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Excerpts from

## **HOLLYWOOD'S DISAPPEARING ACT: INTERNATIONAL TRADE REMEDIES TO BRING HOLLYWOOD HOME**

*Claire Wright*

Hollywood has a dirty little secret: a great many of the U.S.' cultural and entertainment products are not even "Made in the USA" anymore, and Hollywood itself appears to be for sale to the highest bidder. ...

A great many of the films shot outside of the U.S. are shot in Canada, which has the most established film incentive programs, both on the federal and provincial level. ... The question addressed in this article is whether, under U.S. and WTO law, a foreign government can artificially lower the costs of production in an industry to such an extent that a number of U.S. companies choose to establish local production companies in that country and forego production in the U.S., thereby decimating the industry in the U.S. Specifically, as a case study, this article focuses on the Production Services Tax Credit (PSTC) film incentives that Canada offers to domestic and foreign film companies alike to produce films that need not possess any Canadian content. ... (T)hey are using Hollywood to put Hollywood out of business.

### ***THE WORLD TRADE ORGANIZATION HAS RULES FOR ITS MEMBERS***

All WTO Members are required to sign the SCM (Subsidies and Countervailing Measures) Agreement when they join the WTO. Hence, as the U.S. and Canada have been Members of the WTO since its inception in January 1995, they have been parties to the SCM Agreement since that time. ...

Article 1 of the SCM Agreement defines a subsidy as "a financial contribution by a government or any public body within the territory of a Member ... [for example,] where: ...government revenue that is otherwise due is foregone or not collected (*e.g.*, fiscal incentives such as tax credits) ... [ ] and a benefit is thereby conferred." ... Hence, there can be no question that Canada's PSTC film incentives meet the definition of a "subsidy" set forth in Article 1 of the SCM Agreement.

### ***THE WTO RULES APPLY TO SUBSIDIES FOR THE MANUFACTURE OF GOODS, AND (EVEN BAD) FILMS ARE GOODS***

Article 10, note 36 of the SCM Agreement indicates that the SCM provisions apply only to subsidies granted by WTO Members in connection with the "manufacture, production or export of any merchandise ... ." (*The article cites in detail other WTO cases and precedents in both Canada and the United States to demonstrate that a film is a tangible "good," "product" or "merchandise"—terms used interchangeably throughout the SCM Agreement—instead of a*

*service. For example, the MPAA would not be able to file 301 petitions for the protection of its copyrights in foreign countries if films were not classified as "goods.")*

... (A) feature film has also been treated as a good throughout much of U.S. domestic law. For example, a film must be considered to be a tangible "good" in order to receive copyright protection under Section 102(a) of Title 17 of the U.S. Code. ... The Internal Revenue Code (IRC) ... specifically states that "the term "tangible personal property" shall include a film, sound recording, video tape, book, or similar property." A stronger statement on the issue of whether a feature film is a good or a service is difficult to imagine.

## ***SUBSIDIES THAT VIOLATE WTO RULES BY CAUSING HARM TO ANOTHER MEMBER ARE ACTIONABLE***

Government benefits meeting the definition of a "subsidy" under Article 1 of the SCM Agreement ... are referred to as "actionable subsidies." **Actionable subsidies are inconsistent with a WTO Member's obligations under the SCM Agreement only if they are provided to a specific enterprise (company) or industry and cause "adverse effects to the interests of other Members."** ... Canada's PSTC film incentives are provided to a specific industry. Furthermore, these incentives clearly appear to be causing adverse effects to the U.S., which is another WTO Member. ...

In a subsidies case, there is no requirement that the different causes of "injury" or "threat of injury" to a domestic industry be compared so as to ascertain whether the subsidies provided are the most important, or even one of the most important, causes of the injury or threat of injury. **So long as the subsidized imports in question are one of the causes of the injury or threat thereof ... the subsidy program in question is inconsistent with the SCM Agreement.**

## ***THE U.S. FILM PRODUCTION INDUSTRY HAS BEEN HARMED BY FOREIGN SUBSIDIES WHICH ARE ACTIONABLE UNDER WTO RULES***

*Since the Canadian incentives clearly meet the definition of an actionable subsidy, the article then discusses in great depth how they meet the exact standards for the specific "adverse effects" described in Article 15.4 of the SCM Agreement:*

1. Numerous reports demonstrate that Canada's PSTC film incentives have been successful in luring U.S. film producers north of the U.S. border to shoot their feature films in Canada. ... As these films are then imported into the U.S. at the conclusion of filming, there necessarily has been **a significant increase in subsidized Canadian-origin feature film imports into the U.S.**
2. ... **(T)he costs of producing feature films in the U.S. have been suppressed so that they can compete with the heavily subsidized U.S.-developed films produced in Canada and other countries.** ... (W)ages and salaries, as well as various fringe benefits, of feature film production workers in the U.S. have decreased. ... (B)usinesses such as restaurants, hotels, and costume shops catering to the feature film industry in the U.S. have reduced their costs to local film production companies in order to retain business in the local area. ... (S)tate and local governments have provided all kinds of incentives and subsidies ... Of course, U.S. taxpayers, including, in particular, the film industry workers who live in the areas most affected by the outsourcing of the U.S. film industry, ultimately pay the cost of these government subsidies, thereby reducing their wages and salaries even further.

All of these sacrifices on the part of film workers, companies providing services to the film industry, and members of the public, have combined to lower the costs of feature

film production in the U.S. below what they otherwise would be.... Unfortunately, as discussed in this article, **all of these sacrifices together have been insufficient to stem the outsourcing of U.S. feature film production to other countries offering very generous film subsidies.**

3. Given Canada's tremendous growth in the production of U.S.-developed feature films and the loss thereof in the U.S., **the U.S.' share of the world market for feature film production has declined.**
4. ... (T)he outsourcing of the U.S. feature film production industry, to Canada and elsewhere, has effectively destroyed the livelihoods of many people who formerly were employed in the industry. Even more ominously, it appears that **the future dominance of the U.S. in the feature film industry is jeopardized**, as our children's jobs in this industry are outsourced to workers in other countries through the use of exceedingly generous foreign subsidies. In other words, for the most part, **it does not appear that Canada and other countries are "creating" jobs for their children in the entertainment industry but rather are stealing them from the U.S.**
5. ... (W)ages in the feature film production industry have declined in recent years. This is not surprising, given the large number of industry workers who have lost their jobs completely or are only occasionally employed in the industry. That is, those still actively seeking employment in the industry have very little bargaining power in the marketplace, and **this weak bargaining power manifests itself in the form of lower wages, salaries, residuals, and other benefits received by a worker when employed ...**
6. Given the great decline of the feature film production industry in the U.S., **capacity in the industry is underutilized.**
7. ... (A)s most feature films shown in Canada and many other countries are, in fact, U.S.-developed films,;... **Canada's PSTC film subsidies have caused the displacement or impedance of imports of U.S.-origin feature films into Canada as well as into numerous third countries.**

### ***THE WTO PROTECTS ENTIRE INDUSTRIES, NOT SHAREHOLDERS OF COMPANIES***

The Motion Picture Association of America (the MPAA) has argued that the PSTC film incentives actually increase film producers' profits by lowering their production costs, and thus the incentives are not inconsistent with the SCM Agreement. ...The growth or decline in producers' profits, however, is only one criterion among many other criteria listed in the SCM Agreement for determining whether a U.S. industry is being materially injured by foreign subsidies, and the WTO Members quite clearly would not have included all of the above-discussed criteria if they had considered such criteria irrelevant to a finding of material injury. ... **WTO rules do not protect national *companies* but rather national *industries* and national *products*.**

### ***THE U.S. NEEDS TO ASK FOR ENFORCEMENT OF THE WTO RULES.***

**It is strongly recommended that the U.S. Government pursue a legal challenge testing the consistency of the foreign film subsidies, and in particular the Canadian PSTC film subsidies, with the SCM Agreement before the U.S. feature film production industry disappears completely.** This action is warranted on account of the material injury that the U.S. feature film industry appears to be suffering and the fact that these subsidies appear to be inconsistent with Canada's obligations under the SCM Agreement.

... (It) is recommended that interested parties in the U.S. file a Section 301(A) petition with the USTR as a method of prompting the U.S. to initiate a WTO dispute resolution proceeding against Canada.

In summary, **Canada and other WTO Members should not be permitted to circumvent the SCM Agreement simply because the shareholders of U.S. movie houses benefit from these countries' unfair trade practices as well.** ... (A) decision on the part of the U.S. Government to challenge the foreign film subsidies would be consistent with the mission of the WTO, which is to enforce the rules of fair and free trade among the WTO nations so as to promote and protect the economic well-being of all WTO Members and the national industries in those Members.

*NOTE: Emphases are added, and editorial notes are italicized.*

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\* [http://www.tjssl.edu/index.cfm?rID\\_int=4&sID\\_int=43&xID=124](http://www.tjssl.edu/index.cfm?rID_int=4&sID_int=43&xID=124)

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\*\* <http://www.uakron.edu/law/lawreview/authors.php>