



Comments from the Coalition for the Diversity of Cultural Expressions
within the framework of
General Review of the
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
submitted to
Global Affairs Canada

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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 50 organizations that collectively represent the interests of more than 350,000 professionals and 3,000 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 25 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 CDCE would like to thank Global Affairs Canada for holding this general review to assess the functioning of the Comprehensive and Progressive Agreement Trans-Pacific Partnership (CPTPP), which gives us the opportunity to communicate our concerns and recommendations.

In the following pages, the CDCE will recall the comments and proposals it presented on August 23, 2019, during the Consultations with Canadians on the holding of negotiations on possible accessions to the [Comprehensive and Progressive Agreement Trans-Pacific Partnership](#). We take the opportunity of this review to present important developments in the area of the diversity of cultural expressions since the submission of this brief, namely the adoption, in April 2023, of the *Online Streaming Act*, as well as the meteoric development, in just over a year, of generative artificial intelligence - developments that further strengthen the arguments and demands that were presented in 2019.

Responding to the invitation to identify "existing provisions in the Agreement that would benefit from revision or updating"¹, CDCE calls on the Canadian government to take every opportunity to improve cultural protection in the CPTPP. It's worth recalling that the CPTPP, like the Comprehensive Economic and Trade Agreement (CETA), marked a break in the Canadian tradition of cultural protection, by including reservations in certain chapters rather than a blanket exemption. This remains a source of disappointment and concern for the Canadian cultural sector.

In this intervention, we would like to recall Canada's commitments to protecting the diversity of cultural expressions, emphasize the concerns that were put forward by the CDCE in 2019, and particularly the importance of protecting culture in the field of e-commerce. We will then deal specifically with the few remaining flaws in the CPTPP, and finally present our recommendations to Global Affairs Canada. A list of our recommendations can be found in the appendix.

¹ Join the discussion: The General Review of the Comprehensive and Progressive Agreement Trans-Pacific Partnership (CPTPP): <https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/transpacific-cptpp-transpacifique-ptpgp.aspx?lang=eng>

3. Canada's commitment to the protection of the diversity of cultural expressions in trade agreements

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 artists 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."²

3.2. Canada's obligations under the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

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"³. 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, 155 Parties, 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

² CRTC (2018) Harnessing Change: The Future of Programming Distribution in Canada
<https://crtc.gc.ca/eng/publications/s15/pol1.htm>

³ <https://www.unesco.org/en/legal-affairs/convention-protection-and-promotion-diversity-cultural-expressions>

(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.

All States are faced with the challenges of adapting their laws to digital realities. 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 "promoting dialogue between private operators and public authorities in order to enhance greater transparency in the collection and use of data that generate algorithms, and encouraging the creation of algorithms that ensure greater diversity of cultural expressions in the digital environment and promote the presence and availability of local cultural works".⁴

In June 2023, at the Conference of the Parties, the Parties asked the Convention Secretariat to set up a group of experts with a mandate to make recommendations on four themes:

- linguistic diversity of online cultural content;
- discoverability of local and national cultural content online;
- increased transparency of digital platforms;
- the impact of artificial intelligence on the cultural and creative industries.

The work of the Expert Group will culminate in a report containing recommendations to be presented to the Conference of the Parties in June 2025.

In a gesture that eloquently testifies to its leadership role in this field, Canada has co-organized, with the Government of Quebec, the first meeting of the UNESCO Expert Group on the Diversity of Cultural Expressions in the Digital Environment, in Quebec City from May 27 to 30, 2024.

3.3. The Canadian exemption clause and the CPTPP

The cultural exemption appears in Canada with the negotiations of the Canada-U.S. Free Trade Agreement (FTA). We will not repeat here the account of the historical evolution of the Canadian cultural exemption⁵.

However, we must remember that 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 Agreement Trans-Pacific Partnership (CPTPP). In the CETA, reservations and the reference to the 2005 UNESCO Convention protect Canada's ability to formulate policies to maintain cultural sovereignty relatively well⁶.

4 UNESCO (2017), Operational guidelines on the implementation of the Convention in the digital environment, article 16.2.

5 See the comments filed by the CDCE as part of the Consultations in anticipation of possible negotiations on e-commerce at the World Trade Organization (WTO) on April 25, 2019. On line: <https://cdce-cdce.org/en/publications/cdces-recommendations-on-canadas-future-world-trade-organization-wto-negotiations-on-e-commerce/>

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

In the case of the CPTPP, significant concessions were granted, notably in the chapter on e-commerce, which does not contain a specific cultural reservation. However, after the withdrawal of the United States, Canada signed side letters with the other 10 remaining partners to generate bilateral agreements that specify that "Canada may adopt or maintain discriminatory requirements obliging service providers or investors to make financial contributions for the development of Canadian content, and may adopt or maintain measures that limit access to foreign audiovisual content online"⁷. We'll look at this issue in more detail in the next section. It's also worth noting that the preamble to the CPTPP affirms "the importance of promoting corporate social responsibility, cultural identity and diversity, [...] as well as the importance of preserving [the] right [of the Parties] to regulate in the public interest"⁸.

Fortunately, as part of the renegotiation of the North American Free Trade Agreement (NAFTA), despite the retaliation clause, Canada succeeded in securing a global cultural exemption that applies to the entire agreement, including e-commerce. This result is all the more encouraging given that the U.S. had hoped to obtain concessions from Canada in the area of culture, more specifically in the chapter on electronic commerce.

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

The CDCE regularly makes contributions⁹ describing the impact of technologies and models for offering cultural content online, and suggesting ways to ensure that the diversity of cultural expressions is protected and promoted. Over the past five years, the CDCE has been particularly active in protecting and promoting the diversity of cultural expressions on online distribution platforms, in copyright matters and in the field of generative artificial intelligence.

4.1. Current challenges for the protection and promotion of the diversity of cultural expressions in the digital environment and development of the legal framework

The development of technologies and models for offering cultural content online is having a huge impact on cultural ecosystems at various levels. The development of public policies in this area is crucial.

Until April 2023, the Canadian legislative framework did not apply to online programming services (Netflix, Spotify, etc.), which are largely foreign. They were not subject to discoverability and showcasing requirements, nor were they required to fund local and national content, which was detrimental to the influence of our culture, in addition to maintaining an inequitable system with regard to national companies.

⁷ The letters use the same wording and are available online : <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/letters-lettres.aspx?lang=eng>

⁸ <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>

⁹ See the CDCE website : <https://cdec-cdce.org/en/>

On this subject, it's important to note that in April 2023, the Government of Canada finalized the modernization of its *Broadcasting Act*, now the *Online Streaming Act*, which regulates online broadcasting platforms, whether Canadian or not. The CRTC is currently working on the regulations, which will ultimately improve support for Canadian content, both through increased funding for production and through enhancement measures. This move demonstrates Canada's ongoing commitment to supporting its cultural industries, and to preserving and promoting a diversity of cultural expression in the digital environment. It is therefore necessary to ensure that the trade agreements in which Canada is involved are consistent with this commitment and leave it all the room for maneuver it needs to act in this area.

In addition, a number of projects are still underway. One of the most important is the necessary modernization of the *Copyright Act*. The CDCE has identified [six priorities](#) in this respect. These include reducing the number of exceptions and ensuring that the private copy regime is technologically neutral.

Finally, for over a year now, the dazzling development of generative artificial intelligence has been shaking up our societies as a whole, but the cultural milieu in particular has been perturbed. The CDCE has produced several documents documenting the risks this poses to cultural ecosystems, and putting forward demands aimed at mitigating them¹⁰.

Developing a legal framework to guarantee legal certainty and confidence in AI is a priority for the Canadian cultural ecosystem, and it is necessary to preserve all possible leeway in free trade agreements in this respect.

5. The weaknesses of the CPTPP

5.1. The absence of a global exemption for culture

The CPTPP should have included a comprehensive cultural exemption clause, applicable to all chapters of the agreement. Instead, Canada has accepted the inclusion of a number of reservations and clauses in certain chapters of the agreement. As technological developments progress at great speed, it is nonetheless essential to protect culture against applications that do not yet exist, and a global exemption remains the best way to achieve this goal.

5.2. The absence of a specific reservation for electronic commerce

Following the withdrawal of the United States in January 2017, the Canadian government signed letters of agreement with the other 10 partners to enhance existing cultural reserves. The relevant paragraph of these letters reads as follows:

¹⁰ On line on CDCE website: <https://cdec-cdce.org/en/publications/generative-ai-recommendations/> and <https://cdec-cdce.org/en/publications/cdce-brief-c27/>

Canada and [the other Partner] agree that, in continuing to give effect to the Agreement, notwithstanding the following language in Annex II – Canada – 16 and 17 – under the Cultural Industries Sector, first paragraph under the subheading “Description,” that states “except: (a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and (b) measures restricting the access to on-line foreign audio-visual content”, 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 content¹¹.

These letters corrected a fundamental gap in Annex II, which exempts cultural industries from the application of certain obligations set out in Chapters 9 (Investment) and 10 (Cross-border trade in services), by cancelling two exceptions to this protection granted to culture:

Canada reserves the right to adopt or maintain a measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content, except:
(a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and
*(b) measures restricting the access to on-line foreign audio-visual content*¹².

However, neither Annex II nor the letters of agreement refer to Chapter 14 on electronic commerce, and more specifically to Article 14.4, which we refer to here:

1. *No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products. [...]*
3. *The Parties understand that this Article does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.*
4. *This Article shall not apply to broadcasting*¹³.

As we can see, this article does not apply to broadcasting. But the term broadcasting is not defined in this chapter. It is, however, in Chapter 18 on intellectual protection:

broadcasting means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” if the means for decrypting

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

12 <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tp/text-texte/31-2-a3.aspx?lang=eng>

13 <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tp/text-texte/14.aspx?lang=eng>

are provided to the public by the broadcasting organisation or with its consent;¹⁴.

If the scope of the term broadcasting for the purposes of Article 14.4 is not clear to us, what is certain is that the definition of cultural industries is much broader. Think, in particular, of books, periodicals and newspapers.

Without a cultural reservation, such a clause could be interpreted as preventing 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 could also be interpreted as preventing Canada from requiring online service providers to make financial contributions for the development of Canadian content.

Of course, Article 14.2 provides that, generally, the measures in the e-commerce chapter must comply with the obligations, including exceptions and non-compliant measures, of the relevant provisions of Chapters 9 (Investment) and 10 (Cross-border trade in services). Paragraph 5 of this article states:

5. For greater certainty, the obligations contained in Article 14.4 (Non-Discriminatory Treatment of Digital Products), Article 14.11 (Cross-Border Transfer of Information by Electronic Means), Article 14.13 (Location of Computing Facilities) and Article 14.17 (Source Code) are:

- (a) subject to the relevant provisions, exceptions and non-conforming measures of Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services); and*
- (b) to be read in conjunction with any other relevant provisions in this Agreement*¹⁵.

Indirectly, the cultural reservation in Annex II would apply to Article 14.4 and even to the other provisions of the chapter on electronic commerce. However, in the opinion of cultural exemption lawyers, "uncertainties remain as to the articulation between these non-compliant provisions/exceptions/measures relating to "services" or "investment" and the rules of the chapter on electronic commerce that deal with "digital products"¹⁶.

The real scope of commitments relating to e-commerce under the CPTPP, and their effects on possible Canadian cultural policies applicable in the digital environment, thus appear more ambiguous than civil society would have wished.

A cultural reservation directly linked to the chapter on e-commerce, with no applicable exception, would have completely removed any doubts on the matter. To a lesser extent, the inclusion of a sentence linking the e-commerce chapter directly to the Annex II reservation would have been more reassuring.

¹⁴ Article 18.57 <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tppt/text-texte/18.aspx?lang=eng>

¹⁵ <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tppt/text-texte/14.aspx?lang=eng>

¹⁶ Guèvremont, Véronique, Bernier, Ivan, Otasevic, Ivana and Clémence Varin (2019), Comments submitted by the UNESCO Chair on the Diversity of Cultural Expressions as part of consultations in anticipation of possible negotiations on e-commerce at the World Trade Organization (WTO).

5.3. Accession of new partners to the CPTPP

Although the signing of the letters of agreement represented a very significant improvement, there can be no guarantee that new partners will agree to sign a letter of agreement with Canada on the issue of culture.

What will happen, in particular, if the United States decides to return to the partnership? Will Canada lose the comprehensive cultural exemption it managed to maintain in the Canada-USA-Mexico Agreement (CUSMA) since the United States will be able to refer to the CPTPP rules?

5.4. Intellectual property rights

In general, the CDCE considers that trade agreements should not include copyright provisions, particularly those that are similar to the exception for Network Services¹⁷ in the Canadian *Copyright Act* or the Safe Harbour of the United States *Digital Millennium Copyright Act*¹⁸.

Some provisions of Chapter 18 on intellectual property should not have been included in the TPP. Article 18.66 opens the door to the extension of exceptions to the copyright regime. Section 18.82 and Schedule 18-E are also problematic, the former considerably limiting the liability of Internet service providers for copyright infringement, the second by restricting derogations to existing measures. Fortunately, the CPTPP suspends the application of some articles, but the Parties may decide to reinstate them, while article 18.66 is maintained.

6. CDCE recommendations for modernizing or improving the Agreement in the context of the present Review

- **The CDCE recommends that the Canadian government seize any opportunities that may arise to exempt culture as a whole from the CPTPP, and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.**
- **Failing a global exemption, the CDCE recommends exempting culture directly from the e-commerce chapter.**
- **If it is not possible to modify the text of the Agreement, the CDCE reiterates that Canada must sign letters of understanding with all new partners. In our view, it would be entirely legitimate for Canada to broaden the scope of these letters to ensure the widest possible cultural exemption. In this way, Canada could sign new letters with partners already confirmed to the CPTPP. This broadening should necessarily include article 14.4, and should not limit Canada's ability to adopt measures other than the two set out in the letter of understanding.**

¹⁷ Article 31.1, *Copyright Act*

¹⁸ Section 512 of the U.S. Digital Millennium Copyright Act: <https://www.law.cornell.edu/uscode/text/17/512>

The CDCE proposes that the 2nd paragraph of the letters of agreement be replaced by the following text:

Canada and [the partner] agree that, as part of the arrangements for continuing to give effect to the Agreement, this Agreement shall not apply to any measure adopted or maintained by Canada relating to a cultural industry.

- **In order to maintain control of its copyright policies, the Canadian government should demand that section 18.82 and Schedule 18-E remain suspended forever, and seize every opportunity to eliminate section 18.66.** In fact, the CDCE hopes that the revision of the Canadian Copyright Act will allow it to adapt to contemporary reality, and in particular to increase the revenues of Canadian rights holders. Our members agree that the number of exceptions in the Copyright Act should be reduced, that digital platforms should remunerate rights holders more, and that private copying should become technologically neutral.

7. Conclusion

The current general review represents an opportunity for Canada to once again improve the agreement by better protecting its culture.

This protection is all the more important at a time when Canada has just completed the revision of a law that is crucial to the survival of the cultural sector (the *Streaming Online Act*), and when key public policies will need to be put in place in the short term to ensure the sustainability of the diversity of cultural expressions: targeted revision of the *Copyright Act* and development of a regulatory framework in relation to generative artificial intelligence.

In this context, it is imperative that Canada continues to defend the global cultural exemption, especially when it comes to e-commerce.

Appendix 1 : CDCE Recommendations

Recommendation 1

The CDCE recommends that the Canadian government seize any opportunities that may arise to exempt culture as a whole from the CPTPP, and not agree to provisions that would limit or penalize the adoption of measures protected by the exemption.

Recommendation 2

The CDCE recommends adding cultural industries to Article 14.2 (3).

Recommendation 3

The CDCE proposes that the 2nd paragraph of the letters of agreement be replaced by the following text:

Canada and [the partner] agree that, as part of the arrangements for continuing to give effect to the Agreement, this Agreement shall not apply to any measure adopted or maintained by Canada relating to a cultural industry.

Recommendation 4

To remain in control of its copyright policies, the Canadian government should demand that section 18.82 and Schedule 18-E remain suspended forever, and take every opportunity to eliminate section 18.66.