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THE IMPACT OF TECHNOLOGICAL CHANGE ON CANADA’S AFFIRMATIVE POLICY MODEL IN THE CULTURAL INDUSTRY AND NEW MEDIA SECTORS

Liss Jeffrey

This Article has an unusual genesis. Following an address to the Saturday evening conference panel at the Canada/U.S. Law Institute conference by Ron Atkey, senior partner of Osler, Hoskin & Harcourt, audience members unanimously expressed the opinion that the Canadian position on its cultural industries policies had not been fairly represented. Considering that Mr. Atkey reputedly acts on behalf of the U.S. entertainment behemoth, Time Warner, this perception seemed well-founded. You see, Time Warner publishes *Sports Illustrated*, which has been at the epicenter of a very heated U.S./Canada conflict over trade and cultural policies. Briefly, Time Warner challenged Canadian regulations in 1995 by dumping a “split-run”1 edition of *Sports Illustrated* into Canada via satellite, thus using new media to bypass a tariff on split-run imports. This unprovoked move cleverly triggered a cul-

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1 “Split-run” refers to the Canadian edition of a magazine (published originally in another country) with substantially the same editorial content as the foreign original, but with more than five percent of its ads targeted towards Canadians. The producers of split-runs recover their costs through sales and ads in their home markets, and then compete at an advantage with Canadian publishers whose existence depends on attracting ad revenues in their domestic market to cover editorial and production costs. Canadian writers do not reach their audiences, and Canadian stories do not get told without a healthy magazine industry. Many call this practice “cultural dumping.”
ture/trade domino effect. Following consultations, the Canadian government introduced magazine legislation which was subsequently knocked down by the World Trade Organization, in a ruling that deemed that magazines were goods like any other commodity, and found both postal subsidies favouring Canadian magazines and the initial tariff against split-runs to be inconsistent with trade obligations under the GATT.\(^2\)

Under protest, since in our system magazines are cultural products, not goods like shoes are, the Canadian government introduced revised legislation, Bill C-55,\(^3\) to regulate foreign advertising services. Services fall under the GATS or NAFTA, under which the United States has no right of access to the Canadian market. This move prompted the U.S. Trade Representative (USTR) to change tactics and threaten punitive trade retaliation against Canada. But first, the USTR said that the split-run decision was the thin edge of the wedge, which could be used to force a dismantling of all of Canada’s trade-related cultural industries policies.

The USTR’s attitude calls to mind the comment of pioneering American producer/distributor Lewis Selznick, who asked back in 1922 why Canadians wanted to make films. After all, said Selznick: “If Canadian stories are worth making into films, companies will be sent into Canada to make them.” The conflict itself illustrates the fundamental point: to understand the impact of technological change on Canada/U.S. relations in these transitional times, it is necessary to look closely at developments in traditional areas of friction, such as the cultural industries, and also to factor into any analysis the growing web of international trading regimes.

Meanwhile back in Cleveland, by this point the Canadians had abandoned their legendary niceness, and resembled a scrappy Saturday night hockey crowd ready to rumble. Chairman Henry King, demonstrating his unfailing quick-wittedness, jumped into the fray to explain that the Department of Canadian Heritage, which holds chief responsibility for culture and communications, could not accept his invitation to appear on the panel, but had sent me as an observer. Instead of delivering a speech, Professor King asked if I would prepare a post-panel paper.

I gladly agreed. I regret only the lack of opportunity to debate these views.\(^4\) Without repeating Mr. Atkey’s survey of regulatory measures, and of

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\(^4\) For a more complete airing of these issues, see the proceedings from a major symposium sponsored by the Centre for Trade Policy and Law of Carleton University, in The Culture/Trade Quandary: Canada’s Policy Options (Dennis Browne ed., 1998).
course making no claim to speak officially for the Department of Canadian Heritage, I intend to outline briefly the overarching rationale for Canada’s cultural industries policies, discuss aspects of the challenges of technological change for the old and new media sectors, and survey recent directions and initiatives in a comparative context.

But at the outset, I hope to clarify how Canadian concerns over culture and the cultural industries represent a major instance of systems friction between our respective countries. Despite our shared bonds, we Canadians may as well be addressing the Martians when it comes to explaining our affirmative cultural industries regulatory model to most American audiences. This clash is over fundamental values. You kept your national security and military establishment out of the Free Trade Agreement, and we supposedly kept our cultural industries exempt. We insist on affirming a space for our own conversations and cultural productions, while keeping our borders open to foreign cultural products. The affirmative policy model promotes Canadian content production, in both major languages in an officially multicultural society, and the cultural industries to sustain and support this lively mosaic. You equally vigorously maintain that cultural productions are commodities, no more or less, a competitive market must be the only standard for success or failure, and the affirmative policy model constitutes a trade barrier in disguise. But you fail to consider the advantages of your large market, nor your dominance of our market. If you let the Canadians get away with this, we might even give the world some bad ideas! Go ahead, have your Canadian culture, your officials tell us, so long as it is only a subsidized entity, niche arts on welfare, and certainly not in the strategic (for us) and lucrative (for you) areas like magazines and broadcasting or (God forbid) that cultural-industry-on-steroids, movies, where there might be a chance of popular success. In response to this attitude, consider Oscar Wilde’s line: “It is possible to know the cost of everything, and the value of nothing.” Or as our Industry Minister remarked during the magazine dispute, upon surveying the U.S. dominance of our cultural industries markets: “How much more do you want?”

This difference in values illustrates one of many distinctions between us! And now let me proceed with the argument of this Article, simply stated, for reasons of time.

*The historic aspiration to secure a national space where Canadians can communicate among themselves provides the enduring rationale for an affirmative model of cultural industries policies and regulations.*
An affirmative policy model means the positive use of regulation, legislation, and other supportive measures to encourage Canadian creators, content, and cultural industries firms. The current "cultural policy toolbox" includes financial and program incentives, Canadian content requirements and other regulatory support mechanisms, tax measures, foreign investment and ownership restrictions, and measures to protect intellectual property. The linkage of cultural and industrial instruments is necessary because without a sustainable investment, distribution, and ownership environment, creators will not reach their audiences, and distinctive Canadian content will not be produced in any significant degree. Geography still matters in a virtual age, as the overwhelming majority of new artists and distinctively Canadian productions are created by Canadian firms and enjoyed by Canadian consumers. Without the domestic cultural industries, there would be an end to the variegated public mosaic of voices that make up the Canadian conversation in our media and cultural institutions.

In effect, Canada issued its first declaration of techno-cultural independence in 1932 when the Canadian Radio Broadcasting Commission (later the CBC) was established. But it is important to counter a common misconception: the rationale for Canada's cultural industries has never been based primarily on spectrum scarcity, or any other technological argument. Instead, Prime Minister R.B. Bennett justified Canada's techno-cultural policies in 1932 by arguing that Canadians wanted and needed a choice of programming from Canadian sources, and that the nation itself required an instrument for development of cultural sovereignty and national identity. In the digital age, this rationale does not disappear. Whatever the technology, it is still fundamentally a cultural industries argument. The aim is to ensure cultural space, our form of national security, as Franklyn Griffiths suggests. Living culture does not exist in some hot house vacuum. If there are no Canadian companies to support and sustain it, to return to Mr. Selznick, indeed American companies will do the job albeit from an American perspective. The difference now is that you can send in magazines like Sports Illustrated by satellite, and there is no need to open a local office! So the technology has changed, but the rationale for Canada's affirmative cultural industries model has not. The reason is simple: the economics of the U.S. competitive advantage have not changed, nor has the fact that Canadian culture cannot thrive unless cultural producers have a viable base within their own domestic market.

The rationale supporting affirmative policies on ownership, for example, is that Canadian-owned cultural industries are more likely to create, distribute, and exhibit Canadian content. Independent Canadian sound recording companies, for example, released ninety percent of all music qualifying as Canadian in 1994-95, despite the fact that they take sixteen percent of the market. In book publishing, Canadian-controlled companies publish eighty-seven percent of the titles published in Canada. Between 1990 and 1994, foreign-controlled film distribution companies contributed less than three percent of the total rights and royalties paid to Canadian film productions. Artists like Shania Twain, Bryan Adams, and others are nurtured in Canada before signing with foreign firms that can achieve global reach. What regulation did, in this case the Canadian content regulations in the radio music industry, was ensure a space to nurture and distribute Canadian creative production. It paid off. The world of music is richer for this cultural diversity.

There is a remarkably clear parallel to be drawn here between culture and economics. Research and development (R&D), we would all agree, is fundamental to a culture of innovation, and an engine of growth in a knowledge-based economy and society. Out of the top ten firms spending on R&D in Canada, six were Canadian! Some of the hottest Canadian digital media companies, including Alias and Softimage, of course, like Bryan Adams and Shania Twain, were brought up and nurtured in Canada before being bought up by foreign companies with greater access to capital and global reach. The question of significant benefit to Canada, a vexed issue in the traditional cultural industries milieu, will unquestionably heat up in the new media environment.

The Canadians have been quick to enter the new media industry, in part due to our longstanding national investment and regulatory support for telecommunications infrastructure, and our educational system. Canada’s commitments to universal, affordable access to telephone service and education have paid off. There are mixed opinions on how well we will do in the future global environment, especially if the rules on foreign ownership of infrastructure change. Will Canadians find themselves shut out of access to the means of communications and knowledge production? If all the action is in Hollywood or Silicon Valley, will our highly creative talents have to move? Will new media producers find that they must homogenize or Americanize

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7 Softimage, headquartered in Montreal, Quebec, designs and develops products used for 3D imaging in the fields of medicine, interior design, engineering, and architecture. See Softimage Home Page (visited July 14, 1999) <http://www.softimage.com>.
all of their cultural production to reach a global market? After all, Canadians have an accustomed taste for American and other foreign cultural production, but the American market is notoriously parochial. MuchMusic in Toronto has found that it is one thing to talk about free markets and export potential. It is quite another to actually penetrate that market and reach those audiences. There is a reason why films made in Canada often must spread garbage on the streets and eliminate any telltale signs of bilingualism: American audiences want American stories and voices. We are at such an early stage in the transition to a digital environment that these issues are outside the scope of this brief foray, and will prove difficult to resolve in the future. But make no mistake: these are cultural as well as economic questions. The common view now, as the Wall Report (1998) and others including the CRTC have found, is that for the time being, the Canadian new media industry is vibrant. There is little will in Canada for regulation of the new media environment. However, as the Information Highway Advisory Council report and policy statements from Industry Canada, the Department of Canadian Heritage, and the federal government itself have made clear, Canada remains committed to affirmative policies and to supporting Canadian content in the new media environment. Concerns chiefly surround the perennial entrepreneurial questions of investment for continued growth, as well as the more recent and controversial brain drain and tax issues.

Before we are too quick to abandon these affirmative policies, on some strange organic argument about infant industries, we should pause. The nurturing of creative talent and development of firms that act in ways that contribute significant national benefits is an ongoing process. Where is the payback for the taxpayers who fund education and a safer and more civil society, where the divide between the haves and have-nots is not so wide as it is in the

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8 MuchMusic is Canada’s first 24-hour video and music channel. To visit their Web site, see <http://www.muchmusic.com> (visited August 11, 1999).


10 In the New Media Report, Broadcasting PN 99-84/ Telecom PN 99-14, released May 17, 1999, the CRTC decided that it would exempt new media Internet services from regulation. The CRTC applied the test of the affirmative policy model, and based its decision on both technical grounds (under the statutory definition of broadcasting, most new media Internet services to date are alphanumeric), and a cultural industries rationale. The industry seems vibrant to this point, with Canadian Web sites representing five percent of world sites, and world francophone sites accounting for five percent of total sites. Thus, American products are not yet undercutting Canadian new media services by dumping programs and siphoning off advertising, unlike in television where regulatory and legislative measures continue to be required to ensure a space for Canadian cultural content and identity.
United States? Is it unreasonable to expect that the citizens and firms who share in the benefits will make a contribution to the collective quality of life, in return for years of support, instead of throwing temper tantrums and adopting a give-my-company-what-it-wants-or-we’ll-take-our-money-and-run blackmail stance? (I am referring to Clive Allen’s outburst in response to a question I posed on foreign ownership and Nortel’s important contribution to R&D spending.) In an economy based upon knowledge, or better put by Business Week, an entertainment economy as opposed to a cold war economy, Canada’s strategic decision back in the days of radio to affirm sovereign space for its cultural industries now seems far-sighted. On the trade front, given the fact that in this post war environment, entertainment products have outpaced aerospace as the number one U.S. export, it is difficult to avoid the suspicion that the United States adopts a willful blindness when it comes to recognizing the strategic non-economic interests in the cultural industries of other nations, even its allies. It is, of course, imperative to continue to nurture talent and innovative firms in a nation where the small and diverse market presents a structural disadvantage, compared to the giant next door. We must innovate or perish in this knowledge and entertainment economy and society. In the cultural industries, whether old or new media services, Canada will always need an affirmative policy model if it wants to secure a space for its own living culture. Again, the reason is plain: the U.S. comparative advantage will not change in the foreseeable future. Opinion polls report that Canadians consistently recognize the wisdom of cultural support by government, especially with respect to American culture. Take that R&D analogy again. The need for fundamental research never disappears. Nor does the need to nurture homegrown talent and cultural industry firms.

Let us keep in mind, it is early yet to tell what the longer term will hold for Canada in the new media industries. Shelf space does not disappear as an issue merely because there is more virtual space. Canada’s cultural industries policies have been in place for years, yet recent statistics show: forty-five percent of book sales, eighty-one percent of English language consumer magazines sold on newsstands, and over sixty-three percent of magazine circulation revenues, seventy-nine percent of retail sales of tapes, CDs, and concerts, and eighty-percent of film distribution revenues are foreign. How much more do you want? Does affirmative cultural industries policy work? Comparison of unregulated movie screens and affirmative policies for television screens offers a decisive answer. In terms of reaching audiences, ninety-four to ninety-seven percent of screen time for movies on Canadian theatrical

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screens is foreign, and all attempts at regulation in this area have been defeated by the pressures of Jack Valenti and the Motion Picture Association of America. In the regulated television sector, twenty-nine percent of Anglophone viewing time is spent on Canadian shows, and we have built an industry that makes distinctive programming and now exports it worldwide. Unlike the film industry, where established foreign firms can take North American distribution rights without contributing a dime to the Canadian movie industry, in television, the affirmative regulations on advertising and income tax mean that advertising revenues stay in Canada, and underwrite the production of Canadian shows. The affirmative model is not perfect, and must be refined to meet the challenges of new technologies and trading regimes, but without it, we may as well fold our igloos into that great melting pot next door and apply for statehood. At least that way, we could have political representation!

*The systems frictions between trade and culture are evident internationally, as information and communications technologies increasingly bring the world norm closer to the historic Canadian reality of a dual commitment to cultural self-determination and an open economy.*

The Canadian case was once an anomaly: living next to the United States and its heavily promoted spill-over cultural industries was an accident of geography. No longer. The onset of the digital age has not eliminated geography, it has transformed its significance. Technological change is bringing the world closer to the Canadian model. We are committed to free expression, and to liberalized trading. But we are also committed to cultural sovereignty. Canada currently plays a leading role in fostering initiatives to exempt culture from international trading regimes, treat culture as more than a commodity, and find multilateral instruments to value cultural diversity and expression within national and international frameworks. You might think of this process as a kind of multilateral agreement on cultural development. In March 1998, Canadian Heritage Minister Sheila Copps and her delegation attended a cultural policy conference organized by the United Nations Scientific and Cultural Organization in Stockholm, where they drafted an action plan to address three themes: building a world of inter-cultural communications, meeting the challenges of globalization and technological change, and promoting the principle that cultural goods and services are uniquely distinct from other goods and services. In June 1998, Copps invited culture ministers

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12 Jack Valenti is the President and Chief Executive Officer of the Motion Picture Association of America.
from twenty countries to Ottawa, where a new alliance launched an international network to promote cultural diversity. The United States was not invited; after all, you would doubtless find it horrifying to have a culture minister. (Judging from the way he negotiates directly with foreign governments, maybe Jack Valenti is your unofficial cultural minister!) Canada’s long-standing commitment to cultural sovereignty, more recent comprehension of the strong value of cultural diversity, and advanced capacity in old and new media, provide it with major incentives to advance this agenda. This is soft power at work.

Digital media and the attempted extension of international trade regimes into cultural productions unquestionably threaten Canada’s framework of domestic regulation and legislation. Legally and morally, however, new media and trade agreements do not alter the legitimacy of Canada’s consistent commitment to cultural expression and diversity within a framework of national sovereignty. Canada’s previous response had been to seek a cultural exemption, as with the FTA and NAFTA. Most knowledgeable observers believe that this strategy has failed to resolve disputes. Without intending disrespect, it is hard to hold a dialogue with the deaf. On the multilateral stage, the WTO is suffering from “mission creep" by default as its undeniable success as global umpire in the trading arena emboldens it to expand its mandate, ignoring the case for distinguishing cultural productions like movies or magazines from goods like shoes. (Give someone a hammer, and everything looks like a nail.) There are alternatives. Canada intends to accelerate its efforts to promote a new international instrument on cultural and linguistic diversity in new information, communications, and entertainment technologies, through informal contacts, bilateral agreements with countries, such as the Canada-Chile agreement, international cultural alliances, and representations to multilateral bodies including WTO, UNESCO, and maybe an agency for civil governance that does not yet exist. We will also pursue an economic agenda of E-commerce, and continue to deregulate new media services while watching to see the effects on Canadian culture and sovereignty. We may be ahead of the recognition that it is both possible and necessary to have affirmative cultural and trading policies.

The stakes in the design of a twenty-first century Canadian knowledge nation are high. Our task would be far smoother if our American friends took seriously our historic efforts to build a space for our own culture and conversations. By way of provocative conclusion, I call upon this distinguished group to respect Canada’s sovereign right to enact cultural industries policy to affirm a cultural space, and also urge you and your representatives to behave like friends, not like bullies in the Global Village – or will that be the Valenti Village in the Gates Galaxy under the AT&T Avalanche?
Postscript: In a humiliating about-face, the Canadian government caved into U.S. threats to retaliate against the steel and wheat sectors, and was forced to withdraw its legislation on split-run magazines. Might, not right, rewrote these rules. The redrafted bill phases out the Canadian magazine regulations. Astonishingly, while the bill was under debate in the Canadian Senate, the actual wording was hammered out in Washington and enshrined in a bilateral agreement. A unique motherhood statement regarding American respect for Canada’s cultural aspirations did little to console those who had warned that “free trade” with a superpower – whatever its other benefits – would compromise Canada’s cultural and national sovereignty.13