted that "60% of all films in Europe come from the USA, and the percentage is increasing . . . . For every 12 or 13 films we buy from the USA, there is at most one which the Americans buy from us." *Id.* at 114.

[151] 47 U.S.C. § 310(a) (1988).

> ***(a) Grant to or holding by foreign government or representative***
>
> The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof. *Id.*

[152] 47 U.S.C. § 310(b) (1988).

> **(b) Grant or holding by alien or representative, foreign corporation, etc.**
>
> No broadcast . . . license shall be granted to or held by —
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;
>
> (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

Id.

[153] *Id.* For example, Rupert Murdoch first had to become a citizen before acquiring Twentieth-Century Fox. *See* Bill Carter, *The Media Business*, N.Y. TIMES, Oct. 2, 1989, at D10.

Radio Act of 1912,[154] which contemplated that a foreign-controlled radio station could seriously threaten national security by potentially interfering with American communications.[155] The Community stresses that these U.S. laws, as well as the FTA Exemption Clause, explicitly recognize culture as a separate and distinct animal from other goods and services, thereby warranting the restrictions.[156]

IV. Present Situation

A. *United States Reaction to Protectionist Policy*

The American reaction to the inclusion of the Exemption clause was swift.[157] Jack Valenti, President of the Motion Picture Association of America, noted that if NAFTA is left unchanged, it will cause the film, TV, and video industry severe injury, putting its $ 3.5 billion trade surplus at risk.[158] Jay Berman, President of the Recording Industry Association of America, stated: "The Canadians have deliberately confused commerce and culture . . . [f]or the Canadians, culture is used to mask a real commercial interest . . . [m]ost often this type of commercial self-interest will result in dis-

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154 An Act to Regulate Radio Communication, Pub. L. No. 62-264, 37 Stat. 302 (1912).

155 *See id.*; James G. Ennis & David N. Roberts, *Foreign Ownership in US Communications Industry: The Impact of Section 310*, 19 Int'l Bus. Law 243 (1991). This law was preserved for the most part at Section 12 of the Radio Act of 1927, and based "upon the idea of preventing alien activities against the government during the time of war." 68 Cong. Rec. 3037 (1927)(statement of Sen. Burton K. Wheeler). The Communications Act of 1934 added § 310(a)(5) which sought to prevent alien-controlled parent companies from circumventing the national security goals by creating domestic wholly-owned subsidiaries which would be allowed to hold licenses.

156 EC Vice-President Martin Bangemann stated that

> [Any] criticisms addressed by the American Government are totally unjustified. No element of our directive infringes on the international trading rules. They are all the more unjustified because in the bilateral free trade agreement between the United States and Canada, the United States has explicitly recognized that cultural products are not to be placed on the same footing as other merchandise. They have formally accepted to respect very strict quotas concerning US audiovisual products on Canadian soil.

European Community Adopts TV Without Frontiers Directive, Eur. Community News, Oct. 4, 1989, at 1, 2.

The late British media magnate Robert Maxwell, always critical of the U.S. entertainment industry, argued that "[b]ecause [the U.S. has] had no competition, costs have gone sky high . . . You [the U.S.] need the competition . . . . Now it's our turn. . . . You will not be able to drive us into the ground." *U.S. Officials, Industry take Hardline on EC Broadcasting Directive*, 6 Int'l Trade Rep. (BNA) 1020, 1021 (Aug. 2, 1989).

157 Congressional action followed shortly with approval of House Resolution 257. *House Approves Resolution Urging U.S. Action to Protest Television Programming Directive*, 6 Int'l Trade Rep. (BNA) 1384 (Oct. 25, 1989). For more on H.R. Res. 257, see *infra* note 175 and accompanying text.

158 *See* Valenti Letter, *supra* note 20, at 2; *Accord sets "Dangerous Precedent"*, Comm. Daily, Sept. 14, 1992, at 6.

criminatory treatment for United States copyright industries."[159] For these reasons, the U.S. entertainment industry has repeatedly called for renegotiation of the NAFTA Exemption Clause.[160]

The EC did not escape criticism. Mr. Valenti, in response to the Directive, wondered whether "[t]he culture of any European [is] so flimsily anchored, so tenuously rooted, that European consumers and viewers must be caged and blinded else their links with their historic and distinguished past suddenly vanish?"[161] The U.S. Trade Representative Carla A. Hills, denouncing the Directive as "blatantly protectionist and unjustifiable,"[162] stated:

> We do not understand why the Spanish culture is more protected by a film produced in Germany by "Europeans" than by a Spanish film of Mexican origin, or why the English culture is promoted more by a film produced in France by "Europeans" than by a film of New Zealand origin.[163]

However, despite all the criticism, the U.S. still does not seem to recognize that there is a genuine problem.[164] The United States domination of global entertainment markets has caused visible resentment.[165]

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[159] McQueen, *supra* note 19, at 9. The Intellectual Property Alliance voiced its concern in an August 12, 1992 statement that its "members who fall within the definition of a cultural industry (for example, movie companies, music publishers, record companies, and book publishers) have always strongly opposed the Canadian cultural exemption in the [ ]FTA and will need to evaluate the implications of how such a 'cultural exemption' might be applied" in the NAFTA. Int'l Intellectual Property Alliance, *NAFTA Agreement Affecting the U.S. Copyright-based Industries is Reached* (Aug. 12, 1992). *See also Model*, *supra* note 27, at 1434.

[160] Valenti Letter, *supra* note 20, at 5-6; California Governor Pete Wilson Statement on Mexico Free Trade (Aug. 12, 1992).

[161] Greenhouse, *supra* note 143, at A1.

[162] *US Outraged by EC Move to Restrict Foreign Programs, Will File GATT Case, Hill Says*, 6 Int'l Trade Rep. (BNA) 1292 (October 11, 1989).

[163] Nancy Dunne, *EC TV Rule to be Taken to GATT*, FIN. TIMES, Oct. 11, 1989, at 8.

[164] One academic observed that

> [m]any Americans are relatively unaware of the extent of the success of their entertainment business in selling television programs abroad. . . . Why do Americans pay so little attention to the outside world? Because all the world is fascinated by the Manhattan skyline and San Francisco Bay, by blue jeans, and by American film and screen entertainment. When all roads led to Rome, the Romans were less worldly than world dominant. When Britannia ruled the waves, the British did not study the world as much as sail around it.

QUESTER, *supra* note 106, at 42.

[165] In relation to the U.S. the other production communities around the world have had limited success distributing mass media products internationally. In 1991, U.S.-based productions accounted for 81% of all EC screenings (rising to a level of 90% in states such as the UK, Greece, the Netherlands and Ireland), 70% of all European box-office receipts, and 54% of all comedies and dramas broadcast on television. *See* Frances Williams, *Europe Baulks at Hollywood's Onslaught-Solution of Audiovisual Row May be In Sight*, FIN. TIMES, Nov. 10, 1993, at 7; *European Film Industry Tries to Fight Off U.S. Behemoths*, AGENCE FRANCE PRESSE, Sept. 24, 1993. According to one source, the U.S., France, Italy, the UK, and Germany

The recent Uruguay Round of the General Agreement on Trade and Tariffs ("GATT")[166] is representative of this resentment. The issue of razing external barriers to audiovisual cultural products has proved to be a major hurdle in attempts to conclude the 117-nation Uruguay Round, which began in September 1986.[167] The dispute, in what is essentially a bilateral argument between the U.S. and the EC,[168] is predicated upon the removal of the restrictive television quotas[169] as well as the total deregulation of trade in audiovisual products.[170] Consequently, this sector was removed from further negotiations by the U.S. and Europe in order to conclude the Uruguay Round.[171]

The EC, despite its own cultural diversity and in a concerted attempt to become more competitive in the market,[172] internally removed its barriers to these audiovisual products. It has also or-

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supply between 80 and 90% of all imported films. *World Communication Report*, U.N. ESCO, 160-61 (1989).

Witness, for example, the decision by the French film industry to exclude all non-French speaking films from the Cèsars(the French Oscars).

> Intellectuals fear that the French language, long under siege by English, needs defending. . . . French film industry officials, supported by Jack Lang and his Ministry of Culture, worry that French films are being swamped at the box office by Hollywood products. The language issue has never arisen with the Oscar because Hollywood can rightly assume that its national products will also be international hits.

John Rockwell, *French Strike a Linguistic Blow in Their Film Industry Oscars*, N.Y. TIMES, Jan. 18, 1993, at C11-12.

166 General Agreement on Trade and Tariffs, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

167 The Uruguay Round is scheduled to conclude on December 15, 1993. In July 1993, Congress voted to extend the President's "fast track" authority on the GATT Uruguay Round until April 15, 1994, thus extending the congressional notification period from 90 to 120 days, making the effective expiration for concluding negotiations December 15, 1993. *See* Uruguay Round Fast Track Extension, Pub. L. No. 103-49, 107 Stat. 239 (1993).

168 France, being the most outspoken member of the EC on this issue, sees its own audiovisual industry being swamped by cheap American products. The U.S. is troubled by French taxes on all cinema tickets which are used to subsidize the French film industry. *See Experts Discuss French Position on Cultural Imperialism* (CNN cablecast, Oct. 28, 1993). If the U.S. is successful in removing these restrictions, the taxes collected would have to be distributed evenly to all film distributors, foreign and domestic.

169 *See supra* section III.

170 *See* Motion Picture Association of America President Jack Valenti, *Global Trade: Protection of an American Trade Prize* (Jan. 1993) [hereinafter *American Trade Prize*]

171 Bob Davis and Lawrence Ingrassia, *Trade Acceptance: After Years of Talks, Gatt is at Last Ready to Sign Off Pact . . . No Hooray From Holltywood*, WALL ST. J., Dec. 15, 1993, at A1. Unable to resolve the issue of trade in audiovisual products, specifically limits on foreign programming as well as the use of taxes on cinema tickets to subsidize the French film industry, the USTR agreed to drop the issue altogether. This preserves the U.S right to retaliate against the EC for "unfair" trade practices. *See* Keith Bradsher, *U.S. And Europe Clear The Way For A World Accord On Trade, Setting Aside Major Disputes . . . Movies, TV And Financial Services Are Some Areas Left Out*, N.Y. TIMES, Dec. 15, 1993, at A1.

172 "The development of more productive and competitive indigenous industries is largely the result of technological innovation in the marketplace, but in some instances, governments are encouraging indigenous production through protective policies and through a variety of grant programs." GLOBALIZATION, *supra* note 15, at 21.

ganized subsidy programs by which European-wide productions are facilitated.[173] NAFTA concurrently removes from free trade these very industries, effectively shutting out the U.S. on two fronts.

Government hearings,[174] subsequent resolutions,[175] and com-

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[173] *See supra* notes 144-47 and accompanying text. The long term objective of the EC, "led by the French, [is] [t]o so frustrate the American industry, to so curb us, that we will be forced to do more and more production in Europe in order to immunize ourselves from these harsh restrictions. Result, job loss in America." *American Trade Prize, supra* note 170, at 3.

[174] *Television Broadcasting and the EC, Hearing before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) [hereinafter *Directive Hearings*].

[175] On October 23, 1989 the U.S. House of Representatives, by simple resolution, voted unanimously to denounce the Directive. H.R Res. 257, 101st Cong., 1st. Sess. (1989). The resolution was introduced by the House and Ways Committee Chairman Dan Rostenkowski (D-Ill.) and Trade Subcommittee Chairman Sam Gibbons (D-Fla). The Resolution stated:

> Whereas the European Community (EC) Council of Ministers adopted on October 3, 1989, a broadcasting directive . . . that obliges member states of the EC to take steps to ensure that each broadcaster reserves a majority of programming time for European works;
>
> Whereas such broadcasting directive contains a local content requirement, in the form of both a quota and a minimum floor, that infringes upon the ability of United States broadcasting, film, and related industries to market their goods in the EC;
>
> Whereas such local content requirement violates the General Agreement on Tariffs and Trade (GATT), specifically Article I relating to most-favored-nation treatment and Article III relating to national treatment;
>
> Whereas the adoption of this restrictive and discriminatory broadcasting directive is inconsistent with claims by EC officials that the program to achieve the economic integration of Europe by the end of 1992 is not a program of protectionism and will not deny access to non-European entities;
>
> Whereas section 301 of the Trade Act of 1974 requires the United States Trade Representative to take action when the Trade Representative determines that rights of the United States under any trade agreement are being denied, or an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States, under, any trade agreement, or is unjustifiable and burdens or restricts United States Commerce; and
>
> Whereas such section 301 authorizes the United States Trade Representative to take action in response to an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States Commerce; Now, therefore, be it
>
> *Resolved*, That the House Representatives—
>
> (1) denounces the action taken October 3, 1989 by the EC Council of Ministers in adopting a broadcasting directive that is trade restrictive and in violation of the GATT;
>
> (2) deplores the damage which will be inflicted on the United States broadcasting, film, and related industries as a result of the implementation of the GATT-illegal restrictions under the broadcasting directive;
>
> (3) regrets the adverse consequences which the EC action will have on—
>
> (A) the bilateral trade relationship between the United States and the EC, particularly with respect to EC steps to achieve economic integration, and
>
> (B) efforts to strengthen the multilateral trading system and achieve open and fair trade through the GATT Uruguay round of negotiations;

plaints concerning the EC Directive were generally ineffective.[176] David Webster, a former BBC director, stressed that "[t]he American pressure ha[d] been of such a nature that it ha[d] irritated most European countries. It may have persuaded [them] . . . that the directive may have been a good idea after all, because if it annoys the Americans that much, there must be something good about it."[177]

The problem with the Exemption Clause is further exacerbated by the inclusion of unclear language in reference to retaliatory provisions and dispute resolution. The wording employed by section 2005(2) of the FTA, and to which NAFTA subscribes,[178] 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 the [Exemption Clause]."[179] This allows for the promotion of retaliatory protectionist measures that can be implemented by the U.S.[180] if they feel that Canada has employed unreasonable

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> (4) strongly urges the President and the United States Trade Representative to take all appropriate and feasible action under its authority, including possible action under section 301 of the Trade Act of 1974, to protect and maintain United States access to the EC broadcasting market;
>
> (5) requests the United States Trade Representative to consult regularly with the Committees on Ways and Means of the House of Representatives on the status of this dispute; and any action which it is considering with respect to the dispute; and
>
> (6) directs the Clerk of the House to transmit a copy of this resolution to appropriate officials in the EC.

Id. For a discussion of the possible responses available to the United States under GATT, see Suzanne Michele Schwarz, *Television Without Frontiers?*, 16 N.C. J. INT'L & COM. REG. 351, 362-75 (1991).

176 The House and Ways and Means Committee believed the issue was not one of cultural sovereignty but was protectionist policy aimed at shielding European industry from competition. *See House Condemns EC Move on Television Rule*, Reuters, Oct. 23, 1989.

177 *Aggressive U.S. Stance on Quotas May Have Hurt More Than Helped*, VARIETY, Oct. 4, 1989, at 2.

> Last minute single issue pressure by the United States may in the long run make matters more difficult. . . . The European Parliament has swung to the left and to the Greens, and these people tend to see broadcasting as an instrument of social policy rather than a business which delivers entertainment. On the quota issue, they are likely to be more defensive of European culture and less attracted by arguments about free markets.

Directive Hearings, *supra* note 174, at 60 (statement of David Webster, Senior Scholar at the Annenberg Washington Program and Former director of the BBC).

178 *See supra* note 21 and accompanying text.

179 FTA, *supra* note 10, § 2005(2) (emphasis added).

180 On February 2, 1993, Senator Max. S. Baucus (D-Mont.) introduced the Trade Agreements Compliance Act of 1993, S. 269, 103rd Cong., 1st Sess. (1993). The Act is designed to revive and extend "Super" section 301, which expired at the end of 1990. The bill, endorsed by President Clinton, sets a fixed schedule of retaliatory action to be levied on foreign countries that have in effect unfair trade practices, rather than a system of indefinite negotiation. 139 CONG. REC. S 1029 (daily ed. Feb. 2, 1993). *See also* Keith Bradsher, *Study Says Trade Pact Will Aid U.S. Economy*, N.Y. TIMES, Feb. 3, 1993, at D1.

restraints on cultural trade, permitting "see-saw" legislation without any proper resolution.[181] In other words, instead of requiring or even "forcing" negotiation, the Clause tolerates increased "equivalent commercial," protectionist-style retaliation.[182] Canadian action to enforce these restrictions can create more than just "irritants"[183] in bilateral relations[184] and contributes nothing to ultimate free trade objectives.

Therefore, in consideration of the U.S. dominant position in the market and as a staunch advocate of open and free global trade,[185] the question becomes whether the U.S. government should take the initiative in liberalizing its own laws to facilitate and encourage foreign access in this area.

B. *Current Assessment*

At this time, despite the Exemption Clause in both the FTA and the NAFTA as well as the EC Directive and incentive programs, demand for U.S. cultural exports continues to grow, especially in Canada.[186] However, this present trend is not necessarily predic-

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[181] Jack Valenti, though adamantly against the Exemption Clause, recognized that "retaliation does nothing to heal the wounds these restrictions inflict on our business, nor does retaliation repair the damage to our ability to compete in world markets infected by protectionist hedgerows." Valenti Letter, *supra* note 20, at 2.

[182] Harking back to the C-58 Income Tax amendment, *supra* note 99, one can see the absurd results of this *equivalent commercial-style* retaliation. The mirror legislation that was proposed by the U.S. in retaliation to the bill led to "Canada shoot[ing] its advertisers in the foot by denying them cheap access to audiences," in Canada as well as the U.S. Glen O. Robinson, *Comment, in* CULTURES IN COLLISION: THE INTERACTION OF CANADIAN AND U.S. TELEVISION BROADCAST POLICIES 127 (Can.-U.S. Conference on Communications Policy 1984).

[183] *See supra* note 28-29 and accompanying text.

[184] *See* Biennial Report, *supra* note 11, at *14.

[185] President Clinton stated in a recent speech at American University:

> The truth of our age is this, and must be this: Open and competitive commerce will enrich us as a nation. It spurs us to innovate. It forces us to compete. It connects us with new customers. It promotes global growth without which no rich country can hope to grow wealthier.

President's Speech: Prosperity Aids Freedom, N.Y. TIMES, Feb. 27, 1993, at 6 [hereinafter *President's Speech*].

The Republicans concur. As former Secretary of Housing and Urban Development Jack Kemp (R-NY) stated: "Open trade forces governments to compete to lower taxes and reduce regulations to make their economies more competitive. . . . While Mr. Clinton has endorsed the [NAFTA] our goal should be nothing less than global trade liberalization." Jack Kemp, *Taxes v. Growth*, N.Y. TIMES, Feb. 19, 1993, at A27.

[186] *See* Richard Turner, *Hollyworld*, WALL ST. J., Mar. 26, 1993, at R1. Over the 5-year period from 1987 to 1991, net-exports for the motion picture and TV programming industry showed nearly a two-fold increase. *See* GLOBALIZATION, *supra* note 15, at 19; John Marcom Jr., *Empty Threat*, FORBES, Nov. 13 1989, at 43.

"The fact remains that Canadian viewers, in impudent disregard of their government's wishes, seem to prefer foreign programs, at least as far as entertainment is concerned." Robinson, *supra* note 182, at 126.

> "There is a tremendous acceleration of American culture here" says [Canadian sociologist] Dr. [Reginald] Bibby. About a year ago he surveyed English-

tive of the future. Historically, many nations have had state-controlled broadcast services. Nevertheless, global trends in the media reflect a move toward more competition and less state regulation.[187] The U.S. and the other governments, instead of bickering and arguing over cultural imperialism, must discover workable methods of cultural exchange and trade, and accept the worldwide changes that affect the globalization of culture.[188]

By creating a protectionist-style policy, like NAFTA's cultural exemption and the EC Television Directive, one source believes that "by implementing policies that either foreclose competitive entry or raise its cost, governments can under certain circumstances skew the globalization process . . . ."[189] To combat this trend, instead of rallying against trade policy in this area and calling for retaliatory legislation to "force" open trade,[190] the U.S. should work with the other governments to eliminate such policies.[191]

For the free trade process to ultimately have a positive effect on the economies of the nations involved, a harmonization of the national laws of the member states must come about. Quantitative restrictions, such as quotas in trade, must be abolished in order to reduce distortions in trade.[192] In attempting to comply, the member states involved believe that harmonization of their laws with those of the other member states will cause a significant loss of sovereignty. One of the methods by which a gradual and recipro-

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> speaking Canadian teenagers to see who and what they most admired. The most popular athlete, TV show, rock group, movie star, author and TV news person were all American. And their favorite politician was George Bush.

Michael T. Malloy, *America, Go Home*, WALL ST. J., Mar. 26, 1993, at R7.

187 Media liberalization in Western Europe, for example has led to the gradual introduction of independent, commercial TV stations in the UK, France, Spain, Germany, Portugal, and Italy. In 1980 there were a total of 38 TV channels in Europe, that number was estimated to be more than 125 in 1991. *See* Mark Schapiro, *Lust-Greed-Sex-Power. Translatable Anywhere.*, N.Y. TIMES, June 2, 1991, § 2, at 29.

188 *See generally* GLOBALIZATION, *supra* note 15.

189 *Id.* at 48.

190 This is most evident by the position of the United States Trade Representative Mickey Kantor who favors trade sanctions with those countries that do not conform with open U.S. trade policies. This has created some disagreement among Clinton officials. However, the President as well as his administration are ultimately committed to the congressional passage of the NAFTA in 1993. *See* Keith Bradsher, *Administration Rift Reported Over Course of Trade Policy*, N.Y. TIMES, April 28, 1993, at A1.

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> At a time when capital is mobile and highly fungible, we simply cannot afford to work at cross purposes with the other major industrial democracies. Our major partners must work harder and more closely with us to reduce interest rates, stimulate investment, reduce structural barriers to trade, and to restore robust global growth.

President's Speech, *supra* note 185, at 6.

192 As embodied in the preamble of the NAFTA. *See supra* note 1 and accompanying text.

cal compliance can be accomplished is by encouraging foreign investment between countries with which one conducts free trade. Through foreign direct investment, countries gain a net benefit—increased capital, employment and specialization. Between Canada-U.S., the liberalization of this level of foreign investment in the broadcast sector will best achieve the goals of free trade.

V. SOLUTIONS

A. *Foreign Direct Investment*

The U.S. has historically been the world's most open and accessible market.[193] Cultural industries attempt to invest outside of the traditional borders via exports or foreign direct investment ("FDI").[194] FDI in the U.S. has increased dramatically in the past decade.[195] This trend has been most dramatic in the cultural sector. For example, the Japanese headquartered Sony Corporation has extensive operations throughout the world. Sony has acquired both CBS Records in 1988,[196] becoming one of the world's largest producers of recorded music, and Columbia Pictures in 1989.[197] Matsushita, another Japanese corporation, purchased MCA in 1990 for $6.13 billion.[198] This and other FDIs in the U.S. have increased the U.S. domestic work force employed by U.S. affiliates of foreign-based firms. Between 1986 and 1990, the total assets held by U.S. affiliates of foreign corporations in the motion picture industry (which includes both television tape and film) increased from $1.194 billion to $22.166 billion, over 1800 percent.[199] Total employment by industry affiliates increased from 10,600 in 1986 to

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[193] *See President's Speech, supra* note 185, at 6. "We must remember that even with all our problems today, the United States is still the world's strongest engine of growth and progress. We remain the world's largest producer and its largest and most open market." *Id.*

[194] Foreign Direct Investment ("FDI") is defined as the ownership by a foreign person or business of ten percent or more of the voting securities(or equivalent equity for an unincorporated business of a firm located in the United States. *See* International Investment and Trade in Services Act, Pub. L. No. 94-472, § 3(10), 90 Stat. 2059, 2060 (1976) (codified as amended at 22 U.S.C. §§ 3101, 3102(10) (1988)). The foreign-owned, acquired or established entity by the foreign-based corporation is commonly referred to as a U.S. affiliate of a foreign-based firm.

[195] *See* U.S. BUREAU OF ECONOMIC ANALYSIS, U.S. DEPT' OF COMMERCE, 72 SURVEY OF CURRENT BUSINESS (1992).

[196] *See* Peter J. Boyer, *Sony and CBS: What a Romance!*, N.Y. TIMES, Sept. 18, 1988, § 6, at 34. CBS was subsequently renamed Sony Music Entertainment, Inc.

[197] *See* Geraldine Fabrikant, *Sale to Sony Approved by Columbia Pictures*, N.Y. TIMES, Sept. 28, 1989, at D9. Columbia Pictures was subsequently renamed Sony Pictures Entertainment.

[198] Geraldine Fabrikant, *$6.13 Billion MCA Sale to Japanese*, N.Y. TIMES, Nov. 27, 1990, at D1.

[199] *See* Ned G. Howenstein, *U.S. Affiliates of Foreign Companies: 1987 Benchmark Survey Results, in* BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, 69 SURVEY OF CURRENT BUSINESS, tbl. 2 at 118 (July 1989); Steve D. Bezirganian, *U.S. Affiliates of Foreign Companies:*

42,700 in 1990, a total increase of over 400 percent.[200]

But this type of investment has also had its share of problems. Some believe that the severe economic downturn seen today is attributable to this increased FDI. Many associate the downturn with the increasing trade deficit, the weakening bargaining power of U.S. labor, and our ability to compete.[201] On the political front, others stress that with increased FDI comes a significant loss of sovereignty,[202] as investment and ownership provides foreign investors direct managerial control over some of this country's most visible "American" products.[203] Even with all this criticism, it is still generally believed that FDI does actually provide a net benefit to the U.S.[204]

With the prospect of free trade on the horizon, the Progressive Conservative government in Ottawa initially recognized this trend. In 1985, with the adoption of the Investment Canada Act ("ICA"), Ottawa espoused a more liberal, "open for business" attitude towards foreign investment.[205] The ICA repealed the anti-foreign investment, FIR Act, adopted over ten years earlier.[206] As a result, they substantially increased the asset and revenue threshold for investment, and replaced the "significant benefit" test[207] with a

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Operations in 1990, in BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, 72 SURVEY OF CURRENT BUSINESS, tbl. 11.2 at 59 (May 1992).

200 *See* Howenstein, *supra* note 199, tbl. 2 at 118; Bezirganian, *supra* note 199, tbl. 11.2 at 59.

201 *See* EDWARD M. GRAHAM AND PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 59-66 (2d ed. 1991).

202 "The worry that a substantial presence of foreign-owned firms will distort the domestic political process." *Id.* at 85. For views on the negative influence of foreign-owned business' see generally PAT CHOATE, AGENTS OF INFLUENCE (1990) and MARTIN & SUSAN TOLCHIN, BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION (1988).

203 One only need to consider recent reaction to the Japanese acquisitions of Columbia, MCA, as well as Rockefeller center. As President Clinton recently asked

> Could it be that the world's most powerful nation has also given up a significant measure of its sovereignty in the quest to lift the fortunes of people throughout the world? It is ironic and even painful that the global village we have worked so hard to create has done so much to be the source of higher unemployment and lower wages for some of our people.

President's Speech, supra note 185, at 6.

204 *See* GRAHAM AND KRUGMAN, *supra* note 201, at 159-61. In an unusual move, 300 economists ranging from conservatives, like James Buchanen and Milton Friedman, to liberals including Paul Samuelson and James Tobin, jointly signed a letter in support of the NAFTA. The general feeling among these 300 economists is that razing barriers would not only boost the incomes of the member states but enhance greater total productivity as well. *See* Sylvia Nasar, *A Primer: Why Economists Favor Free-Trade Agreement*, N.Y. TIMES, Sept, 17, 1993, at A1.

205 Investment Canada Act, ch. 20, 1985 S.C. 419 (Can.). "Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians." *Id.* ¶ 2.

206 *Id.* ¶ 46.

207 *See supra* notes 94-97 and accompanying text.

more liberal "net benefit" test.[208]

The ICA review process places the government in a unique, political, win-win situation. During this process the government has the ability to fashion suitable criteria by which the potential investor will have to conform so as to provide a "net benefit" to Canada. Ottawa "is able to tell Canadian nationalists that it has exacted concessions for Canada while telling the business community and potential foreign investors that it has continued its practice of not blocking acquisitions."[209] With the adoption of the FTA, significant revisions to ICA investment thresholds were made and the ICA foreign investment procedure was made even easier for U.S. investors.[210] However, any investment in industries that concern Canada's cultural heritage or national identity shall be strictly reviewed regardless of the amount or character of the investment.[211]

The contribution as a whole is considered positive. Having the ICA in place encourages investment while helping to contain nationalist sentiment. As a result, this Act helps take the "pressure out of the system for ad hoc government intervention and provides a framework [by which] the government [can] negotiate with an acquiror in the Canadian public interest."[212]

Despite these arguments for and against FDI, the goal of free trade is clear: to promote and encourage full and open trade, especially with those countries in which we conduct and propose to conduct such free trade. By encouraging FDI a solution may be found to counter the protectionist stance of the Exemption Clause in the NAFTA. The problem, however, is to identify a starting point. It is with the radio and television sector that we find our closest cultural ties with Canada. Liberalization of foreign investment in this sector could provide a proving ground for closer ties while maintaining cultural integrity. Encouraging foreign investment in U.S. broadcast entities would allow dissemination of those

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[208] Investment Canada Act, *supra* note 205, ¶ 21(1). The Minister designate, who is in charge of the administration of this Act, as well as the review agency, Investment Canada, shall decide within forty-five days of the non-Canadian investment application if it does provide such a net benefit to Canada. *Id.* ¶ 21(2).

[209] International Merger Law, *supra* note 95.

[210] Canada-United States Free Trade Implementation Act, ch. 65, 1988 S.C. 1999 (Can.). The Act initially provided for two classes of investor, "Canadian" and the "Non-Canadian." With the adoption of the FTA, the ICA was amended by adding a third class of investor, "American." The review process has been liberalized as it applies to "Americans." According to the new Act, if a person falls under the definition of "American," he will be entitled to the same treatment as a Canadian when establishing a new business in Canada. In the area of acquisitions the review thresholds are to be gradually increased. *See id.*

[211] *See id.*

[212] International Merger Law, *supra* note 95.

uniquely Canadian products in the U.S. as well as offer incentives for the Canadian government to loosen its regulations and potential barriers to foreign cultural trade.

B. *Foreign Ownership and Investment in the Broadcast Sector*

Foreign investment in the broadcasting sector in both the U.S. and in other countries is limited. Liberalization in this area could bring about change in the trade of Canadian and U.S. cultural products.

Canada currently allows for limited foreign ownership and restricts holdings to 20% in both over-the-air and cable broadcast entities.[213] Furthermore, no single foreign shareholder may own more than 10% of the stock of such an entity.[214]

The alien ownership restrictions in the U.S. broadcast radio and television market[215] provide no incentives for foreign governments to open their markets to increased alien participation. If the U.S. would liberalize its approach to foreign investment and ownership, then perhaps Canada would consider the same in light of NAFTA. The U.S. arguably has the most advanced, competitive broadcasting industry in the world. If these barriers to foreign entry into the broadcast market were liberalized in the U.S. and subsequently throughout the world, the strength of the U.S. industry and the opportunities derived therefrom would exceed any concomitant risks. Foreign license access to other U.S. broadcast technologies has not been so limited. In 1964, the Communications Act was amended to allow broadcast licenses of alien amateur radio operators[216] and in 1970 the FCC refused to apply section 310 of the trade law to cable television systems.[217] The cable ruling, in particular, has led to a growing number of Canadian owned cable systems in the U.S.[218]

The original purpose for the regulation and general prohibition of foreign ownership and control in the broadcast sector was the result of national security concerns. This purpose is arguably not a factor in today's market. When the Radio Act of 1912 was

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213 *See* GLOBALIZATION, *supra* note 15, tbl. 6.1 at 83.

214 *Id.*

215 *See supra* notes 150-52 and accompanying text.

216 Act of May 20, 1964, Pub. L. No. 88-3313, 78 Stat. 202 (1964).

217 *In re* Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for a Grant of Station Licenses in the Cable Television Relay Service, Report and Order, 59 F.C.C.2d 723 (1976). Finding that foreign investment in cable television was limited and posed neither a threat to the development of cable as an industry nor to national security. *Id.* at 726.

218 *See* Susan Goldberg, *Canadian Cause: It's Aggressively Seeking Viewers South of the Border,* BARRONS, Dec. 29, 1980, at 11.

proposed, broadcasting was operating in a largely unregulated environment.[219] After World War I, national security concerns intensified. In the postwar era of the 1920s, the drafters of the Radio Act of 1927 were primarily concerned that German-owned radio stations in the U.S. were used during the war to communicate with German warships.[220] However, the ability of any foreign-controlled radio station to block the transmissions of a less powerful system and broadcast over the same frequency is no longer relevant; the risks are remote at best. Even if they so choose, those within the U.S. who desire to communicate to any outside entity have many other unrestricted and unregulated technologies at their disposal.[221] In the early days of radio regulation, broadcasting equipment was scarce. Today, however, there are over 11,400 broadcast radio stations and over 1,500 broadcast television stations.[222] The fear of hostile foreign control is naive at best. Ultimately, these foreign ownership rules do not harmonize with the U.S. criticism of both the Exemption Clause and EC quotas.[223] The benefits of liberalizing foreign access in this area could spur mirror liberalization throughout the world, as well as inject needed capital and expertise into the U.S. market. Foreign investment in the U.S., although ceding some sovereignty to foreign control, may enable the market to acquire new management and technical skills. This could lead to increased specialization and a more efficient use of the world's resources by encouraging international trade.[224]

However, the biggest obstacle to liberalization of the FCC li-

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219 An Act to Regulate Radio Communication, Pub. L. No. 62-264, 37 Stat. 302 (1912). Section 2 of the Act limited license ownership to citizens of the United States or Porto [sic] Rico.

220 *See* Ennis & Roberts, *supra* note 155, at 243. The Radio Act of 1927 contained more comprehensive restrictions than its predecessor, the Radio Act of 1912, and stated that:

> The station license required hereby shall not be granted to, or after the granting thereof of such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or representative of any alien; (b) to any foreign government, or representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

Act of Feb. 23, 1927, Pub. L. No. 69-632, Ch.169, § 12, 44 Stat. 1162, 1167 (1927) (repealed 1934).

221 *See* GLOBALIZATION, *supra* note 15, at 85.

222 Broadcast Station Totals as of May 31, 1993 (F.C.C. News Release, Jun. 10, 1993).

223 *See supra* section IV.A and accompanying text.

224 "By facilitating economic activities across national boundaries, firms that engage in FDI also transfer resources between countries. If the coordination capabilities of such firms are superior to the market's, FDI will facilitate trade between countries, thereby improving the economic welfare of all countries." GLOBALIZATION, *supra* note 15, at 16.

censing laws seems to be the recurring notion that there is a need for national cultural sovereignty.[225] Such ideas call into question whether increased foreign investment and control could harm the public interest. Could national sovereignty interests ultimately be harmed by the infiltration of those foreign entities not acting in the interest of the people? This author believes it cannot happen. The broadcast license itself is inextricably linked to the community for which it represents.[226] "The FCC requires each broadcaster to provide programming that meets the needs of its audience, to reach with its signals its entire community of license, and to locate its studio within the contours of its community of license."[227]

The goal of the FCC licensing procedure is two-fold; first, the FCC shall provide for "a fair, efficient, and equitable distribution of radio service . . . ."[228] Second, the FCC is required to grant and subsequently renew licenses that serve the "public convenience, interest, or necessity."[229] With respect to the second factor, the broadcaster is expected to use "good faith" in meeting the program needs of the community.[230] The licensee is required by law to submit program logs every three months that detail their community-directed programming.[231]

These factors are considered when the FCC reviews the broadcaster upon renewal of their broadcast license. In order to renew the license, the licensee must address community issues with responsive programming as well as comply with any other legal requirements.[232] The fear of any loss of sovereignty hinges on this element. Given these requirements, any broadcast station owner,

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[225] Early broadcast content regulations required that the broadcaster air not less than 5% local, 5% informational, or 10% non-entertainment programs. These were scrapped by the Commission in 1984, when it was agreed that market incentives ensure that the broadcaster will meet the needs of the community. *In re* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1078 (1984), *recon. den'd*, 104 F.C.C.2d 358, 359 (1986).

[226] *Id. See also In re* Application of Zenith Radio Corp., 40 F.C.C.2d 223, 230 (1973) (footnotes omitted) ("Broadcast stations are, of course, licensed to serve the public interest.") (quoting F.C.C. Chairman Dean Burch).

[227] GLOBALIZATION, *supra* note 15, at 90.

[228] 47 U.S.C. § 307(b) (1988).

[229] 47 U.S.C. §§ 307(a), (d), 309(a) (1988). Licensees are required to operate the station in the public interest. *Id.* § 309(e) (1988). The radio and television broadcaster "is expected to address those issues that it believes are of importance to its community of license . . . ." *In re* Deregulation of Radio, 96 F.C.C.2d 930, 931 (1984).

[230] 98 F.C.C.2d, at 1092.

[231] 47 C.F.R. §§ 73.3526(a)(8)(i), 9 (1992). The regulations require that every commercial television station, as well as every commercial AM/FM radio station, submit "every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period" and is to be filed quarterly with the FCC. *Id. See also* 98 F.C.C.2d, app. A at 1118.

[232] *Id.* at 1093.

foreign or otherwise, must conform to its licensed community rather than the converse.[233] Therefore, any deviation from this requirement will result in the loss of its broadcast license.

With these considerations in mind, liberalization becomes more palatable. In the context of a free trade agreement, such as the NAFTA, this liberalization could prove most fruitful with increased internal North American investment that expands broadcast ownership. In other words, what could develop is a reciprocity-style scenario; a gradual liberalization in the broadcast sector that could lead to similar liberalization in Canada. Relaxing the Communications Act restrictions on foreign ownership of broadcast stations could be used as a catalyst to that change.

C. *Proposed Changes*

The proposed amendment to the Communications Act, Title 47, section 310 could be the stepping stone to increased relaxation of foreign ownership restrictions through existing and future bilateral agreements. As noted earlier, NAFTA, though impervious to amendment, could be redefined and changed by reciprocal legislation and harmonization of laws, such as the one proposed here. The author therefore proposes to amend the Communications Act of 1934 by the inclusion of a new subsection—47 U.S.C. 310(f)[234]

> **(f) Preference Given to Alien Applicants by Reason of a Bilateral Treaty Between the United States and the Alien's Government**
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> In addition to broadcast licenses which the Commission may issue to aliens pursuant to this Act, the Commission shall issue preferential authorizations, under such conditions and terms as it may prescribe, to permit an alien or representative, whose government has in effect a bilateral agreement with the United States, to obtain a broadcast license, for such operation on a reciprocal basis by United States entities, if the Commission finds that the public interest will be served by the granting of such a license.

This new subsection calls for preferential treatment to be af-

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[233] The Commission eliminated the formal ascertainment procedures established in Ascertainment of Community Problems, 27 F.C.C.2d 650 (1971), and *In re* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 441 (1975), *recon. granted in part*, 61 F.C.C.2d 1 (1976). In its place, and in conformance with program obligations, renewal applicants "may determine the issues in their community that warrant consideration by whatever means they consider appropriate" in order to ensure that the licensees "actively discover[ ] the problems, needs, and issues facing their communities . . . ." 98 F.C.C.2d, at 1098.

[234] For excerpts from 47 U.S.C. § 310, see *supra* notes 151-52.

forded to those aliens and representatives whose government has in effect a bilateral agreement with the U.S. Even with the addition of this new subsection (f), section 310 of the Communications Act of 1934 still limits the amount of broadcast station ownership by an alien while calling for the Commission to prescribe "conditions and terms" by which it will grant these licenses. The author therefore proposes that the Commission initiate a rulemaking process to determine how best to establish these "conditions and terms" of *preferential authorization. Through the rulemaking process the* Commission can pursue the liberalization of foreign investment by member states in the broadcast sector, while at the same time determining the basis of the status of the potential reciprocal treatment[235] by the foreign government in question. This will ultimately benefit the U.S. as well as potential investors so as to retain advantages inherent in free trade.

The reciprocity clause of subsection (f) is added so as not to cause a so-called "opening of the floodgates" of foreign investment and intervention. This reciprocity does not have to be immediate, it can take the form of a contract for future reciprocal treatment by the disadvantaged country.

A form of this reciprocity is already evident in cultural exchanges within the entertainment community. The Immigration Act of 1990[236] promotes reciprocal treatment by ensuring equal treatment for performers from the United States.[237] For example, Equity, the British actors union, and Actor's Equity, its American counterpart, have agreed on a reciprocal arrangement whereby roles in both countries are allocated to foreign performers on a one-for-one basis.[238] At this time, the U.S.-based Screen Actors Guild ("SAG") and its Canadian counterpart, the Alliance for Canadian Cinema, Television and Radio Artists ("ACTRA"), are actively negotiating an equitable exchange agreement which will serve to facilitate and equalize the number of performers crossing the border to work. Under these arrangements the unions will have the ability to act on each others' behalf to promote foreign

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235 The reciprocity arrangement, as applied here, should consist of sound legal standards based on the principle that foreign controlled broadcast entities in the U.S. would be subject to the same treatment under U.S. law that U.S. controlled entities receive in the country with which we have in effect a bilateral agreement. *See generally* GRAHAM & KRUGMAN, *supra* note 201, at 145-46.

236 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended 8 U.S.C. §§ 1101-1459 (Supp. II 1991)).

237 *Id.* § 207(b)(4)(C), 104 Stat. at 5026.

238 *See* Simon Tait, *Actress Fights Rule That Costs U.S. Role,* THE TIMES (London), Feb. 1, 1992, § Home News. Only actors who have attained "star status" are exempt from these rules.

performers' rights.[239]

The establishment of reciprocal treatment in the broadcast sector is consistent with the goals of the NAFTA and will ultimately provide for equal market access for every member state. With a system of reciprocity firmly in place, harmonization of the laws of the respective countries could develop more rapidly. Forms of reciprocal treatment could include revisions to existing national member state laws, such as the amendment proposed here to the broadcast ownership rules, as well as the future negotiation of side agreements to the NAFTA concerning cultural trade.

VI. Conclusion

As stated in the preamble, the goal of the NAFTA is to STRENGTHEN the bonds of friendship and cooperation, CONTRIBUTE to the harmonious development and expansion of world trade, REDUCE distortions to trade, FOSTER creativity and innovation, and PRESERVE flexibility to safeguard public welfare.

The Exemption Clause of the NAFTA contradicts these very goals, but its existence is not without reason. The unfortunate consequence is that suspicions on both sides of the 49th parallel run high; both the Canadians and the Americans cry imperialism and protectionism, respectively. But this does not have to be the case. Though hope for true free trade is long-term, progress can be made by advocating and effectuating procedures whereby those long-term goals of the NAFTA can be championed. This author concludes that by revising the U.S. foreign ownership rules in the broadcast sector, the U.S. will offer the Canadian government incentives to loosen its regulations and potentially all barriers to foreign cultural trade. Instead of cries of imperialism and protectionism, we will have cries of cooperation and diversity and truly STRENGTHEN the bonds of friendship and cooperation among nations.

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239 *See SAG Recruiting Canada for Trades and "Enforcement"*, BACKSTAGE, Mar. 19, 1993, at 1. "We've had a long and positive relationship with ACTRA and in our view this agreement will take us to a higher level and spirit of cooperation." *Id.* (quoting SAG National Director Ken Orsatti).