



Coalition  
for the Diversity of  
Cultural Expressions

Comments from the Coalition for the Diversity of Cultural Expressions  
in the context of the consultation on  
Canada's Future World Trade Organization (WTO) Negotiations on E-Commerce

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## List of acronyms

CDCE: Coalition for the Diversity of Cultural Expressions  
CETA: Comprehensive Economic and Trade Agreement  
CPTPP: Comprehensive and progressive trans-Pacific partnership agreement  
CRTC: Canadian Radio-television and Telecommunications Commission  
CUSMA: Canada-USA-Mexico Agreement  
FTA: Canada-U.S. Free Trade Agreement  
GATS: General Agreement on Trade in Services  
GIC: Governor in Council  
IFCCD: International Federation of Coalitions for Cultural Diversity  
MAI: Multilateral Agreement on Investment  
NAFTA: North American Free Trade Agreement  
TSP : Telecommunications Service Provider  
UNESCO: United Nations Educational, Scientific and Cultural Organization  
WTO: World Trade Organization

## 1. Presentation

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main French- and English-speaking professional organizations in the cultural sector in Canada. It is composed of 30 organizations that collectively represent the interests of more than 200,000 professionals and 2,000 companies in the book, film, television, new media, music, performing arts and visual arts sectors. The CDCE speaks as a Coalition, after consultation with its members.

Equally concerned about the economic health of the cultural sector and the vitality of cultural creation, the CDCE works mainly to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

It promotes the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* and ensures its implementation to give it full force of application at the national level.

It also ensures that the government's capacity to implement policies to support local cultural expressions is properly preserved and deployed; that trade liberalization and technology development do not systematically lead to a standardization of content and a disruption of local ecosystems in the face of foreign investment; and that the CDCE also provides the secretariat of the International Federation of Coalitions for Cultural Diversity (IFCCD).

## **2. Introduction**

The Coalition for the Diversity of Cultural Expressions (CDCE) has been the voice of the cultural sector for more than 20 years to ensure the protection and promotion of the diversity of cultural expressions. Throughout this process, it has been able to rely on the Canadian government's determination to exempt culture from trade negotiations.

The emergence of electronic commerce (e-commerce) is no longer recent and the members of the World Trade Organization (WTO) have been discussing the opportunity for comprehensive trade negotiations in this area for more than 20 years now. However, the commercial framework has progressed through bilateral or plurilateral agreements in recent years, while national regulatory initiatives are few in number, incomplete and slow to be launched.

As part of these comments, the CDCE will ask the Canadian government to ensure that the cultural sector is exempt from possible WTO negotiations on e-commerce. However, it should be noted that the low level of information on these possible negotiations makes it difficult for us to provide very specific comments.

Moreover, the scope of e-commerce is extremely broad. Indeed, the slightest activity that generates digital data can potentially be monetized, and many activities already generate large quantities of data. We believe that some of the issues facing the cultural sector, such as access to data and the development of artificial intelligence, deserve to be addressed on a global scale. However, these matters raise questions that go well beyond trade issues. It would be wise to address them in another forum before setting the terms of trade at the WTO.

We also understand that we are initiating a consultation process and that the CDCE will have the opportunity to respond to the summary of comments received during this phase and then be invited to continue the discussions throughout the negotiation process.

We will briefly review the history of the Canadian cultural exemption and discuss its global dimension. We will underline the importance of this exemption in the digital age. We will then address our concerns regarding this possible negotiation, including on some of the specific issues raised by the Canadian government as part of this consultation. The reader will find in the appendix the list of our recommendations.

## **3. Canada's commitment to the protection of cultural expressions**

### **3.1. Importance of the diversity of cultural expressions**

The importance of culture for the society has been affirmed on many occasions by the Canadian government, civil society and companies in the telecommunications and broadcasting sectors. Beyond the declarations, this commitment was materialized by all the steps taken by the governments of Canada, Quebec and civil society that finally led to the adoption in 2005 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, of which Canada was the first signatory.

Cultural expressions make it possible to materialize our identity, to share it, to make it known to the world and to make it evolve. They promote social integration, allow us to interpret our past and imagine the future. They inform and entertain. They constitute an invaluable collective heritage. It is for this reason that

governments in Canada have adopted cultural policies and laws over the decades that have enabled the development of so many cultural talent and enterprises.

Canadians are committed to Canadian cultural content and support the federal government's support: "78% of Canadians consider content made in Canada to be of moderate or high importance to them personally. In addition, [m]any focus group participants said they support a government role in the development of Canadian content. Some view Canadian content as helping to strengthen unity and shared identity. Others noted that financial support to ensure the production of Canadian content helps to develop talent of actors, writers, and producers and creates employment throughout Canada."<sup>1</sup>

### 3.2. Origins and evolution of the Canadian exemption clause

The cultural exemption appears in Canada with the negotiations of the Canada-U.S. Free Trade Agreement (FTA). The idea of excluding culture from trade negotiations was already included in the recommendations of the Macdonald Commission<sup>2</sup>.

As Ivan Bernier and Anne Malépart<sup>3</sup> remind us, in 1985, representatives of the cultural community took up this recommendation, formed a "Communications and Cultural Industries Strategy Committee" and managed to convince the political and journalistic communities that Canadian cultural industries must be preserved from the American industries already dominant in Canada.

The Canadian government made a commitment to exclude identity and cultural sovereignty from the negotiations. However, the issue had to be negotiated with a partner who disagreed.

The exemption was finally obtained, but not without compromise. With a few exceptions (abolition of customs duties on tapes and records), the main counterpart is the retaliation clause, which authorizes the adoption of compensatory measures "having equivalent commercial effect" in response to any cultural measure otherwise incompatible with the Agreement.

The North American Free Trade Agreement (NAFTA) incorporates the exemption set out in the FTA in Annex 2106, but with "exclusive" reference to the provisions of the FTA. It should be noted that this exemption applies only between Canada and the United States, between Canada and Mexico and any other state that joins the agreement. Mexico, on the other hand, obtains only a few specific protections in the NAFTA<sup>4</sup>. Some changes are made to the definition of cultural industries, extending the scope of the exemption to individuals.

Under the General Agreement on Trade in Services (GATS) at the WTO, although the proposal made by some States to exclude cultural services was rejected, Canada took advantage of the flexibility offered by the text to avoid making commitments on market access and national treatment with regards cultural services.

The negotiation of the Multilateral Agreement on Investment (MAI), which would have led to the

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<sup>1</sup> <https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr1>

<sup>2</sup> Canada. Privy Council Office (1985), Report of the Royal Commission on the Economic Union and Development Prospects for Canada. Vol. 1 / Donald S. MacDonald, chairman, p. 382. [http://publications.gc.ca/collections/collection\\_2014/bcp-pco/Z1-1983-1-1-2-eng.pdf](http://publications.gc.ca/collections/collection_2014/bcp-pco/Z1-1983-1-1-2-eng.pdf)

<sup>3</sup> Bernier, Ivan, and Anne Malépart, "Les dispositions de l'Accord de libre-échange nord-américain relatives à la propriété intellectuelle et la clause d'exemption culturelle", in *Les cahiers de propriété intellectuelle*, Montréal, 1994, Vol. 6, no 2, pp. 139-171.

<sup>4</sup> See NAFTA Annex 1.

liberalization of investment in the cultural sector, led civil society organizations and the governments of Quebec, Canada, France and *Francophonie* to mobilize to obtain a cultural exception. It is in this context that in 1998, the Coalition for the Diversity of Cultural Expressions was created<sup>5</sup>.

The efforts of all actors in the cultural sector and governments led to the adoption in 2005 of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Among other provisions, the preamble to the Convention stipulates that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value"<sup>6</sup>. The Convention also recognizes the sovereign right of the Parties to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory (Article 5).

Canada was the first country to ratify the Convention. Today, 145 countries, in addition to the European Union, have ratified it. The Convention does not take precedence over other treaties. Nevertheless, Parties must take the Convention into account when interpreting and applying these other treaties (Article 20) and must promote its objectives and principles in other international forums (Article 21). These are binding commitments for the parties that adhere to them.

Canada has shifted from its traditional approach when it negotiated reservations in certain chapters of the Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP). In the CETA, reservations protect Canada's ability to formulate policies to maintain cultural sovereignty relatively well<sup>7</sup>.

In the case of the CPTPP, significant concessions have been made, notably in the chapter on e-commerce for which a specific reservation for culture is missing. However, after the withdrawal of the United States, Canada signed side letters with the remaining 10 partners to generate bilateral agreements that specify that "Canada may adopt or maintain discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development and may adopt or maintain measures that restrict access to on-line foreign audio-visual content"<sup>8</sup>. According to some legal experts, there is still uncertainty about the actual scope of e-commerce commitments under the CPTPP and their impact on potential Canadian cultural policies applicable in the digital environment. Fortunately, Canada seems to have recently distanced itself from this risky and weaker approach.

As part of the renegotiation of NAFTA, the United States sought cultural concessions from Canada, specifically in the chapter on e-commerce. The CDCE and its members were well aware of this risk after the experience of the CPTPP. The good news is that the overall cultural exemption has been maintained for Canada and applies to the entire agreement, including e-commerce.

However, the retaliation clause remains. This clause can be invoked against measures that do not comply with the agreement. Therefore, for specific commitments for which the culture isn't specifically excluded (in addition to the global exemption), retaliation is allowed. As Ivan Bernier and Véronique Guèvremont pointed out following the publication of the first texts, Canada has made new commitments under the Canada-USA-Mexico Agreement (ACEUM)<sup>9</sup>, particularly with respect to e-commerce, which is still relatively unregulated in Canada.

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<sup>5</sup> See our website for more information: <https://cdce-cdce.org/en/>

<sup>6</sup> <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf>

<sup>7</sup> <https://www.ledevoir.com/culture/496243/alena-les-industries-quebecoises-de-la-culture-et-l-alena-2-0>

<sup>8</sup> The letters use the same wording and are available online: <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/letters-lettres.aspx?lang=eng>

<sup>9</sup> <https://www.ledevoir.com/opinion/idees/538439/une-menace-a-la-souverainete-culturelle-du-canada>

## 4. The importance of protecting culture in the field of e-commerce

The CDCE has recently made numerous contributions<sup>10</sup> that describe the impacts of technologies and models for providing cultural content online, and then propose ways to ensure that the diversity of cultural expressions is protected and promoted. We will first briefly present the main issues for the cultural sector, and then describe how e-commerce provisions could limit Canada's ability to meet various challenges in the digital environment.

### 4.1. Current challenges for the protection and promotion of the diversity of cultural expressions

The developments of technologies and models for the provision of online cultural content have a huge impact on cultural ecosystems at various levels. We refer the reader to the CDCE submission filed on January 11, 2019 with the Broadcasting and Telecommunications Legislative Review Panel<sup>11</sup> for a full explanation. In these comments, we will briefly describe the major issues for the cultural sector.

- 1- The Canadian legislative framework does not apply to online programming services (Netflix, Spotify, etc.), which are largely foreign. They are not subject to requirements for discoverability and financing of local and national content, generating an unfair two-tier system for national licensed services.
- 2- These companies do not provide access to usage data, thus we have no information on access or exposure to a variety of content.
- 3- Canadian cultural content can win a global audience, but it is also drowned in an ocean of foreign content. The origin and diversity of content are not yet part of the criteria taken into account by the recommendation algorithms; they rather operate in an opaque way and determined by private interests<sup>12</sup>. Canadian content, when available on these platforms, gets lost in so many contents from everywhere, but often from the United States.
- 4- While television and radio continue to play an important role in the lives of Canadians, these services are in decline. This generates a reduction in revenues for broadcasting distribution undertakings and broadcasters, which are the only ones required to contribute to Canadian content support funds. As a result, the resources of these funds are decreasing. This is what forced Canadian Heritage to increase its contribution to the Canada Media Fund in 2017.
- 5- These decreases in funding, combined with the steady decline in advertising revenues from conventional media, have negative effects on the diversity of cultural expressions, both quantitatively and qualitatively. For example, in the audiovisual sector, spending on Canadian programs is declining and some specific contents (programs of national interest, local news, content aimed at Aboriginal or linguistic minorities, fiction, documentaries, content for children) are likely to be particularly affected. In the music sector, the loss of revenue is mirrored in a decrease of the number of projects that can be supported or the resources available to promote them.

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<sup>10</sup> See CDCE website: <https://cdec-cdce.org/en/>

<sup>11</sup> Online, on the CDCE website: <https://cdec-cdce.org/en/brief-by-the-cdce-in-the-context-of-the-broadcasting-and-telecommunications-legislative-review/>

<sup>12</sup> For more information on this subject, see Fenwick McKelvey's text (2016), The new attention factory. Discoverability and Canadian cultural policy. Online: <https://www.policyalternatives.ca/publications/monitor/new-attention-factory>



- 6- The opportunities in terms of discoverability and financing are not the same for the English and French markets in Canada. Francophone products export less well in a global market and have a smaller funding base.
- 7- The models put in place in the digital age are impoverishing many artists, creators and cultural professionals. The median earnings of artists are \$23,100, 45% lower than those of Canadian workers<sup>13</sup>. The introduction of some 40 exceptions to the Copyright Act in 2012, and its inadequacy to technological realities, has considerably weakened the incomes of creators and right holders.
- 8- We see the principle of copyright remuneration being questioned, using the pretext of innovation stimulation or, as we have seen in Europe, to avoid restrictions on the freedom of individuals to share the work of others without limits. But in the end, it is the creation of new works that is affected.
- 9- Telecommunications service providers (Internet and mobile) benefit from access to online cultural content: video and audio account for most of the time spent online by Canadians, for a combined total of 72%<sup>14</sup>. Their revenues are growing and their profit margins was of 38.1% in 2017<sup>15</sup>, but they do not pay a penny to finance cultural content.
- 10- The increase in the cost of access to cultural content and the subscription per service formula lead to two negative trends for the diversity of cultural expressions: concentration of use on a few services, probably to the detriment of local and national content, and piracy.

#### 4.2. Adapting the legal framework to contemporary realities

Canada has recently undertaken the revision of key laws for the cultural sector (broadcasting, telecommunications, radiocommunication and copyright) to address some of these challenges. The majority of organizations heard during the consultations stressed the need to adapt our laws to the digital world to ensure the sustainability of cultural industries as instruments to support the creation of cultural content. In its report on the future of programming distribution in Canada<sup>16</sup>, the CRTC states that the status quo in the music and audiovisual sectors is no longer acceptable. In the book sector too, the changes brought about by digital technology, including piracy, are disrupting the business<sup>17</sup> model.

For the CDCE, urgent actions are required to support the creation and discoverability. However, some of the recommendations made by the CDCE may never materialize unless the Canadian government's ability to protect and promote its culture is adequately protected. We will now provide two examples of the changes we consider necessary.

First, as part of the review of the *Broadcasting Act*, the CDCE proposes that online programming services, both foreign and Canadian, contribute to the enhancement and financing of Canadian content. This can be achieved in the short term by a Direction from the Governor in Council to amend the New Media Exemption Order. This proposal implies that the CRTC will have to determine the best ways to regulate the presence

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<sup>13</sup> Hill Strategies (2019), A Statistical Profile of Artists in Canada in 2016: <https://canadacouncil.ca/research/research-library/2019/03/a-statistical-profile-of-artists-in-canada-in-2016>

<sup>14</sup> <https://crtc.gc.ca/eng/publications/s15/mar1.htm>

<sup>15</sup> CRTC, Communications Monitoring Report 2018, pp. 86 and 95.

<sup>16</sup> <https://crtc.gc.ca/eng/publications/s15/>

<sup>17</sup> See, for example, ANEL's December 2018 submission to the Copyright Act Review: [https://www.anel.qc.ca/wp-content/uploads/2018/12/Me%CC%81moire-de-l'Association-nationale-des-e%CC%81diteurs-de-livres-ANEL\\_Comite%CC%81-PCHP.pdf](https://www.anel.qc.ca/wp-content/uploads/2018/12/Me%CC%81moire-de-l'Association-nationale-des-e%CC%81diteurs-de-livres-ANEL_Comite%CC%81-PCHP.pdf)

and promotion of Canadian content on online programming services. These regulations must be accompanied by an obligation to provide data on the cultural content accessed by Canadians.

Second, as part of the revision of the *Copyright Act*, the CDCE supports the proposal that the new Act be adapted to contemporary reality so that digital platforms pay intellectual property rights to those who own them in Canada and that the private copying regime includes technological devices that provide access to cultural content.

All States are faced with the challenges of adapting laws to the digital environment. In its *Operational Guidelines on the implementation of the Convention in the digital environment*, the Conference of Parties to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions recommends measures to "promote dialogue between private operators and public authorities in order to encourage greater transparency in the collection and use of data that generates algorithms, and encourage the creation of algorithms that ensure a greater diversity of cultural expressions in the digital environment and promote the presence and availability of local cultural works"<sup>18</sup>.

### **4.3. Example of a provision in existing agreements that could compromise Canada's cultural sovereignty**

Trade negotiations now include commitments on e-commerce, from which the cultural sector must be preserved, otherwise new laws to protect and promote our culture will not be adopted.

Article 19.4 (1) of the CUSMA on the non-discriminatory treatment of digital products (which includes digital books, videos of all kinds, music, etc.) provides a good example of how potential clauses could limit Canada's cultural sovereignty:

*No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.*

Without the cultural exemption, such a clause would prevent Canada from requiring platforms distributing cultural content to offer, promote or introduce local content to their users in Canada, or to set presence thresholds. It should be noted that an almost identical clause (14.4) has also been included in the CPTPP. It seems clear that a number of States, including the United States, will wish to incorporate a national treatment clause similar to the provisions of the CUSMA and CPTPP into a possible e-commerce agreement.

## **5. Recommendations and concerns of the CDCE regarding a possible WTO agreement on e-commerce**

### **5.1. A global cultural exemption in the context of possible negotiations on e-commerce at the WTO**

It is very important that culture is exempt from a possible WTO agreement on e-commerce. A global exemption clause must therefore be included. We strongly prefer that possible exceptions to the cultural

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<sup>18</sup> UNESCO (2017), *Operational Guidelines on the Implementation of the Convention in the Digital Environment*, Article 16.2. [https://en.unesco.org/creativity/sites/creativity/files/sessions/digital\\_operational\\_guidelines\\_en.pdf](https://en.unesco.org/creativity/sites/creativity/files/sessions/digital_operational_guidelines_en.pdf)

exemption, which would be extremely specific and limited, be included in the exemption, rather than providing for cultural reservations in certain chapters or for certain provisions. This would better protect the culture from applications that do not yet exist. We ask the Canadian government not to agree to provisions that would weaken the global exemption, for example by allowing measures of equivalent effect<sup>19</sup>.

**The CDCE recommends that if the Canadian government engages in trade negotiations on e-commerce at the WTO, it should globally exempt culture from a possible agreement and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.**

## 5.2. Application of the 2005 Convention

As explained above, the adoption of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005 was conceived as a tool to protect culture in a context of increasing economic liberalization. However, despite significant progress, an in-depth study reveals that parties to the Convention do not systematically incorporate exemption clauses in their trade negotiations, nor other suggested provisions to protect and promote the diversity of cultural expressions, such as Article 16 on preferential treatment for developing countries<sup>20</sup>.

The application of the 2005 Convention to trade negotiations is one of the priorities identified at the Montreal Congress of the International Federation of Coalitions for Cultural Diversity (IFCCD)<sup>21</sup>. The IFCCD is already calling on its members to ask their governments to exempt culture from possible trade negotiations on e-commerce.

Under Article 21 of the Convention, "the Parties undertake to promote the objectives and principles of the Convention in other international fora. To this end, the Parties shall consult each other, as appropriate, bearing in mind these objectives and principles. As Ivan Bernier points out, Article 23.6 (e) states that the Intergovernmental Committee should "establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums"<sup>22</sup>.

**The CDCE suggests that Canada includes the issue on the agenda of the next meeting of the Convention's intergovernmental committee<sup>23</sup>, and that a consultation, including representatives of civil society, be launched by the Convention secretariat no later than 2020. This consultation should identify the provisions to be included in a possible WTO agreement on e-commerce to implement the objectives and principles of the 2005 Convention.**

**The CDCE also suggests that the preamble to a possible WTO agreement refers to the UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions.**

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<sup>19</sup> We are thinking in particular of Article 32.6, paragraph 4 of the CUSMA, commonly known as the retaliation clause.

<sup>20</sup> Guèvremont Véronique and Ivana Otašević (2017), Culture in treaties and agreements, UNESCO, 123 pages. <https://en.unesco.org/creativity/files/culture-treaties-agreements>

<sup>21</sup> The IFCCD secretariat is provided by the Canadian coalition : <https://ficdc.org/en/>

<sup>22</sup> <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf>

<sup>23</sup> Rule 8 of the Rules of Procedure of the Intergovernmental Committee: 8.2 The agenda of an ordinary session of the Committee may include: (d) any item proposed by the members of the Committee; 8.3 The provisional agenda of an extraordinary session shall include only those items for which the session has been convened.

### 5.3. Positive list

Technological developments should not be used as a pretext to further liberalize, now or in the future, a potentially infinite set of goods and services. Indeed, digital products and services are called upon to reach every corner of people's lives. A piece of music listened to on an online platform remains a cultural content with value and meaning, just as a health service, provided digitally, remains a health service that must be framed as such.

**We therefore believe it is extremely important that the parties to a possible agreement on e-commerce formulate liberalization commitments in the form of a positive list, i.e. the agreement will apply only to the sectors they identify and within the limits that States may wish to formulate.**

### 5.4. Definitions used

Canada's definition of cultural industries used to exempt them from trade agreement commitments has changed little over time, despite the evolution of cultural industries, products and services. This strategy has three important advantages.

First, the continuity of this practice demonstrates the Canadian government's commitment to protect its cultural industries. Second, it ensures consistency between Canada's commitments and its many trading partners in separate treaties. Third, in the event of a dispute, an evolutionary interpretation of cultural industries could be adopted to include contemporary forms of cultural products and services.

Let us recall the definition of NAFTA's cultural industries, which cover "persons engaged in the following main activities:

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- (b) the production, distribution, sale or exhibition of film or video recordings;
- (c) the production, distribution, sale or exhibition of audio or video music recordings;
- (d) the publication, distribution or sale of music in print or machine readable form; or
- (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;"<sup>24</sup>.

In the context of a possible WTO agreement on e-commerce, "the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The work programme will also include consideration of issues relating to the development of the infrastructure for electronic commerce"<sup>25</sup>.

Without more information on how the agreement will be crafted, especially regarding engagements and exemptions, it is difficult to propose new texts. But we can already underline the importance that the definition that will be used to determine the scope of the cultural exemption covers at least what is currently covered by Canada's definition of cultural industries.

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<sup>24</sup> NAFTA, Article 2107, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/21.aspx?lang=eng>

<sup>25</sup> WTO (1998), Work Programme on Electronic Commerce, accessible on this website: [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm)

The CDCE also stresses the importance of consulting with representatives from the cultural sector should a new definition be discussed in these negotiations.

**If a possible agreement on e-commerce was to be negotiated at the WTO, Canada should consult with representatives from the cultural sector and ensure that the definition to be used for the application of the cultural exemption is technologically neutral and meets the following criteria:**

- **The definition should include at least the same sectors:**
  - o **for publishing: books, magazines, periodicals, newspapers;**
  - o **for audiovisual: films or video recordings, audio or video music recordings, musical compositions, radiocommunications, all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;**
- **The activities covered by the traditional definition must be included: publication, production, distribution, sale, exhibition, publishing;**
- **In order to ensure technological neutrality, the definition should not specifically define the formats used for the production and access to cultural expressions and should allow the inclusion of cultural expressions using new technologies (virtual reality, augmented reality, artificial intelligence, etc.).**

#### **5.5. Market access and non-discrimination**

As noted above, national treatment rules (non-discriminatory treatment of digital products) would most severely limit the ability of the Canadian government to exercise its cultural sovereignty. While Canada wishes to adopt new policies in the digital environment, these rules would prevent it from adopting measures to promote the discoverability of Canadian content, or even requiring a ratio of Canadian works on online platforms.

**It is essential that the rules of national treatment do not apply to culture.**

#### **5.6. Subsidies and taxation power**

Canada must retain its ability to raise funds from companies involved in e-commerce in the cultural sector, whether in the form of taxes or contributions to the financing of cultural content.

It must also be able to decide that the funds raised to meet this objective are accessible to Canadians only. This is currently the case and it is a rule that was developed as part of a Canadian broadcasting system where the companies contributing to these funds are Canadian. However, the increasing role of foreign programming companies in the supply of cultural content is reducing the funds available for Canadian content.

**That Canada may collect taxes or other contributions, including those aimed at financing cultural content, from companies engaged in e-commerce. That Canada protects its authority to define the conditions of access to any funding for culture.**

#### **5.7. Intellectual property rights**

The CDCE hopes that the revision of the *Copyright Act* in Canada will allow to adapt to the contemporary reality and in particular, to increase the income of Canadian rights holders. Our members agree that the

number of exceptions in the *Copyright Act* should be reduced, that digital platforms should pay more to rights holders and that private copying should become technologically neutral.

CDCE opposes the inclusion of principles similar to the exception for Network Services<sup>26</sup> in the Canadian *Copyright Act* or the Safe Harbour of the United States<sup>27</sup> *Digital Millennium Copyright Act* in the intellectual property chapters of any trade agreement. During the recent CUSMA negotiations, technology companies lobbied for the inclusion of provisions similar to these exceptions in the agreement. In the context of the revision of the Canadian law, this would have created obstacles to the accountability of intermediaries, particularly platforms that distribute user-generated content, for the distribution of content. The final provisions of the CUSMA concerning intellectual property did not cause dissatisfaction among CDCE members.

The European Union has just adopted a directive forcing these platforms to obtain licences for their use of copyright-protected content, which would have been impossible if it had made incompatible commitments in trade agreements.

**It therefore seems fundamental to us that Canada does not make any international commitments that could affect the remuneration of copyright holders, in particular provisions similar to the exceptions on Network Services or "Safe Harbour" benefiting companies in the technology sector to the detriment of the cultural sectors.**

#### **5.8. Transfer of technology, data, source code, local presence or storage**

Online programming companies collect a lot of data on who subscribes to or uses their services. As we have seen, recommendation algorithms fuel this data and allow companies to guide users to specific content based on particular interests. This wealth of data is jealously guarded by these companies for whom they represent a source of fundamental wealth<sup>28</sup>. However, it is currently impossible to access certain data of public interest that would allow the society as a whole to evaluate the health of its cultural diversity in the digital environment.

As part of the review of the *Broadcasting Act*, the CDCE requested that the regulation of online programming services be accompanied by an obligation to provide data on the cultural content accessed by Canadians.

**That nothing in a possible WTO agreement prevent the Canadian government from requiring foreign companies to provide data on the cultural content accessed by Canadians.**

#### **5.9. Crown Corporations**

CDCE expects that state-owned companies, particularly those in the culture and media sector such as Radio-Canada and Telefilm, will not be affected by possible WTO negotiations.

**That nothing in a possible WTO agreement affects current and future state-owned companies operating in the cultural sector.**

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<sup>26</sup> Section 31.1 of the *Copyright Act*.

<sup>27</sup> Section 512 of the United States *Digital Millennium Copyright Act*: <https://www.law.cornell.edu/uscode/text/17/512>

<sup>28</sup> Tch  houali, D.; Plamondon, J. (2018). *Usage Data and Data Usage in the Platform Age: The Need for a Regulatory Framework to Better Assert Our Digital Sovereignty*, Montreal, ISOC Quebec, Coalition pour la Culture et les M  dias (CCM), 32 p.

## 5.10. Telecommunications

The CDCE would prefer that Canada refrain from lowering the limits on foreign ownership of telecommunications companies. First, we described in a recent communication<sup>29</sup> that the societal scope of telecommunications is expanding considerably with the development of digital technology and is expected to reach every corner of people's lives. Canadians will increasingly have online access to cultural content and many products and services from various sectors (such as health and education). Many other services, such as transport and retail, will increasingly depend on the connected objects that use telecommunications networks.

While the deployment of 5G networks will make it possible to offer a range of products and services, several of which have probably not yet been imagined, it seems prudent to us that States retain as much control as possible over this sector, which is already highly strategic to them.

In addition, the CDCE, like other organizations, believes that telecommunications companies should contribute to the financing of Canadian cultural content because they benefit greatly from the online distribution of cultural content. The less Canadian these companies are, the more difficult it will be to regulate them.

**That Canada refrains from lowering barriers to foreign ownership of telecommunications companies.**

## 5.11. Access to negotiators and transparency

The CDCE expects the Canadian government to continue to consult with cultural sector organizations on this potential negotiation and to provide a regular update on the status of the negotiations. This collaboration has been highly appreciated in the past, particularly in the context of the renegotiation of NAFTA.

**That Canada establishes a WTO committee on e-commerce that brings together all stakeholders to inform and consult them throughout the negotiations. That a committee on cultural industries also be created to inform and consult cultural sector organizations on issues that concern them.**

## 6. Conclusion

We note that e-commerce in all sectors of activity is only very poorly regulated globally. The cultural sector is no exception to this reality. It is inconceivable to us that we should abandon the societal objectives that have been pursued for so long simply because the way in which content is transmitted has changed. Rather, these objectives must be adapted to work in the digital environment.

This is what Canada has undertaken to do in recent years with the revision of several laws that are crucial to the cultural sector. In this context, it is imperative that Canada continue to defend the global cultural exemption, especially when it comes to e-commerce.

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<sup>29</sup> CDCE (2019), Comments by the Coalition for the Diversity of Cultural Expressions on the Consultation on the Proposed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation. Online: <https://cdec-cdce.org/en/proposed-order-issuing-a-direction-to-the-crtc-on-implementing-the-canadian-telecommunications-policy-objectives/>

## **Appendix 1: CDCE Recommendations**

### **Recommendation 1**

The CDCE recommends that if the Canadian government engages in trade negotiations on e-commerce at the WTO, it should globally exempt culture from a possible agreement and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.

### **Recommendation 2**

The CDCE suggests that Canada includes the issue on the agenda of the next meeting of the Convention's intergovernmental committee, and that a consultation, including representatives of civil society, be launched by the Convention secretariat no later than 2020. This consultation should identify the provisions to be included in a possible WTO agreement on e-commerce to implement the objectives and principles of the 2005 Convention.

The CDCE also suggests that the preamble to a possible WTO agreement refers to the UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

### **Recommendation 3**

That the parties to a possible agreement on e-commerce formulate liberalization commitments in the form of a positive list, i.e. the agreement will apply only to the sectors they identify and within the limits that States may wish to formulate.

### **Recommendation 4**

If a possible agreement on e-commerce was to be negotiated at the WTO, Canada should consult with representatives from the cultural sector and ensure that the definition to be used for the application of the cultural exemption is technologically neutral and meets the following criteria:

- The definition should include at least the same sectors:
  - o for publishing: books, magazines, periodicals, newspapers;
  - o for audiovisual: films or video recordings, audio or video music recordings, musical compositions, radiocommunications, all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;
- The activities covered by the traditional definition must be included: publication, production, distribution, sale, exhibition, publishing;
- In order to ensure technological neutrality, the definition should not specifically define the formats used for the production and access to cultural expressions and should allow the inclusion of cultural expressions using new technologies (virtual reality, augmented reality, artificial intelligence, etc.).

### **Recommendation 5**

It is essential that the rules of national treatment do not apply to culture.

### **Recommendation 6**

That Canada may collect taxes or other contributions, including those aimed at financing cultural content, from companies engaged in e-commerce. That Canada protects its authority to define the conditions of access to any funding for culture.



**Recommendation 7**

That Canada does not make any international commitments that could affect the remuneration of copyright holders, in particular provisions similar to the exceptions on Network Services or "Safe Harbour" benefiting companies in the technology sector to the detriment of the cultural sectors.

**Recommendation 8**

That nothing in a possible WTO agreement prevent the Canadian government from requiring foreign companies to provide data on the cultural content accessed by Canadians.

**Recommendation 9**

That nothing in a possible WTO agreement affects current and future state-owned companies operating in the cultural sector.

**Recommendation 10**

That Canada refrains from lowering barriers to foreign ownership of telecommunications companies.

**Recommendation 11**

That Canada establishes a WTO committee on e-commerce that brings together all stakeholders to inform and consult them throughout the negotiations. That a committee on cultural industries also be created to inform and consult cultural sector organizations on issues that concern them.