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**The 'Cultural Industries':
A Clash of Basic Values?
A Comparative Study of the EU
and the NAFTA in Light of the WTO**

Rostam J. Neuwirth



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Abstract

Originally coined in the 1940s by protagonists of the Frankfurt School, the concept of 'culture industry' was gradually transformed from a derogatory term into the potentially more constructive concept 'cultural industries' in the context of the global culture and trade debate.

The present article uses three paintings by the Belgian painter René Magritte to visually outline the framework of the conceptual and perceptive challenges, which were introduced by the various technological innovations underlying the various sectors embraced by the cultural industries and highlights some of the consequences these entail for the regulation of international trade. In particular, two legal precedents concerning the periodicals industry -involving, on the one hand, the EU and, on the other hand, the NAFTA and the WTO - are used to highlight the potential for a clash between cultural and commercial considerations as they are conceptually combined in the cultural industries. For the sake of greater clarity it is shown that in the overall regulatory process such a clash can occur either at the level of the legal idea, or the legal norm, or the legal decision.

The article concludes by emphasising the need for a balance between cultural and commercial considerations with a view of their mutual reconciliation in the regulation of international trade, both at the global as well as the regional level.

Author

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Key words

Cultural Industries - North American Free Trade Agreement (NAFTA) - European Union (EU) - World Trade Organization (WTO) - Culture - Trade - Trade Linkage Debate - Constitutionalisation - Legal Theory.

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The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in Light of the WTO¹

Rostam J. Neuwirth

1. Introduction

The concept of cultural industries and the position they hold in the present international political and economic world order can be contemplated through three paintings by the Belgian painter *René (François Ghislain) Magritte* (1898-1967). It is no mere coincidence that Magritte was able to grasp so well the principal features of the cultural industries, since it was during his lifetime and, particularly, during the period in which he created these paintings that the concept itself was coined in the light of political turmoil and new technological innovations.² Moreover, a surrealist work of art may in fact in the moment of its creation be 'over-realistic' and therefore eventually requires the time factor to close the gap between the mind's idea, the creative process and its final material manifestation in reality. The titles of the relevant paintings are "Attempting the Impossible" (1928), "the Key to the Fields" (1936) and "Not to Be Reproduced" (1937).

In this chronological order, their titles and visual content may be used to illustrate some of the principal stages in the evolution of the concept of the cultural industries. The first stage began as an idea and was subsequently formulated as the concept of 'culture industry' (*Kulturindustrie*).³ Then, once the concept was coined, it was subject to discussions in various scientific fields, ranging from sociology to political economy and economics.⁴ In the provisionally final stage, it became enshrined for the first time in a text of

¹ An earlier version of this paper has been published in Francesco Palermo and Gabriel N. Toggenburg (eds.), *European Constitutional Values and Cultural Diversity* (EURAC Research, Bolzano/Bozen, 2003, out of print).

² Compare: "Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit" (The Work of Art in the Age of Mechanical Reproduction, (1936)), in Rolf Tiedemann and Hermann Schweppenhäuser (eds.), 1 *Walter Benjamin - Gesammelte Schriften*, (Suhrkamp, Frankfurt a. M., 2nd ed. 1978), 436; and see the chapter on the cultural industries in Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (Verso, New York, 1997), 120.

³ See Theodor W. Adorno, *The Culture Industry* (Routledge, London, 1991), 98.

⁴ See e.g. the diverse contributions in UNESCO, *Cultural Industries: A challenge for the future of culture* (Paris, UNESCO, 1982); Nicholas Garnham, *Capitalism and Communication: Global Culture and the Economics of Information* (SAGE, London, 1990); and for the field of economics David Throsby, *Economics and Culture* (Cambridge University Press, Cambridge, 2001); Françoise Benhamou, *L'économie de la culture* (La Découverte, Paris, 2001).

international (trade) law, the 1988 Canada-US Free Trade Agreement (CUSFTA).⁵ Since then the concept has continued to raise important legal questions in the context of several economic integration projects.

Again taken in this chronological order the paintings are also a means to ponder on the dynamics underlying the process of the formation of law. For the realisation of law (*Rechtsverwirklichung*), the way in which a law becomes formulated and then eventually applied to a great variety of facts, follows a similar procedure. The nature of this process is often exemplified by three major logical steps. Not impossible *per se* but perhaps impossible to put into words, the first step takes place in the mind and consists of the formulation of a legal idea (*Rechtsidee*). Then, as a second step, the idea becomes transformed into a legal norm (*Rechtsnorm*) which, finally, is applied to real facts usually taking various forms of a legal decision (*Rechtsentscheidung*).⁶ This logical line of legal reasoning is called the legal syllogism.⁷

This kind of reasoning, however, is difficult to apply to the cultural industries. This difficulty is due to the concept's character of an oxymoron, i.e. a figure of speech (or a word) in which apparently contradictory terms appear in conjunction. Originally, John Sinclair writes, the concept was designed to "set up a critical contrast between the exploitative, repetitive mode of industrial mass production under capitalism and the associations of transformative power and aesthetico-moral transcendence that the concept of culture carried in the 1940s, when it still meant 'high' culture".⁸

Today, this contrast takes more the form of a conflict between cultural and commercial (or economic) values and interests. In the case of the cultural industries these values and interests clash because of their dual nature.⁹ Therefore, the present, and even more so the future, treatment of the cultural industries in the context of various political and economic integration

⁵ Canada-United States Free Trade Agreement, done at Ottawa, 22 December 1987 and 2 January 1988, and done at Washington, D.C. and Palm Springs, 23 December 1987 and 2 January 1988, 27 *International Legal Materials*, 281.

⁶ See Arthur Kaufmann, *Analogie und "Natur der Sache"* (Decker und Müller, Heidelberg, 2nd ed., 1982), at 13.

⁷ A syllogism consists of two, one major and one minor, premises, whose successful subsumption is followed by a conclusion; see Brian Winters, "Logic and Legitimacy: The Uses of Constitutional Argument", 48 *Case Western Reserve Law Review* (1998), 263.

⁸ John Sinclair, "Culture and Trade: Some Theoretical and Practical Considerations" in Emile G. McAnany and Kenton T. Wilkinson (eds.), *Mass Media and Free Trade: NAFTA and the Cultural Industries* (University of Texas Press, Austin, 1996), at 30.

⁹ See e.g. Trevor Knight, "The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals", (57)2 *U.T. Fac. L. Rev.* (1999), at 165, Council Resolution of 8 February on fixed book prices in homogenous cross border linguistic areas, [1997] OJ L 042, 17/02/1999, at 3, Council Decision of 22 September 1997 on cross-border fixed book prices in European linguistic areas, [1997] OJ L 305/02, 07/10/1997, at 2 and Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on Certain Legal Aspects Relating to cinematographic and other audiovisual works [2001] COM (2001) 534 mainly at 3.

projects is unsatisfactory, and continues to pose a serious conceptual challenge.

Keeping in mind these three logical steps, the present analysis tries to cast some light on the cultural industries in the context of both North American and European integration projects as well as the parallel process of global integration under the aegis of the World Trade Organization (WTO). Part one departs from the level of ideas describing the general background of the cultural industries, which is rooted in the mysterious relation between culture and trade as part of the wider 'trade linkage debate'. Here, the goal is to clarify their mutual relation on the basis of three examples. Part two follows the understanding of the dual nature inherent in the cultural industries as being the key to the fields forming the broader culture and trade debate and outlines the principal normative approaches found in the European Union (EU), the North American Free Trade Agreement (NAFTA) and the WTO. Based on these norms, part three compares the case law as it was produced first in the European and later in the North American context. The comparison is made to help to evaluate the general impact of the different norms discussed. Finally, the concluding remarks offer some suggestions with regard to the future treatment of the cultural industries in the global context, the foundations of which are currently being laid in the course of negotiations for a new trade liberalisation round, launched at the 4th WTO Ministerial Conference held between the 9-14 November 2001 in *Doha, Qatar* (The Doha Round).

2. The Constitutionalisation of Culture and Trade: "Attempting the Impossible"?

2.1. *The Strange Case of Culture and Trade: Dichotomy, Quandary, or Synergy?*

The oxymoronic clash between 'culture' and 'industry' finds its equivalent in the juxtaposition of the two broader, but at least equally elastic, concepts of culture and trade. From early human history until today, the conceptualisation of culture and trade has posed considerable difficulties. These difficulties persist on the present international trade agenda, both globally and regionally, where the concept of culture has been, and continues to be perceived as being principally incompatible with the values of free trade. Among other concepts that are deemed incompatible with free trade, such as the environment, development, human rights or social and labour standards, culture is arguably the most dynamic as well as comprehensive, and hence the most difficult, concept to outline in the 'trade linkage debate'.

From this observation it derives that any effort to formulate a proper major premise for the treatment of the cultural industries in integration projects,

and notably those of NAFTA, the EU and the WTO, must begin with an attempt to clarify their mutual standing. As the title suggests, while this task is perhaps not 'impossible', it is definitely not easy, as the following examples show. The difficulty is to a large extent due to the extreme fluidity of ideas and their constant change in history. With the ideas the mutual interaction between culture and trade can change from one of dichotomy, across quandary, to eventually one of synergy.

2.1.1. Dichotomy: The Roman Example

The first example of ideas about the relation between the concepts of culture and trade is one of their mutual exclusiveness. It is found in a part of the legal writings of the Roman jurist *Gaius* (130-180 AD). In the second book of his *Institutiones*, he distinguishes things which are either subject to private dominion or not subject to private dominion.¹⁰ The distinctions made by *Gaius* form the basic reference to what in later writings became known as the category of "things which cannot be the object of exchange or of any legal commercial transaction" (*res extra commercium* or *res quarum commercium non est*). This classification referred especially to the right to buy and sell reciprocally. Things falling under this category were thus excluded from commercial transactions. Particularly the things subject to divine dominion (*res divini iuris*) can be compared to the concept of cultural property.¹¹ In a wider sense this classification also represents an approach to culture in the realm of international trade law, particularly the spirit underlying the approach chosen by the drafters of the 1948 General Agreement on Tariffs and Trade (GATT).¹²

2.1.2. Quandary: The Present State of Affairs

The term 'quandary' probably highlights best the perception of the present state of play in the interaction between culture and trade on the regional as well as global level. The present challenge is exemplified in the UNESCO publication on Culture, Trade and Globalization, published in the year 2000. The booklet acknowledges the enormous significance of both culture and trade, but when it comes to their combined consideration, such as in the case of the cultural industries (cultural goods and services), it draws a rather ambiguous image:

¹⁰ See Edward Poste, *Gaii Institutionum Iuris Civilis Commentarii Quatuor or Elements of Roman Law by Gaius* (Clarendon Press, Oxford, 1871), at 130 et seq.

¹¹ *Res divini iuris* included sacred things (*res sacrae*), religious things (*res religiosae*), and sanctified things (*res sanctae*); see Max Kaser, *Römisches Privatrecht* (Carl H. Beck, München, 15th ed. 1989), 90-1.

¹² General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187 (entry into force 1 January 1948).

The issue of 'culture and trade' has now acquired prime strategic significance. Cultural goods and services convey and construct cultural values, produce and reproduce cultural identity and contribute to social cohesion; at the same time they constitute a key free factor of production in the new knowledge economy. This makes negotiations in the cultural field extremely controversial and difficult. As several experts point out, no other industry has generated so much debate on the political, economic and institutional limits of the regional and global integration processes or their legitimacy. When culture is put on the table, it often prompts complex discussions on the relationship between the economic and non-economic value of things, that is, the value attributed to those things that do not have an assigned price (such as identity, beauty, or the meaning of life).¹³

The causes for the present quandary concerning the cultural industries are to a large extent found in the foundations of the present international trading regime itself. These foundations were laid with the adoption of the GATT. It is noteworthy that the GATT resumed the work of the League of Nations (1920-1946) building on various efforts as well as failures coming from experiences gained during the latter's existence. These rules have been, however, subject to considerable changes in the course of eight subsequent negotiation rounds, which in 1995 culminated in the creation of the WTO. Nevertheless, although the scope of the WTO expanded into many new areas, the rules governing the issue of culture remained by and large the same.

2.1.3. Synergy: The Constitutionalisation Debate

Largely due to the absence of a relevant legal source in the search for a third example that sketches the contours of a potentially harmonious and mutually enriching relationship between culture and trade, it is necessary to refer to the product of another artist's mind. Such a possible account for a synergic relation between culture and trade is given by *Stefan Zweig* (1881-1940) in his poetic record of history titled "Sternstunden der Menschheit" ("Decisive Moments in History") first published in 1927. A contemporary of *Magritte*, his account of human history has lost nothing of its relevance. In fact, the foreword to the fourteen 'decisive moments' contrasts, as an allusion to the dichotomy between culture and trade, an artist's artistic or cultural endeavour with one dedicated to more insignificant and mundane things. From this initial dichotomy, he proceeds to a more dynamic view, which reveals an eventual causal link, a possible synergy, hidden under a deeper layer, between the rare decisive moments and the constant efforts of millions of people. He wrote:

¹³ UNESCO, *Culture, Trade and Globalization: Questions and Answers* (UNESCO, Paris, 2000), at 9.

No artist is unceasingly an artist during the entire twenty-four hours of his daily life; every substantial, lasting success that he achieves always comes into being only in those few rare moments of inspiration. Similarly, history, in which we admire the greatest poet and actor of all time, is by no means ceaselessly creative. Even this "mysterious workshop of God," as Goethe reverently called history, a vast number of insignificant and mundane things occur. Even here, as everywhere in art and life, the sublime, unforgettable moments are rare. Usually, as an annalist history indifferently and persistently does nothing but add link to link in that enormous chain that stretches through the millennia, adding fact to fact, for all excitements needs time for preparation, and every real event must undergo development. Millions of people within a nation are always necessary for one genius to come into being; millions of idle human hours must always pass before a truly historical, decisive moment in history makes its appearance.¹⁴

Interpreted for the context of the present analysis, his observation hints at a possible, but perhaps undetected, linkage between culture and trade. Probably the linkage has still not been duly excavated from its hidden place because it is either so obvious as to be invisible, or else too deeply embedded in the centre of life so that a human being must step back and engage in the difficult endeavour of a critical self-reflection in order to bring it to the surface. Nonetheless, *Zweig's* observations are echoed in those of trade lawyers who, due to the development of trade law and practices through customs and usages, advocate the universal history of cultures (*universelle Kulturgeschichte*) as the richest source enhancing the understanding of trade.¹⁵

2.2. The Legal Idea

Each of the three examples is situated in a different historical context. *Stefan Zweig's* statement is exceptional because its aim - as compared to the two other examples - is not to regulate or describe the necessities of the respective epoch but instead to give a literary explanation of the natural forces working behind the evolution of mankind. Thus it is the idea about a possible link between culture and trade that plays a significant role in the life of an individual and a nation alike, an idea which deserves further thought in the light of present problems and developments in the international arena. The idea that it is possible to derive synergy effects from a link between culture and trade must be taken seriously and must be made part of present

¹⁴ Stefan Zweig, *Decisive Moments in History: Twelve Historical Miniatures* (Ariadne Press, Riverside, 1999), 5.

¹⁵ See e.g. Levin Goldschmidt, *Handbuch des Handelsrechts* (Verlag Ferdinand von Enke, Stuttgart, 2nd ed. 1875), at 6 and 10; see also Karsten Schmidt, *Handelsrecht* (Carl Heymanns Verlag, Köln, 4th ed. 1994), at 36, 40 et seq.

day legal considerations. An important impetus comes from the ongoing constitutionalisation debate in trade law as well as in law generally that begins to occupy the WTO and the EU and, perhaps only indirectly - by way of the WTO -, also NAFTA.¹⁶

3. The Cultural Industries: "The Key to the Fields"?

3.1. NAFTA, the EU and the WTO: Three Normative Approaches

From the idea of a harmonious relation between issues pertaining to the fields of culture and trade comes the question of how best to deal with trade and non-trade subjects. In light of the foregoing examples and also the present tendency for the organisation of societies, including cultural and economic aspects, to increase in complexity, the need for a regulatory approach that allows for synergy effects between the traditionally separate fields of culture and trade increases. For the realm of the WTO, *Debra P. Steger* has recently expressed a similar idea by stating that the question is not whether the WTO should or should not deal with the "trade and ..." subjects but instead "how should these so-called non-trade subjects be dealt with within the WTO system?".¹⁷ This challenge, however, depends largely on the conditions governing the organisation of the international legal order as a whole, particularly concerning the role played by various public and private international actors and their horizontal as well as vertical interaction.

In the endeavour to free synergies between culture and trade, the key concept leading to the field of the trade and culture conundrum is provided by the notion of the cultural industries. Due to their dual nature as an oxymoron, the cultural industries pose an interesting intellectual as much as practical challenge to the existing normative frameworks and their organisational structures. A challenge which is met differently in the context of the NAFTA, the EU and the WTO.

3.1.1. NAFTA

By virtue of Article 2106 and Annex 2106, NAFTA incorporates the provisions relevant for the cultural industries from its predecessor, the CUSFTA, which contained the first authentic legal definition of the cultural industries. Article 2107 NAFTA defines the cultural industries as persons engaged in any activities involving the publication, distribution or sale of books, magazines, periodicals or newspapers, film or video recordings, audio or video music recordings and broadcasting.

¹⁶ See e.g. Joseph H.H. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press, Oxford, 2000); Gráinne De Búrca and Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart, Oxford, 2001).

¹⁷ Debra P. Steger, "The Boundaries of the WTO: Afterword: The 'Trade and ...' Conundrum - A Commentary", 96 *AJIL* (2002), 135-145.

The provisions in NAFTA have the effect that they exempt the cultural industries from the terms of the agreement covering mainly the free flow of goods and services. The general exemption, however, is subject to four exceptions.¹⁸ There exists a major problem in determining the actual value of the exemption of the cultural industries which goes back to divergent interpretations of its wording by the two parties. The discord applies mainly to the right for each country to respond to the introduction of new measures affecting trade to the cultural industries as laid down in Article 2005 Paragraph 2 CUSFTA ("Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this agreement but for Paragraph 1"). According to the Canadian reading of the relevant articles, the US right to retaliate is limited to measures inconsistent with the CUSFTA and not NAFTA and therefore restricted to the sector of the cultural industries.¹⁹ The United States, on the other hand, sees its right to retaliate as unlimited. In fact, there remains considerable room for uncertainty in the procedure, functioning and scope of the exemption, which seems unlikely to change in the near future.²⁰

3.1.2. The European Union

In the case of the EU, the time period between the creation of the European Economic Community and the entry into force of the Treaty on the European Union (TEU) was characterised by the absence of an express legal basis for cultural considerations and actions. The sole indication for a possible derogation from the principles enshrined in the Treaty is found in Article 36 (now 30) TEC which concerns measures to protect "national treasures possessing artistic, historic or archaeological value". Within the scope of this provision fall mainly objects pertaining to cultural property. It should be noted that the wording used in Article 36 is identical with the provision in Article XX lit. f. GATT, which is also incorporated by way of reference into NAFTA (Article 2101). The change, however, came with the entry into force of the TEU on November 1, 1993, which by virtue of Article 128 of the Treaty on the European Community (now Article 151 TEC) introduced a provision on culture into Community law. Paragraph 1 lays down the Community's

¹⁸ Compare Articles 401, 1607 para. 4, 2006, and 2007 CUSFTA; see also Jon R. Johnson and Joel S. Schachter, *The Free Trade Agreement: A Comprehensive Guide* (Canada Law Book, Aurora, 1988), at 141 and Jon R. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Canada Law Book, Aurora, 1994), at 470-472.

¹⁹ See Keith Acheson and Christopher Maule, *International Agreements and the Cultural Industries* (Centre for Trade Policy and Law, Ottawa, 1996) at 7-9 and Johnson and Schachter, *The Free Trade Agreement ...*, 145-147.

²⁰ See e.g. the quote from Barry Appleton, *Navigating NAFTA: A concise user's guide to the North American Free Trade Agreement* (Carswell, Scarborough, 1994), at 191, reproduced in Acheson and Maule, *International Agreements ...*, 9, see generally Dennis Browne, *The Culture/Trade Quandary: Canada's Policy Options* (Centre for Trade Policy and Law, Ottawa, 1998).

obligation to “contribute to the flowering of the cultures of the member states while respecting their national and regional diversity”. Paragraph 2 emphasises the subsidiary role of the Community in the field of culture, and in recital 4 it refers specifically to the field of artistic and literary creation, including the audiovisual sector. Paragraph 3 calls for both the Community’s and member states’ enhanced international cooperation with third countries as well as international organisations. A key role is played by paragraph 4, which contains a cross-section clause that requires the Community to take cultural aspects into account in its action under other provisions of this Treaty. Paragraph 5 contains provisions of a procedural character (unanimity voting).

3.1.3. The World Trade Organization

In the framework of the WTO, provisions containing a reference to culture are virtually non-existent. The most relevant provision is Article IV GATT, which under certain conditions exempts cinematographic films from the rules on the free trade in goods, and notably those on quantitative restrictions, by allowing parties to the agreement to adopt screen quotas for cinematographic films. Despite the provision’s limited scope there are reasons to argue for its evolutionary interpretation. These reasons are found in the technological state of play at the time of its drafting, which happened long before the advent of transnational broadcasting via satellite when cinema was the most important mass medium. Furthermore, in the light of the later evolution following the adoption of the GATT until the creation of the WTO system as a ‘single package’, the provision can be seen as having evolved together with the context. This would mean that either the provision is interpreted as comprising the new media, particularly given the ongoing tendency of convergence, or it calls for its amendment or even the negotiation of a separate agreement dealing with cultural matters under the WTO system.

Another provision with a possible link to culture is found in Article XX lit. a. and f. GATT. This article enumerates exceptions to the established principles of the underlying trade regime for measures “necessary to protect public morals” (lit. a.) and for measures “imposed for the protection of national treasures of artistic, historic or archaeological value” (lit. f.). The exact wording of the two exceptions does not suggest a direct applicability to the cultural industries and a possible link could only be established through the use of extensive interpretation methods.

For services it is true that they have been included in the WTO Agreement by virtue of the General Agreement on Services (GATS). In its present form GATS does not feature any general exemption for the cultural industries but equally under certain conditions leaves untouched existing legislation restricting the freedom to provide services for the sectors covered by the

cultural industries.²¹ Additionally, for further liberalisation, particularly for the application of the national treatment principle, it requires the parties' positive commitment in specific sectors.²² It is interesting to note that with regard to the cultural industries neither Canada nor the European Union have inscribed the audiovisual sector in the schedules of commitment for national treatment.²³

3.2. *The Legal Norm*

This brief glance at the most relevant norms reveals great disparities in their approach to the sectors of the cultural industries: First, the Canadian Government has chosen to protect certain cultural goods and services by way of an exemption in its trading relations with the partners in the free trade area created by NAFTA. The EU - after long years of negative integration carried out mainly by the ECJ - has gone further and decided to deal with culture by way of positive integration between its member states, albeit with limited room for action. The WTO is the most fragmented in character with no particular reference to either the cultural industries or culture. In fact, in more than half a century, the only directly related provision has remained in a kind of embryonic state as compared to the neighbouring provisions of GATT 1947 which have developed into separate agreements.

4. The Case Law Experience: "Not to be Reproduced"?

4.1. *A Comparative Approach: "The Same or Not the Same: That is the Question?"*

Walking in Florence (Italy), one may ask oneself whether the replica David statue placed on *Piazza Signoria* or the one on *Piazza Michelangelo* are really like the original housed in the *Galleria dell'Accademia*? *Leonardo Da Vinci's* response would probably have been "no", given his definition of an artistic work as "a work of a creative act which can neither be repeated, nor copied".²⁴ A similar answer was given by *Walter Benjamin* in his article "L'Œuvre d'art à l'époque de sa reproduction mécanisée" ("The work of Art in the Age of Mechanical Reproduction") published in 1936, despite his distinction between the process of imitation and that of mechanical reproduction.²⁵ While the imitation of manmade artefacts for educational as well as commercial purposes was frequent in history, *Benjamin* believes that the mechanical reproduction of a piece of art results in the loss of its authenticity due to the shattering of the time-space relationship, the

²¹ Article II para. 2 GATS.

²² Part III GATS.

²³ See Acheson and Maule, *International Agreements* ..., 4.

²⁴ Quoted in Stanislaw E. Nahlik, "La protection internationale des biens culturels en cas de conflit armé", 120 *Recueil des Cours* (1967), 61-163, at 69.

²⁵ Benjamin, "Das Kunstwerk im Zeitalter ...", 436.

destruction of its aura, the deprivation of its embeddedness in a tradition, the separation of the functional basis of a work of art, and its service to (religious) rites and cults.²⁶

The clash of culture and trade (or commerce) in these sectors is found in the dual nature inherent in various goods or services pertaining to the cultural industries. From an economic perspective, these sectors rely on mechanical, and increasingly digital, production methods, which enable them to provide an almost endless number of such goods and services. These goods and services are characterised, on the one hand, by a great risk due to initial high production costs, and, on the other hand, by extremely low reproduction and even lower distribution costs. It is notably the risk based on the unknown consumer demand and the potential of huge sums in revenues from the possibility of cheap audience-maximisation that are some of the major economic characteristics attributed to the cultural industries. At the same time, however, these goods and services are also prone to become transmitters of cultural values in the form of symbols and may also have a considerable impact on combined individual and collective human behaviour. It is particularly the facility with which these goods and services can be reproduced that causes the changes in the individual to finally express themselves on the collective level. Whence the importance conferred upon the cultural industries for concepts such as cultural cohesion or identity. Unfortunately, their influence is also considerable in the case of war and ethnic conflicts, as has been reported for the Rwanda genocide.²⁷ The cultural relevance inherent in these goods and services is recognised also in numerous legal instruments, such as the *International Convention Concerning the Use of Broadcasting in the Cause of Peace* (1936)²⁸, the *Beirut* (1948)²⁹ and the *Florence Agreement* (1950)³⁰.

The dual nature of cultural goods and services is worth analysing, using case law from the EU and NAFTA/WTO.³¹ The selected cases occurred in the

²⁶ "What is aura actually? A strange weave of space and time: the unique appearance or semblance of distance, no matter how close the objet may be"; *ibid.* at 438, 440-441.

²⁷ See e.g. Noam Chomsky, *Media Control: The Spectacular Achievements of Propaganda* (Seven Stories Press, New York, 1997) and William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide", 46 *McGill LJ* (2000), 141-171.

²⁸ International Convention concerning the Use of Broadcasting in the Cause of Peace, signed in Geneva on 23 September 1936, 186 *LNTS*, at 301 (entry into force 2 April 1938).

²⁹ Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, adopted by the General Conference at its third session in Beirut on 10 December 1948, 197 *UNTS*, at 3.

³⁰ Agreement on the Importation of Educational, Scientific and Cultural Materials, with Annexes A, B, C, D and E and Protocol annexed, *UNTS* 1734, signed in Florence on 17 June 1950 (entry into force on 21 May 1953) and extended in scope, by the Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, Nairobi 1976.

³¹ Note that the mixed implication of NAFTA and the WTO is due to the particularity of the NAFTA dispute settlement system exists a choice for complainants to settle disputes in either forum, the NAFTA or the WTO (Art. 2005 para. 1 NAFTA).

print media sector, more specifically in the field of newspapers and periodicals. The print media sector is of particular interest because it constitutes the oldest sector of the cultural industries dating back to *Johann Gutenberg's* invention and as such is the point of departure in the long evolution and ongoing trend of convergence of the cultural industries.

4.1.1. *The European Union: Commission of the EC v. French Republic*

Some time before the discussed provision on culture was introduced into Community law by virtue of Article 128 (now 151) TEC, the Commission twice seized the European Court of Justice to decide upon the matter of newspapers and journals in France.³² In both cases the Court established that France had failed to fulfil its obligations under the Treaty, notably the prohibition of "quantitative restrictions on imports and measures having equivalent effect" (Art 30 [now 28] TEC). In the first case the relevant measures were contained in the *Code des Postes et Télécommunications* which provided for a preferential 'press-rate' for newspapers and periodicals. Its Article D 21 stipulated that newspapers and periodicals printed abroad were generally exempted from the preferential treatment and subject to fees of ordinary printed matter. Only where publications qualified as 'French publications', i.e. when the chief editor was of French nationality and was resident in France, when the home country also granted similar treatment to French publications (reciprocity) or when the foreign publications were posted France, were they granted the same preferential treatment.

Long before court proceedings were instigated the French Government defended its policy by arguing that the relevant provisions did not "fall within the prohibitions of article 30 and that it was furthermore questionable whether that article was at all applicable to products which served as vehicles of political, social and cultural information and hence could not be equated with goods".³³ In the judgment, the Court dismissed latter arguments by the French Government, notably that the reduced postal rate is irrelevant for the consumer choice, that the provision is not discriminatory because of the reciprocity clause as well as the possibility to post 'foreign' publications on French territory.

The second case concerned Article 39bis of the French *Code général des impôts*, which accorded certain tax advantages to undertakings publishing either a newspaper or fortnightly journal devoted mainly to political affairs. The contested advantages consisted in the authorisation to establish, by means of charge against taxable profits, a tax-free reserve for the purchase of

³² Case 269/83, *Commission of the European Communities v. French Republic* [1984] ECR 843 and Case 18/84, *Commission of the European Communities v. French Republic* [1985] ECR 1339.

³³ Case 269/83, *Commission of the European Communities v. French Republic* [1984] ECR 843, at 838.

assets needed in order to run the newspaper or to deduct from taxable profits any expenditure incurred for that purpose. In 1980 Article 39bis was changed by Article 80 of the *Loi de finances* (Finance Law), which excluded from the said benefits newspapers by publishers which they print abroad.

In its defence, the French Government put forward three principal arguments: First, it argued that printing is a service and not a good, which means that Article 30 is not applicable. In its legal reasoning the Court relied on the mention of publications in the Common Customs Tariff (CCT) and in turn stated the sole applicability of Article 30. Based on the Commission's concern, which was not about the choice of a potential reader but about the "options available to newspaper publishers with regard to the production of their publications", the Court also dismissed the arguments that the fact that a publication is printed in France rather than another member state cannot influence the choice of a potential reader and that, failing earlier notification, the tax provision is part of an aid scheme in favour of the newspaper industry. For these reasons the Court declared that the contested tax provision of French law encourages newspaper publishers to have publications printed in France rather than other member states. Therefore, the tax provision can be qualified as a measure having an effect equivalent to a quantitative restriction in the meaning of Article 30, and consequently results in the failure of the French Republic to fulfil its obligations under the Treaty. In the aftermath of the two cases, France amended the contested legislation and brought it in line with the judgment.³⁴

4.1.2. NAFTA and the WTO

In *Certain Measures Concerning Periodicals*³⁵ the United States contested three Canadian measures concerning the periodical industry. The first measure concerned Tariff Code 9958, the effect of which was the prohibition of the importation into Canada of certain periodicals, namely special editions, including a split-run or regional edition, that contain an advertisement that is primarily directed at a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical's country of origin. Not included in the regime were catalogues,

³⁴ See the new Art. D 21 of the *Code des postes, et des télécommunications* as amended by Décret n° 85-1156 du 29 octobre 1985 Art. 1 Journal Officiel du 6 novembre 1985 which reads now: "Les journaux et écrits périodiques étrangers sont soumis au tarif des plis non urgents ou au tarif des imprimés selon leur destination. Toutefois cette disposition ne s'applique pas aux publications des pays de la Communauté économique européenne instituée par le traité de Rome qui bénéficient du tarif préférentiel de presse dans les mêmes conditions que les publications françaises"; and Code général des impôts (CGI) Article 39bis 1bis Cbis: "Les entreprises de presse ne bénéficient pas du régime prévu aux 1 bis A et 1 bis A bis pour la partie des publications qu'elles impriment hors d'un état membre de la Communauté européenne".

³⁵ See Canada - Certain Measures Concerning Periodicals (Complaint by the United States) (1997), WTO Doc. WT/DS31/R (Panel Report), and Canada - Certain Measures Concerning Periodicals (Complaint by the United States) (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report).

newspapers, or periodicals. The principal aim pursued by the regime was the “encouragement, promotion or development of the fine arts, letters, scholarship or religion”.³⁶ The second measure was the Excise Tax which provided for the imposition, levy and collection, in respect of each split-run edition of a periodical, a tax equal to 80 percent of the value of all the advertisements contained in the split-run edition. It defined a split-run edition as an edition of an issue of a periodical in which more than 20 percent of the editorial material is the same as a comparable edition and which contains an advertisement that does not appear in identical form in all the excluded editions. Finally, the last measure concerned the Canadian system of funded and commercial postal rates, which was mainly designed to supplement the foregoing measures.

In its findings, the panel, and later the Appellate Body, followed the US claims and held the contested measures to be in violation of the free trade principles, notably the provisions on the elimination of quantitative restrictions and the national treatment principle enshrined in the GATT, and asked Canada to comply with these findings. With regard to the ‘funded rate scheme’, the violation of the obligations laid down in the GATT were only established after the Appellate Body’s report. In the meantime, Canada complied with the Appellate Body’s recommendations by introducing the controversial *Bill C-55: An Act Respecting Advertising Services supplied by Foreign Periodical Publishers*.³⁷ Despite the new act, there remains significant doubt as to whether Bill C-55 is in conformity with Canadian international trade law obligations.³⁸

4.2. The Legal Decision

This brief survey of cases in the context of the EU and NAFTA reveals a striking similarity not only in their factual aspects but also in the legal responses. In the latter case, the involvement of a ‘higher’ level, namely the invocation of the global and multilateral WTO dispute settlement, brings in a further aspect. In all the cases, the ‘key to the fields’ is provided by the relevant norms in place that determine the specific treatment of the cultural industries in general, and periodicals in particular. These norms advocate the free movement of goods across national borders, mainly through principles of national treatment and most-favoured nations. At the same time, they are confronted with the difficulty of drawing a line between goods and services in the production chain. The norms vary particularly with respect to culture, or

³⁶ *Ibid.*, at 2.

³⁷ See Bill C-55: An Act Respecting Advertising Services supplied by Foreign Periodical Publishers, S.C. 1999, c. 23.

³⁸ See e.g. Yasir A. Naqvi, “Bill C-55 and International Trade Law: A Mismatch”, 31 *Ottawa Law Review* (1999/2000), 323-353.

more precisely the way they define the relation of culture as well as cultural issues to the principles of free trade. Last but not least, the fact that the cases are set at relatively similar normative stages in the process of economic integration but at different times underlines the dynamic nature of the development of legal rules.³⁹ The same dynamism appears in the fact that the EU has in the meantime amended its legal framework with regard to culture.

5. Conclusion

From a comparative perspective, this examination of the legal framework of the EU, NAFTA and the WTO has revealed an interesting regularity. The regularity consists, as visualised by *Magritte*, first and foremost in the identical process that underlies both the transformation of ideas into reality and the formation of legal norms. Comparable to a hermetic system, the EU, NAFTA and WTO not only influence each other but also struggle with identical problems and challenges with respect to culture and the cultural industries. Nevertheless, the overall structure, and resulting from that also the normative approach to the cultural industries, varies greatly within each of them. This is due to a great variety of determinants, such as the number of member states, or signatory parties, legal culture, the historical background and the initial motives behind their creation. Equally important is the current state of play in the process of economic integration measured against the background of five principal steps on the ladder of economic integration.

Moreover, there is a striking similarity in the legal responses given to the cases concerning the cultural industries that arose in the WTO, NAFTA and the EU at different times. The similarity is even more striking given the different legal framework applied to them. The difference, however, becomes manifest on the next level, i.e. that of its reception and implementation. France has changed its conflicting legislation following the ECJ's judgement and amended the relevant provisions so that they comply with the recommendations set forth in the judgment. Canada, on the other hand, has amended its legislation only by changing the legal approach but has left the policy objectives practically unaltered.

As a last remark, summarising the above, I believe that the key question in the context of the treatment of the clash between culture and trade values, as encompassed in the concept of the cultural industries, within an economic integration project lies in the process fuelled by a constant interaction between the actual legal framework in place and the ideas about its

³⁹ For the progressive development of economic integration, see Bela Balassa, *The Theory of Economic Integration* (George Allen, Unwin Ltd, London, 1962), at 2-3 (classifying the principal stages as ranging from [international] cooperation, free-trade area, customs union, common market, economic union, to complete economic, i.e. political integration).

improvement over time. The importance of this element, as reflected in the intention of the parties combined with the availability of instruments, is shown in the need to complement the gap that was created by the removal of barriers to trade (negative integration) through legislative measures (positive integration). For the WTO during the *Doha Round* negotiations this means that as long as the WTO through its parties to the Agreement does not wish to engage in closer international cooperation going beyond the existing regime covering the free movement of goods and, to a lesser extent services, sufficient room must be left for cultural differences. This is necessary for technological innovations with cultural implications, as it is the case with the cultural industries. If, on the other hand, the will exists for closer integration and instruments are made available for the WTO institutions to serve as a safety net substituting for the loss of protective (legislative) measures at the national level, the room for the parties' national cultural space can be gradually reduced. Once this point has been attained, the need for national restrictions diminishes, whereas the need for a constitutional framework as a guarantee for coherence between the great diversity of its component parts continues to increase.

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