

The domino game

*Canadian distribution as a global threat
to the American way of life*

When the Minister of Communications, Flora MacDonald, proposed legislation in February, 1987, to bolster Canadian film distribution, the American Majors reacted with predictable outrage.

Within days, Jack Valenti, president of the Motion Picture Association of America (MPAA), was petitioning the Canadian government for an audience. Prodded by the Prime Minister's Office, MacDonald (against her better judgement, said many) eventually agreed to meet with him. The details of that conversation are not known but, a year later, the industry is still waiting for legislation to be tabled.

The MPAA, however, is not content with postponement. They want to see any such move discouraged once and for all. Recently, the Canadian Independent Film Caucus* obtained a congressional brief prepared by the MPAA earlier this year entitled "U. S. Film Industry's TRADE CRISIS in Canada."

The brief, reprinted below, proposes swift retaliatory action to ensure the survival of the U. S. film industry if the Canadian legislation is enacted.

The notion of the American film industry being endangered by Canada is so patently ludicrous that one might be forgiven for thinking it an overheated Hollywood sequel to *The Mouse That Roared* (*The Revenge of Hollywood North!*). But after the laughter comes the tears for the remorselessly xenophobic vision that underlies the MPAA histrionics. The brief reveals how little Americans understand the world beyond their borders.

That Canada or any nation should aspire to legitimate cultural self-definition is beyond the American ken. Cultural industry is industry pure and simple; cultural sovereignty is nothing more or less than a ruse to gain economic advantage. As with the Communists, a policy of containment must be enforced. If Canada "falls," other nations will follow suit.

Can Congress take this message seriously? On February 29, 1988, 41 California members of Congress sent a message to the House Ways and Means Committee chairman demanding "safeguards from future barriers Canada may impose on the distribution of U. S. films, home videos and television programs." The letter quoted liberally from the MPAA brief. While Congress deliberates on appropriate protectionist measures, the American Majors continue to dominate 98 per cent of Canadian screens.

All of the following documents were prepared by the MPAA. Use of emphasis (capitals, bold, etc.) maintains the emphasis in the original documents.

"EVEN IF WE ARE ABLE TO FASHION SOME KIND OF CONCORD, WE ARE MERELY DELAYING THE COLLISION WITH A NEW CANADIAN GOVERNMENT, READY TO PASS ANGRIER LAWS THAN WE NOW CONFRONT."

"WE HAVE TRIED, GOD KNOWS WE HAVE TRIED, TO PLACATE THE CANADIANS."

"IF CANADA GETS AWAY WITH ITS HANDCUFFING OF THE U.S. INDUSTRY, THERE WILL BE AN EPIDEMIC OF SUCH BARRIERS."

* The Canadian Independent Film Caucus was formed in 1984 as the voice of a forgotten sector of the film industry - independent documentary filmmaking. The Caucus coalesced in response to a Telefilm policy which made documentaries ineligible for funding.

For a group of young filmmakers, operating outside the National Film Board but weaned on its traditions and passionately committed to the social and aesthetic values of documentaries, Telefilm's act of omission was unconscionable. As John Walker, then head of the CIBC, wrote to Peter Pearson, then executive director

of Telefilm, it was like deciding not to fund landscape art because we already have the Group of Seven. Funding for documentaries was reinstated.

Today the Caucus boasts some 60 member companies whose films have been broadcast and won numerous awards internationally. But it remains a struggle to get those films made and seen in Canada. The Caucus continues to campaign vigorously for policy changes to foster the small, independent filmmaker whether in documentaries or increasingly in low-budget drama productions.

Annexes to the brief

Four specific suggestions offered to The Canadian Minister of Communications and Culture (sic) by Jack Valenti

1. A screen quota

This means forcing Canadian Theaters to reserve at least 10 per cent of their screen time for Canadian Pictures.

2. A box office levy

Most European, Latin American, and Asian developed countries impose a small levy on every ticket sold in their theaters.

These revenues are then used to subsidize native film production.

3. A video levy

A small levy attached to the sale of every blank cassette and every pre-recorded cassette. These revenues go to subsidize native producers of film and video material.

4. Formation of a Canadian / U.S. Council

This body would be composed of professionals from the film, television, and home video industries from both Canada and the United States. It would meet at least four times a year. It would take up problems in all those areas and try to solve them without the intervention of the Canadian Parliament or the United States Congress.

Proposed amendments to Omnibus Trade Bill:

Market Access Provision

1. Each year, the United States Trade Representative (USTR) would be required to compile a list of those countries which deny access to American intellectual property in their markets through various unfair means.

2. From this list, the USTR would select those one or two countries whose behavior is most offensive, and would initiate a Section 301 filing. The time period for identification and initiation of an investigation is limited to 60 days. The USTR may, however, in his discretion, decide not to initiate an investigation against any offending country where the USTR determines that such action would be detrimental to the U.S. economic interest or where the offending country is making progress toward solving the problem.

3. If the issues raised in the complaint have not been successfully negotiated to the USTR's satisfaction within six months, the USTR must recommend action to the President. The USTR may, however, elect to extend the period for negotiations another three months, in his discretion, if complicated issues arise, or

substantial progress is being made in resolving the issue.

4. Upon receipt of the USTR's recommendation, the President has 30 days to choose whether and how to respond. In those cases where the USTR has extended its period of investigation due to exceptional circumstances, the President may have an additional 90 days to make his decision. The President has complete discretion to act or not to act. If he chooses not to act, he must submit a written statement to the Congress certifying that (1) the elimination of such acts, policies, and practices is impossible, and (2) the taking of action would not be in the national interest, or (3) the offending country is establishing procedures to eliminate the practices and this is agreeable to the petitioner or a majority of the industry's representatives.

Implementation of Article 2005: Cultural Industries With Respect to the Motion Picture Industry

At such time as the President must take remedial action in response to actions that would have been inconsistent with the Agreement but for Article 2005, paragraph 1, with respect to the enactment by the Government of Canada of legislation, proclamation, or other action having the force and effect of law, either directly or indirectly, which impedes the production, distribution, sale or exhibition of film, television programs or video recordings, the President shall consider in his assessment of equivalent commercial effect the actual and potential damage to U.S. interests which would result if such Canadian actions were adopted internationally by other U.S. trading partners in such trade with the United States.

Statement of Administrative Action (Required by Section 102 of the Trade Act of 1974)

Section -----. This section provides that when the President is assessing the value of measures of equivalent commercial effect as provided for by Article 2005 of the Agreement, in response to actions taken by the Government of Canada which impede the production, distribution, sale or exhibition of film, television programs or video recordings, he shall consider the actual and potential damage to U.S. interests which would result if such Canadian actions were adopted internationally by other U.S. trading partners in trade in motion pictures with the United States. The President shall also consult closely with representatives of the motion picture industry to ensure that the full economic damage of such Canadian action is fully assessed.

The U.S. film industry's TRADE CRISIS in Canada

As presented by the Motion Picture Association of America

THE ISSUE

The Canadian government, fueled by the passions of a small band of anti-American film distributors and producers, announced early last year, in a speech by the Minister of Communications and Culture (sic), its intention to pass legislation to restrict the movement of American movies, television and home video material in Canada.

Moreover, because of tough Investment Canada policies, the Walt Disney Company cannot even open a distribution office in Canada, and Twentieth Century Fox's status in Canada is now under review by the Canadian government. What makes this rather absurd is that no Canadian company is ever denied the opening of its office in the United States.

Due to protests by Members of Congress directly to the Canadian Prime Minister last summer, the tough, restrictive parliamentary proposal declared by the Minister of Communications and Culture was temporarily derailed. But Disney is still denied entry.

The Canadians banished from the Free Trade agreement U.S. films, television, home video.

Because of Canadian insistence, films, television, and home video were exiled from the Free Trade Agreement. The Canadians refused to go forward with the Agreement unless American movies, television programs and home video were kicked out.

Meanwhile, Canada pledged to the U.S. negotiators it would try to 'accommodate' the U.S. film industry outside the Agreement. Negotiations have been going on between the U.S. film industry and Canadian officials for over three months.

As of this moment, we are at an impasse, with our member companies held hostage to the impasse. We have tried, God knows we have tried, to placate the Canadians. We have more than met them halfway. We agreed to give them everything they claimed they wanted earlier, that is, to negotiate separately for Canadian and U.S. rights to creative material. Now they want more, more than we can safely give.

The Canadians are demanding a "licensing" process which is unacceptable.

The Canadians are now demanding a form of "licensing" for films, television programs and home video which we cannot accept. If we yield, we put to risk our free market access in western Europe, Latin America and Asia. In none of the major foreign markets are we faced with such restrictions, now.

Once we surrender to such a licensing

arrangement in Canada, we would be hard pressed to evade the same elsewhere. These same licensing muzzles would be applied to television and home video. This Canadian licensing move is, in reality, the first step in a confiscatory scheme whereby, in time, Canadian owned companies will be given by their government more and more films that Americans have legal rights to market.

We have been fighting other nations' attempts to erect licensing (in various forms) and other non-tariff trade barriers. We simply cannot accept in Canada what we are struggling to prevent around the world. "Licensing" becomes unpredictable. No matter how benign it may seem at first, within a short time it always results in more stringent rules that weaken our market position. That is why we are implacable in our opposition to "licensing" of any kind.

The crisis in Canada is a matter of survival for the U.S. film industry.

This trade crisis in Canada is not just a matter of more or less revenues for the U.S. film industry. It is a matter of survival. Some 38 per cent of all U.S. film, television and home video revenues come from foreign markets. If Canada gets away with its handcuffing of the U.S. industry, there will be an epidemic of such barriers. If we are shut out, our revenues will be shut off. Foreign revenues keep us going in this country. If other nations want to do to us what the Canadians are determined to do, foreign revenues will surely begin to dry up. Then the U.S. film industry is wounded, both as a major industry in this country, and as a trade surplus producer around the world.

THE TRADE ASSET VALUE OF THE U.S. FILM INDUSTRY

1. The U.S. film industry is a valuable, unique U.S. trade Asset. We return to this country more than \$1 billion annually in surplus balance of payments.

2. We have a trade surplus with every country in the world with whom we do business.

3. We dominate world screens, in the cinema and in the home, all over the globe. Therefore we are vulnerable to anti-America sentiment and a target for producers and distributors who are envious of our success with their own people. It is important to remember that the folks making decisions favoring U.S. movies over Canadian movies in Canada are not Americans. It is the Canadian people who have made these choices!

THE DANGERS AHEAD

1. If we submit to Canadian demands we become prey to an epidemic of such restrictions in much of the world. Our global trade would be shrunk, laying waste a valuable surplus-balance-of-trade producer.



PHOTO: HAZEL FIELD

Jack Valenti

power in Canada, but from successor governments keen to take an even harder line.

What we need from the Congress to defend ourselves from this and future Canadian government attacks on us

First, we need language in the implementing legislation to the Free Trade Agreement that would more clearly define the President's authorized discretionary counter-actions to future Canadian laws which would hobble our access to an movement in that marketplace. The language would not disturb the FTA, nor would it soil its intent. It would merely make it riskier for this Canadian government or any other, to erect barriers to the U.S. film industry, barriers which would entice other countries to do the same.

Second, we need to insert a Market Access amendment in the Omnibus Trade Bill. This amendment is already inside the Senate version of the bill. If this bill passes and is signed by the President, this Market Access amendment would give us a stronger shield to defend ourselves against assaults on free trade.

To sum up our position:

We want no protection from, tariffs on, or barriers to Canadian movies or any other country's creative works. There are no restrictions of any kind to the free movement of foreign creative material in the United States.

All we want is the right to compete fairly, openly, evenly for the favor of audiences. We want nothing more than to be granted the same freedom of action in the Canadian and other markets that Canadians and the rest of the world find so alluring and profitable in ours.

What the Canadians want to do that we cannot accept without injuring our global trade

First, they want us to submit to a version of a "licensing" process, before we would be allowed to market our films in Canada. Nowhere in the free developed world are we confronted with licensing restrictions. (Except in Switzerland, a small market. We are urging U.S. trade negotiators in forthcoming bilateral talks to abolish this Swiss licensing scheme.)

Second, the Prime Minister of Canada stated in a letter to the Chairman of the Senate Finance Committee that Canada's sole objective was "to make it possible for Canadians to make and see their own movies."

Third, what about alternatives? When Jack Valenti visited with the Minister of Communications in Ottawa some months ago, he offered her four specific suggestions which would, indeed, help achieve the Prime Minister's objective. His suggestions were ignored.

Fourth, American investment in film and television production in Canada in 1987 was over a quarter of a billion dollars! Alas, the Canadian government seems to take that for granted. •

2. Even if we agreed to some unhappy conditions in Canada today, how would we be protected against rougher treatment by whoever succeeds the Mulroney government in Ottawa? Since we are outside the Free Trade Agreement we would be at a new government's mercy.

3. The Canadians wave a banner of 'cultural sovereignty' under which they claim validity for their restrictive proposals. But 'cultural sovereignty' is a fiction and every professional in the business knows it. Canada wants to enrich a few native film distributors who, under their scheme, would be able to market films for which U.S. distributors have clear legal contractual rights to distribute. This is not 'cultural sovereignty.' But it most certainly is 'economic sovereignty.'

Therefore: We are at a fork in the road

We can sit still, do nothing and submit to the will of the Canadian government urged on by a group of producer / distributors who have enormous leverage with their government. If we do, we put to hazard our global trade. Even if we are able to fashion some kind of concord, we are merely delaying the collision with a new Canadian government, ready to pass angrier laws than we now confront.

Or we can turn to the Congress to safeguard us, not merely from the Administration now in

Film distribution

As explained to Congress by the MPAA

Here is how a film such as *Empire of the Sun* is licensed for showing by a Canadian theater:

Warner Bros. has the rights to distribute the film and sign agreements with the Warner Bros. Canadian office to share a percentage of the box office receipts.

The Warner Bros. Canadian office pays its expenses, i.e., the cost of the film print, advertising, publicity, delivery, administrative and related charges, and certain taxes.

From the net revenues derived from the licensing of films to the theaters, the Canadian office sends back the surplus to the office of Warner Bros. in the United States.

This becomes a part of the income which the U.S. film industry brings back each year as a trade surplus.

HOW DO U.S. FILM COMPANIES OBTAIN RIGHTS TO DISTRIBUTE FILMS OF OTHER COMPANIES?

MPAA member-companies obtain the rights to distribute films in one of two ways:

1. "In-house" production. About two-thirds of the films distributed by MPAA member-companies are made "in-house." The companies have the right to distribute these films in any market in the world. These are called "worldwide" distribution rights.

2. "Pick-ups" is a trade term for those films made by another producer who negotiates a license with the MPAA member company for distribution. In many cases, the producer / licensor of the film retains the right to distribute the film in certain geographic areas. Thus, the MPAA company distributing a particular film may not have worldwide distribution rights.

THE CANADIANS WANT TO BAR U.S. FILM DISTRIBUTORS FROM DISTRIBUTING CERTAIN FILMS IN CANADA

The Canadian Minister of Communications, Flora MacDonald, in February, 1987, announced her intention to introduce legislation in Parliament requiring the "licensing" of film and video distribution companies in a manner which would force foreign film distributors, who do not have worldwide distribution rights in a film, to relinquish to a Canadian distributor the right to distribute that film in Canada.

"Pick-up" films acquired by a U.S. film distributor from another producer / licensor which does not grant worldwide distribution rights typically would come under the MacDonald restriction.

For example, United Artists acquired *Chariots of Fire* distribution rights from another producer / licensor, and did not obtain worldwide distribution rights for the film. The producer / licensor reserved the right to distribute the film in certain geographic areas.

Under the Canadian proposal, films such as *Chariots of Fire* would have to be distributed by a Canadian, not a U.S. distributor. Profits would go to the Canadian distributor. The U.S. company would be forced to give up control of the marketing strategy, including advertising and publicity.

THE POTENTIAL DAMAGE OF THE PROPOSED CANADIAN RESTRICTION

The Canadians want to change the rules. Canada is one of the largest export markets for the U.S. film industry. The peril the U.S. movie industry faces is that if the Canadian government imposes serious restrictions forbidding U.S. companies to distribute films in Canada, it is estimated that MPAA member-companies could lose \$50 million* or more annually in export revenues.

Making and distributing movies is a very risky business. There is no formula to accurately predict when a film will be a box office success. Eight out of 10 movies made in the United States never make a profit from exhibition in American theaters. Only four in 10 movies make a profit from all ancillary and foreign markets. Some 38 per cent of all U.S. film, television and home video revenues come from foreign markets.

The Canadian proposal has worldwide ramifications for the U.S. movie industry.

If Canada gets by the imposing trade restrictions on how U.S. film companies operate in Canada that pattern would surely have a ripple effect and quickly spread to other countries.

France, Germany, Italy, the United Kingdom, Japan, and other countries could decide to adopt the Canadian proposal in their country.

If this occurs, our \$1.1 billion annual trade surplus derived from the export of U.S. distributed films would be severely shrunken, perhaps by several hundred million dollars, and the U.S. movie industry would suffer a massive economic hemorrhage.

* Report to the United States Trade Representative: Trade Restrictions Facing the MPEAA Member Companies in Foreign Markets, May 1987.