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The Global Cultural Commons after Cancun:
Identity, Diversity and Citizenship

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Abstract: The cultural politics of global trade is a new and unexplored terrain because the public domain of culture has long been associated with national sovereignty. States everywhere have invested heavily in national identity. But in an age of globalization, culture and sovereignty have become more complex propositions, subject to global pressures and national constraints. This paper argues three main points. First, new information technologies increasingly destabilize traditional private sector models for disseminating culture. At the same time, international legal rules have become more restrictive with respect to investment and national treatment, two areas at the heart of cultural policy. Second, Doha has significant implications for the future of the cultural commons. Ongoing negotiations around TRIPS, TRIMS, GATS and dispute settlement will impose new restrictions on public authorities who wish to appropriate culture for a variety of public and private ends. Finally, there is a growing backlash against the WTO's trade agenda for broadening and deepening disciplines in these areas. These issues have become highly politicized and fractious, and are bound to vex future rounds as the global south, led by Brazil, India and China flexes its diplomatic muscle.

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THE GLOBAL CULTURAL COMMONS AFTER CANCUN: IDENTITY, DIVERSITY AND CITIZENSHIP

The last two decades have witnessed a broadening and deepening of cultural flows unprecedented in history.¹ Thanks to new information technologies, movies, television programs and music are consumed by a worldwide audience. Magazines, books and newspapers are sold around the globe. Many experts are rethinking the challenges posed by cultural diversity, as research continues to show that in a hyper-democratic age, technology diffuses power downwards and towards the margins.

The cultural politics of global trade is a new and unexplored terrain because the public domain of culture has long been associated with national sovereignty. States everywhere have invested heavily in national identity. But in an age of globalization, culture and sovereignty have become more complex propositions, subject to global pressures and national constraints.² This paper argues three main points. First, new information technologies increasingly destabilize traditional private sector models for disseminating culture. At the same time, international legal rules have become more restrictive with respect to investment and national treatment, two areas at the heart of cultural policy. Second, Doha has significant implications for the future of the cultural commons. Ongoing negotiations around TRIPS, TRIMS, GATS and dispute settlement will impose new restrictions on public authorities who wish to appropriate culture for a variety of public and private ends. Finally, there is a growing backlash against the WTO's trade agenda for broadening and

¹ The authors would like to thank Paul Audley, Sol Picciotto, Sylvia Ostry and Stephen Clarkson for their insightful comments and suggestions on earlier drafts of this paper.

² Joseph E. Stiglitz and Andrew Charlton. "The Development Round of Trade Negotiations in the Aftermath of Cancun: A Report for the Commonwealth Secretariat." New York: Initiative for Policy Dialogue, Columbia University, 2004.

deepening disciplines in these areas. These issues have become highly politicized and fractious, and are bound to vex future rounds as the global south, led by Brazil, India and China flexes its diplomatic muscle.

Culture is a difficult and elusive term to define.³ Nevertheless, we define culture as a set of ideas and practices embedded in the plural and diverse historical experience of a society. Cultural practices are the markers of public memory. The cultural commons is that portion of culture that remains in the public domain, in which artists, as individuals and citizens, exchange ideas and promote creativity. As such, the boundaries of the cultural commons are constantly shifting and evolving. Culture is central to social relations and building cohesive societies—always a hot button issue because it intersects with closely held social values, public perceptions and popular sovereignty.⁴ Culture is so complex because it is a tradable commodity, a tool of identity for groups and individuals and a strategic resource for every society. It is a challenge to examine these three aspects because they are often at odds with each other.

³ Dick Stanley. "The Three Faces of Culture: Why Culture Is a Strategic Good Requiring Policy Attention." In *Accounting for Culture: Thinking through Cultural Citizenship*, edited by Caroline Andrew, Monica Gattinger, M. Sharon Jeannotte and Will Straw. Ottawa: University of Ottawa Press, 2005.

Researchers and social thinkers have used hundreds of definitions of culture. Always, definitions of the term say more about the cultural context of the thinker, than they do about the thing itself, as Stanley points out.

⁴ Daniel Drache. *Borders Matter: Homeland Security and the Search for North America*. Halifax, Nova Scotia: Fernwood Publishing, 2004.

In a period of innovation, technological change drives trade in culture. This is especially true of the communications revolution, where technological change impacts all adjacent sectors of society, and even affects the structure of the market. Experts agree that trade in cultural commodities has contradictory effects on authority, power, values and public opinion.⁵ More than ever, culture has become a tool of identity, used by states and citizens to defend sovereignty and further national goals.⁶ A significant body of evidence shows that inequities in income and wealth create imbalances and counter-movements, and in these circumstances culture is defined as a strategic resource.⁷ Recent events have underlined the importance of culture at a time when technological change and trade liberalization have brought the world's societies into closer proximity.

DID YOU KNOW?

Global consumers spent \$911 billion on media and entertainment in 2003, more than the value of global trade in automotive parts and textiles combined. World trade in automotive parts and textiles was worth \$621 billion, and \$152 billion respectively.

Global spending on media and entertainment grew by 4.3%.

The United States leads in global consumption of media and entertainment, accounting for 57% of all spending.

Source: PricewaterhouseCoopers LLP, World Trade Organization 2004

The WTO is leading the charge to broaden and deepen market access across the globe. Dismantling state-erected barriers in the global south is a top priority – especially in relation to

⁵ David Throsby. *Economics and Culture*. Cambridge: Cambridge University Press, 2001.

⁶ Daniel Drache. "Introduction." In *Staples, Markets and Cultural Change: Selected Essays*, edited by Daniel Drache. Montreal: McGill-Queen's University Press, 1995.

⁷ Dani Rodrick. "Globalization, Social Conflict and Economic Growth." Geneva: United Nations Conference on Trade and Development, 1997.

entertainment and media industries. Despite an unprecedented attempt to reorganize culture as a global commodity, *the most surprising finding of our ongoing research is that local cultures remain surprisingly resilient in the face of monolithic media monopolies*. Since the mid-1980s, local cultures have begun to consume Anglo-American entertainment in ever-larger amounts. However, they also appropriate new technologies for local cultural purposes. This appropriation rewires the circuitry of culture, to use an apposite phrase of Nestor Garcia Canclini, one of the hemisphere's most astute cultural observers.⁸ But there is still a yawning chasm between the demands of multinational corporations, and the desires of local producers. Global players seek rules harmonization and stronger property rights. Local players want to broaden and deepen cultural space and to appropriate new cultural ideas in innovative and imaginative ways. An untamed drive to privatize public culture does not serve either agenda.

The political economy of culture has four main features - its global industries, intergovernmental institutions (WIPO, WTO, UNESCO), norms (diversity, accessibility) and practices (typified by an often porous divide between public and private). We begin with a survey of the global cultural economy, highlighting its dramatic growth and transformation in the recent period. We then move from an examination of industries to the pivotal relationship between technology and the global cultural commons. We look at the growth of digital communication in the global south with a frame that Innis termed, the 'bias of communication.'⁹ Historically, the newspaper created a reading public, located in cafes and salons – a public of elite interaction. Cellular phones and the internet, long the prerogative of the wealthy north, are now creating discursive publics in the global south as well, linked

⁸ Nestor Garcia Canclini. *Consumers and Citizens: Globalization and Multicultural Conflicts*: University of Minnesota Press, 2001.

⁹ Harold Adams Innis. *The Bias of Communication*. Toronto: University of Toronto Press, 1951.

by bonds of instant communication and up-to-the-minute information—a powerful political cocktail in the hands of civil society.¹⁰

These *Innisian* effects - rapid technological change and the phenomenal spread of digital communication across the globe¹¹ – add to the density and intensity of flows of culture. Our model of global cultural flows prioritizes the asymmetrical flow of people, ideas and information. Two features predominate - the sheer commercial intensity of media and entertainment, and the asymmetrical movement of people and capital. Despite the inequity of this exchange, mobile technology empowers individuals by breaking down the temporal and spatial barriers to communication. This occurs unevenly at first, but the effect is often an exponential democratization of communication. The demographics of public identity expand as technology diffuses power downwards and towards the margins. The WTO is at the centre of these global dynamics due to the increasing influence of its rules on behind-the-border areas of policy-making. As a result, the issues around culture are often examined through the notions of citizenship, the strategic state, the generation of social capital and governance.¹² Inevitably, culture is not free. The interface between culture and commerce is intensely conflicted because many governments fail to adequately define the public's role in cultural development, sustenance and regulation.

¹⁰ John Ralston Saul. *The Collapse of Globalism: And the Reinvention of the World*. Toronto: Penguin, 2005.

¹¹ See Innis, *supra*.

¹² Gilles Paquet. "Governance of Culture: Words of Caution." In *Accounting for Culture: Thinking through Cultural Citizenship*, edited by Caroline Andrew, Monica Gattinger, M. Sharon Jeannotte and Will Straw. Ottawa: University of Ottawa Press, 2005.

1. CULTURE AND COMMERCE IN AN ERA OF GLOBALIZATION

Culture crosses borders despite ethno-linguistic barriers and regulatory walls. One need only look at the success of the top-grossing film of all time, *Titanic*, to get some sense of the speed and intensity at which culture travels in an age of global technology. It grossed more than \$1.2 billion dollars at the international box office, more than any other single film before or since.¹³ In the past, culture moved at the speed of steam and wind power. Today, culture moves at the speed of light, along fibre optic cables. Often, experts contend that cultural flows benefit big media. But digital technology is entering the service of local and regional cultures, with unpredictable effects. It is doubtful whether the model of free culture embraced by online communities will win out against rent-seeking corporate actors. However, dissent is growing.

Trade in cultural goods and services have been a key driver behind the intensification of global flows of people, money and ideas. The growth of international markets for movies, music, television, books, magazines, newspapers and tourism has created an effect which sociologists and anthropologists call 'global cultural flows.'¹⁴ Global cultural flows are "intense transnational movements of people, media texts and ideas that are disjunctive to financial flows and have unpredictable (...) effects on (...) cultural diversity."¹⁵ Flows of culture increased with the rise of market triumphalism in the 1990s, as well as in the economic crises of the 1970s. Today, these flows continue to intensify despite the

¹³ Ibid.

¹⁴ Arjun Appadurai. *Modernity at Large: Cultural Dimensions of Globalization*. Minneapolis: University of Minnesota Press, 1996.

¹⁵ Daniel Drache. *The Political Economy of Dissent: Global Publics after Cancun* Robarts Centre for Canadian Studies, York University, January, 2004. Available from www.robarts.yorku.ca.

widening global income gap and unabated levels of global poverty.¹⁶

Although media conglomerates contribute significantly to the volume and intensity of global flows, they have not succeeded in creating a single global culture. The systematic privatization of public culture and the swamping of linguistic minorities in a sea of English, are two of the most worrying trends. Trade economists call these 'negative externalities,' and they are caused by the spread of markets for Anglo-American films, television shows and mass advertising. Minority groups and southern countries are finding it more and more difficult to maintain their cultural freedom while being bombarded by North American culture. Disquiet has found a political outlet. In November 2001, UNESCO's General Conference, composed of 190 member countries, acclaimed the *Universal Declaration on Cultural Diversity*.¹⁷ This declaration reaffirmed the centrality of culture to national identity, human freedom and southern development. A draft instrument is now before the conference and leading experts expect it to be adopted by November 2005.

One reason is that large corporations are perceived by many to be in partnership with the WTO. The reaction has been sharp and predictable. Primary corporate objectives include market access and rules harmonization in the south and expansion of existing markets in the north. The largest trans-nationals such as News Corp. of Australia and the Walt Disney Company of the United States have been industry leaders, owning huge shares in one of the fastest growing segments of global trade. This oligopoly is unprecedented and raises concerns among trade-watchers about the future of public culture. Oligopolies are anti-competitive cartels, where prices are set by internal collusion, not market

¹⁶ Daniel Drache, and Marc Froese. "The Great Global Poverty Debate: Balancing Private Interests and the Public Good at the WTO." Toronto: Robarts Centre for Canadian Studies, York University, 2003.

¹⁷ Read the full declaration at www.unesco.org.

competition. Significantly, the WTO is mute on the issue of international competition policy, despite attempts by the EU to formulate new rules.¹⁸ However, through TRIPS, GATS and dispute settlement, the WTO has had much to say about the export and enforcement of intellectual property rights. Its legal norms and Dispute Settlement Mechanism are singularly designed to promote flows of goods, services and money across national boundaries. The aim of the WTO is to treat all things cultural as any other commodity.

Rising in prominence, enforcement of intellectual property rights is at the centre of the WTO's international free trade regime, alongside the norms of non-discrimination, national treatment and reciprocity. And the WTO itself is at the furthest remove from the cultural commons. Artistic creativity thrives in an open environment, in which ideas are formed and culture exchanged.¹⁹ The Trade Related Intellectual Property Rights (TRIPS) Agreement gives expanded rights to copyright holders, provides strict penalties for infringement and offers no incentive for nourishing public culture. It is controversial in a number of respects. First, it increases copyright protection to fifty years, far longer than many states afforded protection previously.²⁰ Second, it gives media conglomerates a lock on the world's most lucrative markets for culture through strict enforcement measures embedded in the

¹⁸ A.C. Cutler "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy." *Review of International Studies* 27, no. 2 (2001): 133-50.

¹⁹ Lawrence Lessig has been a pioneer in challenging restrictive property rights regimes. For his perspective on the importance of creative freedom, visit <http://creativecommons.org>.

²⁰ Recorded music is considered a 'performance,' and protected for fifty years. Once it enters the public domain, it is free for anyone to download, share or sample. Musical composition is further protected by copyright law. A composition, the written score for a piece of music is protected for the duration of the artist's lifetime, and then for seventy years after death. Some countries protect for even longer. The Supreme Court in the US recently upheld a law extending performance copyright to seventy or more years.

agreement.²¹ Finally, *it turns national governments into watchdogs for the private sector rather than protectors of the public domain*. This is a big step towards the privatization of culture. Corporations previously had to navigate many different sets of national standards. Why is all this happening?

The best answer is because cultural goods and services represent a rapidly growing portion of the global economy. This fact has not received sufficient attention from WTO advocates. Some writers believe that commodification robs culture of its authenticity because private ownership removes culture from the public sphere.²² While the sphere of culture may be privately owned, it is always shared. Readers, movie-goers and television watchers share experiences that shape and reflect the social ideas of millions of people around the world. That these experiences are increasingly derivative of Anglo-American culture is cause for concern in global north and south alike.²³ The quandary facing policy makers and global governance experts is, how can countries protect

²¹ Articles 41 and 61 in Part III of the TRIPS Agreement. Article 41 lays out the general obligations that that signing countries bear for enforcing trademarks and copyrights. Article 61 deals with the criminal procedures states must implement to combat piracy. Article 41 paragraph 1 states, "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." Article 61 states, "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. . . In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence." The full text of TRIPS is available at www.wto.org.

²² Naomi Klein. *No Logo: Taking Aim at the Brand Bullies*. Toronto: Knopf Canada, 2000.

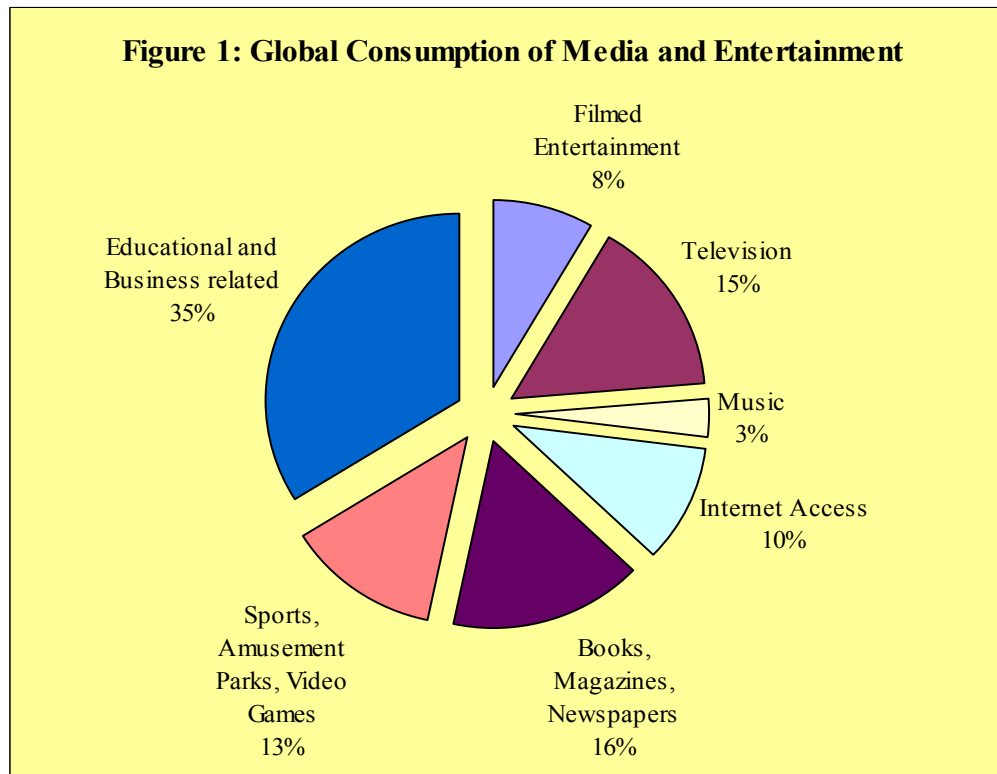
²³ Tim Burt. "Quotas Fail to Save European Producers from an Influx of Us Television Shows." *Financial Times of London*, May 27th 2005.

cultural freedom, promote multicultural identities and simultaneously recognize the property rights of cultural producers? So far, there are no definitive answers, nor any consensus on how to nourish the cultural commons. Global publics are deeply divided between two visions for the future—*a global culture for private economic actors, or a renewed cultural pluralism for global publics.*

1.1 THE GLOBAL CULTURAL ECONOMY

The global cultural economy is a leviathan in its complexity and market reach. To understand the transformative potential of global cultural flows for northern profits and southern development, one needs a sense of their magnitude and intensity. The global market for media and entertainment is massive. \$1.2 trillion was spent in 2003 on various forms of advertising and entertainment around the world (see figure 1). Many in the global south have been struggling to come to terms with the magnitude of global cultural production. More than \$300 billion is spent annually on advertising, a massive number in itself. But the market for consumable media products is even larger. Worldwide consumption of media and entertainment topped \$911 billion in 2003, up 4.3% from consumer spending the year before. The growth of consumer spending on entertainment far outstripped the growth of national economies in the 1990s, many of which expanded at a rate of 2-3% a year.²⁴

²⁴ *Global Media and Entertainment Outlook: 2004-2008*
PricewaterhouseCoopers LLP, 2004 [cited July 14 2004]. Available from
www.pwc.com/outlook



Source: PricewaterhouseCoopers LLP 2004

Much of this growth comes from new information technologies. Internet services already account for 10% of the global market, and this share is bound to grow as broadband access becomes more readily available in Asia and the global south. By the end of the decade, more than a billion people will work and play in the online universe. This is bound to breed more conflict and competition as culture becomes a strategic resource.²⁵ Multinational corporations rely upon copyright as an anchor point for expansion. Media giants are taking advantage of new opportunities afforded by current licensing and publishing

²⁵ George Yudice. *The Expediency of Culture: Uses of Culture in the Global Era*. Durham: Duke University Press, 2003.

arrangements to strengthen the linkages within existing production chains.²⁶

The heyday of the 1990s, when anything was available for free on the Internet is largely over. User fees and subscriptions have replaced public access. Even as the technology stock bubble burst in 1999-2000, the media and entertainment industries were working on business strategies that involved licensing online content and reigning in the technology that undercut copyrights.²⁷ The corporate agenda for copyright is more stringent than that of any national government. In the past, technology outpaced regulation, but no more. The American film and music industries have been especially zealous in guarding their rights. Facing an expected loss of \$5.4 billion next year due to piracy, the film industry is turning to the model of strict copyright enforcement pioneered by the music industry—including partnerships with international law enforcement and specific online theft provisions included in each of the eleven bilateral trade agreements negotiated by the US Trade Representative over the past several years.²⁸

The Anglo-American cultural economy is now typified by a copyright enforcement regime that may or may not meet the needs of the vast majority of cultural producers. And as the cases below show, this model of cultural production is being generalized across North American and European markets, and there is less and less room for small producers, independent distributors and developing countries to maneuver. This is further cause for

²⁶ Gautam Malkani. "Copyright's Haven of Stability." *Financial Times of London*, November 17th 2004.

²⁷ Lawrence Lessig. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: The Penguin Press, 2004.

²⁸ Mickey Kantor. "Film Pirates Are Robbing Us All." *Financial Times of London*, November 18th 2004.

concern because the WTO's legal culture is biased against these actors.

1.2 FILM

Film is the icon of cultural globalization, and one of the dominant cultural flows today. In the US, the creative industries are central to international trade. The export of movies, TV, music, books, and software generate more international revenue than any other single sector—including agriculture, aircraft and automobiles.²⁹ Further, “among such drivers of the economy, only the film industry has a positive balance of trade with every country in the world.”³⁰ US movies are distributed in more than 150 countries, a broader market than even the lucrative television market. While much is made of the opening weekend box-office take of the latest summer blockbuster, only a fraction of film revenues are taken at the ticket counter. Most revenues come from overseas distribution and the lucrative international markets for DVD releases.

The global market for film is worth approximately \$75 billion annually, and accounts for almost 10% of the global entertainment sector. In the English-speaking world, American film is king, but in the rest of the world, it remains a pretender to the throne. The global market for television is almost twice as large, and while it is widely acknowledged that Hollywood makes tremendous profits from overseas markets, rival centers of production are flourishing. India's ‘Bollywood’, film production in China, the animation industry in Japan, and television production in Mexico, Venezuela and Brazil, where the tele-novella enjoys unrivalled popularity, are only a few of these competitors. In terms of sheer number of releases, the Mumbai film industry is the

²⁹ Ibid.

³⁰ Ibid.

largest in the world. More than 1000 films were released in 2002, a banner year. Of late, no fewer than 800 films are produced annually in India.³¹ Few experts have stressed this southern side of the equation. The global south is developing rival centers of cultural production in many regions, and in ways that nobody could have foreseen even a few decades ago.³²

FIGURE 2: CULTURE CONSUMPTION: GLOBAL MARKETS FOR MEDIA AND ENTERTAINMENT IN 2003	
(% increase from 2002)	In Billions of US\$
Filmed Entertainment (9.5%)	\$75.3
TV (6.6%)	\$140.1
Recorded Music (-6.7%)	\$30.5
Internet Access (23.3%)	\$92.4
Books, Magazines and Newspapers (1.7%)	\$147.9

The WTO has been a crucial part of the American film industry's success, defending distribution rights in Canada and striking down Turkey's theatre tax which singled out imported films.³³ Peter

³¹ *The Indian Media and Entertainment Industry* [HTML File]. UK Film Council, 2002 [cited October 15th 2004]. Available from www.ukfilmcouncil.org.uk/filmindustry/india/.

³² Canclini, op. cit., 2001.

³³ *Canada – Measures Affecting Film Distribution Services* (WT/DS 117)
Turkey – Taxation of Foreign Film Revenues (WT/DS 43)

Grant describes how when traditional market models are applied to trade in culture, the phenomenon of the film blockbuster often chokes creativity and ultimately starves the market of diverse cultural products.³⁴ Media companies often bet on the cultural product that seems most likely to sell the quickest, such as blockbuster movies and pop music hits. In the free trade model, producers profit from economies of scale at home, and reap massive gains from culture markets abroad. This is the thinking that currently dominates global trade. Regardless of whether the production is French, Japanese, German or American, the goal is to create a virtuous circle between local production, global distribution and the cosmopolitan consumer—an integrated, global commodity chain for culture. For its part, the WTO is a dealmaker, creating linkages between copyright protection, market consolidation and corporate expansion. This is accomplished through binding dispute settlement, a much more effective mechanism than old-fashioned diplomacy.³⁵

1.3 TELEVISION

Television is perhaps the most ubiquitous of global cultural products.³⁶ More people watch TV than use any other medium (except radio). New communications technologies are dwarfed in comparison. There are more TVs than people in every part of the world except Africa, where there is one television for every two

³⁴ Grant and Wood, *op. cit.*, 2004.

³⁵ J.H.H. Weiler. "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement." Paper presented at The Jean Monnet Seminar and Workshop on the European Union, NAFTA, and the WTO: Advanced Issues in Law and Policy, Harvard Law School, Cambridge Mass., September 2000.

³⁶ PricewaterhouseCoopers LLP, *op. cit.*, 2004.

people by recent estimates.³⁷ The G8, in comparison, has approximately five TVs for every person. While American TV is seen in fewer countries than film, it is more profitable, according to the latest research by PricewaterhouseCoopers. With TV so pervasive, spending on cable television, new digital cable subscriptions, satellite TV and pay-per-view movies tops \$140 billion per year globally. Further, the amount spent on television advertising adds another \$120 billion to an already lucrative market. In terms of audience, television remains unrivalled, far outpacing newspapers and the Internet as the foremost news and entertainment choice around the world. Spending on cable and satellite television will continue to grow at a healthy 7% for the foreseeable future.

Copyrights for television content have been a particular concern for big media, as the technology to create a high-quality copy for broadcast is widely available, as anyone who owns a VCR will attest. The biggest challenge to property rights for television content comes from small television stations that broadcast without paying associated licensing fees. Part III of the TRIPS agreement, which deals with the enforcement of intellectual property rights, has been an issue in Greece, for example, where American television programming is regularly used without the consent of copyright holders.³⁸ This is theft, and is often cited as the main reason to tighten national copyright laws, despite the fact that most American cable companies were launched with the rebroadcast of network programs, essentially pirated from NBC, ABC and CBS.³⁹

³⁷ Daniel Drache, Marco Morra, and Marc D. Froese. "Global Cultural Flows and the Technological Information Grid: An Empirical Examination." Toronto: Robarts Centre for Canadian Studies, York University, 2004.

³⁸ *European Communities/Greece - Motion Pictures, TV, Enforcement* (WT/DS124, 125)

³⁹ Lessig, op. cit., 2004.

In the history of intellectual property rights, there have always been turning points where intellectual property rights could have been interpreted narrowly. One such fork in the road occurred in the first half of the twentieth century, when American courts and legislators determined that the public good of free culture outweighed the negative externalities for private economic actors. The history of copyright law teaches that it is wrong to lock down new technologies and ring-fence small cultural producers because of the threat posed to intellectual property rights. Lawrence Lessig describes how early producers of Film, cable TV and radio used pirated content to great commercial success, actions upheld by the US Supreme Court.⁴⁰ Cultural creativity is a dynamic process that relies upon an ethic of public sharing. "The law should regulate in certain areas of culture—but it should regulate culture only where that regulation does good."⁴¹ Locking up culture in the private sphere of commerce stifles the creative spirit upon which private actors draw in order to create and sell their product.

**PIRACY: LESS SWASHBUCKLING,
MORE SURFING**

Global sales of pirated music reached \$4.6 billion in 2003

1 in 3 CDs purchased around the world is fake – 1.1 billion in 2003

Number of legally available music files on the internet: 1-2 million

Total number of music files available on the internet: 700-800 million

Cost of piracy to the US movie industry in 2003: \$3 billion (not including internet piracy)

Sources: Financial Times, International Federation of Phonographic Industries, Motion Picture Association 2004

⁴⁰ Ibid.

⁴¹ Lessig 2004, p. 305.

The supreme irony of the situation is that in the creation of a universal culture, transnational actors believe that such a culture should not be shared universally, but rather should only be accessed through carefully circumscribed corporate channels. Commercial culture resembles Disney Land. You pay to get in, but once inside, it quickly becomes apparent that there is less diversity, less content, less excitement than the advertising promised. And what diversity does exist, is largely contrived.

1.4 MUSIC

Music is one of the highest profile cultural products in the world. It is a \$30 billion a year industry⁴², but copyright protection is a double-edged sword for musicians and other cultural producers. It protects the creative output of artists, but aggressively enforced long-term copyrights are a primary weapon in the war for transnational corporate profit, as most copyrighted work resides in the vast libraries of Universal, Disney and Time Warner.⁴³

The global market for recorded music is smaller than the markets for film, television, and the printed word. Nevertheless, music is one of the most volatile and problem ridden sectors because new technologies, which aid the flow of music across national boundaries also undercut corporate profits and artists' copyright. Currently, one in three music CDs sold in the world is counterfeit, and more than a billion counterfeit copies of popular music enter the global marketplace each year.⁴⁴ As a result, sales of music have declined for the past several years, causing panic among the giants of the music industry, and sending waves of litigation through the sector. Napster's famous file-sharing network was

⁴² PricewaterhouseCoopers LLP, op. cit., 2004.

⁴³ David Throsby. op. cit. 2001.

⁴⁴ See the web site of the International Federation of the Phonographic Industry at www.ifpi.org for more statistics on music piracy.

shut down, to the consternation of many Generation Y listeners.⁴⁵ But more recent litigation has upheld the legality of file-sharing software in the face of alleged copyright 'misuse' by big media, who often use copyright fees to stifle commercial competition.⁴⁶ Efforts to curb losses aren't expected to staunch the wound dealt by digital piracy until at least 2006.⁴⁷ Nevertheless, music publishing is becoming more competitive, as market leaders try to better develop and market their catalogues of music. Apple Computers is the prime example – the itunes and ipod divisions now account for the bulk of Apple profits – proving to be even more popular than the ubiquitous mackintosh computer. There are profits to be made at the margins by decoupling music publishing from recording in order to focus on development of markets for existing work—from bulk sales to radio stations, to television commercials, movie soundtracks and even toys.⁴⁸

Litigation at the WTO has been a preferred method for harmonizing national copyright standards in the music industry. One of the putative aims of the current round of trade negotiations is to stamp out piracy. In the TRIPS framework, all members of the WTO are obligated to provide national treatment for all sound recordings, and to provide criminal penalties for piracy (see footnote 5 above). Under TRIPS, copyright is protected for 50 years from date of production, a much longer period than many national laws stipulated. For example, under Japanese law in the mid-1990s, sound recordings were only protected for 25 years. Japan was singled out as a test-case for TRIPS in 1996.⁴⁹ In a fit of juridical overkill, the US and the EU pursued complaints against

⁴⁵ To learn more about the copyright battles in the US, see Hilary Rosen. "How I Learned to Love Larry." *Wired Magazine*, November 2004.

⁴⁶ For more information about the limits of copyright go to Digital Law Online at <http://digital-law-online.info/lpdi1.0/treatise15.html>.

⁴⁷ PricewaterhouseCoopers LLP, op. cit., 2004.

⁴⁸ Gautam Malkani. "Copyright's Haven of Stability." *Financial Times of London*, November 17th 2004.

⁴⁹ For the full text of this case, see *Japan – Measures Concerning Sound Recordings* (WT/DS 28/42) at www.wto.org

Japan's copyright protection limits separately, but bound themselves to each other's case. In essence, Japan was sued by the two largest economies in the world—doubly and simultaneously. The EU argued that Japanese copyright protection terms had cost upwards of \$100 million in lost revenues for the recordings produced between 1946 and 1971. Likewise, the US claimed damages in the realm of \$500 million USD. On Dec. 26, 1996, the Japanese government capitulated and changed copyright law to reflect its TRIPS obligations.

This dispute dealt with aspects of intellectual property protection previously in the realm of the Berne Convention and the World Intellectual Property Organization (WIPO).⁵⁰ Under the Berne Convention of 1886, countries pledged to grant the same protection to the works of other contracting states as they did to their own nationals. The TRIPS agreement is sometimes referred to as a 'Berne-plus' agreement. It goes further, in terms of raising minimum standards of protection, as well as laying out detailed enforcement procedures and making disputes over property rights subject to the WTO's dispute settlement rules.⁵¹ Never before has copyright been so staunchly defended.

1.5 BOOKS, MAGAZINES AND NEWSPAPERS

Books were pronounced dead by pundits at the height of the tech bubble, one of the most widely cited examples of 'new economy' hyperbole. Books, magazines and newspapers account for almost \$150 billion of spending annually. As an important set of cultural products, the majority of books are sold in the global north, but southern markets for newspapers are massive. Cheap

⁵⁰ For more information about the history of intellectual property regulation, see www.wipo.org

⁵¹ Ivan Bernier. "Catalogue of International Principles Pertaining to Culture." Quebec City: Faculty of Law, Laval University, 2000.

newspapers are the primary means of conveying ideas. The worldwide market for newspapers, both sales and advertising, was worth \$56 billion in 2003. In every major city across Latin America, Asia and India there are dozens of dailies in local languages, and newspapers are a key venue for advertisers of local goods and services. Print industries are still expanding at a combined average of almost 2% annually, making them attractive for local producers who can find a market niche. Magazines and newspapers are building blocks for national culture, and as such are closely protected by governments. Many governments in both the developed and developing worlds indirectly support publishing through many different kinds of subsidies.⁵²

The most important cultural protection dispute to date involved American magazines sold in Canada.⁵³ While magazines do not have the profile of audio-visual products, the Internet has revolutionized the publishing process. When a US publisher used the Internet to circumvent Canadian law banning the importation of split-run periodicals -- i.e. special issues containing advertisements primarily directed at the Canadian market but replicating the editorial content of a foreign issue -- the Canadian government imposed a massive excise tax and the US sued.⁵⁴

Article III of the GATT states that a country must treat imports in the same way that it treats domestically produced products.⁵⁵ The US argued that Canada's magazine regime unfairly discriminated against imported products (American split-run magazines). Canada responded by declaring that its magazine regime was

⁵² For example, In France, newspapers are tightly regulated and generously subsidized by the government, to the extent that reporters on assignment receive half-price fares on French railways. For more information, see www.discoverfrance.net/France/DF_media.shtml.

⁵³ *Canada - Certain Measures Concerning Periodicals* (DS 31)

⁵⁴ Acheson, Keith, and Christopher Maule. *Much Ado About Culture: North American Trade Disputes*. Edited by Robert M. Stern, *Studies in International Economics*. Ann Arbor: University of Michigan Press, 1999.

⁵⁵ Read the full agreement at www.wto.org.

needed to protect Canadian culture, and therefore legal under Article XX, which states allows for the protection of public morals, public health and works of artistic or historic value. They argued that Canadian magazines cannot be directly compared to American magazines on the basis of their physical form alone (the dispute settlement panel compared two news magazines, *Time* and *Macleans*, in terms of size, number of pages and type of paper used). But physical characteristics are never definitive when comparing cultural products. Canadian magazines carry content important to Canadians; their significance to maintaining Canada's cultural distinctiveness must also be considered.⁵⁶ The important issue for Canada was whether one was Canadian owned and carried Canadian news. The panel disagreed, saying that the relative distinctions for the basis of trade are physical—what kind of magazines were these? Are they similar products? If so, market share should be decided by free competition. The panel ruled against Canadian cultural needs. Since the GATT came into force in 1947, Article XX has never been successfully used to defend culture. What is most troubling is that WTO agreements contain no effective solution to the problem of public goods in commercial trade. Furthermore, countries attempting to protect culture will be punished in litigation.

1.6 THE INTERNET

As the newest form of communication since the introduction of television, the Internet is expected to grow by leaps and bounds. Already a hundred billion dollar a year sector, combined global spending on Internet access and online advertising is expected to continue its red-hot growth spurt (17% annually) into the next

⁵⁶ Daniel Schwanen. "A Room of Our Own: Cultural Policies and Trade Agreements." In *Choices: Managing Global Linkages*. Ottawa: Institute for Research on Public Policy, 2001.

decade.⁵⁷ Internet growth is fastest in the north. The number of people online exploded from 7.3 million in 1993 to 297 million in 2001 in the G8. Similarly, in the G20, internet users rose from 430,000 people in 1993 to 25.28 million in 2001. During the same period, Asian use grew from 14 million to 74.1 million. Even in Africa, where telephone landlines are often a luxury, Internet usage blossomed from approximately 40,000 people to an estimated 4.25 million.⁵⁸ In absolute terms this is a fairly large number, but relative to population, it is still a drop in the bucket.

Broadband is the next generation of digital communication technology set to revolutionize the online experience.⁵⁹ Television, movies, and even phone calls are now available through a broadband connection. In 2003, China had twice as many broadband Internet subscribers as Canada—8.6 million to Canada's 3.9 million. The US leads with almost 22 million broadband subscriptions. However, nowhere in the world has broadband made faster inroads than Korea, where 70% of all households are connected by broadband. In North America and Europe, price is still a key factor in broadening and deepening diffusion. As prices are expected to fall in the next five years, consumer research groups estimate that the current global market of 100 million broadband subscribers will grow to more than 300 million.⁶⁰ Double-digit growth in broadband is projected to continue to the end of the decade, if not longer.⁶¹

The appeal of broadband for vertically integrated corporations is in the ability to bundle different products and

⁵⁷ PricewaterhouseCoopers LLP, op. cit., 2004.

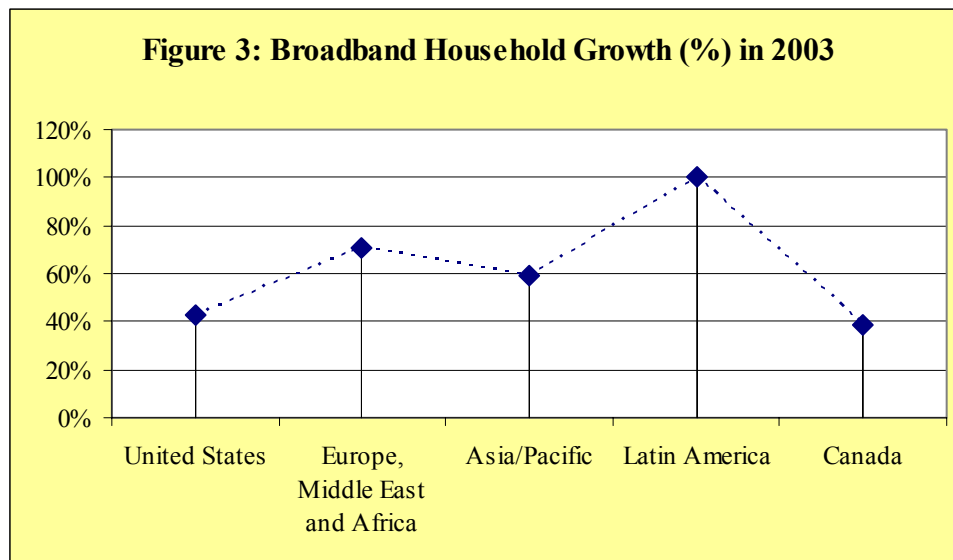
⁵⁸ Drache, Morra and Froese, op. cit., 2004.

⁵⁹ Scott Morrison "Triple Play Shows the Way," *Financial Times of London*, July 20 2004.

⁶⁰ Ibid.

⁶¹ PricewaterhouseCoopers LLP, op. cit., 2004.

services, which are usually sold separately.⁶² Broadband Internet will deliver movies, television and telephone services – all in addition to standard internet services. Competing in broadband technology requires deep pockets, an established market presence and a ready source of cultural content.⁶³ Technology makes this bundling possible, but the WTO's expansion of market access and promise of economies of scale makes this opportunity too important to pass up for media giants hungry for the efficiencies found in market consolidation. In the battle for cultural dominance, the media titans have won the first round, or so it would appear.



Source: PricewaterhouseCoopers LLP 2004

⁶² Scott Morrison. "Triple Play Shows the Way." *Financial Times of London*, July 20 2004.

⁶³ Lessig, op. cit., 2004.

2. DIGITAL TECHNOLOGY AND THE CULTURAL COMMONS

Nowhere is the intersection between trade, culture and development more apparent than at the WTO, where the current round of trade negotiations has ground to a halt over differing visions of the relationship between state, society and economy.⁶⁴ American trade interests view the issue of trade liberalization through a purely economic lens which privileges individualism, efficiency and profit. On the other side of the Atlantic, European interests privilege collective preferences, as a recent Brussels memo stressed.⁶⁵ Below the equator, the global south needs efficiently run international markets that would create new opportunities for local and regional cultural industries. The south also requires the support of international regulatory institutions that recognize that culture is a large part of public identity, and continues to be subject to national oversight.

What has gone wrong? Why does not TRIPS benefit southern cultural producers and smaller northern ones as well? The frank answer is that these independent producers are not part of a vertically integrated corporate commodity chain for distribution. And many do not want to be. Furthermore, TRIPS was not drafted with the interests of small, local producers in mind. The titans have the wealth to control technology and international public law in the service of a single Anglo-American model of cultural distribution. Local cultures, facilitated by new communication technologies, are significant actors on the regional stage, and national governments are still powerful defenders of culture. However, in an era of globalization, small cultural

⁶⁴ Jeremy Rifkin. "Worlds Apart on the Vision Thing." *The Globe and Mail*, August 17th 2004, A15.

⁶⁵ "The Emergence of Collective Preferences in International Trade (Internal Memorandum)." Brussels: European Union, 2003.

producers are often drowned out of policy debates by a chorus of larger corporate players.⁶⁶

Currently, market consolidation provides many profitable efficiencies for global conglomerates. By controlling a product from conception through to residual licensing, the biggest media and entertainment companies optimize marginal returns, a necessity for executives whose seven figure bonuses depend upon the bottom line. A summer blockbuster movie produced by Warner Bros. Studio is advertised on America Online and distributed by a Time Warner affiliate. Simultaneously, its soundtrack is released on Warner Music. Later, it may be licensed for cable television play on HBO, and eventually make its way to a Warner controlled network or television station. Product rolls down the pipe; licensing fees flow up.⁶⁷

Figure 4: The Corporate Agenda for Trade in Culture



With this business strategy, the corporate agenda for global free trade in culture consists of three goals (see Figure 4 above). The

⁶⁶ "World Culture Report 2000: Cultural Diversity, Conflict and Pluralism." Paris: United Nations Educational, Scientific and Cultural Organization (UNESCO), 2000.

⁶⁷ Grant and Wood, *op. cit.*, 2004.

first is to build bigger national markets for cultural products. Growing the market requires convincing consumers to spend more. American consumers spend the most, accounting for at least 35 cents of every dollar spent on media and entertainment worldwide, and are willing to spend larger portions of their wages for entertainment.⁶⁸ Capitalizing on this demand is of first-order importance. Concentration of ownership in the Anglo-American market is a natural outgrowth of this drive to capture the lucrative home audience. Media conglomerates hungrily eye the global south as the next logical frontier. The second goal is to expand market access everywhere. Using the WTO to remove public policy roadblocks to the free flow of cultural goods and services across national borders is key.⁶⁹ This has been difficult because national regulatory authorities for broadcasting often (but not always) resist a market driven compromise on community standards. The FCC in the US and the CRTC in Canada are two examples. Similar bodies are significant in Europe, China and India. The last agenda item is to consolidate international markets with a focus on the global south. Expansion in the south is less predictable, and profits are less assured than many companies assumed when they began forays into Asia and post-communist Eastern Europe in the 1990s.⁷⁰

2.1 TECHNOLOGY, LOCAL CULTURE AND TRADE

Many countries, such as the United States, Canada, Germany, Japan and India effectively use global markets to produce and promote culture. However, the vast majority of the world does not have the resources to sustain the economies of scale required

⁶⁸ PricewaterhouseCoopers LLP, op. cit., 2004.

⁶⁹ Daniel Drache. *Borders Matter: Homeland Security and the Search for North America*. Halifax, Nova Scotia: Fernwood Publishing, 2004.

⁷⁰ York, Geoffrey. "Boom and Gloom: The Struggle for a Country's Soul." *Globe and Mail*, October 23 2004.

to go nine rounds with Time Warner. Nevertheless, tourism, entertainment production and distribution services, art and media are vital to the gross national product of all countries. Cultural trade in these industries is a significant portion of GNP in Western European, North American, and highly developed Asian economies. For developing countries heavily reliant on international trade, culture will be of growing importance for national development.⁷¹ Tellingly, the OECD's Multilateral Agreement on Investment (MAI) was defeated in part by European, and to a lesser extent Canadian, concerns about the effect it would have on a nation's ability to legislate to protect cultural products.

Developing skills for the information economy requires raising literacy rates with a greater investment in education—an area of primary importance for developing nations. As literacy levels rise, culture becomes more than entertainment; it becomes part of a strategy for social cohesion and inclusion. Over the past twenty years, fertility rates, the number of children born per woman, have fallen in almost every country across the globe.⁷² As fertility rates fall and societies redefine gender roles, corresponding values, rules, institutions, and family practices are transformed in new ways. Identity becomes a strategic resource to facilitate the active participation of both genders in the public life of southern societies. Rising literacy rates are a close ally in this process. Across the globe, literacy rates have soared in the past twenty years. Even in such places as Afghanistan, torn by poverty, civil war and violent religious oppression, literacy rates have more than doubled (from 18% to 47%).⁷³ The figure below shows how rising literacy and falling fertility rates creates a scissors effect, in which national culture plays an increasingly central role for the creation of public identity. Few experts have confronted the transformative potential of the rise in literacy worldwide. According to

⁷¹ UNESCO World Culture Report, op. cit., 2000.

⁷² Emmanuel Todd. *After the Empire: The Breakdown of the American Order*. New York: Columbia University Press, 2003

⁷³ Ibid.

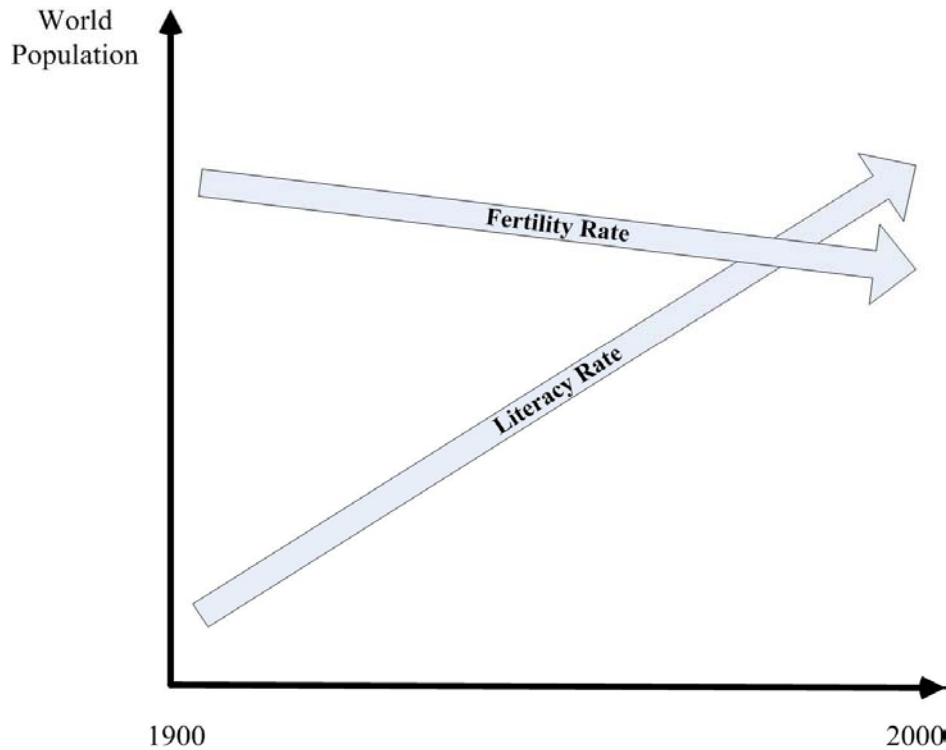
Emmanuel Todd, this may be the most significant trend of our times, transforming the poorest states from from 'least-developed,' or even failed states to developing nations, and at the same time raising social, political and economic expectations in the global south. All too frequently, a narrow economic focus on globalization misses the transformative effects of technology, liberalization and new forms of public administration.⁷⁴

Innis' concept of the 'bias of communication' better captures the dynamic structure of cultural creativity in a world of rising inequality and asymmetrical cultural flows.⁷⁵ His principal insight is that technology plays a large role in the organization and control of information, and carries a vast potential to accumulate power for those with the competence to use it. In a hyper-democratic age, technology diffuses power downwards and towards the margins. Internal markets respond to this set of pressures differently than international markets because they empower large segments of the consumer public. The text-messaging phenomenon sweeping Asia, Europe, North America and Africa is a striking example of this *Innisian* effect. African farmers and fishermen – traditionally excluded from informed participation in the market – are using it to achieve higher prices for the produce they sell. It is an ideal instrument for organizing spontaneous public demonstrations in Asia's mega-cities. The anti-Japan demonstrations of 2005 were facilitated by text-messaging, which was used to mobilize thousands of urban Chinese nationalists.⁷⁶

⁷⁴ David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton. *Global Transformations: Politics, Economics and Culture*. Stanford, CA: Stanford University Press, 1999.

⁷⁵ H. A. Innis. "The Bias of Communication." In *Staples, Markets and Cultural Change: Selected Essays*, edited by Daniel Drache. Montreal: McGill-Queen's University Press, 1995.

⁷⁶ Jim Yardley. "A Hundred Cellphones Bloom, and Chinese Take to the Streets." *New York Times*, April 25th 2005.

Figure 5: The Demographics of Public Identity

In the first quarter of 2002, 24 billion messages were sent globally.⁷⁷ Mobile technology empowers individuals by breaking down the temporal and spatial barriers to communication. This occurs unevenly at first, but the effect is often an exponential democratization of communication. Today, digital technology is closer to those who have not had access in the past, including the poor, children and the disabled. Short Message Service (SMS)

⁷⁷*ITU Strategy and Policy Unit News Update: Policy and Strategy Trends* [HTML file]. International Telecommunications Union, 2002 [cited October 15 2004]. Available from www.itu.int/osg/spu/spunews/2002/jul-sep/jul-septrends.html

technology has been revolutionary for the hard of hearing who now use cellular phones almost as freely as anyone else.⁷⁸

2.2 THE BIAS OF COMMUNICATION? INNISIAN EFFECTS

In North America, it used to be true that land-lines were for everyone, and cell-phones were only for the well-off. Now, mobile technology opens lines of communication in the global south where land-lines are often for the wealthy, and everyone else goes without. In a previous report we found that the worldwide growth of cellular networks has exceeded expectations in the global south.⁷⁹ The democratization of cellular technology is a worldwide trend, but the biggest relative gains have been in Africa, where the number of phones increased by more than two hundred times over the past decade. From 1993 to 2001, the number of cell-phones per 100 inhabitants increased from 0.18 or one cell phone for every five hundred people, to 48, one phone for every two people. In Asia and the G20, the number of phones increased from less than one for every ten people, to an average of 1.5 phones for every person living in Latin America, Eastern Europe, India, China and the rest of Asia. In the G8, subscription is so cheap that in many families, each member has their own phone.

India provides a snapshot of the democratizing impact of technology in the global south.⁸⁰ As of October 2004, the number of mobile subscribers in India surpassed the number of fixed-line subscribers for the first time. With a growth trajectory second only to China, India's 'teledensity' is expected to expand further. Currently, 45 million Indians subscribe to a mobile service, and that number is expected to rise to 100 million by mid-2006.

⁷⁸ Ibid.

⁷⁹ Drache, Morra and Froese, op. cit., 2004.

⁸⁰ Edward Luce. "India Rings up Huge Rise in Mobile Phone Use." *Financial Times*, November 10th 2004.

Industry watchers have noted that “this is not just a revolution in terms of growth in the market, it is also a dramatic shift of power to the consumer. . .”⁸¹ The cultural effects of mobile technology are similarly striking. The growth of consumer markets for mobile technology stand to have as large an impact on electoral outcomes as the introduction of newspapers did more than 300 years ago. The newspaper created a reading public, located in cafes and salons. The cellular phones and the Internet are creating discursive publics linked by bonds of instant communication and up-to-the-minute information—a powerful political cocktail in the hands of civil society.

While commentators often suggest that cell phones are a key factor in the breakdown of face-to-face contact in post-industrial society, ‘texting’ also opens new avenues for spontaneous public communication.⁸² Much attention has focused on the role of information and communication technologies (ICTs) in fostering good governance practices on a global level. The instantaneous transmission of photos from Rwanda, the former Yugoslavia and Iraq alerted the global public to human rights abuse and galvanized international condemnation. Email and SMS technology were used to organize counter-publics and orchestrate mass demonstrations of dissent such as the ‘Battle in Seattle’ in 1999⁸³ and the Madrid bombings in 2004. Civil society uses ICTs to strengthen a bottom-up approach to mobilization—so necessary for the democratization of the information society.⁸⁴ Since the mid-nineties, digital technology has been a lynchpin of popular protest and mass dissent. Now, at the dawn of the 21st century, it

⁸¹ Ibid.

⁸² Lara Srivastava. "Social and Human Considerations for a More Mobile World." In *ITU/MIC Workshop on Shaping the Future Mobile Information Society*. Seoul: International Telecommunications Union, 2004. Available from www.itu.int

⁸³ Clyde Summers, “*The Battle In Seattle: Free Trade, Labor Rights, And Societal Values*”, (2001) 22 *University of Pennsylvania Journal of International Economic Law* 61-90.

⁸⁴ ITU 2002

has entered the mainstream of local and regional cultures beside the other revolutionary media of mass communication – radio and television.⁸⁵

2.3 LOCAL ROOTS, GLOBAL IMPACTS

In a postmodern age every viewer imagines themselves to be a cosmopolitan channel surfer. American film and music is seen and heard everywhere, even in regions where English is hardly spoken. Research shows that across the globe, people remain rooted in local and regional cultural milieus. Global cultural flows alert us to the fact that culture is multi-layered and multi-centered.⁸⁶ Competing centers of cultural production facilitate a transfer of knowledge and ideas. Often there is a lag in these processes of globalization, in the ways that communities adapt and appropriate cultural ideas, images and discourses. In Appadurai's conception, these processes lead to wider geographies of knowledge with intensely local forms.⁸⁷

Paradoxically, while media titans have become more powerful and autonomous, local cultures in India, Latin America, Africa and Asia are gaining the ability to promote their cultures on a global level—many for the first time. Contrary to expectations, global cultural flows have not produced a monoculture. Deterministic explanations that ignore or minimize diversity at the local level

⁸⁵ Cell phone manufacturers have begun to cater to southern consumers, producing handsets for the Muslim world which point in the direction of Mecca and ring the user at prayer time. Mobile providers in India offer services for the Hindu on the go. For a nominal charge, the user can send a prayer over the wireless network, to the appropriate temple. Culture plays an important role in the evolution of technology in different regions. See Srivastava 2004.

⁸⁶ Arjun Appadurai. "Grassroots Globalization and the Research Imagination." In *Globalization*, edited by Arjun Appadurai. Durham & London: Duke University Press, 2001.

⁸⁷ Ibid.

have lost sight of the essential—culture is too big for any one set of actors to control, despite a thickening of cross-national cultural exchange. The story of the Indian film industry is the best-known example.

It is the largest in the world, in terms of numbers of films made. Indian production dwarfs Hollywood with more than 900 films per year.⁸⁸ In contrast, approximately 200 films per year come out of the US. In dollar terms, American film is more profitable, with \$7 billion in domestic theatre ticket sales every year, and another \$6.4 billion in international sales. Bollywood is a \$750 million-a-year industry, with just over \$100 million of that revenue coming from foreign sales.⁸⁹ Indian films cater to a vast subcontinent, linking many different communities.⁹⁰ The centre of Hindi language film production is Mumbai, and it only accounts for 25% of production. The rest of the movies are produced in regional production centers, in some 25 different languages. For the enormous diasporic communities in Canada, the United States and the United Kingdom, these films are as much a tool of identity as they are on the South Asian subcontinent.

The same approach to cultural production is seen in other regional production centers, such as in Sao Paulo, Brazil, home of a massive tele-novella production industry.⁹¹ Local tastes predominate and local producers continue to thrive in culturally unique, regional markets. Audiences from India, Latin America, Europe and North

⁸⁸ Manjunath Pendakur. *Indian Popular Cinema: Industry, Ideology and Consciousness*. Edited by John A. Lent, *Hampton Press Communication Series*. Cresskill, New Jersey: Hampton Press, 2003.

⁸⁹ Leela Jacinto. *Indian Film Industry Gives Hollywood a Run for Its Melodrama* [HTML file]. ABC News Internet Ventures, September 30, 2004 [cited November 24 2004]. Available from www.abc.go.com/international/print?id=81141

⁹⁰ UK Film Council, op. cit., 2002.

⁹¹ Jose Marques de Melo. "Development of the Audiovisual Industry in Brazil from Importer to Exporter of Television Programming." *Canadian Journal of Communication* 20, no. 3 (1995).

America demand local cultural production, which reflect regional norms and values. As a result, divergence rather than convergence is the predominant cultural trend. Action and romance are interpreted in culturally specific terms.⁹²

American cultural industries and the State Department have found themselves on the outside looking in on a vibrant cultural scene, and have aggressively moved to use tighter trade rules to pry open markets and expand the American cultural model – the dissemination of ever larger ‘blockbuster’ films and music recordings. But American industries such as retailing giant Wal-Mart are not waiting for the successful conclusion of the Doha Round before beginning their quest for supremacy in the markets of the developing world. The Indian government has already largely capitulated to pressure from the Bush administration.⁹³ Nor do entertainment providers wish to face other restrictions, as is happening now with UNESCO’s *Universal Declaration on Cultural Diversity*, the first step towards the creation of an independent instrument for defending cultural diversity. In particular, Articles three, eight, nine and eleven of the UNESCO Declaration provide a very different understanding of trade and culture from that promoted by the WTO, advocating cultural diversity as a factor in development and asserting the unique nature of cultural goods and services and the central role of the state in defining and implementing cultural policy.

⁹² The entertainment industry in India outperforms the rest of the economy by a substantial margin. In 2001, the sector grew by 30%. Government has hastened to capitalize on this growth. In 1997, it granted film production ‘industry’ status, and the government has begun to promote foreign investment by removing trade barriers and introducing legislation to curb film piracy.

⁹³ Jo Johnson. "Wal-Mart's India Hopes Boosted." *Financial Times of London*, May 30 2005.

THE DOHA DECLARATION AND THE UNIVERSAL DECLARATION ON CULTURAL DIVERSITY: COMPARING EXCERPTS

Doha WTO Ministerial 2001: *Ministerial Declaration* – November 2001

Paragraph 1: The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

Paragraph 17: We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration.

Paragraph 20: Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade. . . we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

The Universal Declaration on Cultural Diversity – November 2001

Article 3: Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.

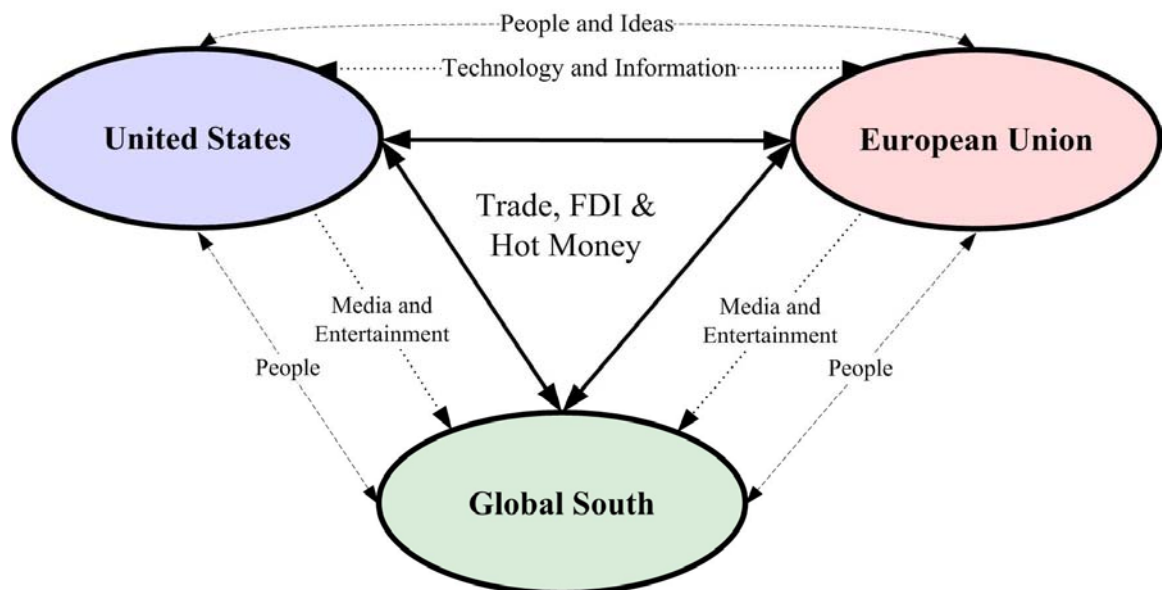
Article 8: . . . particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists and to the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.

Article 9: It is for each State, with due regard to its international obligations, to define its cultural policy and to implement it through the means it considers fit, whether by operational support or appropriate regulations.

Article 11: Market forces alone cannot guarantee the preservation and promotion of cultural diversity, which is the key to sustainable human development. From this perspective, the pre-eminence of public policy, in partnership with the private sector and civil society, must be reaffirmed.

In a world dominated by global cultural flows, states often equate protection of identity with their continued political viability. Culture flows often produce disjunctive outcomes for producers who are not part of the Anglo-American circuit for English-language culture. If we were to map global cultural flows, two features predominate—the sheer commercial intensity of media and entertainment, and the asymmetrical movement of people and capital (see Figure 6 below).

Figure 6
Global Cultural Flows: Asymmetrical
Exchange of People, Ideas and Information



Source: Roberts Centre for Canadian Studies 2004

In this figure, cultural pluralism is marked by a dualistic tension between the commercial and private, and the popular and public. As a result, regulating the political economy of culture presents

new opportunities and risks for international policy makers. The corporate goals for regulation are unambiguous. The interests of culture are best served by privatizing local production, and bringing it into the commodity chain for distribution. These are the priorities of the WTO as well. Much of the WTO's jurisprudence underscores its commitment to a privately owned cultural economy (see appendix). This of course does not mean that there would be no public culture as we know it—but it does mean that creativity, as the principle engine of culture, would be locked into narrow channels for property rights enforcement. The thinning of the social and a thicker, more robust intellectual property regime are the first steps down this road.

3. CONSERVATISM, FREE TRADE, PLURALISM

The question that requires more thought is, how should countries promote cultural freedom while defending cultural pluralism?⁹⁴ In particular, new technology carries a vast potential to accumulate power for those with the competence to use it. In an age of intense information flows, information technology is empowering for business and civil society alike. Under WTO governance, the privatization of public culture has accelerated, but issues such as corporate concentration of ownership in the cultural industries, safeguarding language rights, broadening access to the internet, and the imperative to defend local cultures from predatory trade practices require governments and civil society continue to be innovative locally and internationally. The danger in the current trade round is one of too much tunnel vision and too little broad angled understanding of culture as a strategic resource.

⁹⁴ *Human Development Report 2004: Cultural Liberty in Today's Diverse World* United Nations Development Programme, 2004 [cited September 7 2004]. Available from www.undp.org.

There are four key areas of WTO negotiation which are increasingly contentious with respect to culture. These threaten to derail future rounds, anger civil society and jeopardize the aims and objectives of UNESCO's *Universal Declaration on Cultural Diversity*.

- Stringent application and enforcement of expanded intellectual property rights – Broader and deeper intellectual property rights, and their tough enforcement, are the principal objectives of American entertainment industries. In the cases of music, film, television and print media, multinational corporations demand that developing states beef up lax enforcement measures especially in the 'axis of patent evil,' Brazil, India and China.⁹⁵
- Enhancing investment rights – European goals are to develop an ironclad regime in one of the fastest growing areas of the global economy. While investment negotiations are now on hold and will not be negotiated in the Doha round, GATS and TRIMS aim to resurrect many of the provisions of the OECD's failed Multilateral Agreement on Investment, with the potential of forcing a re-evaluation of existing policy in a number of cultural areas, including public broadcasting and prohibitions on foreign ownership of cultural industries.⁹⁶
- The problem of exemptions – Exemption clauses for sensitive areas used to be the norm under the GATT, and

⁹⁵ James K. Glassman. *Get Tough with 'Axis of Patent Evil'* [HTML file]. American Enterprise Institute, April 14th, 2005 [cited June 7th 2005]. Available from http://www.aei.org/publications/pubID.22300,filter.all/pub_detail.asp

⁹⁶ Garry Neil. *WTO's New Round of Trade Negotiations: Doha Development Agenda Threatens Cultural Diversity* International Network for Cultural Diversity, November 20th, 2001 [cited June 6th 2005]. Available from www.incd.net/resources/papers.html

many asymmetrical relationships were possible.⁹⁷ The new WTO legal culture is against exemptions, with the Autopact and bananas disputes as cases in point. Furthermore, the WTO has been reluctant to set and maintain high standards, as the beef hormones case against the EU has underscored. Unlike the World Health Organization that has strengthened its regulatory capacity to prevent disease outbreaks, the WTO has shown no inclination to expand its regulatory power to protect.⁹⁸

- Transparency and accountability – Nothing in this round addresses the concerns of developing countries and civil society about competition policy and the rampant powers of multinational corporations. An EU-style competition policy directorate would have the authority to protect consumer rights against the American cultural industry oligarchs.⁹⁹

At a time when new citizenship rights and social diversity are a dominant discourse, the WTO is a laggard. Nevertheless, new ideas about the importance of culture to human freedom and social empowerment have created a dialogue between policy makers and global publics on the future of cultural diversity in an age of free trade.¹⁰⁰ In 2004 the United Nations Development

⁹⁷ Michael J. Trebilcock and Robert Howse. *The Regulation of International Trade*. 2nd ed. London: Routledge, 1999.

⁹⁸ Frances Williams. "WHO Gains New Powers to Tackle Disease." *Financial Times of London*, May 24th 2005.

⁹⁹ The Canadian magazine *Adbusters* has posted an online Media Carta for individuals to sign, demanding that the right to communicate, including the right for citizens and civil society to buy radio and television airtime under the same rules and conditions as advertising agencies, be enshrined in the Universal Declaration on Human Rights. Access the petition at www.mediacarta.org

¹⁰⁰ The debate about the future of cultural citizenship in the Canadian context is clearest in the work of Charles Taylor, who advocates a 'politics of recognition' in which society has the obligation to recognize the cultural identity of social groups, and Will Kymlica, who suggests a 'difference-blind' public policy, an approach closer to liberal individualism. See Charles Taylor. "The Politics of

Program released its Human Development Report entitled, *Cultural Liberty in Today's Diverse World*.¹⁰¹ It raises important questions about the future of diversity in a world defined by asymmetrical cultural flows.¹⁰² We see at least one danger and one positive development in the current arrangement of the global cultural economy. There is a large and obvious danger in the privatization of public culture, which is accelerated under the WTO regime. The WTO has powerful instruments to promote corporate objectives, but the process has been uneven and partial because in unexpected ways, new technology and knowledge transfers are empowering communities around the globe. This Innisian effect is likely to deepen and intensify. A decade ago, people were not very connected. Today, the anti-globalization movement is connected and media savvy.

Regional trade blocs have very different understandings of the central importance of the global cultural commons as a strategic resource. The EU and the US face one another as adversaries across the bargaining table in Geneva. The American media conglomerates are aggressively promoting the US State Department's objectives to broaden copyright law and deepen trade liberalization. In contrast, policy makers in the EU understand that the culture/trade interface cannot be one-dimensional and trade must accommodate diversity, not the other way around.¹⁰³ The sharp differences in approaches can be explained by the fact that the EU is linguistically and socially diverse and its internal stability depends upon a pluralistic approach to the global commons. The US is equally diverse, but

Recognition." In *Multiculturalism: Examining the Politics of Recognition*, edited by Amy Gutmann. Princeton, NJ: Princeton University Press, 1994; and Will Kymlicka. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. New York: Clarendon Press, 1995.

¹⁰¹ For the full text of the report, see <http://hdr.undp.org/reports/global/2004/>

¹⁰² UNDP, op. cit., 2004.

¹⁰³ "The Emergence of Collective Preferences in International Trade (Internal Memorandum)." Brussels: European Union, 2003.

the conservative revolution in America has painted multiculturalism as a threat to the American way of life.¹⁰⁴

As a result, the EU is more open to form alliances with multicultural countries such as Canada and others in the global south against the American global entertainment cultural industries. This new geopolitical positioning takes place at a time when there is little appetite to return to an older form of cultural protectionism. But the first big challenge will be ratification of UNESCO's *Universal Declaration on Cultural Diversity*. Currently there is little hope the US will add its signature to the growing list of supporters. Nevertheless, support for this declaration is a barometer of the global drive for pluralism. While largely declaratory, it heralds a new agenda for governance beyond the market-favoring goals of the Washington Consensus.

The core members of the global south regard culture as a strategic resource and significant reservoir of soft power. So far, much of the cultural agenda has been overshadowed by imperatives to broaden markets and expand intellectual property rights. Promoting cultural pluralism at home and abroad will not happen until governments are convinced that culture is a strategic resource to manage, not unlike forests, mineral deposits, high tech industries and human capital. A course correction is needed. UNESCO is becoming a counterweight to the WTO. Although there is unlikely to be much substantive agreement during the Doha round, small steps towards liberalization in certain sectors can have a disproportionately larger impact than any comprehensive agreement. Southern states and global counter-publics have begun to ask the million dollar question – who benefits from this divide and conquer strategy?

Three questions are directly relevant for countries thinking ahead to the next round of trade negotiations.

¹⁰⁴ Samuel P. Huntington. "The Hispanic Challenge." *Foreign Policy*, no. 141 (2004): 30-46.

1. If the existing rules around trade and culture are not adequate, how can they be improved?
2. Will societies see better outcomes through increasing the oversight of the WTO, or through empowering UNESCO's new international instrument on cultural diversity?
3. In an altered regime, how do cultural diversity and new citizenship practices become capstones of an international system for trade in culture?

In the last decade, the global cultural commons has come into its own, rooted in a strong commitment to public culture and artistic creativity at the national level. The intense internationalization of cultural flows has made them competitors and rivals to dominant financial flows. Trade may lead culture, but in some periods the reverse may be true – the emergence of informed counter-publics has changed the international landscape. New citizenship practices and identity politics have captured the imagination of anti-globalization protesters as well as national policy makers. Cultural diversity has become the high standard of our time. On the right, cultural politics are always dangerous, often xenophobic and anti-immigrant. On the left, identity politics are just as potent, challenging the existing authority structure, and championing redistributive social policy and building inclusive societies. The lack of forward momentum at the WTO is a powerful signal that bureaucrats and policy makers have yet to assimilate. They ought to, because identity, diversity and citizenship may trump trade liberalization in the near future.

APPENDIX: WTO JURISPRUDENCE ON CULTURAL MATTERS¹⁰⁵

WTO dispute settlement has had a significant impact on the cultural commons.

A Chronology of Dispute Settlement

Note: Chronology ordered by date of request for consultations because many cases involving TRIPS do not make it all the way to a dispute panel.

1996

Japan – Measures Concerning Sound Recordings (DS 28/42)
Brought by the United States (1996) and European Communities (1996)

Turkey - Taxation of Foreign Film Revenues (DS 43) Brought by the United States

Japan - Measures Affecting Distribution Services (DS 45) Brought by the United States

1997

Canada - Certain Measures Concerning Periodicals (DS 31)
Brought by the United States

Ireland - Measures Affecting the Grant of Copyright and Neighbouring Rights (DS 82)

¹⁰⁵ Full documentation of all cases can be found at www.wto.org. Please see www.robarts.yorku.ca for more analysis of WTO jurisprudence.

Brought by the United States

1998

European Communities - Measures Affecting the Grant of Copyright and Neighbouring Rights (DS 115) Brought by United States

Canada - Measures Affecting Film Distribution Services (DS 117) Brought by the European Communities

European Communities/Greece - Motion Pictures, TV, Enforcement (DS124, 125) Brought by the United States

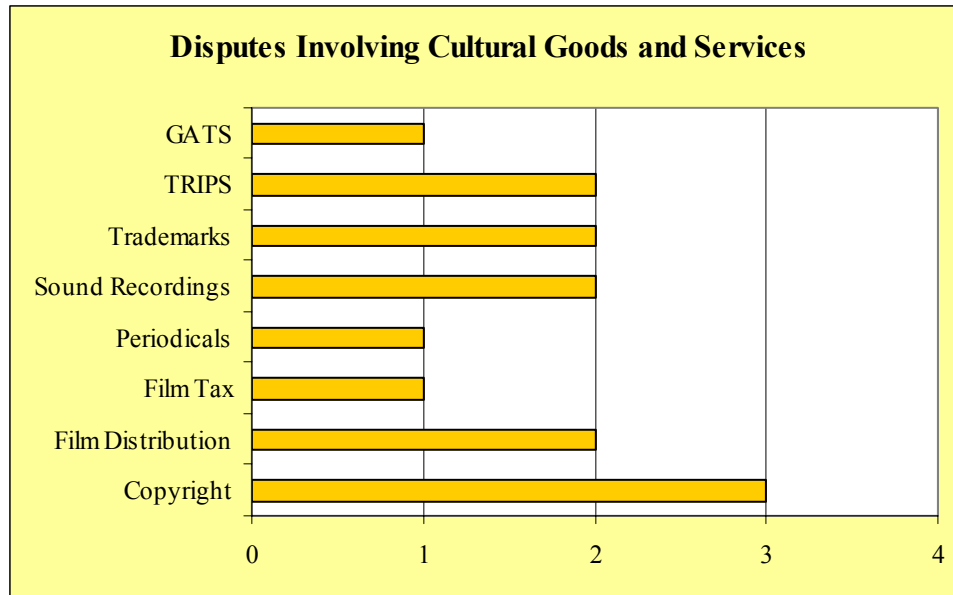
1999

United States - Section 110 (5) of the US Copyright Act (DS 160) Brought by the European Communities (1999)

European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (DS 174/290) Brought by the United States (1999) and Australia (2003)

2003

United States - Cross-Border Supply (GATS) (DS 285) Brought by Antigua and Barbuda



Source: WTO online databases

The most important case to date has been the Canada/US magazine dispute. But more cases as important as this one are likely because of aggressive action on the part of US producers to enforce TRIPS and GATS.

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