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Kevin Lee

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“The Little State Department”: Hollywood and the MPAA’s Influence on U.S. Trade Relations

*Kevin Lee**

I. INTRODUCTION

Over the past century, the U.S. film industry in Hollywood has dominated the global entertainment industry. American films appear today in more than 150 countries, and the Motion Picture Association of America (“MPAA”), the film industry’s lobbying group, proudly proclaims that the “U.S. film industry provides the majority of home entertainment products seen in millions of homes throughout the world.”¹

Hollywood’s worldwide box office revenue amounted to \$25.82 billion in 2006.² Approximately 85% of worldwide ticket sales are directed toward Hollywood movies,³ and international sales generate approximately half of the U.S. film industry’s revenues.⁴ At one point the audiovisual industry was the United States’ second largest export industry, following the aerospace industry.⁵ The trade flow in film is entirely one-sided; American films dominate foreign markets, but foreign films have failed to establish a significant presence in the U.S. market, accounting for only 1%

* J.D. 2008, Northwestern University School of Law. I would like to thank Olufunmilayo Arewa for her valuable guidance on this article.

¹ Motion Picture Association of America, About Us, <http://www.mpa.org/AboutUs.asp> [hereinafter MPAA—About Us] (last visited Jan. 28, 2008).

² MPA WORLDWIDE MARKET RESEARCH & ANALYSIS, MPA SNAPSHOT REPORT: 2006 INTERNATIONAL THEATRICAL MARKET 1 (Apr. 2007), available at <http://www.mpa.org/International%20Theatrical%20Snapshot.pdf>.

³ Alan Riding, *Unesco Adopts New Plan Against Cultural Invasion*, N.Y. TIMES, Oct. 21, 2005, at E3.

⁴ Claire Wright, *Hollywood’s Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 AKRON L. REV. 739, 747 (2006).

⁵ Sandrine Cahn & Daniel Schimmel, *The Cultural Exception*, 15 CARDOZO ARTS & ENT. L.J. 281, 281–82 (1997).

of movies shown.⁶

In this article, I argue that the U.S. government has actively advocated domestic film industry interests in bilateral and multilateral trade agreements because of Hollywood's importance to the U.S. economy, and also because of the MPAA's influential lobbying efforts. Furthermore, I show that the MPAA has intervened directly in bilateral trade relations to protect its interests, even when such interests may run counter to the benefit of the U.S. economy.

In Part II, I explore the nature of the film industry, the economic growth of the U.S. film industry, and Hollywood's comparative advantage. Part III provides an overview of the MPAA and the history of its close relationship with the U.S. government. Part IV, examines U.S. bilateral trade relations with regard to film, and the actions the MPAA has taken to advance its interests. Finally, Part V concludes by examining the MPAA's involvement in multilateral trade agreements relating to the film industry.

II. HOLLYWOOD AND THE FILM INDUSTRY

A. Film as a Cultural Industry

The complexity of classifying motion pictures as a product is an important factor in disputes over the global film trade. Films have the dual personality of both a good and a service, where motion pictures generate income either as a service in the form of film screenings and broadcasts, or as a good through the sales of movies in video or disc format. Furthermore, some countries emphasize the cultural and artistic nature of film, devoting attention to a movie's content, while other countries look solely at the commercial aspect of film distribution or sales in the context of trade.

The complex identity of motion pictures gives rise to the description of the movie business as a cultural industry. A cultural industry is a societal institution that employs modes of production and organizes industrial corporations "to produce and disseminate symbols in the form of cultural goods and services, generally, although not exclusively, as commodities."⁷ While the production and distribution of film may be classified as an "industrial" process, the actual sale or screening of a movie results in "cultural consumption."⁸

The contrast between the cultural and economic characteristics of

⁶ Riding, *supra* note 3.

⁷ Luc Véron, *The Competitive Advantage of Hollywood Industry* (Columbia Int'l Affairs Online, Mar. 1999) (quoting Nicholas Garnham, *CAPITALISM AND COMMUNICATION* (1990)), available at <http://www.ciaonet.org/wps/vel01> [hereinafter *Competitive Advantage of Hollywood Industry*].

⁸ *Id.*

movies is the root of the controversy over Hollywood's dominance of the global movie market and the status of film in trade agreements. The U.S. government and the MPAA see films in international trade in solely economic terms as "commercial products that should be subject to market forces."⁹ In contrast, other countries, most notably France and Canada, have traditionally tied films to national identity and argue that cultural works deserve a special status besides that of a regular tradable commodity.¹⁰ These conflicting views have been the source of disagreements over the propriety of quotas and subsidies as applied to the international film trade.

B. An Economic History of Hollywood

In its early history, the Hollywood film industry was run on the economic model of the studio system, "a pure example of a Fordist mode of production and a classic oligopoly."¹¹ Under the studio system, a film studio controlled all stages of a movie's economic life, from the birth of the screenplay written by a studio-employed writer to film production to final distribution in a studio-owned theater.

Hollywood's global dominance began in the aftermath of World War I. The war "seriously disrupted European film industries or forced them out of international markets," creating a vacuum that the American studios could fill.¹² The war had a dramatic impact on the trade flow of film. During 1913, the United States exported 32 million feet of film; by 1925, this figure had risen to 235 million feet.¹³ Between these years, U.S. film exports to Europe increased by 500%, and the development of film markets in Asia, Latin America, and Africa "spurred a tenfold growth in U.S. exports."¹⁴

At the height of the studio system era, Hollywood produced an average of 400 films each year between 1930 and 1950, with a peak of 504 films—approximately one film per week for each studio—in 1941.¹⁵ However, the studio system came to an end with the 1948 Paramount Decrees, after a federal antitrust suit against Paramount Pictures forced the Hollywood studios to divest their theater chains and mandated competition in the

⁹ Carolyn Hyun-Kyung Kim, Comment, *Building the Korean Film Industry's Competitiveness*, 9 PAC. RIM L. & POL'Y J. 353, 364 (2000).

¹⁰ See Mark Wheeler, *Globalization of the Communications Marketplace*, 5.3 HARV. INT'L J. PRESS/POL. 27 (2000).

¹¹ *Competitive Advantage of Hollywood Industry*, *supra* note 7.

¹² W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 128 (1995).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Competitive Advantage of Hollywood Industry*, *supra* note 7.

exhibition sector.¹⁶

The studios adapted to the new competitive landscape and restabilized their markets by increasing film distribution revenues from foreign markets.¹⁷ During the 1960s, foreign markets accounted for approximately 50% of total revenues.¹⁸ The 1980s and 1990s featured a wave of industry mergers and acquisitions that reduced Hollywood to six major film distributors: Buena Vista Pictures Distribution (The Walt Disney Company), Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and Warner Bros. Entertainment Inc.¹⁹

C. Hollywood's Competitive Advantage

It is an undisputed fact that Hollywood is the dominant supplier of audio-visual services to the world.²⁰ Several factors may explain Hollywood's dominance of the global film industry.

Foreign competitors argue that Hollywood keeps trade flows one-sided by saturating the U.S. market with an excessive supply of different, but not so different movies, which serves as a non-tariff barrier for the U.S. film industry.²¹ However, foreign competitors cannot point to the use of quotas or subsidies that many countries use to protect their domestic film industries. Neither the U.S. federal government nor California offers comparable subsidies. Although several states offer incentives to attract film production, including sales tax exemptions on hotel stays and streamlined permit procedures, these incentives are significantly less than the subsidies offered by other countries.²²

Wildman and Siwek argue that Hollywood's dominance can be explained by the size and wealth of the English-speaking market. U.S. film producers enjoy a "domestic opportunity advantage" because English-speaking markets in the United States and other parts of the world are large and generally wealthy.²³ Although English trails Mandarin, Hindi, and Spanish in total global speaker population, film demand is determined by

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Competitive Advantage of Hollywood Industry*, *supra* note 7.

²² DEP'T OF COMMERCE, THE MIGRATION ON U.S. FILM AND TELEVISION PRODUCTION: THE IMPACT OF "RUNAWAYS" ON WORKERS AND SMALL BUSINESSES IN THE U.S. FILM INDUSTRY 89 (2000), available at <http://www.ftac.org/files/doc2000.pdf>.

²³ Shao, *supra* note 12, at 133 (citing Steven S. Wildman & Stephen E. Siwek, INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS (1988)).

both demographic and economic factors.²⁴

Some have also argued that the proximity of numerous related and supporting industries around Hollywood contribute to the film industry's success.²⁵ For example, film production suppliers, special effects companies, law firms, talent agencies, and related industries such as television are all located within Hollywood in the Los Angeles region. Although all these factors may influence the success of Hollywood films, a crucial component of the success of the U.S. film industry in international trade negotiations is Hollywood's close relationship with the U.S. government.

III. THE MOTION PICTURE ASSOCIATION OF AMERICA

A. An Overview of the MPAA

The MPAA is the U.S. film industry's official lobbying group, and its membership includes the six major U.S. film distributors.²⁶ The official purpose of the MPAA and the Motion Picture Association ("MPA"), its international counterpart, is to "serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA."²⁷ The organization had a budget of approximately \$60 million in 1999.²⁸

The MPAA was founded in 1922 as a reaction to scandal and fears of government regulation. Public concern began to grow over increasingly risqué film plots and high-profile celebrity criminal trials, which led to a fear of mass boycotts and government censorship.²⁹ In response, the film industry established the Motion Picture Producers and Distributors of America in 1922 and began to self-regulate by initiating a "moral blacklist" in Hollywood.³⁰ The MPAA continues to actively self-regulate today by issuing movie ratings.

On the international front, the MPAA has focused on keeping foreign markets open to U.S. films and battling film piracy. The MPA was formed in 1945 as the Motion Picture Export Association of America, with the goal of reestablishing American films in the world market in the aftermath of World War II, and in response to growing barriers to the importation of

²⁴ *Competitive Advantage of Hollywood Industry*, *supra* note 7 (citing Steven S. Wildman & Stephen E. Siwek, *INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS* (1988)).

²⁵ *Id.*

²⁶ Motion Picture Association of America, Members Page, <http://www.mpa.org/AboutUsMembers.asp> (last visited Jan. 28, 2008).

²⁷ MPAA—About Us, *supra* note 1.

²⁸ *Competitive Advantage of Hollywood Industry*, *supra* note 7.

²⁹ *Id.*

³⁰ *Id.*

American films.³¹ The organization's experience in negotiating on its own with foreign governments has earned it the moniker of "the little State Department," and its foreign activities span the diplomatic, economic, and political arenas.³² Based in Washington, D.C., the MPA also has offices in Los Angeles, California, Brussels, São Paulo, Singapore, and Toronto.³³

Although the MPAA engages in a variety of activities, its efforts are united by the common theme of minimizing government interference by preventing government censorship on the domestic side, and fighting trade barriers and securing property rights in the international arena.³⁴

B. Domestic Industry Groups and Government Trade Relations

Domestic interest groups like the MPAA constantly seek to lobby their governments in order to advance their interests in foreign trade relations. Throughout history, interest groups have competed in the political marketplace to establish favorable institutions and special interest provisions with their governments in order to advance their economic interests.³⁵ Government cooperation to advance private interests in the international sphere originated from the classical understanding of international law which recognized only states as actors, where a government would assert its "sovereign prerogative" to negotiate treaties that reflected the considerable influence of domestic industries.³⁶

Under the modern international system, however, non-state actors have greater recognition. As Okediji observes, "the state and private industries that dominate the globalization process collaborate in greater concert than previous milieus of international law and international relations could have foreseen or facilitated."³⁷ Domestic industries have a wide opportunity to assert influence in Washington because of the requirement of implementing legislation to give domestic effect to treaty obligations.³⁸ The need for

³¹ MPAA—About Us, *supra* note 1.

³² Thomas H. Guback, *Hollywood's International Market*, in THE AMERICAN FILM INDUSTRY 463, 471 (Tino Balio ed., rev. ed. 1985); *see also* MPAA—About Us, *supra* note 1.

³³ MPAA—About Us, *supra* note 1.

³⁴ Luc Véron, *Hollywood and Europe: A Case of Trade in Cultural Industries, the 1993 GATT Dispute* (Columbia Int'l Affairs Online, 1999), available at <http://www.ciaonet.org/wps/vel02> [hereinafter *Hollywood and Europe*].

³⁵ *See* Craig Allen Nard & Andrew P. Morriss, *Constitutionalizing Patents: From Venice to Philadelphia*, 3–7 (Case Research Paper Series in Legal Studies, Working Paper 04-12, 2004), available at <http://ssrn.com/abstract=585661>.

³⁶ *See* Ruth L. Okediji, *Public Welfare and the Role of the WTO*, 17 EMORY INT'L L. REV. 819, 837, 851–52 (2003) [hereinafter *Public Welfare and the Role of the WTO*].

³⁷ *Id.* at 879–81.

³⁸ *See* Ruth L. Okediji, *The International Relations of Intellectual Property*, 7 SING. J. INT'L & COMP. L. 315, 375, 381 (2003).

Congress to enact domestic legislation thus gives interests groups a “second bite at the apple” for rent-seeking and to influence the domestic effects of relevant treaties.³⁹

American industry groups began to play a prominent role in treaty negotiations beginning with an 1878 conference in Paris on patents. During this conference the prominent role of American private actor interests represented a change of industry actors growing from followers to leaders in seeking enhanced intellectual property (“IP”) protection.⁴⁰ In past decades, American private sector actors have actively led and promoted new multilateral regimes to expand and protect their property rights, as embodied by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) during the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”).⁴¹

The MPAA provides an effective example of how interest group lobbying can influence a government to advocate its interests in the international system, as well as an example of how a private sector actor can exert its economic influence independently in the international arena.

C. The MPAA’s Economic Influence

In a 2005 report, the MPAA estimated that the U.S. film industry employs 359,100 people.⁴² Most employees live in California, although the film industry contributes significantly to the economies of other states, most notably New York and Illinois.⁴³ In a 1998 study, the MPAA estimated Hollywood’s direct economic impact on the California economy amounted to \$27.5 billion in 1996, with a total direct employment of 226,000 people.⁴⁴ These figures do not account for the approximately 50,000 jobs in companies specializing in supporting the entertainment industry, including multimedia programming, advertising, law firms, accounting firms, talent agencies, and catering companies.⁴⁵

While Hollywood has a significant importance to the U.S. economy, some have argued that the industry’s powerful influence in Washington is not proportionate to its actual economic impact. The jobs created by the film industry represent only approximately 5% of civilian employment in

³⁹ *Id.*

⁴⁰ Susan Sell, *Intellectual Property and Public Policy in Historical Perspective*, 38 LOY. L.A. L. REV. 267, 293–94 (2004) [hereinafter *Intellectual Property and Public Policy*].

⁴¹ *See id.* at 314; *see also infra* Part V.B.

⁴² MPA WORLDWIDE MARKET RESEARCH & ANALYSIS, US ENTERTAINMENT INDUSTRY: 2005 MPA MARKET STATISTICS 25 (2006), available at http://www.entertainmentecon.org/edp/File/Report/MPA_05_Economic_Review.pdf.

⁴³ Wright, *supra* note 4, at 747.

⁴⁴ *Hollywood and Europe*, *supra* note 34.

⁴⁵ *Id.*

Southern California, and Hollywood's direct output represents only about 5% of the added value created in the Los Angeles area, or a total of only 1.5% in California.⁴⁶ One explanation for why Hollywood's economic importance is inflated is the strength and history of Hollywood's relationship with Washington.

D. MPAA-U.S. Government Relations

Although the domestic film industry's size and economic strength provides Hollywood a voice in Washington, the MPAA's influence in Washington is not based solely on economic factors. Hollywood enjoys a special relationship with Washington "based on a sort of mutual fascination."⁴⁷ As Brownstein has noted, "[p]ractical campaign help and mutual social envy explain much of the attraction between Washington and Hollywood, but not all of it."⁴⁸ The mutual fascination between politicians and the film industry has a particular resonance for each side; by associating with celebrities, politicians affirm their legitimacy, and celebrities view politics as part of a quest for respectability and just another stage to exercise their ego.⁴⁹ In other words, "the capital of power and the capital of glamour are inextricably bound."⁵⁰

One can also explain the close ties between the MPAA and the government based on the fact that so many of the organization's leaders and employees have high-level experience working in the federal government. The MPAA's first president, Will Hays, was a former U.S. Postmaster General and a former chairman of the Republican National Committee who ran Warren Harding's 1920 presidential campaign.⁵¹ Jack Valenti, the MPAA president from 1966–2004, was a former adviser to President Lyndon B. Johnson.⁵² Dan Glickman, the current MPAA president, was a former Secretary of Agriculture and a former congressman from Kansas.⁵³ These ties are not just restricted to the leadership position. The MPAA has "always been packed with diplomats, trade specialists, and lawyers with substantial government experience."⁵⁴

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ RONALD BROWNSTEIN, *THE POWER AND THE GLITTER: THE HOLLYWOOD-WASHINGTON CONNECTION* 12 (1990).

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 15.

⁵¹ *THE AMERICAN FILM INDUSTRY* 125 (Tino Balio ed., rev. ed. 1985).

⁵² *Competitive Advantage of Hollywood Industry*, *supra* note 7.

⁵³ Motion Picture Association of America, Chairman Dan Glickman, <http://www.mpa.org/AboutUsGlickman.asp> (last visited Jan. 28, 2008).

⁵⁴ *Hollywood and Europe*, *supra* note 34.

1. Relations During World War I

The film industry's ties to the government on the matter of international trade date back to World War I. In 1916, prior to the MPAA's creation, U.S. consuls "were instructed to report on the market for American movies," and "the government, in turn, made this information available to the industry."⁵⁵ American dominance of the global film market in the post-war era led to industry concerns about maintaining open markets. By the 1920s, many countries had already noticed that Hollywood products accounted for approximately four-fifths of all film screenings in the world.⁵⁶ Facing a deluge of American films in their domestic markets, governments began to establish trade barriers to shelter their domestic film industries.⁵⁷ These new barriers prompted Hollywood to seek help from Washington, and the U.S. State Department represented Hollywood's interests and advocated freer trade to benefit the industry.⁵⁸

2. Relations During World War II

During World War II, Hollywood cooperated closely with the U.S. government in support of its war aims by assisting with the country's information campaign.⁵⁹ In the immediate aftermath of the war, the government believed that the export of films would help bring American ideals into destabilized areas, especially in Europe, to fight the spread of communism.⁶⁰ President Truman "secretly supported propaganda schemes that included the promotion of U.S. film exports."⁶¹

In an official 1944 "Circular to All Diplomatic Officers," Assistant Secretary of State A.A. Berle stated:

The Department desires to cooperate fully in the protection of the American motion picture industry abroad. It expects in return that the industry will cooperate wholeheartedly with this government with a view to insuring that the pictures distributed abroad will reflect credit on the good name and reputation of this country and institutions.⁶²

Relations between the MPAA and the government were so close, the MPAA "was permitted to use State Department secure communications

⁵⁵ *Id.*

⁵⁶ Shao, *supra* note 12, at 128.

⁵⁷ *See id.* at 129.

⁵⁸ *See id.*

⁵⁹ *See Competitive Advantage of Hollywood Industry, supra* note 7.

⁶⁰ Shao, *supra* note 12, at 129.

⁶¹ *Id.*

⁶² *Hollywood and Europe, supra* note 34.

facilities for sensitive messages.”⁶³ Washington and Hollywood therefore derived a mutual benefit from their relationship during World War II and the early years of the Cold War. Hollywood could count on Washington to negotiate lower foreign trade barriers and, in turn, Washington relied on Hollywood to spread American ideals to engender sympathies for the United States and to counteract communist influence. However, there were still certain boundaries that Hollywood could not cross; “In many cases, the [MPAA] negotiated directly with foreign governments, threatening US retaliations in some instances.”⁶⁴

3. Recent Relations

In recent decades, film piracy has become a top concern for the MPAA. The MPAA claims that its member studios lose approximately \$6.1 billion each year as a result of piracy.⁶⁵ Consequently, the MPAA established its international anti-piracy program in 1976, with its goals to:

[I]mplement and strengthen existing copyright legislation, assist local governments and law enforcement authorities in the investigation and prosecution of piracy cases, initiate civil litigation on behalf of its Member Companies against copyright infringers, and . . . work[] to strengthen the copyright law of other nations and suggest appropriate penalties.⁶⁶

Amendments to Section 301 of the Trade Agreements Act of 1979 institutionalized private sector participation in foreign trade policy by giving private petitioners the right to seek government redress.⁶⁷ This effectively made Section 301 a powerful weapon for domestic industries who claimed they were aggrieved by foreign trade practices.⁶⁸

Under the “Special 301” procedure, the United States Trade Representative (“USTR”) identifies “priority countries” with rampant IP rights violations.⁶⁹ If the identified country does not negotiate with the United States within six months or if negotiations are ineffective, the United States has the right to impose unilateral trade sanctions.⁷⁰ The

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MOTION PICTURE ASSOCIATION, ANTI-PIRACY FACT SHEET: ASIA-PACIFIC REGION 1 (2006), <http://www.mpa.org/AsiaPacificPiracyFactSheet.pdf> (last visited Jan. 28, 2008).

⁶⁶ Stephen K. Shiu, Comment, *Motion Picture Piracy: Controlling the Seemingly Endless Supply of Counterfeit Optical Discs in Taiwan*, 39 VAND. J. TRANSNAT’L L. 607, 617 (2006).

⁶⁷ Susan K. Sell, *Industry Strategies for Intellectual Property and Trade*, 10 CARDOZO J. INT’L & COMP. L. 79, 82 (2002) [hereinafter *Industry Strategies*].

⁶⁸ *Id.*

⁶⁹ Shiu, *supra* note 66, at 622.

⁷⁰ *Id.*

USTR has been “remarkably responsive” to the requests of key private sector actors, and the MPAA views Special 301 as an important tool to influence IP protection reforms in other countries.⁷¹

During the early 1980s, MPAA president Jack Valenti became an outspoken critic of foreign copyright piracy, and was the moving force behind the creation of the International Intellectual Property Alliance (“IIPA”) in 1984.⁷² The IIPA’s objective is to promote copyright interests, and the alliance and its members have actively made use of the Section 301 process.⁷³

The MPAA has also acted independently of the U.S. government to enforce its interests in preventing film piracy. In recent years, the MPAA has initiated local litigation and has actively encouraged local enforcement efforts to seize pirated movies. Although the MPAA did not seize any illegal Digital Versatile Discs (“DVD”) anywhere in the world in 1998; by 2002, the MPAA had seized seven million illegal DVDs and twenty-six million Video CDs worldwide, and the number of seizures continues to grow.⁷⁴

The MPAA thus has successfully influenced bilateral trade relations through lobbying with the U.S. government, and also by resorting to independent means of working directly with local governments around the world.

IV. BILATERAL RELATIONS

A. Canada

The Canadian government is vocal in arguing that films are a cultural product, and therefore should be treated as an exception to free trade agreements. The “unrelenting flow” of American cultural products has motivated Canada to support a cultural protection agenda in trade negotiations.⁷⁵

Canada carved out an exception for films during negotiations over the 1989 U.S.-Canada Free Trade Agreement (“CFTA”). Under Article 2005 of CFTA, “cultural industries” were exempt from the agreement provisions liberalizing bilateral trade.⁷⁶ Article 2012 of CFTA included enterprises

⁷¹ *Id.* at 630; see also *Industry Strategies*, *supra* note 67, at 101.

⁷² SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 84, 100 (2003) [hereinafter *PRIVATE POWER, PUBLIC LAW*].

⁷³ *Id.*

⁷⁴ Shiu, *supra* note 66, at 612–13.

⁷⁵ Eireann Brooks, Comment, *Cultural Imperialism vs. Cultural Protectionism: Hollywood’s Response to UNESCO Efforts to Promote Cultural Diversity*, 5 *HOFSTRA J. INT’L BUS. & L.* 112, 126 (2006).

⁷⁶ Canada-U.S. Free Trade Agreement, U.S.-Can., Jan. 2, 1988, available at <http://>

engaged in “the production, distribution, sale or exhibition of film or video recordings” under the definition of “cultural industries.”⁷⁷ This provision was reproduced in the 1994 North American Free Trade Agreement (“NAFTA”) at Canada’s insistence.⁷⁸ The main purpose of the CFTA and NAFTA cultural exclusion clause is to “protect Canada from losing its cultural identity from a massive influx of U.S. works, which the Canadian public eagerly consumes,” and the language of the provision focuses narrowly on industries likely to affect Canadian cultural identity, such as film rather than opera or dance.⁷⁹

Despite its traditional protests against cultural exceptions as antithetical to free trade, the MPAA has been willing to deviate from free trade principles when U.S. film studios benefit from foreign subsidies. The chief example of such a subsidy is Canada’s Production Services Tax Credit (“PSTC”). Established in 1977, the PSTC is a subsidy that grants a tax credit of 16% of qualified labor costs to any film company, domestic or foreign, that films in Canada with a project budget of at least one million Canadian dollars.⁸⁰ A foreign company only needs to establish a Canadian corporation and employ Canadian labor to qualify, as there is no requirement of “Canadian content” in the film itself.⁸¹

The PSTC has been so successful in attracting U.S. film companies to film their productions in Canada, the country is often referred to as “Hollywood North.”⁸² A 2001 study found that approximately one-third of all feature films in North America were produced in Canada.⁸³ While the major U.S. film studios welcome the subsidies because of the benefits of lowered production costs without cultural content requirements, the export of film production to Canada has generated resistance from domestic film workers who fear the increase in loss of jobs at home.

Hollywood is a unionized industry and since the Depression era unions and guilds have played a major role in the entertainment industry.⁸⁴ By filming in Canada and utilizing local labor, Hollywood film companies can also save on costs by avoiding more stringent union rules which they would be subject to at home. In a 2000 report, the U.S. Department of Commerce estimated that this “runaway production” to Canada resulted in production

wehner.tamu.edu/mgmt.www/NAFTA/fta/complete.pdf.

⁷⁷ *Id.*

⁷⁸ *Hollywood and Europe*, *supra* note 34.

⁷⁹ Cahn & Schimmel, *supra* note 5, at 290–91.

⁸⁰ Wright, *supra* note 4, at 751–52.

⁸¹ *Id.* at 743, 752.

⁸² *Id.* at 740.

⁸³ Meg James, *Study Finds More Films Shot in Canada*, L.A. TIMES, Dec. 13, 2001, at B2, available at 2001 WLNR 10504928.

⁸⁴ See *Competitive Advantage of Hollywood Industry*, *supra* note 7.

cost losses of \$2 billion to the U.S. economy in 1999.⁸⁵

The film industry unions and their coalition, the Film and Television Action Committee (“FTAC”), have lobbied the U.S. government to stop the outsourcing of American film production jobs. In 2001, the FTAC filed a petition with the Department of Commerce under section 701 of the 1930 Tariff Act to investigate whether the United States should impose countervailing duties against Canada for the PSTC subsidy.⁸⁶ The MPAA responded by filing a petition attacking the petitioners’ standing, and the FTAC subsequently withdrew its petition and did not refile.⁸⁷ However, the FTAC now plans to attack the PSTC through a Section 301(a) “unfair trade practices” petition to call for the USTR to pressure Canada to rescind its subsidies, or else face referral to the World Trade Organization (“WTO”) for dispute settlement.⁸⁸

The MPAA has argued that the PSTC incentives are not inconsistent with WTO obligations, as there has been no material injury to the domestic film industry, as Hollywood continues to be profitable.⁸⁹ The MPAA’s attempts to defend the PSTC illustrate that the MPAA is not a consistent proponent of free trade, at least when its members benefit from foreign subsidies. Instead, the MPAA will lobby for the economic interests of its own members, even when doing so appears to go against the interests of the U.S. economy.

B. Europe

U.S. films represent approximately 80% of the films distributed in European theaters, and over 55% of the films shown on European television networks.⁹⁰ In the pre-World War I era, the U.S. film industry lagged its European competitors, “particularly those of France and Italy, in such matters as feature production which had been invented by the Europeans and the establishment of permanent theatres.”⁹¹ However, World War I ended Europe’s advances and established Hollywood’s dominance.⁹²

European countries first began to implement screen quotas during the interwar period to curb the excessive export of American films and to ensure that local films would continue to be exhibited.⁹³ In the 1920s, the

⁸⁵ DEP’T OF COMMERCE, *supra* note 22, at 21.

⁸⁶ Wright, *supra* note 4, at 818.

⁸⁷ *Id.*

⁸⁸ See Film and Television Action Committee, *The Facts About FTAC’s Section 301(a) Filing*, available at <http://www.ftac.net/html/301a-2.html>.

⁸⁹ Wright, *supra* note 4, at 802.

⁹⁰ Cahn & Schimmel, *supra* note 5, at 281.

⁹¹ *Competitive Advantage of Hollywood Industry*, *supra* note 7.

⁹² *See id.*

⁹³ Brooks, *supra* note 75, at 120.

U.S. State Department intervened on the U.S. film industry's behalf in France, Spain, Italy, Germany, Austria, and Czechoslovakia on the basis of a need for freer trade.⁹⁴ Both the government and the film producers supported this policy by pointing out that the United States did not restrict the import of foreign films into its own domestic market. In reality, the dominance of the major studios in domestic U.S. distribution severely limited market access.⁹⁵

World War II brought another crushing blow to the European film industry. The dominant European players, Germany's UFI conglomerate and Italy's Cinecitta, were dismantled or annihilated by bombings.⁹⁶ As in the aftermath of World War I, the U.S. film industry filled the vacuum by flooding the European market with a backlog of previously unplayed American films.⁹⁷ Thereafter, American films maintained a dominant position in the European market.

With closer integration during the 1980s, European films began to benefit from regional arrangements and subsidies to protect European film industries. In 1989, the European Union ("EU") issued the "Television Without Frontiers" Directive, which required at least 50% of audio-visual products broadcast over European television to be of European origin.⁹⁸ The European Union also employs subsidies through Eurimages funds and the European Convention on Cinematographic Co-production, alongside individual state subsidies.⁹⁹ More than 60% of European films receive annual national and regional subsidies totaling \$1 billion.¹⁰⁰

The European Union's embrace of the cultural exception to free trade, which justifies the use of film subsidies and quotas for cultural protection, came to the forefront during heated negotiations with the United States and the MPAA during the GATT Uruguay Round. During these negotiations, the MPAA and the United States argued against the inclusion of a cultural exception to the liberalization of global trade.¹⁰¹ The aggressiveness of MPAA lobbying in Europe had the counteractive effect of leading EU member-states to close ranks. Because the European Union refused to back down from its position, both sides settled on an "agreement to disagree" on the existence of a cultural exception to film.¹⁰² Following these negotiations, Jack Valenti turned from "chief arsonist" to leader of the "fire

⁹⁴ Shao, *supra* note 12, at 129.

⁹⁵ *See id.*; Guback, *supra* note 32, at 467.

⁹⁶ *Competitive Advantage of Hollywood Industry, supra* note 7.

⁹⁷ *See* Guback, *supra* note 32, at 471.

⁹⁸ Kim, *supra* note 9, at 368.

⁹⁹ *Id.* at 369–70.

¹⁰⁰ *Id.*

¹⁰¹ *See infra* Part V.A.

¹⁰² *See id.*

brigade,” and MPAA and USTR officials traveled throughout Europe in 1994 and 1995 to repair relations.¹⁰³

A general analysis of the European film trade provides only a backdrop for the long and often contentious trade relationship the MPAA has enjoyed with individual European countries. The following study of the United Kingdom and France provides two examples of the development and changes to this trading relationship over the past century.

I. United Kingdom

The United Kingdom has traditionally been one of the most profitable sources of foreign revenue for Hollywood. Statistics show that “[b]y 1925, a third of all foreign revenue came from the United Kingdom alone, where American films captured 95% of the market.”¹⁰⁴ The cultural impact of the deluge of American films did not go unnoticed, as a Hollywood industry executive observed that “American producers are now actively ‘Americanizing’ England, her dominions and colonies, and all of Europe.”¹⁰⁵

In response, the British Parliament passed the Cinematograph Films Act in 1927, which required that a certain minimum proportion of films shown in British theaters be domestic in origin.¹⁰⁶ Hollywood responded to the new quotas by making “quota quickies,” or cheap movies made locally in the United Kingdom to comply with the law.¹⁰⁷ Parliament responded again in 1938 with the passage of the Films Act of 1938, which attempted to legislate the quota quickies out of existence by establishing a minimum cost test.¹⁰⁸ The United Kingdom eventually abandoned the screen quota policy during World War II.¹⁰⁹

Today the United Kingdom employs state subsidies to support its film industry. British Screen Finance, which is owned by four U.K. film corporations,¹¹⁰ provides a subsidy with a “quasi-commercial character” to local film producers.¹¹¹ In addition to providing a “U.K. perspective,” the films must also be commercial, in an effort to encourage high-quality and profitable films.¹¹² British Screen Finance also provides incentives for

¹⁰³ *Hollywood and Europe*, *supra* note 34.

¹⁰⁴ Guback, *supra* note 32, at 466.

¹⁰⁵ *Id.* at 468.

¹⁰⁶ *Hollywood and Europe*, *supra* note 34.

¹⁰⁷ Guback, *supra* note 32, at 469.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 470.

¹¹⁰ The companies are Rank, United Artists’ Screen Entertainment, Channel Four, and Granada. Kim, *supra* note 9, at 371

¹¹¹ *Id.*

¹¹² *Id.*

U.K.-linked international co-productions.¹¹³ Under this subsidy system, the domestic market share of U.K. films rose from 3% in 1993 to 23% in 1997.¹¹⁴

The MPAA's chief concern in the United Kingdom is now piracy. The MPAA claims that Hollywood loses out on approximately \$120 million each year due to piracy in the United Kingdom.¹¹⁵ The MPAA's activities in the United Kingdom now concentrate on the extensive optical disc piracy market, and it seized 2.4 million pirated items in the United Kingdom in 2003.¹¹⁶

2. France

While U.S. films garner the greatest share of the French film market, Hollywood's 65% market share is significantly smaller than its average of 90% market share elsewhere in Europe.¹¹⁷ The relative success of the French film industry can be attributed to France's trade barriers to film and its age-old fear of the cultural threat posed by U.S. films.

France is one of the most vocal proponents of the cultural view of cinema. French intellectuals see filmmaking as an art form and scorn American films for representing "vulgar commercialism."¹¹⁸ The French government has adopted this cultural view and provides the domestic film industry with subsidies encouraging innovative, "art-house" films.¹¹⁹ The non-economic view of cinema appears even in French methods of measuring film success, which relies on the number of tickets sold rather than the U.S. industry practice of tabulating the dollar amount of gross box office receipts.¹²⁰

France instituted its first trade barriers to American films in 1928, when the French education minister established a national film quota system on the basis of public morality, state security, and safeguarding French culture.¹²¹ Following World War II, France eased its restrictions on Hollywood films out of the need for U.S. aid for post-war reconstruction. In 1946, French Prime Minister Léon Blum signed an agreement with U.S.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ MPA WORLDWIDE MARKET RESEARCH, 2004 EUROPEAN COUNTRY PIRACY FACT SHEETS 13 (2004), available at <http://www.mpaa.org/EuropeanPiracyFactSheet.pdf> [hereinafter EUROPEAN COUNTRY PIRACY FACT SHEET].

¹¹⁶ *Id.* at 13–14.

¹¹⁷ Brooks, *supra* note 75, at 124.

¹¹⁸ Kim, *supra* note 9, at 371.

¹¹⁹ *Id.*

¹²⁰ *Competitive Advantage of Hollywood Industry*, *supra* note 7.

¹²¹ Bill Grantham, *America the Menace: France's Feud with Hollywood*, WORLD POL'Y J., Summer 1998, available at <http://www.worldpolicy.org/journal/articles/grantham.html>.

Secretary of State James F. Byrnes, whereby France lifted restrictions on U.S. film imports in exchange for \$1 billion worth of credits.¹²² As a result of the Blum-Byrnes Agreement, the releases of French movies declined from ninety-six in 1945 to seventy-eight in 1947. In comparison, not less than 338 U.S. movies were released in French theatres in the first half of 1947.¹²³

The French movie industry reacted with anger, and in 1948 French actors and directors led large demonstrations in Paris against the Blum-Byrnes Agreement.¹²⁴ In response to the protests and lobbying, the French government negotiated and entered into a new quota agreement in 1948 with the MPA and the U.S. State Department permitting 121 American films to enter France each year, while the rest of the world was left competing for a separate annual import quota of 65 foreign films.¹²⁵

The Blum-Byrnes Agreement helped create a “powerful national myth” in the French film industry that quotas were the only means by which France could protect its domestic film industry and cultural identity, and that Hollywood “would deploy all its economic and political muscle to defeat the French.”¹²⁶ The French film industry maintained this attitude when it mobilized in 1993 during the heated negotiations over the status of film in the Uruguay Round, as France took the diplomatic lead in resisting the latest attempt at U.S. cultural “invasion.”¹²⁷

France also places strict limits on Hollywood films in television broadcasts. Although the European Union’s Television Without Borders directive allows each EU member to set stricter quotas, France is the only member country that has done so.¹²⁸ France requires a 40% ceiling broadcast time on television for non-European films.¹²⁹

In addition to quotas, France utilizes subsidies to protect its film industry. France was the European country which established the practice of providing government subsidies to its film, music, theater, and opera industries in the interests of cultural protection.¹³⁰ The French Center for Cinematography and SOFICA are the two organizations which provide subsidies with the purpose of promoting both French film production and distribution.¹³¹

¹²² *Id.*; see also *Hollywood and Europe*, *supra* note 34.

¹²³ *Hollywood and Europe*, *supra* note 34.

¹²⁴ *Id.*

¹²⁵ Guback, *supra* note 32, at 474.

¹²⁶ Grantham, *supra* note 121.

¹²⁷ See *Hollywood and Europe*, *supra* note 34; see also *infra* Part V.A.

¹²⁸ Kim, *supra* note 9, at 368.

¹²⁹ *Id.*

¹³⁰ Brooks, *supra* note 75, at 120.

¹³¹ Kim, *supra* note 9, at 370.

C. Russia

The MPAA has been more successful in exercising its influence in Russia than in the European Union. During the Cold War, Hollywood formally established a foothold in the Soviet Union when the MPAA signed an independent agreement with the U.S.S.R.'s Minister of Cinematography in 1988.¹³² The U.S.-U.S.S.R. Film Panel Agreement allowed the American studios to market their films in the Soviet Union by sharing box office revenue and through the construction and leasing of theaters.¹³³ However, the U.S.S.R. and officials from Groskino, the state-run film distributor, largely ignored the agreement.¹³⁴ The MPAA retaliated in 1991 by placing an embargo on the export of American films to the Soviet Union.¹³⁵

The MPAA later flexed its muscles during negotiations over the 1991 U.S.-U.S.S.R. Trade Agreement. As a result of MPAA lobbying and pressure, the agreement was delayed because of the Soviet Union's lax copyright laws.¹³⁶ The MPAA used its film embargo and political pressure to successfully convince the Soviet legislature to propose stricter copyright laws, although the collapse of the Soviet Union in 1991 precluded ratification.¹³⁷ Following the breakup of the U.S.S.R., the MPAA lifted its embargo on all members of the Commonwealth of Independent States except Russia, and it held off on resuming trade until the Russian parliament enacted appropriate copyright laws.¹³⁸

During the 1990s, the Russian film industry collapsed and fell into a state of disrepair as American films flooded into the market with an average of eighty American releases per year.¹³⁹ Although Russia has resurrected its film industry in recent years, Hollywood films still dominate the local market, with local revenues jumping from \$10 million in 1999 to \$215 million in 2004, out of \$268 million in total Russian film revenue.¹⁴⁰

The MPAA now concentrates on anti-piracy efforts in Russia. The MPAA estimates that it suffered \$275 million in losses due to Russian piracy in 2003, where the local piracy level was estimated to be 75%.¹⁴¹ The raiding of illegal production lines is now the MPAA's top priority in

¹³² Lana C. Fleishman, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189, 218–19 (1993).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 189–90; 214–15.

¹³⁷ *Id.* at 190.

¹³⁸ See Fleishman, *supra* note 132, at 190.

¹³⁹ Brooks, *supra* note 75, at 121.

¹⁴⁰ *Id.* at 122.

¹⁴¹ EUROPEAN COUNTRY PIRACY FACT SHEET, *supra* note 115, at 8.

Russia with 5.1 million illegal videos and discs seized in 2003.¹⁴²

D. Asia

1. China

The U.S. film industry faces substantial market access problems in China in the forms of strict import quotas, a lengthy censorship review process, and cultural “blackout” periods. China currently allows just twenty foreign films to be imported each year, which falls grossly short of the voracious Chinese demand for Hollywood films.¹⁴³ The USTR has advocated on Hollywood’s behalf by pressing Beijing for greater Chinese market access for U.S. films.¹⁴⁴

The MPAA has also expressed its frustration at China’s mandatory censorship process, which takes “two to three times longer than the process in other Asian markets with similar censorship requirements.”¹⁴⁵ According to the MPAA, “China typically takes fifteen to thirty days and sometimes longer to finish its censorship process of films, while Korea takes on average seven to ten days, Singapore generally takes about seven days, Taiwan takes five to seven days.”¹⁴⁶

China has also instituted periodic cultural blackout days where foreign films cannot be shown, in order to “encourage more upright pursuits” among the nation’s youth.¹⁴⁷ However, some have concluded that the blackouts “are more an effort to protect China’s domestic releases than a policy choice to ‘purify the screen.’”¹⁴⁸ The MPAA believes that all of these policies act to limit the legitimate importation of U.S. films, and thus create a large and extremely profitable market for DVD pirates to satisfy the vast Chinese demand for Hollywood films.¹⁴⁹

Piracy and the protection of IP rights are the focus of MPAA activity in China. The MPAA estimates China’s piracy rate of 90% to be the highest in the world.¹⁵⁰ Concerns over rampant IP violations led the MPAA

¹⁴² *Id.* at 10.

¹⁴³ Carl Erik Heiberg, Comment, *American Films in China*, 15 MINN. J. INT’L L. 219, 236 (2006).

¹⁴⁴ Press Release, U.S. Trade Representative, Deputy USTR to Visit China May 24–26 (May 24, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Deputy_USTR_to_Visit_China_May_24-26.html?ht=.

¹⁴⁵ Heiberg, *supra* note 143, at 236.

¹⁴⁶ *Id.* at 236, n.111.

¹⁴⁷ *Id.* at 237.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ MOTION PICTURE ASS’N & LEK, THE COST OF MOVIE PIRACY 4 (2006) (on file with author).

to lobby the USTR to impose sanctions under Section 301 throughout the 1980s and 1990s. Additionally, the USTR obliged Hollywood's concerns by threatening Beijing with sanctions, non-renewal of most favored nation status, and opposition to China's entry into the WTO.¹⁵¹ As a result, China signed separate commitments to IP protection in 1992, 1995, and 1996, and also carried out domestic legal reforms in preparation for entrance to the WTO.¹⁵² However, piracy remained rampant and IP protections were not enforced.

Because the MPAA has been unable to rely on either the USTR or Chinese government action to enforce IP laws on a consistent basis, the MPAA and its member studios have acted on their own in recent years to enforce IP rights in Chinese courts. In 2003, three MPAA companies obtained a judgment in a Shanghai court against two local DVD companies that had sold pirated versions of MPAA films.¹⁵³

2. South Korea

The MPAA has been active in South Korea in advocating for greater IP protection and the elimination of the government's screen quotas. The MPAA focused on South Korea in its early attempts at obtaining greater IP protections in foreign countries through Section 301. Jack Valenti successfully carried out direct negotiations with Seoul over inadequate IP protections in 1985, and he later testified before Congress: "I've just come through a long and tortuous negotiation under a 301 filing with the Republic of Korea They understood what I was talking about."¹⁵⁴

South Korea originally implemented screen quotas in 1966 to "filter out Western influences."¹⁵⁵ The MPAA has concentrated most of its recent activity in Seoul on the elimination or reduction of South Korea's screen quotas, both through the USTR and through direct negotiations with Seoul. Hollywood has offered incentives in return for the quota's repeal and at one point offered to invest \$500 million in the Korean film and theater business in exchange for removal of the screen quota.¹⁵⁶ In 1999, Jack Valenti visited Korea to urge the quota's repeal and "suggested that American filmmakers would provide the training necessary for the Korean film industry to become more competitive."¹⁵⁷

Instead of accomplishing its objectives, the MPAA's aggressiveness has had the opposite effect of mobilizing the Korean film industry to protect

¹⁵¹ Heiberg, *supra* note 143, at 225–26.

¹⁵² *Id.* at 226.

¹⁵³ *Id.* at 230–31.

¹⁵⁴ PRIVATE POWER, PUBLIC LAW, *supra* note 72, at 89, 101.

¹⁵⁵ Kim, *supra* note 9, at 353.

¹⁵⁶ *Id.* at 363.

¹⁵⁷ *Id.*

the quota. Korean filmmakers adopted the cultural exception view and argued that “films should be treated as cultural products,” and “the screen quota is needed to protect and promote Korean culture.”¹⁵⁸ Despite the quota, Korean filmmakers throughout the 1990s had difficulty capturing significant market share against U.S. and other foreign films.¹⁵⁹ Between 1993 and 1998, Korean films only accounted for 15-25% of domestic ticket sales.¹⁶⁰ In order to increase domestic film production, the Ministry of Culture and Tourism announced in 2000 that it would begin to provide subsidies to the Korean film industry.¹⁶¹

The global success of Korean films in recent years have allowed the USTR and Hollywood to claim that the screen quotas and the cultural protection argument are now unnecessary, as Korean movies have become internationally competitive.¹⁶² At a 2005 press conference, USTR Rob Portman stated:

As you know, we believe that the quota should be reduced, and this has been a consistent U.S. position. . . . I will make a personal comment here, which is that Korean films are very competitive. They are considered some of the best films in the world.¹⁶³

Korean filmmakers have countered by claiming that the screen quotas are the driving force behind the industry’s recent success.¹⁶⁴ However, the USTR was ultimately successful in convincing Seoul to lower the screen quotas as a precursor to the opening of talks on a proposed U.S.-South Korea free trade agreement.¹⁶⁵ The Korean government decided to cut the screen quota in half from 146 days to 73 days.¹⁶⁶

¹⁵⁸ *Id.* at 367.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 365.

¹⁶¹ *See Kim, supra* note 9, at 367.

¹⁶² *See* Lorenza Munoz & Josh Friedman, *Coming Attractions: As Its Filmmakers and Moviegoers Gain Hollywood’s Attention, South Korea Aims to Broaden its Share of the World’s Cinema Market*, L.A. TIMES, Nov. 6, 2006, at C1.

¹⁶³ Rob Portman, U.S. Trade Representative, Press Conference at Closing of APEC Trade Minister’s Meeting (June 3, 2005), [http://www.ustr.gov/Document_Library/Transcripts/2005/June/USTR_Portman_Press_Conference_at_Closing_of_APEC_Trade_Ministers_Meeting.html?ht= USTR Portman](http://www.ustr.gov/Document_Library/Transcripts/2005/June/USTR_Portman_Press_Conference_at_Closing_of_APEC_Trade_Ministers_Meeting.html?ht=USTR%20Portman).

¹⁶⁴ Munoz & Friedman, *supra* note 162.

¹⁶⁵ Barbara Demick, *U.S., South Korea Are Nearing Negotiations on Free Trade Pact*, L.A. TIMES, Feb. 2, 2006, at A5.

¹⁶⁶ Press Release, U.S. Trade Representative, USTR Portman Welcomes Korea’s Action to Reduce Movie Restrictions; Benefits US Film Industry (Jan. 26, 2006), http://www.ustr.gov/Document_Library/Press_Releases/2006/January/USTR_Portman_Welcomes_Koreas_Action_to_Reduce_Movie_Restrictions;_Benefits_US_Film_Industry.html?ht=

V. MULTINATIONAL TREATIES

A. GATS

Debates over the status of films in international trade took place during the original negotiations over GATT in 1947. Article IV of GATT allowed states to establish and maintain “internal quantitative regulations relating to exposed cinematograph films” in the form of screen quotas, “computed on the basis of screen time per theatre per year.”¹⁶⁷ The drafters “strongly believed that, because of their unique capacity to diffuse political values, cinematographic films should be treated specifically.”¹⁶⁸ The United States ultimately conceded this exception to GATT believing that it would be in the financial interests of theater owners to show U.S. films because of their popularity, which would prevent significant screen quotas from taking effect.¹⁶⁹

The debate over whether film should have a special status in free trade agreements was renewed during negotiations over the General Agreement on Trade in Services (“GATS”) during the Uruguay Round, which reclassified motion picture distribution and exhibition as an audiovisual service.¹⁷⁰ On one side, the European states sought an explicit cultural exception for motion pictures in GATS that would permit quotas and subsidies, and argued that trade agreements should not result in a “loss of their cultural sovereignty.”¹⁷¹

On the other hand, the United States and the MPAA viewed the “loss of identity” argument as merely “a sham and pretext to establishing trade barriers against U.S. goods in a crucial area of trade.”¹⁷² Audiovisual services were the “final sticking point” of the Uruguay Round after heated negotiations on agricultural and aerospace goods had been concluded, which created great pressure on both sides to come to an agreement.¹⁷³

The removal of trade barriers to film exports were of great importance to both the U.S. government and the MPAA. At the time, the audiovisual sector returned \$3.5 billion each year in surplus balance of payments to the United States.¹⁷⁴ Both the government and the MPAA believed that even greater revenues could be generated from film exports with the removal of

¹⁶⁷ General Agreement on Tariffs and Trade art. IV, Oct. 30, 1947, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

¹⁶⁸ Cahn & Schimmel, *supra* note 5, at 287.

¹⁶⁹ See Shao, *supra* note 12, at 111.

¹⁷⁰ See THE WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 201 (1999).

¹⁷¹ Cahn & Schimmel, *supra* note 5, at 282.

¹⁷² *Id.* at 283.

¹⁷³ See Wheeler, *supra* note 10, at 31.

¹⁷⁴ *Id.*

trade barriers.¹⁷⁵ High profile American directors, such as Steven Spielberg and Martin Scorsese, publicly attacked the European trade barriers.¹⁷⁶

The MPAA had full support and cooperation from the U.S. government. President Clinton regarded the issue as so important that he personally called European leaders “to inform them that he had no intention of backing down over the audiovisual industry.”¹⁷⁷ During this time, the President also gave assurances to the U.S. film industry at a \$2 million Democratic Party fundraiser in Hollywood.¹⁷⁸

However, the MPAA’s aggressiveness had a counterproductive effect of uniting opposition to any liberalization of barriers in the audiovisual sector. Jack Valenti and the MPAA managed to achieve the unique feat in French politics of binding all parties together “in an anti-American consensus to protect French culture.”¹⁷⁹ French President Mitterand was moved to declare, “[w]hat is at stake is the cultural identity of all our nations.”¹⁸⁰ Furthermore, EU negotiation coordinator Hugo Paeman was critical of the MPAA’s belief that it had the power to hold up negotiations.¹⁸¹

Ultimately, the European Union and the United States failed to reach a substantive agreement on the audiovisual sector, and they “agreed to disagree” on an exception for the sector in GATS. Although the Europeans proudly proclaimed that the cultural identity of Europe had been saved, in reality, no cultural exception was placed into GATS.¹⁸² Following the end of the negotiations, the MPAA released a statement stating: “Contrary to many press reports, audiovisual services were not excluded from the new services rules. There are no ‘cultural carve outs’ or other special treatments for this sector.”¹⁸³

The MPAA was correct on this account. Although Hollywood and the U.S. government did not succeed in its bid to fully liberalize the audiovisual sector, the Uruguay Round did not give the European Union or any country the permanent right to erect barriers to film imports. Instead, what the European Union effectively won was the “temporary exclusion of the audiovisual sector from the liberalization process of GATS.”¹⁸⁴ Any agreement on the status of the audiovisual sector was left to future rounds

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 32.

¹⁷⁹ See Wheeler, *supra* note 10, at 32.

¹⁸⁰ *Id.*

¹⁸¹ *Hollywood and Europe, supra* note 34.

¹⁸² *Id.*

¹⁸³ Cahn & Schimmel, *supra* note 5, at 303.

¹⁸⁴ *Id.* at 303–04.

of negotiations.

B. TRIPS

TRIPS achieved the integration of IP into the global context of trade.¹⁸⁵ The basic objective of TRIPS “is to give adequate and effective protection to intellectual property rights, so that the owners of these rights receive the benefits of their creativity and inventiveness.”¹⁸⁶ Rather than being a result of a state-centric negotiation process, however, TRIPS was largely the responsibility of private sector activism, and especially U.S.-based corporate actors like the film industry.¹⁸⁷

Before TRIPS negotiations formally began, “members of private industry in the United States, concerned about inadequate foreign protection of patents, championed a trade-based strategy for securing greater protection of intellectual property rights.”¹⁸⁸ Besides national cooperation, the U.S. industry group coalition reached across borders to establish alliances with European and Japanese counterparts to coordinate on mutual IP interests during TRIPS negotiations.¹⁸⁹

The MPAA was an active actor in the TRIPS negotiation and drafting process, especially in the area of copyright protection. The MPAA demanded early on that the definition of “author” in the agreement include corporations because, unlike the United States, many other countries refused to recognize that corporations could be authors and limited remuneration of royalty payments to “physical” authors.¹⁹⁰ The U.S. government included this demand in its submission of changes to the draft, and pushed for these amendments “until the very last minute.”¹⁹¹ The MPAA was not content with merely lobbying the U.S. government. During the last weeks of the Uruguay Round, “representatives of the MPA were working full-time in Geneva.”¹⁹²

In the end, the private sector lobbyists received 95% of what they wanted.¹⁹³ TRIPS symbolized the strength of private sector actors who cooperate and coordinate lobbying efforts in the international system. It is now “almost impossible to interpret TRIPS provisions without the influence

¹⁸⁵ *Id.* at 305.

¹⁸⁶ WTO Secretariat, *supra* note 170, at 207.

¹⁸⁷ *See Industry Strategies, supra* note 67, at 79, 81.

¹⁸⁸ *Public Welfare and the Role of the WTO, supra* note 36, at 844.

¹⁸⁹ *See Industry Strategies, supra* note 67, at 92–97.

¹⁹⁰ DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 25 (2d ed. 2003).

¹⁹¹ *Id.* at 25–26.

¹⁹² *Id.* at 26.

¹⁹³ *Intellectual Property and Public Policy, supra* note 39, at 314.

of the private sector.”¹⁹⁴ As a result, the MPAA will continue to have an influential role in future interpretations or enforcement of TRIPS provisions with regard to movie copyrights.

C. Convention on Cultural Diversity

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (“Convention on Cultural Diversity”) was the most recent multilateral treaty touching on the status of film in international trade. Article 8 of the Convention allows states parties to “take all appropriate measures to protect and preserve cultural expressions.”¹⁹⁵

While the objective of the treaty was generally “to protect and promote the diversity of cultural expressions,”¹⁹⁶ the Convention was aimed at “the pervasive importation of cultural products, such as films and television programs, from economically dominant countries.”¹⁹⁷ Not surprisingly, France and Canada were the driving forces behind the Convention. Both countries argued that the expression of national culture through mediums such as film was “essential to national identities and therefore must be treated separately from other goods in international trade negotiations.”¹⁹⁸

In contrast to earlier multilateral agreements, the United States tried not to appear too identified with Hollywood interests during negotiations.¹⁹⁹ However, the U.S. film industry’s global influence was a central factor in discussions. France’s culture minister, Renaud Donnedieu de Vabres, made reference to the “current asymmetry of cultural power” which Hollywood represented.²⁰⁰ The United States also tried to establish alliances with other countries that had similar commercial interests such as India, which had its own successful “Bollywood” film industry.²⁰¹ However, India eventually signed on to the Convention and took the position that the treaty related to culture and not trade, and thus its impact was more symbolic than substantive.²⁰²

One hundred forty-eight countries ultimately supported the

¹⁹⁴ *Public Welfare and the Role of the WTO*, *supra* note 36, at 824.

¹⁹⁵ Convention on Cultural Diversity art. 8, Oct. 20, 2005, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

¹⁹⁶ *Id.*, art. 1.

¹⁹⁷ Brooks, *supra* note 75, at 113

¹⁹⁸ *Id.* at 121.

¹⁹⁹ Riding, *supra* note 3.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

Convention, and it was opposed only by the United States and Israel.²⁰³ Louise Oliver, the U.S. ambassador to UNESCO, responded to the defeat by declaring that the result was “extraordinarily disappointing”²⁰⁴ and that the Convention “remains too flawed, too open to misinterpretation and too prone to abuse for us to support,” as it “permit[s] governments to use subsidies and quotas to promote culture.”²⁰⁵

Hollywood feared that the Convention would provide countries with a formal international instrument to justify greater quotas or subsidies to domestic film industries on the basis of cultural preservation. MPAA president Dan Glickman argued “[n]o one should use this convention to close their borders to a whole host of products,” and that the proper place for trade was the WTO, not UNESCO.²⁰⁶ Glickman further expressed the MPAA’s concern over the potential ramifications of the Convention: “What’s to stop a country saying that it’ll only take 20% of U.S. films, or taxing our films but not its own?”²⁰⁷

The Convention is unlikely to produce the dire effects that the MPAA fears. Under Article 20 of the Convention, nothing in the treaty “shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”²⁰⁸ Therefore all Parties to the Convention are still required to adhere to their WTO obligations. While Article 20 also provides that parties would need to take the Convention into account in interpreting their other international obligations,²⁰⁹ the Convention, if ratified, would simply be another factor to consider during future WTO negotiations on cultural products.²¹⁰

VI. CONCLUSION

The MPAA has actively worked both through the U.S. government and independently to advocate Hollywood interests in international trade relations. Over the past century, Washington and Hollywood have developed a close relationship based on mutual interests and the U.S. film industry’s economic influence. This relationship has paid off for the MPAA, as the United States has consistently advocated its interests in bilateral trade relations around the world and in multilateral trade agreements such as GATS, TRIPS, and the Convention on Cultural Diversity.

²⁰³ *Id.*

²⁰⁴ Richard Verrier, *Treaty Vote Distresses Hollywood*, L.A. TIMES, Oct. 22, 2005, at C1.

²⁰⁵ Riding, *supra* note 3.

²⁰⁶ Brooks, *supra* note 75, at 124.

²⁰⁷ *Id.*

²⁰⁸ Convention on Cultural Diversity, *supra* note 195, art. 20.

²⁰⁹ *Id.*, art. 20(1)(b).

²¹⁰ Brooks, *supra* note 75, at 125.

In recent years, however, the MPAA has lived up to its reputation as “The Little State Department” by successfully acting on its own in establishing independent bilateral agreements with foreign governments and enforcing its IP rights abroad. This effective combination of close cooperation with Washington and independent action indicates that Hollywood will be able to maintain its dominant economic position in the international film trade in the decades ahead.

