CANADIAN BOOK PUBLISHING AND NAFTA
A submission to Global Affairs Canada on the renegotiation and modernization of the North American Free Trade Agreement
July 2017

The Association of Canadian Publishers (ACP) appreciates this opportunity to offer input on behalf of our members, 115 independent Canadian-owned English-language publishers, representing every province in Canada and Nunavut. Independent publishers, including those in the ACP and their francophone counterparts in Quebec and across Canada, produce 80% of all new Canadian-authored books each year.

Summary of recommendations:

- Maintain the cultural exception;
- Renew commitment to Canadian ownership of cultural industries;
- Adopt a consistent interpretation of the Berne Convention three-step test to ensure compliance with international treaty obligations;
- Strengthen and enforce piracy laws;
- Maintain a trilateral agreement with Mexico and the United States.

Trade agreements play a critical role in the publishing environment, and none can be more important than that which governs our trade with the US, which is both our largest export market, and also the source of our greatest competition, in the form of a daily tsunami of imported US books which dominate Canadian book-retail space.[1]

The balance of trade in books between Canada and the US tilts very heavily in favour of the US; while American concerns about their trade deficits may be propelling their interests in renegotiating NAFTA, the US enjoys a very substantial trade surplus in the book sector and, no doubt, across the cultural industries. Canadian publishers earn $53 million (CAD) a year through the sale of finished books and rights sales to the US,[2] while recent industry figures show that Canada is the United States' largest export market with sales of approximately

[1] Throughout this paper, references to Canadian publishing should be understood to refer to English-language publishers. The Association of Canadian Publishers does not claim to represent the interests of French- or other-language publishers, for whom the US may be less significant both as a market and as a source of competing imports. Nevertheless, the benefits of the cultural exception have accrued equally to French-language publishers, and they fully share in the commitment of all Canadian publishers to strengthening the protection of intellectual property.
[2] "Export Profile of the Canadian Book Publishing Industry," Canada Book Fund, Department of Canadian Heritage, May 2017.

$340 million (USD) in 2016.[3] Taking into account current exchange rates, Canada incurs a trade deficit with the US book industry of $375 million (CAD) each year.[4]

At the same time, Canadian publishers rely on exporting to the US market, which accounts for as much as 50% of the sales of some Canadian publishers. This applies across all genres of book publishing: children's books, fiction, poetry, biographies and memoirs, cookbooks and self-help, and all other categories of general non-fiction, as well as the scholarly and educational books that are used in classrooms from kindergarten through university. The export business of Canadian publishers, essential to their viability and to Canada's reputation around the world, has been affected by NAFTA in various ways, particularly through two sections of the agreement:

- Annex 2106, which extends the terms of the Free Trade Agreement (FTA, 1988) with respect to an exception for cultural industries, and
- Chapter Seventeen, which deals with Intellectual Property.

A number of other government policies and industry realities intersect with trade agreements at various points in the flow of book business back and forth over the Canada-US border. These include the UNESCO Instrument on Cultural Diversity, to which Canada is a signatory but the US is not; policies and practices of foreign-investment review; copyright law, including the Distribution Right, enshrined in the regulations of Canada's *Copyright Act* of 1999; the international publishing practice of publicly presenting dual or multiple pricing for diverse markets; and the complexity of ebooks as commodities crossing borders. Any discussion of trade policy in our sector requires some consideration of these factors and their interrelationships, and this document will discuss each of these as they relate to NAFTA as it has existed till now, and as it may emerge from new negotiations.

THE CULTURAL EXCEPTION: ANNEX 2106

In negotiating the Canada-US Free Trade Agreement of 1988 (the FTA), Canada fought to have its cultural industries exempted from the terms of the agreement. By securing that exception, Canada was free to create government programs and policies to develop its cultural industries without fear of challenge from the US that such investment would create unfair competition in the international marketplace. The principle was an acknowledgement that cultural industries play a unique role in national life, as compared with purely commercial industries such as manufacturing, forestry, and financial services, and that the rules of market competition should not apply in the same way. When NAFTA superseded the FTA in 1994, the cultural exception came along with it.

In the years since, book publishing has generally remained outside the fray in any cultural industry tensions around Canada-US trade, while cable television and magazine publishing have been the focus of substantive

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[3] "Export Sales of US Trade Book Publishers: Issue 7 – Full Year 2016," Association of American Publishers, 2017.

[4] At July 18, 2017, $1.00 CAD = $0.79 USD.

disputes. During this period publishers have faced an increasingly challenging market, with ever-growing competition from imports, and substantial erosion of copyright protection. Despite these challenges, the Canadian book industry has grown larger, more sophisticated, more competitive, and more international in its reach, in part by leveraging government investment through a succession of support programs – the Publishers' Distribution Assistance Plan, the Book Publishing Industry Development Program, and the Canada Book Fund – as well as the ongoing investments of the Canada Council for the Arts. Government investment in Livres Canada Books, a program dedicated entirely to developing export opportunity and capacity for Canadian publishers, is another example of how the cultural exception has served to advance the growth of Canadian literature and scholarship, extended the success of Canadian writing around the world, and enabled our industry to compete more effectively in the international marketplace against the overwhelming scale of US publishing.

Without the cultural exception, all these programs would have been subject to challenge under a free-trade agreement that did not distinguish between cultural and other industries.

THE CULTURAL EXCEPTION AND OWNERSHIP

The cultural exception of the FTA/NAFTA was not absolute; four exceptions were specified. Three of these related to cultural industries other than book publishing, but one dealt with foreign ownership in any cultural industry, specifically with the terms of sale of a Canadian-based, foreign-owned cultural enterprise.[5] For Canadian book publishers, this touched upon a subject that was looming large and thorny at the time, and still is today.

Earlier government policy had required (in theory, at least) such transactions to transfer ownership into the hands of Canadian-owned companies. Article 1607 of the FTA, however, required the government itself to take on such an acquisition in certain circumstances. Since 1988, there have been many instances of foreign-owned subsidiaries changing hands, some in the indirect scenario outlined in Article 1607, and others in more straightforward transactions. The response of Canadian Heritage's Office of Investment Review has been, with near-absolute consistency, to set aside the Canadian ownership policy and allow foreign interests to prevail, to the great detriment of the Canadian-owned publishing industry. Most egregiously, Investment Review allowed the iconic Canadian publisher, McClelland & Stewart, to be taken over by Random House. In the ten years between Random House taking a 25% share in the M&S and their outright purchase of the company in 2011, an estimated $7 million in Canadian taxpayer dollars flowed to M&S. Today Random House enjoys the ongoing revenue generated by that taxpayer investment, as the books of M&S's rich backlist catalogue continue to sell. The reference in NAFTA to the sale in Canada of foreign-owned subsidiary operations has been an irritant to

[5] From the parliamentary website on Cultural Exemptions in Canada's Major International Trade Agreements, (http://www.lop.parl.gc.ca/content/lop/researchpublications/prb9925-e.htm#(2)): "Any requirement to sell a foreign-owned enterprise engaged in a cultural activity acquired indirectly through the purchase of its parent will be balanced by an offer to purchase the enterprise at fair open market value. (FTA, Article 1607, paragraph 4)

multinational corporations; the Canadian government's practice of disregarding this commitment is an irritant to Canadian publishers.

COPYRIGHT

Canada's *Copyright Modernization Act* is an irritant to our trading partners as well as to our own industry.

During the first twenty-five years of FTA/NAFTA, the copyright laws of Canada and the US were fairly harmonious. Some key differences existed, but each balanced access and compensation in ways that made implementation practical and effective, within each jurisdiction and across the border. The introduction of an exemption from compensation for educational uses of copyrighted works in Canada's *Copyright Modernization Act* (CMA 2012) elicited consternation from the US publishing industry (and that of their counterparts around the world, including Canada), who registered their concerns with the Canadian government, to no avail. Today, as the Canadian government moves toward its five-year review of the CMA, publishers on both sides of the border have been assessing the impact of this legislation on their businesses.

All three NAFTA parties share international treaty obligations with respect to copyright. Many other countries consider the CMA to be in conflict with those obligations, and specifically with respect to the three-step test, established by the World Intellectual Property Organization. An explicit commitment in NAFTA to a consistent interpretation of the three-step test would serve to stabilize and strengthen Canada's educational publishing sector, realign our copyright law with our international treaty obligations, and remove a major irritant of the US sector.

DISTRIBUTION RIGHT

Throughout Canada's history, the largest portion of book-related revenue has flowed from the distribution of imported books, especially from the US and the UK.[6] In recognizing the value of that revenue to Canadian writing and publishing, the *Copyright Act* of 1999 included regulations requiring commercial and institutional purchasers of imported books to abide by territorial copyright restrictions in sourcing their purchases – in effect, to buy through Canadian channels even when buying books from other countries.

DUAL PRICING

The practice of printing two or more prices on book covers is a long-standing one which is generally accepted by individual and retail customers around the world. From time to time, however, it becomes an issue in Canada, usually at times of dramatic change in the value of the Canadian dollar relative to the US dollar. Substantial discrepancies in pricing for US and Canadian markets (inevitably, a higher Canadian price) are irritants to consumers and the retailers who serve them. Further, they encourage Canadian institutional and retail

[6] As mentioned earlier, this history relates to English-language publishing only. Canadian French-language publishers have a parallel history with France as a very large source of competing imports.

customers to circumvent Distribution Right regulations and order direct from US wholesalers. The problems that arise from dual pricing are not rooted in Canada-US trade agreements, but rather supply-chain relationships and public perceptions, and the industry itself must address them. Nevertheless, this issue reflects the kind of complexity involved in bilateral trade of cultural goods, where one partner greatly outweighs the other, in both ability to supply their own very large market and ability to dominate the other's market.

PRINT BOOKS vs EBOOKS

When Canada and the US entered into the FTA, ebooks barely existed; certainly they were not a significant factor in the publishing industry of either country. Today ebooks are an integral part of the global book trade, and with that growth has come a parallel rise in piracy, particularly in the educational-publishing sector. The technology by which ebooks are produced greatly facilitates the production and distribution of illegal copies, and the educational market is a particularly active one for pirated works. A commitment to increased enforcement of piracy laws would be welcomed by the publishing industries in Canada and the US alike.

Another distinction of the ebook marketplace arises in the way that tax authorities define ebooks. For the purposes of retail tax assessment within Canada and elsewhere, it seems that print books are books, and ebooks are something else – transferable files, perhaps. This is not the result of any specific decision by any single government or commercial body, but rather a development that seems to have emerged across many supply chains, not only in Canada, but also the US, and elsewhere. It implies a consensus among tax authorities that the sale of a print book is an exchange of money for goods, and the sale of an ebook is the provision of a service for a fee.

With the passage of time, the evolution of technology, and the expansion or contraction of the ebook market, trade terms of this activity will shift further.

A NEW ROUND OF NEGOTIATIONS

The stakes for Canadian publishers in a favourable trading relationship with the US are very high. It is by far the biggest export market for most Canadian publishers; for some, US sales account for half of their revenue, and for others, the US is their primary market. Any barrier to that market would be debilitating for Canada's entire publishing industry.

It is vital to our sector, and to the larger interests of our country, that cultural industries be addressed in an exception from any trade agreement, and most particularly one with the US. The inclusion of an exception in the EU CETA was a very positive element in that agreement, and will be even more important in any revision of, or successor to, NAFTA.

It's also important that Canadian ownership of cultural industries be more effectively supported going forward. The core principle of Canadian ownership in the publishing sector, so often set aside in recent years, must be strengthened in domestic policy and practice, and that stronger commitment must be reflected in all our trade agreements, and especially in any with the US.

The current US administration has been outspoken in its determination to pursue a “Buy American” policy. While the primary focus of such a policy may be the procurement of materials required for large infrastructure projects and other big-ticket items, it’s important to ensure that cultural goods are explicitly excluded from such a policy, in order to maintain open access for Canadian books and learning materials in US schools, colleges, and universities, as well as public and institutional libraries. The US educational and library markets are essential to the success and stability of the Canadian publishing industry, but pose no significant threat whatsoever to the American book sector.

In a similar vein, much talk is circulating about the threat of US border tariffs. As with “Buy American,” we do not foresee books or other cultural products as targets in this threat. We further note that Canadian publishers have never sought the imposition of tariffs on books coming into Canada, and have consistently advocated the free flow of literature and information across all borders.

In the unlikely event of a new trade agreement raising the tariff on books above its current level of 0%, further complexity could arise around Canadian books that are printed in Asia. Publishers of works with substantial colour, such as children’s picture-books, art books, and cookbooks, routinely rely on colour-specialist printers in Asia, who offer much lower pricing than is available in North America. Country-of-origin rules, if applied to the manufacture of Canadian books sold into the US, would place substantial new obstacles for Canadian publishers.

US trade negotiators have identified Intellectual Property as an area of interest in upcoming trade negotiations. Their interest may be greater with respect to other cultural industries, but the US publishing industry concurs with our own that strengthening Canada’s copyright law and its terms for use of copyright materials for educational purposes will be a positive step in our trade relations.

Finally, we urge Canadian representatives to seek renewal of an agreement that includes all three of the parties to NAFTA: Canada, the US, and Mexico. We believe that multi-lateral agreements with the US serve Canadian interests better than a bi-lateral agreement can. Canadian publishers share with their Mexican counterparts an economic interest in broader access to continental markets as well as an understanding of the need for strong cultural protection with such a powerful next-door neighbour.

We are grateful for this opportunity to provide the perspective of Canada’s independent book publishers on this vital trade relationship, and would be happy to discuss it further at your convenience.

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ABOUT ACP

ACP is the national voice of English-language Canadian-owned book publishers, and represents 115 Canadian-owned and -controlled book publishers from across the country. ACP contributes to the development and maintenance of vibrant, competitive book publishing companies, professionally managed, and owned and controlled in Canada, in order to support and strengthen the contribution that Canadian books make to Canada's cultural, economic, and educational landscape.

To accomplish this goal, the ACP focuses its resources on four distinct areas: Government and Public Relations, including advocacy for Canadian books and writing to elected officials and the general public; Collaborative Marketing initiatives, which extend the competitive capacity of Canadian publishers; Research and Communications, including information-sharing across the book industry and the broader cultural sector; and Professional Development activities that foster the evolution of a more dynamic cultural industry.

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