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THE INFORMATION REVOLUTION – CULTURE AND SOVEREIGNTY – A U.S. PERSPECTIVE

John A. Ragosta

Today, I do not want to talk primarily about the legality, the existence, or even the advisability of Canadian cultural restrictions. Rather, I have been asked to address a topic that is perhaps less interesting in terms of the heat of the debate, but ultimately far more important to Canadians, as it is to the United States – the development of technology, and whether technology is going to undermine the ability to protect so-called “cultural industries” in the manner in which Canada and other countries have sought to do.

Before turning to that topic, however, I must respond to some of Mr. Robinson’s efforts to justify Canadian protectionism allegedly in the defense of Canadian culture.

First, in listening to Mr. Robinson’s presentation, and, in particular, the statement that Americans (by which he means U.S. citizens) really do not have any interest in Canadians or Canadian culture, I am reminded of a phrase from that great U.S. cultural icon – Spiro Agnew. I think that the description that Vice President Spiro Agnew would have used for Mr. Robinson in this regard is “nattering nabob of negativism.”

Canadian culture is not nearly so fragile, nor of so little interest, as Mr. Robinson’s plea for special protection suggests.

As Mr. Robinson was kind enough to send me his notes beforehand, I had one of my legal assistants get on the Internet and pull down a list of names of leading pop artists in the United States who are Canadian nationals. These artists include Sarah MacLachlan, Shania Twain, Alanis Morisette, k.d. lang, Bryan Adams, Crash Test Dummies, Men Without Hats, Barenaked Ladies, and Celine Dion, just to name a few. (I did not mention Anne Murray, Neil Young, or Rush because I know who they are.)

Mr. Robinson may dismiss these artists as “pop culture” (a cultural discrimination in itself), but Canadian influence goes well beyond that. Canadian movies have been increasingly successful, as evidenced by the recent success of The Sweet Hereafter and the consistent popularity of the Anne of Green Gables series among young people. In fact, USA Today, the Weekend Edition last week (and I have to explain that I was on vacation, which is why...
I was reading USA Today) talked about the fact that key movie and television filming sites are moving away from Hollywood. Two of the top ten sites in North America, I believe, are Vancouver and Toronto. As for actors, the list is too long to read. Canadian authors include Margaret Atwood, Douglas Coplin, and Michael Ondaatje, the latter having written a novel later made into an Academy Award-winning movie. Therefore, I do not agree that Americans have no interest in what Canadians have to say.

The second thing that strikes me about Mr. Robinson’s presentation is his statement that Canadian culture is really just “Canadians talking to Canadians about things Canadian.” I have to tell you that this is the best straight line I have ever been handed... but I am going to resist. You can fill in what I might say. It strikes me, however, that were I Canadian and I cannot speak personally to that view, I would be offended by this definition. (I was also offended last year at this conference when Canadian culture was defined as things not-American). I would think that Canadian culture is Canadians speaking from a Canadian perspective about things of greater value: about life, about love, about death, about compromise, about hope, and about fear, etc.

And, of course, The United States has an interest, as does the world, in hearing a Canadian perspective on those transcendent values, just as Canadians are interested in an American perspective or a Japanese perspective or a French perspective on those things.

I was trying to think of an example, and since Mr. Robinson does not want to talk about pop culture, how about Shakespeare? What if Shakespearean literature had died in the Elizabethan era, and that was all there was to Shakespeare – Elizabethans speaking to Elizabethans about things Elizabethan? What if Shakespeare’s, “Hark, what light through yonder window breaks? It is the East and Juliet is the sun. Arise fair sun and kill the envious moon” could not be translated into, “I just met a girl named Maria,” and “say it loud, and there’s music playing; say it soft and it’s almost like praying.” What if, in fact, the United States had nothing to say about the transcendent issues written by an Elizabethan playwright? Then I would suggest that U.S. culture is indeed bankrupt. And I do not believe Canadian culture is that bankrupt. Canadian culture cannot be so narrow as Mr. Robinson urges.

Third, I would say this with respect to Mr. Robinson’s point about the statistical dominance of U.S. culture: the fact is that the United States already

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2 William Shakespeare, Romeo and Juliet, act 2, sc.2.
3 Leonard Bernstein & Stephen Sondheim, Maria, in West Side Story (United Artists 1961).
4 Id.
dominates Canadian culture if one looks narrowly at those statistics. Yet, there is, in fact, a huge U.S. acceptance of foreign market penetration in culture. Random House recently announced it was going to be bought by the German company Bertelsman, which also owns Bantam, Doubleday, and Dell. Harper Collins is owned by an Australian corporation; Penguin and Putnam are owned by Pearson of the United Kingdom. In fact, there is a great openness in U.S. cultural markets and great strength in that openness. Talking about U.S. hegemony, therefore, is itself misleading.

With respect to Jack Valenti’s comments quoted by Mr. Robinson (calling for “war” against foreign cultural barriers in apocalyptic terms), I remember those comments, but nothing came of them. I happened to represent the Motion Picture Association of America (MPAA) for a brief period during the Uruguay Round negotiations. Jack Valenti said that the United States would not tolerate a Uruguay Round Agreement which effectively exempted cultural industries. He talked about fighting it to the death. The MPAA did nothing of the sort. So, the difference between the rhetoric of Jack Valenti, who is indeed a very powerful lobbyist in Washington, versus the equally flamboyant rhetoric on cultural protectionism by Minister Sheila Copps, who in fact holds the reins of power on these issues in Canada, is indeed telling.

Finally, I want to address the question of balance and Mr. Robinson’s criticism of my call for balance in Canada’s cultural policies. I do not mean to suggest, nor did I mean to suggest last year, that the question of balance for Canada involves balancing U.S. interests versus Canadian interests. Quite the contrary; I would not suggest that Canada do that. I think the issue of balance is a question of balancing the protection of real cultural interests with that of purely commercial interests that are currently being protected by many Canadian cultural policies. Canada may be willing to pay the price for the former, but should not pay the price for the latter. The balance is what is going to be greatly affected by the development of technology.

Mr. Robinson says that he is a free trader, but U.S. citizens do not understand Canada’s need to protect its culture. It is not that we do not understand it; we do not accept the overly broad methods that Canada uses to do so. There is a difference. If Canada wants to protect its culture, it should make very clear that trade is not, nor has it ever been, only about money. As I have said many times in the past, trade is not, should not, and has never been only about wealth maximization. Then, Canada should be prepared to pay the price that comes with protection of a particular sector.

The U.S. position on culture has been wrongly characterized in Canada as interested solely in wealth maximization. The U.S. position is said to be that

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5 Jack Valenti is the President and Chief Executive Officer of the Motion Picture Association of America.
because Hollywood makes more money, it ought to take over the market, as the Japanese electronics firms took over our markets in the 1960s and 1970s, based on dollars.

Yet, I do not believe that to be the U.S. position and it is clearly not mine. If Canada, too, rejects that position, it ought to do so clearly, and it ought to clarify that there is a balance that must be struck in trade with other interests – interests that go beyond culture to other issues such as environmental protection, labor interests, and security.

Of course, it is not that simple. When one seeks to protect these other interests in the area of trade, one must assess the cost, because the way the world trade regimes are designed, when you deviate from wealth maximization as a preeminent goal, there is usually a cost. There is always a price to be paid – that is the balance that must be made. Maybe Canada is prepared to pay for protection of important cultural values, but focusing on that issue requires one to define what are the core values that can and should be protected. To date, officials responsible for protecting culture in Canada have largely avoided that difficult question.

Now, I think that this issue of balance finally brings us to the question of technology development about which we are supposed to be talking today. As a preliminary matter, I have historically been very skeptical of the conventional wisdom that technology is going to overtake the schemes by which countries, in particular Canada, have sought to protect their culture. Yet, I am beginning to think better of that. Technology is moving very far and very fast, and I am beginning to think that the changes will be more fundamental than I thought likely at first.

Before I continue, let me briefly mention a list of current cultural issues and disputes among the United States, Canada, and Europe. As we go through these, think about them in terms of balance and technology. With respect to each matter, we might ask: Has Canada reached the proper balance between protecting Canadian commercial interest and the Canadian cultural interest? Second, is the underlying “cultural” restriction that caused this dispute one which is going to be viable, or maintain a reasonable balance as technology develops?

The first is Polygram, which will prove to be an interesting case to monitor. Polygram’s complaint is that the current Canadian film distribution policy limits a European Union company’s ability to distribute films in Canada that did not have at least a fifty-one percent stake in producing, while American producers are exempt from this policy. An interesting aspect, and one on which we will touch later, is that this debate has not stemmed from a debate on cultural protection per se, but from a violation of MFN status. The
E.U. has repeatedly stated that the Polygram case is not to be viewed as a challenge to Canadian cultural restrictions.

The second issue is that of cable restrictions, which have still not been eliminated since our last conference. I am not going to go through the Canadian Radio-Television and Telecommunications Commission (CRTC) process this past year. It did somewhat liberalize Canadian access to U.S. cable service last summer and still continues to preclude access for MTV, HBO, and others. In fact, in January of this year, the CRTC talked about adding a new "cultural" protection by requiring that five percent of a cable service's revenue go to the creation and presentation of Canadian programming.

*Sports Illustrated* and the split-run issue in magazines remains an area of great importance. The *Sports Illustrated* case is interesting. There, Canada argued with some persuasiveness that it was only regulating a service not covered by Canada's GATS obligations and thus a service that the WTO could not reach. GATT obligations, on the other hand, focus on goods; to have GATS disciplines, you have to have something that you can get your hands on. But what does that mean? The panel took a very broad view that all it needed to have authority to address Canadian restrictions was to find something tangible crossing the border in competition with a Canadian product. This view can greatly expand the WTO's ability to reach so-called cultural restrictions.

Ignoring *Sports Illustrated* for the moment, let us briefly think again about Canadian restrictions on split-runs. The primary restriction is Chapter 19 of the Canadian Income Tax Act. The second clause of Chapter 19 states that even if a publication is published, edited, printed, staffed in Canada, and all of its graphic arts are done in Canada, it cannot take a tax deduction for advertising revenues if it is owned by a U.S. citizen. Is that protecting Canadian culture? Is that balanced? Will that survive technological innovation?

The fourth example relates to a recent complaint of the MPAA about Canadian director requirements to have a film certified as Canadian. Consider a film made in Vancouver, having Canadian actors and technicians, that is printed in Canada, and uses a U.S. director. On the other hand, consider a film made in New York, having U.S. actors and technicians, that is printed in the United States, and uses a Canadian director. Which film would appear to promote Canadian culture? Canada's current scheme appears to provide protection to the latter, not to the former.

Finally there is the issue of the Canadian tape levy, which puts a levy on blank tapes, the funds from which are given back to the artists as compen-

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sation for home-taping of their works in Canada. This compensation is provided to non-Canadians only when their home countries do the same for Canadians. As the United States does so only for digital tapes—a small portion of tapes sold—only Canadian performers and not their U.S. counterparts are compensated by the Canadian levy. This apparent national treatment violation basically allows Canadians to buy tapes, often used to tape U.S. films or artists, and pay a levy to the government. Canada, in turn, gives the money from those tapes to Canadian artists.

Some of these practices are legitimate, and some are illegitimate. Today’s question is, what, over the long run, will survive the development of technical knowledge? What is technology capable of overriding in this area? I am not a technological expert, but I have seen enough, talked with enough people, and read enough to realize that unfortunately, the revolution is coming.

For those of us who are slow to learn about the Internet and all of its different capabilities, learn now. On the Internet, you can dial up a movie or a broadcast of a small college’s homecoming football game. You are able to communicate by e-mail. You can subscribe to magazines and order books. While on-line subscription services have yet to catch on fully, in another few years, when high-quality computer printers are a household item, you will wake up in the morning to your issue of *Time* or *Newsweek* in full color (perhaps on glossy paper) on your home printer.

We are undeniably in the midst of a technology revolution that may have an enormous impact on a country’s ability to regulate its cultural industries. Where will the limits lie?

I think that cultural restrictions which seek to regulate distribution rather than content is where regulators, in Canada and elsewhere, are going to run into trouble technologically. Distribution now comes through technology, such as Amazon.com, satellite distribution, digitized music, and Internet access to magazines and movies, just to name a few. Regulation of cable will quickly become irrelevant, because access to the Internet via telephone lines and satellites is becoming ever more popular.

How can Canada seek to regulate this new, burgeoning method of distribution? One could put a bug on every telephone line going into every Canadian’s house and try somehow to filter out things lacking in “cultural purity,” assuming that one can figure out what to filter out. One can deny Canadians access to the Internet, or try to restrict it. I will tell you this, though, there is not a single parent in this room who would accept being denied access to U.S. Internet sites. The French tried that, and they got run

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7 Amazon.com is the largest bookstore in the world, due to its extensive inventory of titles. See http://www.amazon.com (visited June 11, 1998).
over. In fact, my law firm experimented with this notion. We allowed some New York attorney to set our Internet policy for a few months. The firm restricted access to the Internet because it feared attorneys were wasting their time and were messing around on the Internet instead of doing research. They tried to filter out what they viewed to be commercial or entertainment sites. We ultimately had to dump the policy. We could not live with it because our researchers required access to the Internet. So, if you cannot regulate every phone line and every broadcast, how can you restrict access? It seems to me you cannot.

Canada seems to have given up on restricting satellite dishes, especially as they have become much smaller. The only thing that really prevented satellite dishes from entirely taking over the Canadian cable service was a very clever Canadian regulation, one which I used to think would solve the problem for Canada. This very clever regulation says to the Canadian cable services that if you permit your signal to be broadcast over a satellite not authorized by the Canadian government, they will remove you completely from Canadian cable. So, if a company already has substantial access to Canadian cable, like The Nashville Network or Country Music Television does, they would not want to sign a contract that would permit their signal to be used on a “rogue” satellite. This regulation, too, will be taken over by technology. When you reach the point where people will have access to TV through either their telephone lines, which is coming, or through a satellite, cable regulation will be out the window.

That brings me to a point where Mr. Robinson and I do not disagree; perhaps we even agree. Some of these technological advances are going to undermine the ability to restrict distribution. What does Canada do if they want to protect their culture? The first option is to continue to restrict distribution at their own peril, in the way they have been, and watch revolutionary developments in technology pass them and their restrictions by. Maybe they can get lawyers and technicians who are clever enough to figure out all of this and develop new methods to restrict access. I used to think this was possible, but I am no longer sure. I think that, at best, it is a rear-guard action.

The second option is just to rise out from under the restrictions and let the market take over. On the one hand, I think that Canadian culture would thrive far better in such a system than some in Canada might think. Indeed, it was former Canadian Minister of Foreign Affairs Andre Ouellette who said that to “protect” culture, Canada must “project” culture. On the other hand, I

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8 “A country that isolates itself and fails to project its identity in values beyond its borders is doomed to anonymity and loss of influence . . . . Internationalization is essential to success and competitiveness.” Notes for an Address by the Honorable Andre Ouellette,
suspect this would not be a very welcome suggestion in Canada. In fact, even though numbers indicate that Canadians prefer to watch U.S. movies, Canadians continue to hate themselves for doing so. Studies repeatedly show that Canadians want cultural protectionism.

The third option is to get out of the business of trying to regulate distribution, and get into the business of trying to promote Canadian culture and cultural values more directly. I would suggest that many of the current restrictions have nothing to do with protecting Canadian culture. The Country Music Television case, with which I am very familiar because we represented Country Music Television, had nothing to do with protecting Canadian culture. The United States made it very clear that it was willing to live with any Canadian content requirement, any Canadian investment requirement, and any broadcast regulation which required it to put money back into Canada. But that was not sufficient for Canadian regulators. The only difference between Country Music Television and the New Country Network, for which CMT was summarily replaced, was where the dividend check went. That is what mattered to Canadian regulators.

I think that arguably the same is true with Borders bookstores. Borders tried to go out of its way to assure Canada that they would not be the cultural imperialist that Canada feared they would be. Ms. Reisman was brought in to run the show; and several other protections were offered. None were acceptable. It was distribution and the direction of the flow of money that was being regulated.

There are alternatives to promote culture. One example would be to encourage investment in cultural interests. Canada has been very successful in this regard. Canada is the second largest exporter of films and TV shows in the world and makes billions of dollars of revenue per year.

Finally, in analyzing these options, let me raise one legal point. I mentioned national treatment a moment ago. What I am suggesting in terms of options to promote Canadian culture are likely violations of national treatment. Yet, that may be necessary in this area if you are going to have anything left of a cultural policy. Whatever you find acceptable in the way of violating national treatment, however, is never acceptable in violating a trading partner's most favored nation (MFN) status.

This sounds silly because, in fact, I am sure that Canada is not particularly concerned about being overrun by the culture of Guatemala. Canada is concerned primarily about being overrun by the culture of the United

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Minister of Foreign Affairs, on the Tabling in the House of Commons of the Government's Foreign Policy Statement, at 3 (Feb. 7, 1995).

States. Yet, there is no excuse for violations of MFN. If you are going to draft policies targeted at protecting Canadian culture, I would urge that those policies do not violate MFN.

For example, the United States has just announced that it is going to take Canada to the WTO on the question of rerouting telephone lines. You can reroute international telephone lines to and from Canada through any country other than the United States. Canada has said that they are going to change this policy, for it is certainly not a policy that Canadian officials want to defend. Similarly, the NAFTA's cultural restrictions talk only about the application of the culture provision between the United States and Canada. I would suggest that this was a grave mistake. It should have addressed Canada, the United States, and Mexico—not because, again, Canada is concerned about Mexico overrunning its culture, but because discrimination among trading partners is never appropriate.

Canada has begun to fix the problem. The Chilean Free Trade Agreement includes a cultural exemption, not because Canada is concerned about a Chilean cultural invasion, but because of recognition that discrimination among trading partners is not appropriate. The same issue concerns Polygram. I think Canada is going to have trouble with Polygram, whatever the legality of it is, because it raises the issue of protecting Canadian culture against one particular trading partner and not against another. This will ultimately be unacceptable.

I continue to believe that there is a balance for Canada to strike and I do not think it is inconsistent with the protection of Canadian culture. Fortunately or unfortunately, I have come to the conclusion that technology will force the establishment of balance as well as a movement toward increasingly legitimate cultural regulation as restrictions on distribution become increasingly irrelevant. In any case, technology is going to force the balance to be struck in a very different place than where it is now.

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10 See John Zarocostas, E.U. Takes Canada to WTO Over Film Dispute, J. COMMERCE, Jan. 28, 1998, at 3A (reporting that Polygram, a Canadian company that distributes films in Europe, is in breach of global trading rules on services).