ACTRA

WTO E-commerce Consultation
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Canada's Future World Trade Organization WTO Negotiations on E-Commerce
Global Affairs Public Consultation Process

Introduction and Executive Summary

ACTRA welcomes this opportunity to contribute to the public consultation process that will inform Canada's position in the upcoming World Trade Organization negotiations on E-Commerce. ACTRA believes it essential that any such agreement must maintain **Canada's absolute and unrestricted right to implement policies and programs that promote the creation, production, distribution and discoverability of Canadian cultural expressions, including audiovisual programming content**.

ACTRA (Alliance of Canadian Cinema, Television and Radio Artists) brings to this process the perspective of over 25,000 professional performers working in English-language recorded media in Canada. For 75 years, ACTRA has represented performers living and working in every corner of the country who are pivotal to bringing Canadian stories to life in film, television, radio, sound recording and digital media.

From its earliest days, ACTRA has actively contributed to public policy development processes to ensure Canadians are able to see our stories, our lives and our perspectives reflected in arts and cultural expressions, including those shown on our screens. For ACTRA members, telling Canadian stories is not only our livelihood, it's our passion. Canada has an open market for cultural expressions from other countries and our policies are not exclusionary. Rather, they are designed to ensure there is an adequate supply of high-quality Canadian alternatives in the mix. ACTRA supports this approach.

Over the decades, Canada has developed one of the most comprehensive cultural policies in the world, and our successes in television, in music and in literature are a direct consequence of these policies. While providing funding to artists and producers of cultural content is an essential part of the policy toolkit, structural measures, such as content rules and ownership restrictions, are even more powerful because they are not subject to the current state of public finances nor the political whims of the day. Digital technologies have become a game changer for cultural expressions. The Internet is becoming the principal conduit through which creative works of all kinds are distributed; movies, television and radio programs, music, books, magazines, games and other creative works are already widely available. Aside from some forms of visual arts and crafts, all other creative works can be digitized easily and quickly. While many hoped the Internet would unleash a new era where a rich diversity of cultural expressions from every corner of the globe would be available, the reality is that giant Internet firms are curating our access, and their sophisticated algorithms are increasingly leading us to the same sources from the world's dominant cultures. **In 2019, the Internet is bringing cultural homogenization, rather than cultural diversity. ACTRA is urging our government to implement a range of measures to ensure Canadian cultural expressions are available and discoverable, regardless of the technologies of production or distribution.**

Concurrently with the development of the Internet, Canada's cultural policymaking has been restricted and narrowed in bilateral and multilateral trade negotiations. *Prima facie*, many structural cultural policies violate "principles" of "free" trade, such as National Treatment, Most-Favoured Nation Treatment, prohibitions on performance requirements, and others. But Canada's cultural policies are essential, and they need to be wielded in the digital space if we are to continue to see our stories on all of our screens.

It has been documented in *Canadian Culture in a Globalized World: The impact of trade deals on Canada's cultural life,*[1] how the treatment of Canadian culture in trade agreements has been controversial since the 1986 launch of the Canada-U.S. talks. In CUSFTA, CPTPP and NAFTA 2019, culture was a major sticking point and one of the final issues settled. Globally, the issue of *l'exception culturelle* has been prominent in WTO talks, particularly around the General Agreement on Trade in Services. Despite different Canadian governments proclaiming we have achieved a "cultural exemption," each agreement has brought changes to Canadian cultural policies and restrictions on our policymaking. We cannot afford to allow this to happen in an E-Commerce agreement. And we must finally update the definition of cultural industries in our trade agreements since the existing definition is more relevant to the 1980s than to the 2020s.

ACTRA endorses the call for a new approach. With respect to the WTO E-Commerce Agreement, Canada must ensure culture is fully protected by:

1. Acknowledging in the Right to Regulate provisions that all Member States have the right to implement policies to promote domestic cultural expressions and to ensure these expressions are discoverable; and

2. Exempting cultural expressions as well as all those involved in the creative cycle from the agreement. The definition must be contemporary, technology-neutral and based on relevant UNESCO Conventions:

   Cultural expressions, including cultural goods and services, regardless of their medium of production or dissemination, and all persons involved at any stage in their creation, production or dissemination, are exempt from this Agreement. Cultural expressions result from the creativity of individuals, groups and societies and have cultural content. Cultural content is the symbolic

[1] Garry Neil, *Canadian Culture in a Globalized World: The impact of trade deals on Canada's cultural life,* James Lorimer and Company Ltd., Publishers, Toronto, April 2019. Mr. Neil has had a 40-year association with ACTRA, currently as a policy advisor.

meaning, artistic dimension and cultural values that originate from or express cultural identities.[2]

Cultural Policymaking in the Digital Age

Since the 1951 release of the Massey Commission Report, Canadians and their governments, of all political stripes, have accepted the principle that Canada can have a vibrant arts and culture sector only if we have supportive public policies and measures. This is the case because cultural producers in other countries have tremendous competitive advantages over Canadians, since they produce for a primary market many times larger than our own. Many also have the protection of language or physical distance from competitors. The primary market of U.S. producers is more than ten times larger than the Canadian English-language market and they have always enjoyed easy and inexpensive access to our market. When the Massey Commission was conducting its research, there was no shortage of books, magazines, music, art or movies. There was only a shortage of works by Canadian writers, performers, artists and producers. The Report's recommendations and all of the policies and measures that have been implemented since that time are directed at addressing that imbalance.

If we compare Canada's television and film industries, we can understand the critical importance of cultural policies. Canadian television is successful. Large numbers of us watch Canadian dramas, comedies, documentaries and children's programs, and these programs are increasingly popular abroad. In 2017-18, we produced 1,222 TV movies, series and other shows, with a total production value of over $2.7 billion. Canadian broadcasters added $1.1 billion of in-house productions. That same year, we produced 105 movies with total budgets of just over $0.3 billion. U.S. movies took 89.7 per cent of the Canadian box office while Canadian English-language films "reached" an anemic 1.0 per cent market share after several even lower years.[3]

The writers, directors and actors who tell stories in television programs and films are generally the same people, using the same infrastructure. Canadians succeed in Hollywood. So why the huge discrepancy? It is because we have a wide array of effective policies that support the production and exhibition of Canadian television programs but we do not have strong policies in film. It's about more than funding, since 54 per cent of the total budgets of Canadian television productions came from public sources (CBC, tax credits, Canadian Media Fund, Telefilm, etc.) compared to 59 per cent of total film budgets.[4] The key difference is the important structural measures, including:

- ensuring Canadian content is scheduled when Canadians are listening or watching, or is made available and highlighted by those offering programming on-demand;
- requiring firms that make a great deal of money in our system to contribute financially to the production of Canadian content;
- limiting foreign ownership of Canadian cultural industry firms; and
- protecting the integrity of the Canadian market with regulations and tax policies.

Canada does not have equivalent measures in the film industry. There are no cinema screen quotas to reserve a place for Canadian movies, no incentives for cinema owners to program Canadian movies, and

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[2] Ibid;
[3] *Profile 2018*, CMPA in collaboration with the Department of Canadian Heritage, Telefilm Canada, AQPM and Nordicity, March 2019;
[4] Ibid;

no requirements on those who control Canada's box office to invest in production and promotion of Canadian movies. Canada has the storytellers and creative talent, but without supportive public policies, an anemic market share is inevitable.

The cultural industries in Canada and globally are in the midst of fundamental changes as distribution of cultural expressions moves to the Internet.

The effect of this shift on the music industry has been most cataclysmic. Between 1999 and 2014, global music revenues plummeted 44 per cent. While revenues have grown since 2014, total revenues in 2017 were $7.9 billion lower than in 1999, even without adjusting for inflation. Almost 55 per cent of the $17.3 billion in total 2017 revenue now comes from digital sales and streaming. However, the rapid rise in revenue since 2010 has come nowhere close to overcoming the decline in CD and record sales.[5] In 2016, the global music industry began referring to the "value gap," the fact that while the amount of money consumers and advertisers spend on streaming and downloading music has increased phenomenally, the amount received by those who write, compose, sing and produce this music, has fallen seriously behind. The Music Canada *Value Gap* report noted the greatest effect of the value gap is on those composers, singers and musicians who are professionals but not in the top echelon of artists in Canada.

> "The reality for most artists is that the work into which they pour their passion and talent has effectively become at best a part time occupation and for many a mere hobby. Many of them have little choice but to supplement their income with other work and put whatever time and energy remains into their music."[6]

Sales of hard copy magazines, periodicals and newspapers at the newsstand have fallen dramatically. Paid subscriptions are slowly declining. There is still a reasonably strong market for niche publications, such as local periodicals and the B2B (business-to-business) sector. Advertising revenues for hard copy publications are falling. Many publications now make content available online, some for a fee, others for free in the hopes of increasing their hits to sell advertising. But their ad revenues are miniscule compared to Internet giants like Facebook, Google and YouTube.

While consumers are increasingly obtaining books through the Internet, rather than at traditional bookstores, they are only slowly starting to read electronic books. Overall sales of physical books are stagnant, e-book sales are increasing modestly, but overall revenues for Canadian publishers are declining. A December 2018 report from a think-tank of industry heavyweights highlights the challenges for Canadian works. *More Canada* notes the market share of Canadian-authored books has dropped from 27 per cent in 2005 to 13 per cent in 2017, while the number of Canadian titles published has increased.[7] One of the factors in this decline is the inability of a widely used software program to track the nationality of the writer.

The effect of the digital shift in the film and television industry is the most complicated of all. The obvious trend is that audiences are increasingly consuming audiovisual content online, either through computers or mobile devices. The past few years have witnessed the extraordinary growth of over-the-top (OTT) services that distribute exclusively online, led by Netflix, Amazon Prime Video, Hulu and other

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[5] *Global Music Report 2018*, IFPI, March 2, 2018;

[6] *The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach*, Music Canada, October 2017;

[7] *More Canada Report*, Canadian Publishers Hosted Software Solutions, September 2018;

on-demand programming services. Advertisers are moving to these new markets, although there remains a strong but declining base for Canadian linear broadcasters. In Canada, total Internet advertising revenues surpassed television advertising revenues in 2013,[8] and the discrepancy will grow larger in the coming years.

U.S. technology company Sandvine provides regular reports on Internet traffic. For these purposes, it divides the world by region: Americas (North and South America, and the Caribbean) – EMA (Europe, Middle East and Africa) – Asia Pacific. In its most recent report, Sandvine highlighted that Netflix is now responsible for 15 per cent of worldwide traffic by megabytes, followed by YouTube at 11.4 per cent.[9] While Netflix is first in the Americas, it is ranked second in EMA and third in Asia Pacific. YouTube is first in EMA and Asia Pacific. Facebook and Amazon are the other major players. Clearly, consumers globally are increasingly turning to the Internet to watch their favourite videos.

While its impact has been most keenly felt to-date on traditional cultural industries, it is critical to note visual artists and craftspeople are using the Internet to market and sell their products. Performing arts companies sell tickets and market, and some may use technology in future to distribute their works (e.g., Metropolitan Opera in cinemas). More importantly, artists have been historically among the first to embrace the possibilities offered by new technologies. By the early 1980s, musicians and composers were exploring the possibilities of the music synthesiser, which could replicate a wide-variety of sounds. In the 1990s, they were using computer software synthesiser emulations. As this early tool for artistic creation was joined by other software and computer-generated imagery, artists were there. Thus, it is no surprise to learn artists have begun exploring the possibilities of virtual reality/augmented reality (VR/AR) and the longer-term potential of artificial intelligence (AI) to create the next generation of cultural expressions.

The definition of cultural industries exempted under CUSFTA, NAFTA, CETA and other trade agreements dates back to the 1980s. While it covers the traditional industries, the visual arts, performing arts, and crafts are not covered, and artistic works created with VR/AR and AI may fall outside its parameters.

Canada prevaricates: others act

Canada's policy response to the digital environment to-date has been underwhelming. The CRTC has declined to regulate digital media. There are no effective policies for music or publishing. The federal government has offered additional funding for various digital initiatives and export development, and authorized/directed studies, including by the CRTC and the Yale Panel reviewing the Broadcasting, Telecommunications and Radiocommunications Acts. While Canada studies, Netflix and other foreign OTT streaming services enjoy a powerful competitive advantage over analogous Canadian services. These foreign services are not collecting and remitting the Goods and Services Tax, and relevant provincial consumption taxes (GST/HST), they are not subject to Canadian content rules or expenditure requirements, nor do they make a contribution to Canadian content production.

Internationally, Internet-based services are increasingly subject to rules and regulations and required to pay taxes. In 2017, the Conference of Parties to the UNESCO *Convention on the protection and the promotion of the diversity of cultural expressions* (Canada was the first Party to ratify this Convention) recommended measures be taken to:

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[8] *Online ad revenue tops TV in Canada: PwC*, Media in Canada, by Josh Kolm, June 9, 2014;

[9] *The Global Internet Phenomena Report*, Sandvine, October 2018;

> "Promote dialogue between private operators and public authorities in order to encourage greater transparency in the collection and use of data that generates algorithms, and encourage the creation of algorithms that ensure a greater diversity of cultural expressions in the digital environment and promote the presence and availability of local cultural works."[10]

In early 2018, the European Commission published proposals for a three per cent tax on the revenues of all large Internet companies with global revenues above €750 million, including Amazon, Facebook and Google. Several European Union (EU) countries have already adopted such taxes and France recently announced it would do likewise. Beginning in July 2018, Australia required foreign businesses to charge Goods and Services Tax at a flat rate of 10 per cent on imported services and digital products supplied to Australian consumers. Argentina, Brazil, Japan, New Zealand, South Africa, Taiwan, Russia and several U.S. states have also imposed sales taxes.

In July 2015, the City of Chicago began to apply a nine per cent "cloud tax" on Internet-based entertainment, including video, music and gaming services. While a taxpayer group challenged the tax in court, Chicago's action was upheld in the lower court in a summary judgement, which typically means the facts are so overwhelmingly in favour of that party there is no need to proceed further.

With respect to OTT and other Internet-based broadcasting services, the EU is further along. In late 2018, all three pillars of the EU governance structure approved a new Audiovisual Directive, which seeks "to strengthen the competitiveness of the European audiovisual industry and thus promote cultural diversity and heritage in Europe." Member countries will have to comply with the regulations within the next two years.

Under the Directive, video-on-demand services, including Netflix and Amazon Prime Video, must devote at least 30 per cent of their catalogue to European content. Video-on-demand platforms must also contribute to the development of European audiovisual productions, either through a direct investment in content or a contribution to national funds. The level of contribution in each country will be proportional to the on-demand revenues in that country. While some argued the services could meet the quota by reducing the program offerings from the Americas and Asia, Netflix announced it will "reluctantly" adhere to the new rules.

EU member countries may choose to increase the video-on-demand European quota to 40 per cent and/or set a smaller sub-quota for <u>national</u> content. The film fund option is already in place in Germany after Netflix lost a lawsuit against a requirement that it contribute 2.5 per cent of revenues generated from its German subscribers to the country's national subsidy system, the Federal Film Board (FFA). In France, OTT services are required not only to have substantial French and European content in their catalogues, they are also required to highlight this content on their websites and actively promote it. They are also required to contribute two per cent of their French revenues to the Centre national du cinéma et de l'image animée (CNC). Netflix recently made its first payment to the fund.

The European Parliament also passed a new Copyright Directive in September 2018, the EU Commission did so this month, and the Directive comes into effect later this year. It includes measures requiring Facebook, Google and similar platforms to compensate copyright holders when music or news content is used on their sites. It also provides stronger copyright protections including the implementation of

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[10] *Operational Guidelines on the Implementation of the (2005) Convention in the Digital Era*, UNESCO, June 2017 (pg. 5);

systems to detect and block copyright material before it appears online. There are exemptions for small platforms, non-commercial online encyclopaedias, and open-source software platforms.

ACTRA expects Canada will begin to regulate cultural expressions produced and delivered digitally. Thus, it is essential we maintain the policy space to take actions like those adopted by the EU and elsewhere. We also need to ensure we have policy space to support the next generation of Canadian storytellers and artists, regardless of the medium they use to create.

Culture and Trade Agreements Covering E-Commerce

The most recent history of how Canada has treated culture in trade agreements that contain provisions on E-Commerce has been mixed. The provisions of the Trans-Pacific Partnership (TPP) would have been extremely problematic for Canadian cultural policymaking while the modifications that bring us the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) improve the situation only modestly. The provisions of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) are stronger, in part because the E-Commerce commitments are modest. The provisions of NAFTA 2019 are also strong, but they still rely on a definition of cultural industries that is based on the industries that existed in 1987.

TPP to CPTPP

The mechanism Canada used to try to preserve our cultural policy space in TPP was taking a reservation for cultural industries in a number of TPP chapters. In international trade law, such reservations are subject to limitations. Canada can maintain existing cultural measures or make them weaker but would have difficulty strengthening them. There is also an assumption in free trade deals that such "non-conforming" measures eventually will be eliminated.

There are important considerations and some degree of cultural exception in Chapter 14 on Electronic Commerce of the TPP. The key obligation is: "No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products." The Chapter states it does not apply to subsidies or grants, nor to "broadcasting." While the Chapter prohibits imposition of customs duties on cross-border electronic transmissions, it provides this "shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement."

Not only did Canada negotiate weak protections, our own reservations limited future policy options by committing they would neither "discriminate against foreign services" nor "restrict access to foreign online audiovisual content." What Canada achieved in the final hours of CPTPP negotiations were side-letters with each partner country removing these limitations on Canada's own reservations.

The core weaknesses of TPP, therefore, remain in the CPTPP. We still have reservations rather than a general cultural exemption. Further, "broadcasting" is a term that is narrow, undefined and could be problematic as technology continues to develop. While it presumably would cover policies related to foreign OTT services (since they define themselves as film/television program suppliers), it would definitely not cover measures related to publishing, performing arts, visual arts or crafts, and may not apply to music.

CETA

Canada and the EU have mutually agreed to exempt culture from various CETA Chapters. The exemption is asymmetrical as it applies for Canada to the cultural industries and for the European Union to audiovisual services. The exemption is also underpinned by strong language in the Preamble, which provides that parties retain the right to regulate, including for the "promotion and protection of cultural diversity."

The obligations respecting E-Commerce are far more limited than the CPTPP provisions. They prohibit the imposition of customs duties, fees or other charges while permitting the parties to impose an internal tax, providing it is not discriminatory. The chapter also provides that if there is an inconsistency between it and any other chapter, the other chapter prevails to the extent of the inconsistency.

NAFTA 2019 (Canada-United States-Mexico Agreement)

Canada's cultural exemption has been strengthened in the revised NAFTA. Previously, the exemption had been incorporated only by stating Canada's relationship with the United States with respect to the cultural industries is covered by the Canada-United States Free Trade Agreement, and our relationship with any other Party would be identical. In NAFTA 2019, there is a direct cultural exemption. When the NAFTA 2019 text was first released, there were initial concerns about the Digital Trade Chapter, since it is modelled on the TPP Chapter, and has a virtually identical non-discrimination clause. However, upon further examination, the text clearly exempts cultural industries from the chapter.

The problem with NAFTA 2019 (and its predecessors) is the definition of the cultural industries is stuck in the late 1980s when it first appeared in CUSFTA. It includes books, magazines, periodicals and newspapers; film or video recording; audio or video music recordings; music in print; and radio, television, cable and satellite services. It twice makes reference to products that are in a "machine readable form." This definition may not fully cover all forms of production and the dissemination of cultural expressions in the digital age.

Securing Canada's Space to Implement Policies in the Digital Environment

Given the inadequacy of the reservations Canada has taken in the CPTPP and the limitations of that agreement's exemption for broadcasting in its E-Commerce Chapter, ACTRA is extremely concerned about the potential implications of a WTO Agreement on E-Commerce. If Canadian culture is to thrive in the digital age, we need to have effective policies to ensure our artists can create works in the latest medium and that Canadians and global audiences can find these works on the Internet. To maintain our ability to develop such policies, we need to exempt culture from all of the commitments in an E-Commerce Agreement.

Key Recommendations:

ACTRA urges the Government of Canada to make this a fundamental priority for WTO negotiations of an E-Commerce Agreement. Canada must ensure culture is fully protected by:

1. Acknowledging in the Right to Regulate provisions that all Member States have the right to implement policies to promote domestic cultural expressions and to ensure these expressions are discoverable; and

2. Exempting cultural expressions as well as all those involved in the creative cycle from the agreement. The definition must be contemporary, technology-neutral and based on relevant UNESCO Conventions:

   "Cultural expressions, including cultural goods and services, regardless of their medium of production or dissemination, and all persons involved at any stage in their creation, production or dissemination, are exempt from this Agreement. Cultural expressions result from the creativity of individuals, groups and societies and have cultural content. Cultural content is the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities."[11]

Canada's arts and culture community together with successive Canadian governments have been at the forefront of efforts to exempt culture from the provisions of trade agreements, both bilaterally and multilaterally. It is imperative we have the ability to maintain and adapt existing measures, and to implement new cultural policies as required, from content rules to investment measures to funding programs, to help our own artists and cultural industries thrive and succeed in the globalized and digital future. Canada must continue to defend the global cultural exemption, especially for e-commerce.

Respectfully,

Marie Kelly
Executive Director
ACTRA National

[11] Garry Neil, *Canadian Culture in a Globalized World: The impact of trade deals on Canada's cultural life*, James Lorimer and Company Ltd., Publishers, Toronto, April 2019.