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Hollywood's Disappearing Act: International Trade Remedies to Bring Hollywood Home

Claire Wright

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

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I. INTRODUCTION

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,[1] and Hollywood itself appears to be for sale to the highest bidder. In November 2005, the Los Angeles Economic Development Corporation reported that approximately 33% of U.S.-developed feature films are filmed outside of the U.S. today,[2] and there are indications that this figure could be much higher.[3] Forty-five percent of all major studio

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1. A movie shot in another country possesses the country of origin of that other country. *See* Tariff Act of 1930 § 304, 19 U.S.C. § 1304 (2005); 19 C.F.R. § 134 (2005). The country of origin of an imported product is the country of manufacture. *See* 19 C.F.R. § 134.1(b) (2005).

2. Los Angeles Economic Development Corporation, *Film Industry Profile of California/Los Angeles County* 6, 14 (November 2005) [hereinafter *Film Industry Profile*] (utilizing data obtained from the Tuesday edition of the *Hollywood Reporter*), *available at* http://www.laedc.info/pdf/Film-2005.pdf (last visited May 7, 2006). These data reveal that this percentage was 32% in 2003. *Id*. at 14. The *Hollywood Reporter* monitors feature film production by major studios as well as independent companies. For each feature film, the trade magazine reports the film location (or locations, if applicable). Los Angeles Economic Development Corporation, *What is the Cost of Run-Away Production? Jobs, Wages, Economic Output and State Tax Revenue at Risk When Motion Picture Productions Leave California* 15 (August 2005) [hereinafter *What is the Cost of Run-Away Production?*], *available at* www.film.ca.gov/ttca/pdfs/link_overview/ cfc/California_Film_Commission_Study.pdf (last visited May 7, 2006). *See also* Letter from Tim McHugh, Executive Director, et al., Film and Television Action Committee, to Ronald Lorentzen, Acting Director, Office of Policy, Import Administration, U.S. Department of Commerce 12 (June 28, 2004) [hereinafter FTAC Letter] (generally commenting on Unfair Trade Practices Task Force 69 Fed. Reg. 30,285 and noting on page 12 that data maintained by the Directors Guild of America (DGA) shows that one-third of movies shown in theaters in 2003 and shot under DGA contracts were made outside of the U.S.), *available at* www.ftac.org/files/FinalTaskForceLetter.pdf (last visited May 7, 2006).

3. *See infra* Exhibits 7, 8 and 9 (portraying data compiled on May 15, 2005 from the international movie data base, which can be found at www.imdb.com, which indicate that, by the 2004 release year, 65% of U.S.-developed feature films were shot outside of the U.S.). Note that these

films were shot outside of the U.S. during 2004,[4] and for a number of years, an even higher percentage of U.S.-developed television programs and movies-of-the week (MOWs) were filmed in other countries.[5] For example, at least one study reported that, in 1999-2000, the percentage of U.S. - developed MOWs made outside of the U.S. was 59%.[6]

A great many of the films shot outside of the U.S. are shot in Canada,[7] which has the most established film incentive programs, both on the federal and provincial level.[8] The list of U.S.-developed movies filmed in Canada is long and impressive.[9] So many U.S.-developed movies are filmed in Canada that it is referred to in the industry as "Hollywood North,"[10] and Canada's actors' union, the Alliance of Canadian Cinema Television and Radio Artist (ACTRA), even offers a workshop to teach Canadian actors how to use American accents, so that fewer American actors need be hired on any film that is shot in Canada.[11]

A sample of the big budget, well-known feature films shot there within recent years includes *Brokeback Mountain*, *Good Will Hunting*, *Catwoman*, *My Big Fat Greek Wedding*, *The Day After Tomorrow*, *I,*

charts do exaggerate the outsourcing of the U.S. feature film industry in the sense that the searches performed did not account for the fact that a film may be made in multiple foreign locations, and hence such a film is counted multiple times in the charts. However, it is not common for a film to be shot in multiple foreign locations. The author is not aware of any other manner in which the exhibits may be based on incomplete or inaccurate data. At the same time, as it isn't clear how and when data is entered into this data base, the reader is cautioned that there is no guarantee that the data on which these exhibits are based are otherwise complete and accurate.

4. *What is the Cost of Run-Away Production?*, *supra* note 2, at 15.

5. U.S. DEPARTMENT OF COMMERCE, *The Migration of U.S. Film and Television Production* 27-29 (January 18, 2001) [hereinafter U.S. DEPARTMENT OF COMMERCE] (citing The Monitor Company, The Economic Impact of U.S. Film and Television Runaway Film Production (June 1999) [hereinafter The Monitor Company] and Letter fromRobert Solomon, Chairman, Governmental Affair, Southern California Chapter of the Association of Imaging and Technology and Sound (ITS) to Michael Fink, Federal Research Division, Library of Congress (July 5, 2000) [hereinafter Solomon Letter]). The U.S. Department of Commerce and The Monitor Company reports are both *available at* http://www.ftac.org/html/2a.dgasag.html (last visited May 5, 2006).

6. U.S. DEPARTMENT OF COMMERCE, note 6, at 28 (citing the Solomon Letter).

7. The Monitor Company, *supra* note 5, at 3 (stating that, in 1998, Canada captured more than 80% of all U.S.-developed feature film and television projects); *see also infra* Exhibits 5 and 6 (showing that, by 2001, Canada produced 19% of all feature films filmed worldwide that year); *see also infra* Exhibits 7, 8, and 9 (illustrating that Canada produced 31% (20% of the 65%) of all U.S.-developed feature films produced outside of the U.S.).

8. *See infra* Section V (Canadian PSTC Film Incentives).

9. *See* sample list of U.S.-developed feature films produced in Canada during 2000-2005, attached as Appendix A (compiled from data maintained in the international movie data base, which can be found at www.imdb.com).

10. CTV, *Canada the New Hotspot for Video Game Creators*, *available at* http://www.ctv.ca/servlet/articlenews/story/ctvnews/1110995669946_56 (last visited November 4, 2005).

11. FTAC Letter, s*upra* note 2, at 19 (citing Tamsen Tillson, *Canuck Thesps Get Earful: Gross Gives ACTRA Keynote*, DAILY VARIETY (June 2, 2004)).

Robot, *Cinderella Man*, *Electra*, and *Armageddon.*[12] Even many quintessentially "American films" have been shot outside of the U.S., primarily in Canada.[13] The outsourcing of the U.S. feature film industry for economic reasons, which began in the early 1990s and picked up considerable steam in the late 1990s,[14] is continuing unabated. The fact that in the spring of 2005 Jennifer Garner was in Vancouver filming *Catch and Release*, Brad Pitt was in Calgary filming *The Assassination of Jesse James*, and Ben Affleck was in Toronto filming the movie *Truth, Justice and the American Way*[15] illustrates the pervasiveness of this phenomenon.

In fact, the outsourcing of the U.S. film industry is so well-entrenched and accepted by film industry management that there are reports that U.S. film industry workers who have organized activities promoting the retention of film production in the U.S. have been "blacklisted" in Hollywood.[16] Just as in the McCarthy era in the 1950s, these film industry workers say that they are being accused of being Communists and of engaging in potentially dangerous "un-American activities."[17] As a result, they claim that they are finding it difficult, if not im-

12. *See supra* note 9; *see also* database of film productions and production locations maintained by the publisher *Variety*. The database can be searched for specific titles or by films filmed outside of the U.S. *Variety* Home Page, *available at* http://www.variety.com (follow "Film Production" hyperlink; then follow "Film Production" hyperlink under "Charts and Data") (last visited November 6, 2005).

13. *See Variety* Home Page, *available at* http://www.variety.com (follow "Film Production" hyperlink; then follow "Film Production" hyperlink under "Charts and Data") (last visited November 6, 2005). Examples of such movies include *Rudy: The Rudy Giuliani Story*, which portrays the life of Rudy Giuliani, the former mayor of New York City, *Chicago*, which depicts the true-crime story involving Velma Kelly and Roxie Hart in Chicago in the 1920s, *Miracle*, showing the U.S. hockey team triumph over the Soviet team at the 1980 Olympics, *Independence Day,* which was released on July 4, 1996, and portrays a fictitious attempted takeover of the world by aliens, and *Cold Mountain*, which concerns the Civil War period of U.S. history. All of these films were shot in Canada, except for *Cold Mountain*, which was shot in Romania.

14. The Monitor Company, *supra* note 5, at 2-3; *but see* Neil Craig Associates, *International Film and Television Production in Canada: Setting the Record Straight About U.S. 'Runaway' Production"* 1 (October 2004) ("The total direct and indirect economic impact of this activity on the United States in 1998 was CAN$1.7 billion, only a fraction of the US$10.3 billion claimed in the Monitor Report. That report contains contradictory claims and basic arithmetic errors, double counts figures and uses methodologies that are highly unusual in standard economic analysis."), *available at* http://www.filmontario.ca/news.php (last visited May 8, 2006).

15. Review of *Catch and Release*, *available at* http://www.tribute.ca/synopsis.asp?m_id=10699 (last visited November 6, 2005). Review of *The Assassination of Jesse James*, *available at* http://www.tribute.ca/synopsis.asp?m_id=12064 (last visited November. 6, 2005). Review of *Truth, Justice, and the American Way*, *available at* http://www.tribute.ca/synopsis.asp?m_id=10632 (last visited November. 6, 2005).

16. Author's interview with Film and Television Action Committee (FTAC) members Gene Warren, Tim McHugh, and Ann Champion, Burbank, California (July 9, 2005).

17. *Id.*; *see also* Interview on August 4, 2004 of Brent Swift, Former President of FTAC, by

possible, to find work in the film industry in the U.S.[18] If these reports are true, the meaning of "un-American activities" clearly has been turned on its head. What could be more American than arguing that one of America's premier industries should remain in America? Or, more specifically, that American actors should actually portray Americans in stories that reflect and promote American culture and values?

This article addresses whether the film incentives offered by other countries are consistent with those countries' obligations under international law and can be countered with countervailing duties under U.S. domestic law. In particular, this article discusses in some detail whether the foreign film incentives are consistent with these countries' obligations under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (the SCM Agreement).[19]

To be sure, it is not illegal for a U.S. film company to film a movie in a foreign location for artistic reasons. In addition, at the present time, it is not illegal to produce a film project in a foreign location in order to take advantage of lower wage rates and/or a favorable currency exchange rate. Furthermore, some countries and commentators argue that there is, or should be, a "cultural exemption" to the international trade rules, such that incentives provided by a government to domestic producers in order to promote local cultural items are outside of the scope of any international obligations.[20] That argument is not at issue here,

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Andrea R. Vaucher, reported in *Using Trade Pacts to Stem Loss of TV and Film Jobs to Canada*, New York Times (August 5, 2004), *available at* http://www.ftac.org/html/2-news.html (last visited May 8, 2006).

18. *See supra* note 16.

19. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (1999), 1867 U.N.T.S. 14 [not reproduced in I.L.M.] [hereinafter SCM Agreement], *available at* http://docsonline.wto.org/gen-home.asp (follow "Search for Documents: Simple Search" hyperlink; then enter "LT/UR/A-1A/9" into "Document Symbol" search field) (last visited May 5, 2006).

20. *See*, *e.g*., The Cultural Industries Sectoral Advisory Group on International Trade, *Further Opportunities: New Strategies for Culture and Trade Canadian Culture in a Global World*, INTERNATIONAL TRADE CANADA (FEBRUARY 1999), *available at* http://www.dfait-maeci.gc.ca/tna-nac/canculture-en.asp (last visited May 6, 2006). In the WTO case of *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, adopted on March 14, 1997, paras. 3.67-3.71, Canada essentially argued before the Panel that there is a "cultural exemption" to the WTO rules. That is, it alleged that Canadian cultural products such as periodicals are unique and therefore cannot possibly be "like products" to cultural products produced in other countries; hence, Canada's differential treatment of such products does not violate the National Treatment Principle incorporated in the first sentence of Article III.2 of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 91999), 1867 U.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]. The Panel in that case, however, rejected Canada's argument that there is a "cultural exemption" to

however, because there is no requirement that the film maker include any minimum amount of local content in order to obtain the incentives that are the subject of this article.[21]

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.[22] These incentives are based on the percentage of Canadian labor utilized. They are exceedingly generous, and they have been very successful in attracting U.S. film companies to film their movies in Canada.[23] Of course, if the WTO Dispute Settlement Body were to find that the PSTC Programs in Canada are counter to Canada's obligations under the SCM Agreement, similar incentives provided by other WTO Members (and indeed the film incentives provided by the U.S. federal government and several U.S. states) may also have to be

the WTO rules and went on to conclude that the Canadian-origin periodicals and the U.S.-origin periodicals at issue were in fact "like products." *See id*. at para. 6.1. Canada appealed the latter conclusion of the Panel. *See* WT/DS31/AB/R, adopted on June 30, 1997, p. 2 (II.A Arguments of the Participants – Canada). The Appellate Body reversed the Panel's decision on the "like products" question on the basis that the Panel had not considered appropriate or sufficient evidence on the issue.*Id.* at pp. 14, 22 (VIII. Findings and Conclusions – (b)). However, it went on to conclude that the Canadian-origin periodicals and the U.S.-origin periodicals were directly competitive and substitutable products in any case and therefore Canada had violated the second sentence of Article III.2 of the GATT 1994. *Id*. at p. 22 (VIII. Findings and Conclusions – (c)).

21. *See infra* Section V (Canada's PSTC Film Incentives). Some commentators argue that governments should at least be permitted to subsidize their own cultural industries, including their film industries, when those industries are in their embryonic stage. *See*, *e.g.*, PAUL C. WEILER, SPEAKING FOR FUN AND PROFIT, ch. 12 *Leveling the Entertainment World* 8 (West forthcoming 2006). ("[The] special economic features of the entertainment industry's production and marketing costs certainly justify a small and poor Senegal providing government assistance to try to create an Oscar, not just a World Football, contender."). However, this argument is not relevant to the subsidies that Canada currently is providing to its film industry, as that industry is no longer in its infancy stage. *See*, *e.g*., Canadian Film and Televisions Production Association, in association with PricewaterhouseCoopers, L'Association des Producteurs de Films et de Television du Quebec, and the Department of Canadian Heritage, *The Canadian Film and Television Production Industry: A 1999 Profile* 5 (February 1999) ("Canadian feature films . . . are recognized internationally as among the finest in the world."); CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE (CAVCO), 2001-02 CAVCO ACTIVITY REPORT: ACTIVITIES AND PROGRAMS ADMINISTERED BY CAVCO FOR THE PERIOD APRIL 1, 2001 TO MARCH 31, 2002, AT 4 (2002) ("The Canadian government has long recognized the importance of film and video as a cultural resource . . . .").

22. *See infra* Section V (Canada's PSTC Film Incentives).

23. *Id*.; *see also supra* note 9.

abolished. In general, whether any other WTO Member's film incentives contravene that Member's WTO obligations would depend on the magnitude of the harm caused by those incentives to the feature film production industry in one or more other WTO member(s).[24]

In any case, many of the film incentive programs offered around the world have been enacted specifically in order to counteract those provided by Canada.[25] For example, in the late 1990s and early 2000s, both Australia and New Zealand created similar film incentive programs.[26] These programs were quite successful in luring U.S. film producers to film their movies in Australia and New Zealand.[27] In response, the Canadian federal government increased its film subsidy amount from 11% to 16% of qualifying Canadian labor costs in February of 2003.[28] Next, in November of 2004, the U.S. federal government responded by enacting Section 181 of the Internal Revenue Code as part of the Jobs Creation Act of 2004, which allows producers of smaller budget films to deduct 100% of film production costs in the year incurred.[29] Then, the three Canadian provinces where the majority of U.S. films are shot, British Columbia, Ontario, and Quebec, all raised their subsidy percentages in January of 2005.[30] While approximately 30 out of the 50 states have had some local film incentive programs in place for some time, several states, including California, recently have increased their subsidies or are considering doing so.[31] This round-robin effect is the predictable outcome of the U.S.' failure to challenge Canada's film incentives in the first place. Thus, even if the WTO Dispute Settlement Body were to rule that all of these film incentive programs cause adverse effects and should be abolished, the overall effect of such a WTO ruling essentially

24. *See infra* Part VI, Section D.2 (Canada's PSTC Film Incentives Clearly Appear to be Causing Adverse Effects to the U.S. Feature Film Industry).

25. *See* FTAC Letter, *supra* note 2, at 10-11.

26. *See* Appendix D for a description of some of the major film incentive programs in other countries.

27. *See* FTAC Letter, *supra* note 2, at 12.

28. *Id*. at 11.

29. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) [hereinafter American Jobs Creation Act of 2004] (Section 244 of the American Jobs Creation Act of 2004 created a new Section 181 of the Internal Revenue Code, codified as amended at 26 U.S.C. §181 (2005)).

30. *See infra* notes 93–95; *see also* Appendix B, which lists the major film incentives offered by the Canadian provincial governments.

31. *See What is the Cost of Run-Away Production?*, *supra* note 2, at 16 (Illinois, Louisiana, New Mexico, New York and Pennsylvania have been the most enthusiastic suitors, courting production companies . . . . More than 17 other states have introduced legislation that would create similar enticements."); *see also* Appendix C, which lists the major film incentives offered by the various U.S. states.

would be a return to the *status quo ante* - Canada's rich film incentive scheme.

The article concludes that the above-described foreign film incentives, and the PSTC film incentives in Canada in particular, most likely are inconsistent with those WTO Members' obligations under WTO law, as they adversely affect the U.S. feature film production industry. The U.S. Government could therefore pursue a dispute settlement case on this issue in the WTO, requesting that Canada (and other countries with similar film incentive programs) be ordered to abolish those incentives. In the U.S., the U.S. Government could also initiate an action to impose countervailing duties on the subsidized films when they are imported into the U.S. After providing an analysis supporting this conclusion, this article discusses the advantages and disadvantages of the various remedies that could be pursued, considers the obstacles to a legal challenge to the film incentive programs, and provides recommendations for how interested parties in the U.S. might proceed.

II. ECONOMIC DISADVANTAGES OF GOVERNMENT SUBSIDIES[32]

From an economic standpoint, subsidies provided by a government to a particular domestic enterprise or industry interfere with the free market economy principles of supply and demand. In particular, the subsidies support companies and products that otherwise would not exist in the marketplace, and therefore the subsidies are an inefficient use of government, and hence ultimately taxpayer, funds. In addition, the benefits that the recipients receive may be considered to be unfair both by the recipient's competitors and by the taxpayers who are not directly involved in the subsidized company or industry and thus are disproportionately burdened by the taxes assessed to pay for the subsidies. Empty sports stadiums around the country that were built with taxpayer money (and which in some cases are still being paid for by the local taxpayers) provide a good example of the economic disadvantage of government subsidies.[33]

Specifically in the global trade arena, goods that have been subsi-

32. In the case of government subsidies to the film industry, there is also a significant non-economic disadvantage inherent in such subsidies. This is the danger that governments, through their economic support of the film industry, will pressure film producers not to produce movies critical of those governments. This point has been made by a number of commentators. *See*, *e.g.*, U.S. DEPT. OF COMMERCE, *supra* note 5, at 8.

33. *See*, *e.g.*, PAUL C. WEILER, RADICALLY MODERATE LAW REFORM, *Insulating Taxpayers from Both Teams and Studios* (forthcoming). (Copy on file in Law Review office at the University of Akron Law School).

dized by their home countries do not compete fairly with unsubsidized goods in the international marketplace.[34] Companies producing a "like product" in a country into which the subsidized goods are imported may find that they cannot compete with the subsidized imports and as a result both domestic production and exports of the domestic product may be hampered. As indicated above, this unfair trade advantage often leads an importing country to establish its own competing subsides, which, in turn, can lead to the establishment of even more generous foreign subsidy programs.[35]

In summary, domestic subsidies tend to distort international trading patterns through encouragement of the production and exportation of the subsidized product, and discouragement of the production and exportation of products manufactured in non-subsidizing countries.[36] This imbalance in the global economy leads affected nations to respond with their own subsidy programs, and the ensuing subsidy war has the same trade-distorting effect in the global economy as do undisciplined tariffs and quota increases.[37] From an economic perspective, then, domestic subsidies tend to decrease the economic welfare of competing industries and workers in non-subsidizing nations, taxpayers in the subsidizing nations, and the global economy as a whole.[38]

In the instant case, for example, if the government subsides to the film industry remain in existence, a number of nations could end up with empty sound stages and recording studios and yet their taxpayers could be left paying the debt incurred by their governments to build these stages and studios for many years to come. From an overall economic standpoint, it would seem preferable for all of the WTO trading partners to refrain from providing subsidies to their domestic film production companies (other than perhaps for the production of local cultural films) and simply allow the best film production companies in the world to survive.

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34. JOHN JACKSON, WILLIAM DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 767-68 (4th ed., West 2002).

35. *See supra* notes 25-31 and accompanying text.

36. JACKSON, DAVEY & SYKES, *supra* note 34.

37. *Id*.

38. *See*, *e.g.*, *id*. at 767-73 (citing articles on economic rationale behind prohibition against actionable subsidies such as follows: Gary Hufbaur & Joanna Shelton Erb, *Subsidies in International Trade*, INSTITUTE FOR INTERNATIONAL ECONOMICS 5-6 (1984), Warren F. Schwartz & Eugene W Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972); Alan O. Sykes, *Countervailing Duty Law: An Economic Critique*, 89 COLUM. L. REV. 199 (1989)).

III. SIGNIFICANCE OF FILM INDUSTRY TO U.S. ECONOMY AND CULTURE

The entertainment industry clearly is one of the most important industries in the U.S. Historically, it has made a substantial contribution to both the U.S. gross domestic product and U.S. export sales. In 2002, the entertainment sector employed approximately 4.7 million people and generated sales of over half a trillion dollars.[39] This constituted more than five percent of the U.S. gross domestic product.[40] Furthermore, international sales generated approximately half of these revenues.[41] These export earnings are quite significant, in light of an overall U.S. trade deficit of $726 billion by the end of 2005, which constituted an 18% increase over 2004.[42]

The U.S. film industry, as a component of the entertainment industry, in 2002 employed between 153,000 and 353,076 people and paid these people between $9.3 billion to $21.2 billion.[43] More than half of these people lived in California and earned two-thirds of these salaries and wages.[44] The film industry, at least until recently, has also contributed significantly to the economies of several other states, including most importantly New York and Illinois.[45] These direct salaries and wages have a multiplier effect throughout the economy, which often is estimated to be between 2 and 3 times.[46] The industry as a whole generated revenue of $52 billion in 2002.[47] A significant portion of these figures is attributable to the feature film industry.[48]

Without question, U.S. entertainment products are enjoyed by peo-

39. The Office of the United States Trade Representative, *Zoellick Joins Entertainment Industry Launch of Free Trade Coalition*, Press Release 1 (May 13, 2003), *available at* http://usinfo.state.gov/ei/Archive/2003/Dec/31-726528.html (last visited May 5, 2006).

40. *Id*.

41. *Id*.

42. Robert E. Scott, with research assistance from David Ratner, *Trade Picture: Rapid growth in oil prices, Chinese imports pump up trade deficit to new record*, Economic Policy Institute 1 (February 10, 2006) (citing U.S. Department of Commerce statistics).

43. *What is the Cost of Run-Away Production?*, *supra* note 5, at 2 (citing Motion Picture Association of America (MPAA) figures for each of the higher numbers and U.S. Department of Commerce, Bureau of the Census, figures for each of the lower numbers).

44. *Id.*

45. *See*, *e.g*., U.S. DEPT. OF COMMERCE, *supra* note 5, at 8. Motion picture economic activity accounts for more than 13 percent of New York's information industry establishments and some seven percent of Illinois' information sector establishments. *Id.*

46. *See*, *e.g*., U.S. DEPARTMENT OF COMMERCE, *supra* note 5 at 23 (discussing various multipliers used in the entertainment and film industries).

47. *Film Industry Profile*, *supra* note 2, at 1 (citing figures published by U.S. Department of Commerce, Bureau of the Census).

48. *See Film Industry Profile*, *supra* note 2 (reporting employment and wage data for various segments of the entire film industry over the course of several years).

ple all over the world,[49] and it is often said that, as a nation, the U.S. is best known for its entertainment industry.[50] Although moviemaking was first created in France in the late 1800's, Thomas Edison brought this technology back to the U.S.,[51] and the U.S. has been the predominant player in the industry worldwide since World War I.[52] U.S. travelers, for example, cannot help but marvel at the reach of the U.S. film industry into even the remotest corners of the globe. For example, one can travel many hours by plane to some non-English-speaking country, where communication with the taxi driver at the airport is a very trying experience, and yet the local theatres nonetheless primarily exhibit U.S.-developed feature films.

The U.S. entertainment industry, and especially the U.S. feature film industry, unquestionably is the envy of many other countries around the world.[53] Consequently, many other countries have attempted to emulate the U.S.' success in this arena.[54] In particular, they have offered their own feature film industry, as well as the U.S. feature film industry, very generous incentives to produce films in their countries in order to compete directly with the U.S.-developed feature films produced in the U.S.[55] As discussed further below, the U.S. film industry, and the U.S. feature film industry in particular, have suffered a significant contraction in recent years, largely due to the outsourcing of the film industry to other countries.[56] Again, Canada has the most established film incentive program,[57] and this article focuses on the PSTC film incentives that are provided by the Canadian governments.

IV. U.S. FILM INDUSTRY

As a case study, this article focuses not only on the PSTC film in-

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49. *See*, *e.g.*, GEORGE CLACK, PORTRAIT OF AMERICA, UNITED STATES INFORMATION AGENCY, *Exporting Popular Culture* 1 ("For better or worse, many nations now have two cultures: Their indigenous one and one consisting of the sports, movies, televisions programs, and music whose energy and broad-based appeal are identifiably American.").

50. *See id.*

51. *See* WEILER, *supra* note 21, at 2-3; *see also* Frank Wicks, *Picture This: Scientist? Businessman? The Inventor Who Popularized His Fortune Well.*, MECHANICAL ENGINEERING, *available at* http://www.memagazine.org/backissues/july04/features/pictthis/pictthis.html (last visited March 9, 2006).

52. *See* WEILER, *supra* note 21, at 2-3.

53. *See supra* note 49.

54. *Id*.

55. *See* Appendix D.

56. *See infra* Section VI, Part D.2 (Canada's PSTC Film Incentives Clearly Appear to be Causing Adverse Effects to the U.S. Feature Film Industry).

57. *See infra* Section V (Canada's PSTC Film Incentives).

centives in Canada, but it also focuses on the harm that these incentives are causing to a subset of the entire U.S. film industry – the feature film industry. The entire film industry in the U.S. generally refers to the production of at least the following:

(1) full-length feature films;

(2) movies of the week (again, otherwise known as MOWs or made-for-television movies);

(3) series television shows;

(4) television commercials; and

(5) music videos.[58]

These various types of films are produced by either one of the seven "major" film studios or one of the numerous smaller production companies called "independents."[59] The "majors" are members of the Motion Picture Association of American (MPAA), while many of the independent film companies are members of the American Film Marketing Association (AFMA).[60]

Also, whatever the film genre, usually there are three phases to the development of the film: pre-production, production, and post-production.[61] Pre-production tasks include script writing, set design, selection of cast, crew, and location, costume design, and budgeting.[62] U.S. film companies tend to perform some of the pre-production tasks in the U.S., even in those situations where they decide to shoot the film outside of the U.S., but relatively few people are needed to perform these tasks.

Once the above tasks have been completed, the "film" can be pro-

58. The description of the film industry relies heavily on information reported in U.S. DEPARTMENT OF COMMERCE, *supra* note 5, at 9-16 and in Bureau of Labor Statistics, U.S. Department of Labor, *Career Guide to Industries, Motion Picture and Video Industries* (2006-07 Edition, last modified on December 20, 2005), *available at* http://www.bls.gov/oco/cg/cgs038.html (last visited April 28, 2006).

59. *Id*.

60. *Id*. The websites of these associations are http://www.mpaa.org and http://www.afma.com. The MPAA's members are Buena Vista Pictures Distribution, Sony Pictures Entertainment Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corp., Twentieth Century Fox Film Corp., Universal City Studios LLLP, and Warner Bros. Entertainment Inc. *See* MPAA, Members pages, *available at* http://www.mpaa.org/ABoutUSMembers.asp (last visited March 10, 2006).

61. U.S. DEPT. OF COMMERCE, *supra* note 5, at 15.

62. *Id.*

duced or shot in the U.S. or elsewhere.[63] The actual shooting of the film is a very labor-intensive process.[64]

When principal photography on a film is shot outside of the U.S., that film has to be sent to the U.S. for storage, distribution, and sometimes the performance of the post-production activities. Today, this usually means the importation into the U.S. of a physical good, such as a film reel, a DVD, a CD or a computer drive or disc.[65] When the film is completed, the production company usually stores the physical product in a secure "film vault," so as to ensure against its damage, loss, theft and piracy.[66]

For nearly a century, motion pictures were shot onto a strip of light-sensitive, perforated film stock which was then developed to produce a negative. From this negative, a print was struck and various scenes were spliced together by the editor to create the final product.

Today, while the majority of motion pictures still originate on film, there is a rapidly growing trend to use digital video (high-definition) cameras for production. It is too early to predict the complete demise of film as the originating medium, but we are beginning to see its sunset.

Once the principal photography on a film has been completed, the post-production activities must be performed. Post-production activities include editing, color imaging, and the addition of soundtracks, visual effects, musical scoring, titles and credits, and dubbing.[67] This phase has almost entirely moved into the digital world. The computer has replaced the editing machine (Moviola) and the optical lab. Former industry standard items such as grease pencils, tape splicers and film rewinds have gone the way of the dial telephone. Today, U.S. film companies sometimes perform these post-production activities in the U.S. and sometimes they perform these post-production activities outside of the U.S. In any case, proportionately fewer people are required to perform

63. *Id.*

64. *See*, *e.g*., FTAC Letter, *supra* note 2, at 14.

65. Not that today, the majority of feature films still even originate on motion picture film. *See*, *e.g*, Bureau of Labor Statistics, *supra* note 58, at 2.

66. *See*, *e.g*., John Borland, *New Technology a Boon for Big Screen*, CNET News.com 4 (June 30, 2003) ("Magnetic storage is still unstable compared with film, which can last hundreds, or even thousands, of years. Studios store many of their archival films in vaults deep underground at an old salt mine in Kansas or at a former limestone mine in Pennsylvania."), *available at* http://news.com.com/Vision+ Series+Hollywoods+digital+blockbuster/2030-1070_3-1001643.html (last visited April 29, 3006); *see also King Content: Don't Write Off Hollywood and the Big Media Groups Just Yet,* THE ECONOMIST 1 (January 19 2006) ("'Pain is temporary, film is forever.'"), *available at* http://www.economist.com/opionion/displaystory.cfm?/story_id=5411930 (last visited May 6, 2006).

67. U.S. DEPT. OF COMMERCE, *supra* note 5, at 15.

modern post-production tasks and the time required has also shrunk dramatically.

V. CANADIAN PSTC FILM INCENTIVES

The federal and provincial governments in Canada for many years have offered a large variety of incentives to attract foreign film producers, as well as encourage domestic production.[68] For example, Canada has provided some direct financial grants, working capital loans, favorable loan rates with guarantees provided by the Canadian government, waivers for local costs and fees, funding for equity investment, and aggressive marketing campaigns promoting Canada.[69] Canada has also offered a wide range of tax incentives in order to entice both domestic and foreign film companies to shoot their films in Canada.[70]

In the past, most of the film incentives offered by Canada were conditioned on inclusion of a minimum percentage of Canadian content.[71] There are still some incentive programs that require Canadian content,[72] and U.S. film producers not infrequently take advantage of these incentives. The Canadian content tax incentives are the most generous of all of the incentives offered by Canada, generally equivalent to 25% of qualifying labor expenses,[73] which are the wages and salaries paid to Canadian residents or taxable Canadian corporations (for amounts paid to employees who are Canadian residents).[74] However, several of the film incentive programs in Canada no longer require Canadian content.[75]

The most generous incentive not conditioned on inclusion of Canadian content offered by the Canadian federal government is the Federal Film and Video Production Services Tax Credit (PSTC).[76] This program was established in 1997, and it first became available for films shot in

68. *See*, *e.g*, *id*. at 71.

69. *Id*. at 71-73.

70. *Id*. at 71-72.

71. *See* The Monitor Company, *supra* note 5, at 20.

72. CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, 2003-04 CAVCO ACTIVITY REPORT: ACTIVITIES AND PROGRAMS ADMINISTERED BY CAVCO FOR THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004, at 8 (2004), *available at* http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/pubs/2003-04/activ_03-04_e.pdf (last visited May 5, 2006).

73. *Id*.

74. *Id*. at 5.

75. *Id*. at 16.

76. CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *Film or Video Production Services Tax Credit (PSTC)*, (August 2, 2004), *available at* http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm (last visited March 30, 2006).

Canada on or after January 1, 1998.[77] In order to qualify for the tax credit, the production costs for the proposed project must be at least $1 million (CAN),[78] and the tax credit awarded is equal to sixteen percent (16%) of "qualifying labor costs," defined above.[79]

The PSTC Program is actually structured as a transfer of funds rather than as a rebate of taxes paid, but the funds ostensibly are to be used to help the company pay future employment taxes owed to the Canadian federal government. Hence, the PSTC Program acts as a direct reduction of the employment costs associated with shooting a film in Canada, and, today, film companies often receive a check equal to 16% of the qualifying labor costs within a few weeks of filing their PSTC application, sometimes even prior to their commencement of filming in Canada.[80]

Applicants for the PSTC tax incentive must be either a taxable Canadian corporation or a foreign-owned corporation with a permanent establishment in Canada.[81] Accordingly, many U.S. film studios have formed a Canadian branch of their corporations, such as Sony Pictures Home Entertainment-Canada and SKG Studios Canada, Inc. Others have partnered with Canadian production companies, such as Alliance (Universal), TVA International (20th Century Fox), Remstar (Universal), and Cineplex Odeon (Universal). U.S. producers can also simply contract for productions services directly with Canadian companies.[82]

The PSTC Program is co-administered by the Canadian Audio-Visual Certification Office (CAVCO), which is part of the Department of Canadian Heritage, and the Canadian Revenue Agency (CRA). CAVCO determines the eligibility of the production and issues an accreditation certificate.[83] Then, the CRA distributes the funds to the film company.[84]

77. See CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *Film or Video Production Services Tax Credit (PSTC)*, *available at* http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm (last visited August 13, 2005).

78. *See* CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *Film or Video Production Services Tax Credit (PSTC) Guidelines*, *available at* http://www.pch.gc.ca/progs/ac-ca/progs/bcpaccavco/progs/cisp-pstc/pubs/guide_en.pdf (last visited November 4, 2005).

79. *Id.* at 3-4 (gives overview of PSTC tax credit).

80. *Id.* at 13-19 (discussing Canada Revenue Agency's processing of PSTC claims).

81. *Id.* at 4-5 (discussing how PSTC works).

82. *See* The Canadian Motion Picture Distributors Association, *available at* http://www.cmpda.ca/index.jspa (last visited March 30, 2006).

83. CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *Film or Video Production Services Tax Credit (PSTC)*, (August 2, 2004), *available at* http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm (last visited August 13, 2005).

84. *See* http://www.pch.gc.ca/progrs/ac-ca-progs/bcpac-cavco/progs/cisp-stc/pubs/pstc/1_e.cfm#2 (last visited March 20, 2006).

Most of the productions that receive PSTC funds are fiction or dramatic programs, and the total costs of production for projects that qualified for PSTC funding by the end of March 2004 was $16.1 billion (CAN).[85] The portion of these budgets that had been spent in Canada between 1998 and March of 2004 was $8.1 billion (CAN), or 50.1% of the total.[86] For the fiscal year commencing April 1, 2003 and ending March 31, 2004, the cost of production for films receiving PSTC funds was $2.3 billion (CAN) and the amount spent in Canada on PSTC productions that same year was $1.2 billion (CAN).[87] The overwhelming majority (approximately 95%) of originating copyright holders of CAVCO-certified PSTC productions have been from the United States.[88]

Similarly, most if not all of the provinces in Canada provide a tax credit or a tax rebate of an additional percentage of the qualifying labor expenses incurred in the province. This percentage (with occasional maximum amounts based on the aggregate dollar amount of the credit or a percentage of total production expenses) ranges from 18% to 50%.[89] The federal and provincial PSTC funds are cumulative, so the PSTC funds received by a film company can be quite substantial.[90]

As indicated above, at least partly in response to new generous film incentives in other countries,[91] the Canadian federal government raised the PSTC percentage from 11% to 16% in February of 2003.[92] Then, in 2005, the Canadian provinces of British Columbia, Quebec, and Ontario, where the overwhelming majority of foreign films are shot in Canada, all amended their own PSTC programs to make them more generous. British Columbia and Ontario raised their PSTC percentage from 11% to

85. CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *supra* note 72, at 16.

86. *Id*.

87. *Id*.

88. *Id*.

89. *See* Appendix B.

90. DEPARTMENT OF CANADIAN HERITAGE, *Study of the Decline of Foreign Location Production in Canada* 9 (March 2005).

91. For example, the U.K., Ireland, Australia, and a number of other countries provide similar incentives to their domestic and foreign film companies in order to entice them to shoot feature films in those countries. *See* Appendix D. Some of these other film incentive programs are even more generous than the incentive programs in Canada. These incentives include, by way of example, low interest loans, loan guarantees, income tax breaks, free training, free use of film stages and sound studios, and outright cash grants. *See id*. At the time that the Canadian federal government raised its PSTC subsidy rate, however, the Canadian dollar was also gaining in strength, so that the costs of producing a film in Canada were also increasing. *See* CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *2002-2003 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2002, to March 31, 2003* 16 (2003).

92. CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE, *supra* note 78, at 3-4.

18%,[93] and Quebec raised its PSTC percentage from 11% to 20%.[94] Apparently, the provinces raised their rates at least in part to counter the U.S. federal government's new federal tax incentive for producers of smaller-budget films. Again, in the Jobs Creation Act of 2004, the U.S Congress enacted Section 181 of the Internal Revenue Code.[95] This allows producers of feature films with budgets of $15 million or smaller to deduct 100% of the costs to produce such a film in the years in which these costs were incurred, so long as 75% or more of the production costs of the film are incurred in the U.S.[96] The maximum budget of the film is $20 million if the film is shot in an economically depressed area.[97] This federal incentive is in addition to various incentives that exist in approximately 30 of the 50 U.S. states.[98]

From the point of view of the Canadian governments, the purpose of allowing the U.S. film companies to participate in these incentive programs is two-fold. First, the PSTC Program "is a mechanism designed to encourage the employment of Canadians . . . ."[99] Second, Canadian governments are using the PSTC Program to enhance the development of their own local film industries over time.[100] The Canadian governments readily admit both of these goals, at least when defending the incentives to their own taxpayers.[101] In the short term, however, they are using U.S.-developed stories, major U.S. stars, and some U.S. writers and directors to teach them the trade. That is, they are using Holly-

93. British Colombia Film Commission, *Tax Credits*, *available at* http://www.bcfilmcommission.com/finance (last visited August 13, 2005); Ontario Media Development Corporation, *Tax Incentives*, *available at* http://www.omdc.on.ca/English/page-1-61-1.html (June 2, 2005) (last visited August 13, 2005).

94. Quebec City Film and TV Commission, *Incentives*, *available at* http://www.filmquebec.com (last visited August 16, 2005).

95. American Jobs Creation Act of 2004, *supra* note 29.

96. *Id*.

97. *Id*.

98. *See* Appendix C.

99. *See* CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE *supra* note 72, at 16.

100. *See* CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE *supra* note 72, at 4-5 (the Canadian Audio-Visual Certification Office (CAVCO) was created in part to administer the PSTC Program and thereby promote the development of the film industry in Canada).

101. *See*, *e.g.*, Ontario Ministry of Finance, *Ontario Budget 2006: Budget Paper C Details*, Section entitled "Corporations Tax Act," subsection entitled "Enhancing the Ontario Production Services Tax Credit" ("This Budget proposes measures that would foster economic growth and job creation in the entertainment and creative cluster . . . As announced on February 9, 2006, the government proposes to extend the 18 per cent tax credit rate for the [Ontario Production Services Tax Credit] OPSTC until March 31, 2007. This proposed extension reflects the government's commitment to support Ontario's film and television industry, and to help ensure that it remains competitive."), *available at* http://www.ontariobudget.ca/English/paperc.html (last visited on April 29, 2006).

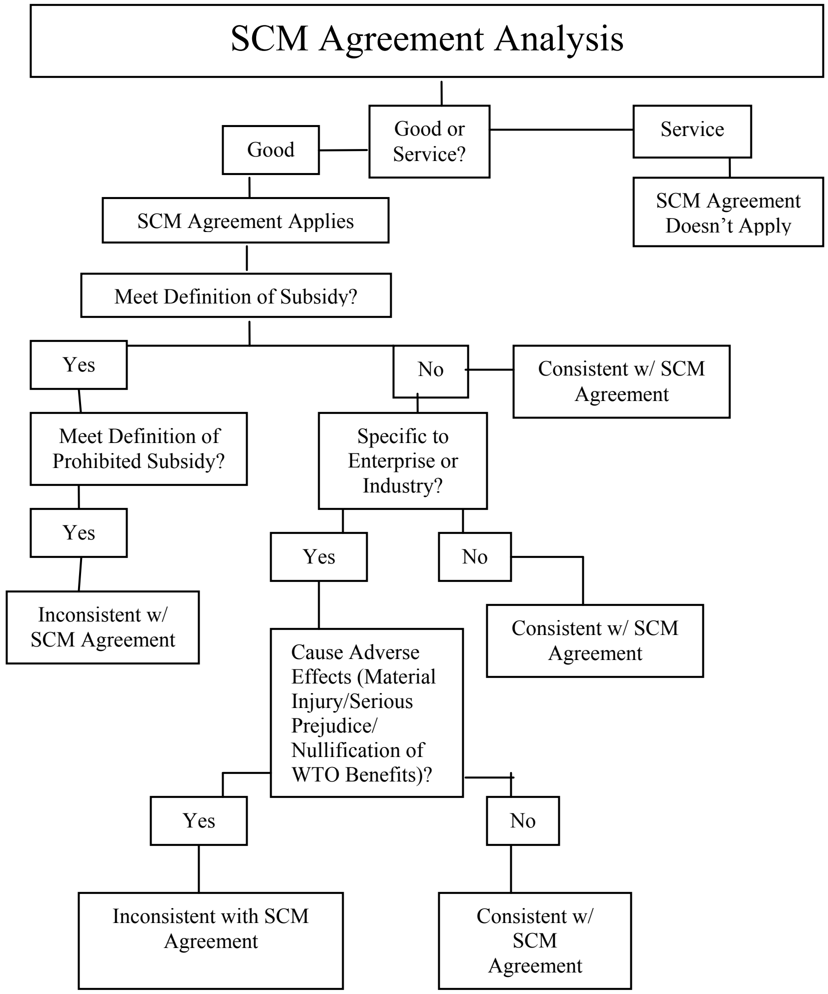
wood to put Hollywood out of business.

VI. THE CONSISTENCY OF CANADA'S PSTC FILM INCENTIVES WITH THE SCM AGREEMENT

All WTO Members are required to sign the SCM 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. In order to demonstrate that Canada's PSTC film incentives are inconsistent with the SCM Agreement, it first must be illustrated that these incentives constitute a "subsidy" as Article 1 of the SCM Agreement defines this term. Then, it must be demonstrated that the PSTC incentives are provided in connection with the manufacture, production or export of merchandise or goods[102] – namely, feature films. Finally, it must be demonstrated that the PSTC incentives constitute either a prohibited subsidy or an actionable subsidy provided to a specific industry that causes adverse effects to the interests of another WTO Member.[103] A graphical depiction of the legal analysis required to demonstrate that Canada's PSTC film incentives contravene Canada's obligations under the SCM Agreement follows, and the remainder of this section of the article proceeds accordingly:

102. *See* SCM Agreement, Article 10, n. 36; *see also* General Agreement on Tariffs and Trade 1994, Art. VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 91999), 1867 U..T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

103. *See* SCM Agreement, Articles 2, 3, 5.



A. Canada's PSTC Film Incentives Constitute a Subsidy

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."[104] Clearly, the PSTC film incentives benefit the film companies that receive them. Furthermore, the PSTC film incentives provided by the Canadian governments

104. SCM Agreement, Articles 1.1(a)(1)(ii), 1.1(b).

are, in fact, a financial contribution by the Canadian governments to these companies. Finally, as the incentives specifically are tax credits, they are a named example of government revenue that otherwise would be due that is foregone.[105] 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.

B. Canada's PSTC Film Incentives are Provided in Connection with the Manufacture, Production or Export of Goods – Namely, Feature Films

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 term "merchandise" is used interchangeably with the words "good" and "product" throughout the SCM Agreement.[106] For the sake of convenience, the word "good" or "goods," as applicable, will be used throughout the remainder of this article unless otherwise noted, but the word "merchandise" or "product" could just as easily have been used. None of these terms is defined in the SCM Agreement. Yet, the conclusion that the SCM Agreement applies only to the manufacture, production or export of goods is further evidenced by the fact that the SCM Agreement is one of the Uruguay Round Multilateral Agreements on Trade in Goods included in Annex 1A to the April 15, 1994 Marakesh Agreement Establishing the WTO.[107] Article XV.1 of the Uruguay Round General Agreement on Trade in Services (GATS),[108]

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105. The fact that the PSTC film incentives are employee tax credits is evidenced by the text of the applicable Canadian tax laws as well as the name of these tax programs. *See*, *e.g*, Canada Income Tax Act, Section 125.5 (2006). On both the federal and provincial level, the programs are referred to as the Production Services *Tax Credit* Programs. (Emphasis added).

106. For example, Articles 1.1(a)(1)(iii), 3.2(b), and 14(d), paragraphs (d) and (h) of Annex I, and notes 58 and 59 of the SCM Agreement all contain the word "good" or "goods." Articles 3 and 5 of the SCM Agreement use the word "product" or "products," and note 36 of the SCM Agreement utilizes the word "merchandise." Note also that note 36 of the SCM Agreement indicates that it is derived from paragraph 3 of Article VI of the GATT 1994, and paragraph 3 of Article VI contains the word "product" while note 36 of the SCM Agreement contains the word "merchandise."

107. *See supra* note 19. This conclusion is also supported by the fact that SCM Agreement is the successor agreement to the Subsidies Code (Agreement on Interpretation and Application of Articles VI, XVI, and XXIII), which was signed by the Members of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-1, T.I.A.S 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947] during the 1979 Tokyo Round of Multinational Trade Negotiations. As its formal name indicates, the Subsidies Code was an elaboration of the subsidies provisions contained in Articles VI, XVI, and XXIII of the GATT 1947. As the GATT 1947 applied only to goods, there is no question that the SCM Agreement, which superseded the Subsidies Code, applies only to subsidies regarding a "good." The GATT 1994 itself superseded the GATT 1947 in the WTO era.

108. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establish-

which clarifies that the WTO Members have not yet made any commitments to reduce or eliminate subsidies provided to the service industries,[109] also confirms this conclusion.

Should the U.S. challenge the Canadian governments' PSTC film incentives in the WTO, Canada is likely to claim that its incentives are not provided in connection with the production or export of the feature films themselves, but rather are provided in connection with the film workers contributing their services in the creation of those films. Then, as the SCM Agreement applies only to goods, not services, Canada could claim that its incentives do not contravene the SCM Agreement. Canada made a very similar argument in the WTO case of *Canada - Certain Measures Concerning Periodicals.*[110] In a WTO proceeding on this issue, Canada might also claim that feature films in any case do not constitute "goods."

There is no evidence that Canada provides the PSTC incentives in connection with the exportation of films, and thus this possibility is not discussed further in this article. However, should Canada argue that its PSTC incentives are not provided in connection with the films *per se* but rather in connection with the production services contributed by Canadian film workers, this argument is likely to fail for the same reasons that Canada's argument failed in the case of *Canada – Certain Measures Concerning Periodicals.* Furthermore, should Canada argue that feature films in any case are not "goods," there are plausible arguments that can be made to support such a conclusion.[111] At the same time, there is overwhelming support for the contrary conclusion. Each of these two objections that Canada could raise to avoid application of the SCM Agreement provisions to its PSTC incentives is discussed further below.

In the case of *Canada – Certain Measures Concerning Periodicals*, Canada originally had imposed an import ban on certain foreign-origin periodicals. The WTO Panel in that case found that this ban violated the quantitative restrictions provision set forth in Article XI of the GATT 1994, and Canada did not appeal this conclusion.[112] The WTO Appel-

ing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.LM. 1167 (1994) [hereinafter GATS].

109. The WTO Members, with respect to subsidies provided to the service industries, are prepared only "to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid . . . trade-distortive effects." GATS, Article XV.1.

110. WT/DS31/AB/R, adopted on June 30, 1997, at 3 (II.A.1 Arguments of the Participants – Canada – Applicability of the GATT 1994 to Part V.1 of the Excise Tax Act).

111. *See* i*nfra* notes 162 -163 and accompanying text.

112. *See* WT/DS31/AB/R *supra* note 110, at 1-6 (I. Introduction and II.A Arguments of the Participants – Canada).

late Body, in its report in this case, pointed out that when Canadian government officials had learned that some foreign publishers had evaded Canada's import ban by electronically transmitting the content of their magazines to Canada and printing their magazines there, Canada had then imposed a very high excise tax on the advertising revenues received by those publishers from Canadian advertisers. Canada did not impose any excise tax on the advertising revenues received by the publishers of Canadian-origin periodicals.

The U.S. then challenged Canada's excise tax as violating the National Treatment Principle contained in the first sentence of Article III.2 of the GATT 1994, on the ground that the Canadian–origin periodicals and the U.S.-origin periodicals in question were "like products" and the excise tax imposed on the foreign-origin periodicals was in excess of that imposed on the Canadian periodicals.[113] The National Treatment Principle contained in Article III.2, first sentence, of the GATT 1994 provides that "[t]he products [of any WTO Member] imported into the territory of any other [WTO Member] shall not be subject . . . to internal taxes or other internal charges of any kind in excess of those applied . . . to like domestic products."[114] In the alternative, the U.S. claimed that the Canadian-origin periodicals and the U.S.-original periodicals in question were at least "directly competitive or substitutable products" and thus Canada's excise tax on the U.S.-original periodicals violated the second sentence of Article III.2 of the GATT 1994.[115] The second sentence of Article III.2 of the GATT 1994 states that WTO Members should not afford protection to domestic goods vis-à-vis foreign-origin goods that are directly competitive or substitutable with those domestic goods. Canada responded to the U.S.' allegations, in part, by arguing that its tax was imposed not on the periodicals themselves but on the advertising services contained in those periodicals.[116] Furthermore, as Canada had not yet agreed to comply with the National Treatment Principle with respect to the advertising services industry, Canada concluded its excise tax could not violate the National Treatment Principle.[117]

In response to Canada's argument regarding its excise tax, the Appellate Body first conceded that advertising services were an important

113. *Id*. at 7-9 (II.B.2 Arguments of the Participants – United States – Applicability of Part V.1 of the Excise Tax Act with Article III.2 of the GATT 1994).

114. GATT 1994, Article III.2.

115. *See* WT/DS31/AB/R *supra* note 110, at 8-9 (II.B.2 - Arguments of the Participants – United States – Consistency of Part V.1 of the Excise Tax Act with Article III.2 of the GATT 1994).

116. *Id*. at 2-6 (II.A.1 Arguments of the Participants – Canada – Applicability of the GATT 1994 to Part V.1 of the Excise Tax Act).

117. *Id.*

service component of the good at issue – a periodical.[118] In addition, the Appellate Body clarified that certain government measures could affect the international trade in both a "good" and a "service" and hence implicate both the GATT 1994 and the GATS.[119] It then went on to hold that Canada's excise tax affected the international trade in the good – the periodical, and thus the tax had to comply with the provisions of the GATT 1994.[120] The Appellate Body explained that its decision in this regard was based on the fact that Canada's excise tax was imposed on, and collected from, the publishers of the periodicals, not the advertising companies.[121] Furthermore, the Appellate Body pointed out, the tax was collected on the basis of the advertising revenues that the foreign publishers received in connection with each separate issue of a periodical.[122]

As discussed above, with respect to the PSTC film incentives, the production companies, not the film workers, must apply to the applicable Canadian governments in order to receive the incentives.[123] The tax credit granted by each of the governments is equal to a stipulated percentage of the qualifying labor expenses (or, in some cases, total production expenses)[124] incurred by the producer to create each separate film.[125] Some of the Canadian provinces even cap the incentive at an absolute dollar figure or a percentage of the total production expenses incurred on the film,[126] which further illustrates that the relevant unit of measure is a feature film, rather than the production services contributed during the creation of the film. Additionally, the Canadian governments pay these incentives to the producers of the films, not to the film workers involved in the production of the films.[127]

Furthermore, as discussed above, the various Canadian governments clearly target their promotional materials regarding the PSTC film incentives to the film production companies, and they market the incentives on the basis that these companies can significantly reduce a film's total production costs by shooting the film in Canada.[128] The Canadian governments also have often touted the success of the PSTC film incen-

118. *Id*. at 11 (IV. Applicability of the GATT 1994).
119. *Id*. at 12 (IV. Applicability of the GATT 1994).
120. *Id*.
121. *Id*. at 11 (IV. Applicability of the GATT 1994).
122. *Id*.
123. *See infra* note 176.
124. *See* Appendix B (Alberta).
125. *See* Appendix B.
126. *Id.*
127. *See*, *e.g*., CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE *supra* note 78, at 4-5 (discussing how PSTC works).
128. *See infra* note 303.

tive programs by pointing to the significant number of films that have been shot in Canada as a result.[129] These governments have explained that they provide the PSTC film incentives, specifically because the incentives result in more films being shot in Canada, and those films then create immediate jobs for their people as well as assist in the development of the Canadian film industry.[130] These are clear admissions on Canada's part that its PSTC film incentives are granted in connection with the feature films themselves and hence affect the international trade in feature films.[131]

In light of the above, if the U.S. were to bring a case in the WTO challenging Canada's PSTC film incentives and Canada then claimed that its governments provide the incentives only in connection with film production services, a WTO Panel almost certainly would follow the Appellate Body's decision in *Canada – Certain Measures Concerning Periodicals*[132] and conclude that the PSTC incentives are a subsidy that is provided in connection with the feature films themselves. This is especially likely, given the fact that the "services" at issue here – the film *production* services – are even more intimately related to the production of a feature film than advertising services are to the production of a periodical. That is, Canada had a stronger argument in the case of *Canada – Certain Measures Concerning Periodicals* that its excise tax affected a service distinct from the good in which the service was incorporated, and yet the Appellate Body nonetheless rejected Canada's argument.[133]

129. *See*, *e.g*, Department of Canadian Heritage, *Study of the Decline of Foreign Location Production in Canada* 4 (March 2005) ("The foreign location production sector has exhibited the most rapid growth – roughly 350 percent over the past ten years . . . ."); *see id.* at 9 ("A key factor in the appeal of Canada as a location of choice for foreign productions was the introduction of the Production Services Tax Credit (PSTC) by the federal government, in 1997.").

130. *See* CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE *supra* note 72, at 4-5, 16.

131. Note that Canada does not claim that it provides the PSTC film incentives in order to encourage the *distribution* of the completed films. Once a film has been produced in Canada, Canada's stated goals in providing the incentives have been accomplished. Accordingly, there is no argument or concern that the PSTC film incentives may be provided in connection with film distribution or film projection services (whether effected through digital or non-digital technology).

132. It is recognized that the doctrine of *stare decisis* is not applicable in international dispute resolution bodies, including the WTO. *See* Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 A.J. I.L. 247, 254, n. 51 (April 2004) (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 1-29 (6th ed. 2003)). In practice, however, WTO panels and the Appellate Body very often follow prior WTO decisions. *Id*. at 254, n. 54 (citing Raj Bhala*, The Myth about Stare Decision and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 853 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. J. TRANSNAT'L L. & POL'Y 1 (1999*);* Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 910-13 (2001)).

133. Note that Canada itself even argued in this case that advertising services are a more dis-

Should the U.S. challenge Canada's PSTC incentives in the WTO, it also would be very helpful to the U.S. that Canada, in *Canada – Certain Measures Concerning Periodicals*, conceded that the printed version of a periodical is a "good." This is the case, because a feature film is directly analogous to a periodical. Both items require that numerous service providers dedicate their time and effort in the production of the finished item. In the case of a periodical, these service providers include, for example, journalists, editors, designers, graphic artists, advertising salespeople, and photographers. In the case of a feature film, such service providers include, by way of example, set designers, set builders, casting directors, costume designers, make-up artists, stunt people, writers, directors, producers, actors, special effects experts, sound technicians, photographers, and editors.

In the case of both a periodical and a feature film, however, once the service providers have completed their various tasks, the item in question is recorded on some tangible, movable carrier medium. In the case of a periodical, this medium typically is a series of pages of paper on which words are printed and photographs are displayed. In the case of a feature film, the medium today is usually motion picture film, at least initially. It then can be copied onto a videotape, a hard drive, a floppy disc, a compact disc (CD) or a digital video disc (DVD). With respect to both a periodical and a feature film, the finished item consists primarily of artistic and editorial content that is protected by the copyright laws, and at least in the case of a feature film, the owners of the film typically store one or more tangible form(s) of the film in a secure storage vault, so as to protect against its damage, loss, theft, and piracy. Both periodicals and feature films have tariff classifications assigned to them in the Harmonized Commodity Description and Coding System (the Harmonized System or HS)[134] that is utilized by WTO Members,[135] and this latter point is significant, as the HS lists only "products" that

tinct service related to the production of a periodical than are services contributed in the production of the periodical itself. *See* W/DS31/AB/R 3 (adopted June 30, 1997) (II.A.1 Arguments of the Parties – Canada – Applicability of the GATT 1994 to Part V.1 of the Excise Tax Act).

134. *See*, *e.g.*, HS heading 3704 (exposed but undeveloped film); HS heading 3706 (exposed and developed motion picture film); HS heading 8524 (recorded videotapes, compact discs (CDs), digital video discs (DVDs), and floppy discs); HS 8471 (hard drives); HS 4902 (periodicals).

135. The WTO Members are not required to follow the HS, but they all do so, as it provides an internationally recognized classification scheme for the goods that are traded among the Members. *See*, *e.g.*, Australian Government, Department of Foreign Affairs and Trade, *A Guide to Navigating the AUSFTA Tariff Schedules and Rules of Origin Annexes* 3 ("Members of the World Trade Organisation (WTO) use the Harmonised System (HS) for tariff classification"), *available at* http://www.dfat.gov.au/trade/negotiations/us_fta/guide_tariff/index.html (last updated March 6, 2004) (last visited May 3, 2006).

can be transported across international borders.[136]

Then, following the production of either a periodical or a feature film, a variety of service providers typically assist in the marketing, sale, and distribution of the item. Both items can be distributed in a physical or digital form,[137] and, in the case of a feature film, service providers also assist in the projection of the film in theaters. Given all of these close similarities between a periodical and a feature film, the Appellate Body's decision in *Canada - Certain Measures Concerning Periodicals,* which treats a periodical as a "good" under the GATT 1994, provides very strong support for the conclusion that a feature film likewise is a "good" under the WTO Agreements, including the SCM Agreement.[138]

This conclusion is further supported by the WTO Appellate Body decision in *U.S. - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada.*[139] This case was brought by Canada against the U.S. under the SCM Agreement, and the Appellate Body opinion addressed the meaning of the word "good" contained in Article 1.1(a)(1)(iii) of the SCM Agreement at some length.

Article 1.1(a)(1)(iii) of the SCM Agreement states that a subsidy under the SCM Agreement may consist of a government's provision to an enterprise or industry of goods or services other than general infrastructure, or, alternatively, a government's purchase of goods from an enterprise or industry.[140] The item in question in that case was standing

136. *See* Werner Antweiler Jr., Policy Analysis Division, Faculty of Commerce and Business Administration, University of British Columbia, *Harmonized Commodity Description and Coding System* (HTML version) 1 ("The Harmonized System is an international six-digit *commodity* classification developed under the auspices of the Customs Cooperation Council. Individual countries have extended it to ten digits for customs purposes, and to 8 digits for export purposes.") (emphasis added), *available at* http://pacific.commerce.uba.ca/trade/HS.html (last visited May 3, 2006); *see also U.S. – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted on January 19, 2004, at para. 61 ("Article II of the GATT deals with the binding of tariffs in respect of particular "products . . . .").

137. As indicated above, the Appellate Body decision in *Canada – Certain Measures Regarding Periodicals* revealed that some publishers had, in fact, evaded Canada's import ban on certain foreign-origin periodicals by transmitting the content of their magazines to Canada via the internet and printing their magazines in Canada. The Appellate Body nonetheless treated these magazines as if they had been imported into Canada, because Canada should have permitted their importation in the first place. *See* WT/DS31/AB/R 15-20 (adopted on June 30, 1997) ("Imported" split-run and domestic non-split-run periodicals of the same type are directly competitive or substitutable, the imported periodicals are taxed in excess of the domestic periodicals and this discriminatory tax measure clearly affords protection to the domestic periodicals; hence, Canada's excise tax violates the second sentence of Article III.2 of the GATT 1994).

138. *See supra* note 132.

139. WT/DS257/AB/R 1 (adopted on January 19, 2004).

140. The SCM Agreement, Article 14(d) further explains that "the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than

timber that various Canadian provinces had agreed to allow specific companies and individuals to harvest and sell in exchange for the payment of a fee that allegedly did not constitute adequate remuneration to those provinces. The agreements entered into by the Canadian provinces and harvesters were referred to as "stumpage contracts." The U.S. considered the stumpage contracts that Canada was providing to these harvesters to constitute a "subsidy" as defined by the SCM Agreement, and the U.S. proceeded to assess countervailing duties on imports into the U.S. of the finished lumber that had been derived from the standing timber. Canada responded that the standing timber which was the subject of the stumpage contracts was not movable and hence was not a "good" under Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, according to Canada, the U.S. had violated the SCM Agreement by imposing countervailing duties on imports of finished lumber from Canada.[141]

The Appellate Body in that case rejected Canada's argument that the word "good" in the context of Article 1.1(a)(1)(iii) refers only to an item that is tangible, movable, and capable of being assigned a specific classification in the HS, which again is the tariff classification scheme utilized by the WTO Members.[142] The Appellate Body went on to point out that "[t]he meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used,"[143] and it noted that Black's Law Dictionary defined a "good" as "tangible ***or*** movable personal property other than money."[144] It elaborated "that the Shorter Ox-

adequate remuneration. SCM Agreement, Art. 14(d). The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation, and other conditions or purchase or sale)." *Id.* Note also that Article 1.1(a)(1) lists various other items that may constitute a "subsidy" under the SCM Agreement, including, for example, cash provided by a government (Article 1.1(a)(1)(i)) and tax reductions and exemptions granted by a government (Article 1.1(a)(1)(ii)).

141. WT/DS257/AB/R para. 61 (adopted on January 9, 2004).

142. *Id.* at paras. 62-67.

143. *Id*. at para. 58 (quoting Article 31(a) of the Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 U.M. T.S. 331, 8 International Legal Materials 679 [hereinafter the "Vienna Convention"]) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

144. *Id*. at para. 58 (citing BLACK'S LAW DICTIONARY 701-02 (7th ed. 1999). *See also* BLACK'S LAW DICTIONARY 714 (8th ed. 2004) (containing the same definition for "good"). This definition of the word "good" provided in Black's Law Dictionary is consistent with other internationally recognized meanings of the word "good." For example, Article 3.1 of the *United Nations Convention on Contracts for the International Sale of Goods* (the CISG) suggests that a "good" is any item of personal property that can be "manufactured" or "produced." *See* 52 Federal Register 6262, 6264-80 (March 2, 1987), United States Code Annotated, Title 15 Appendix (Supp. 1987), Article 3.1.

ford English Dictionary similarly offers a more general definition of the term 'goods' as including 'property or possessions' especially – but not exclusively—'movable property.'"[145] Then, in accordance with these more general definitions of a "good," the Appellate Body held that the standing timber in question is a "good" as that term is used in Article 1.1(a)(1)(iii) of the SCM Agreement and accordingly the U.S. was within its rights to initiate a countervailing duty investigation regarding the imports of finished lumber from Canada.[146]

While the Appellate Body, in *U.S. - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada,*[147] was careful to caution that the meaning it had adopted for the word "good" in Article 1.1(a)(1)(iii) of the SCM Agreement might not be equivalent to the definition of the term "good" used elsewhere in the SCM Agreement or in another WTO Agreement.[148] The definitions for the word "good" provided by Black's Law Dictionary and the Shorter Oxford English Dictionary are still useful with respect to the meaning of the word "good" appearing in Article 10, note 36 and elsewhere in the SCM Agreement. Furthermore, Black's Law Dictionary's definitions for the words "product" and "merchandise" are similar. As stated above, these words are used interchangeably with the word "good" in the SCM Agreement. Specifically, the word "product" is defined in Black's Law Dictionary as "[s]omething that is distributed commercially for use or consumption and that is usually . . . tangible personal property . . . ."[149] Likewise, the term "merchandise" is defined as: "a movable object involved in trade or traffic; that which is passed from hand to hand by purchase and sale . . . This definition generally excludes . . . intangibles . . . ."[150] Black's Law Dictionary, in turn, broadly defines the word "tangible" as "[h]aving or possessing physical form . . . or [c]apable of being understood by the mind."[151]

A feature film clearly is a movable object that can be sold and traded, either domestically or internationally. Furthermore, the carrier medium for a film (whether in the form of motion picture film, videotape, CD, DVD, or a software disc or hard drive) possesses a physical form, and the information recorded on the medium is certainly capable

145. *Id*. at para. 58 (citing Shorter Oxford English Dictionary, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1125)).

146. *Id.* at para 67.

147. WT/DS257AB/R 1 (adopted on January 19, 2004).

148. *Id*. at para. 63.

149. BLACK'S LAW DICTIONARY 1245 (8th ed. 2004).

150. *Id*. at 1008.

151. *Id*. at 1494.

of being understood by the human mind. Thus, while recognizing that WTO decisions are not binding on future WTO panels,[152] the Appellate Body decision in *U.S. - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* provides further strong evidence that a feature film is a good under the SCM Agreement.

Additional support for the conclusion that a feature film is a good under the SCM Agreement is provided in Articles III.10 and IV of the GATT 1994, as well as a number of U.S. statutes and cases. Article III.10 and IV of the GATT 1994 (previously the GATT 1947) have long provided that WTO Members can maintain "screen quotas." A screen quota is a minimum amount of time that local theatres are required to exhibit domestically-developed feature films.[153] These GATT provisions were considered to be necessary, as otherwise a Member's use of screen quotas, through which a Member can provide more favorable treatment to a domestic feature film than to a foreign feature film, would violate the National Treatment Principle contained in Article III of the GATT 1994. While these GATT 1994 provisions refer specifically to "cinematograph" or "motion picture" films, certainly it is understood by the WTO Members that they can rely on these screen quota provisions in the GATT 1994 with respect to locally-developed films recorded on a medium other than motion picture film. A number of WTO Members currently employ screen quotas on a regular basis,[154] and some countries have even extended the idea of screen quotas to actual import quotas for foreign feature films. China, for example, maintains an annual import quota of 20 foreign films,[155] while India maintains an annual import quota of 100 foreign films.[156] These GATT 1994 provisions specifically referring to feature films provide especially strong support for the conclusion that a feature film is a good under the SCM Agreement.

As indicated, 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.[157] A film also is considered to be a "good" under the antitrust laws (*see*, *e.g*., *United*

152. *See supra* note 132.

153. *See*, *e.g*., various screen quota systems discussed at http://www.terramedia.co.uk/law/quotas_and_levies.htm (last visited May 6, 2006).

154. *Id.*

155. *See* GATS/ SC/135, *available at* http://docsonline.wto.org/Schedules of Concessions/Trade in Services/All Commitments/China, p. 19 (last visited May 9, 2006).

156. *See* GATS/ SC/42, *available at* http://docsonline.wto.org/Schedules of Concessions/Trade in Services/All Commitments/India, p. 6 (last visited May 9, 2006).

157. 17 U.S.C. § 102(a) (2006).

States v. Loew's, Inc., 371 U.S. 38 (1962)), and under the U.S. Customs laws, given that there are several Harmonized Tariff Schedule of the U.S. (HTS) classifications assigned to feature films recorded in different formats.[158] The Internal Revenue Code (IRC) is replete with references to films, with most of these references concerning the depreciation of films and videotapes.[159] As only products can be depreciated, these IRC provisions provide strong support for the conclusion that a feature film is a good. Furthermore, § 263A(b)(2)(C) of the IRC[160] 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.[161]

At the present time, the strongest argument supporting the conclu-

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158. *See supra* note 134.

159. *See*, *e.g.*, 26 U.S.C.A. §§ 167, 168, 263A, and 465 (West Supp. 2005).

160. 26 U.S.C. § 263A (West Supp. 2005).

161. An interesting discussion of how Lew Wasserman, President of MCA, and Jack Valenti, President of the Motion Picture Association of America (MPAA), succeeded in convincing the courts, the Internal Revenue Service, and Congress that a feature film should be considered to be tangible property entitling film investors to an investment tax credit, is provided by Connie Bruck in *Profiles, The Personal Touch, Jack Valenti has fought Hollywood's battles in Washington for thirty-five years. Can he still get his way?*, NEW YORK MAGAZINE (August 13, 2001) (cited in The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From the U.S. to Canada: Year 2000 Production Report* 5 (2001)). Jack Valenti also at least initially opposed any type of exemption in international trade agreements for cultural items such as feature films, allegedly stating at times that if a film is "just a toaster with pictures" (a phrase first used by former U.S. Federal Communications Commission (FCC) Chairman Mark Fowler in an interview in Reason Magazine on November 1, 1981 (*See*, *e.g.*, http://www.terramedia.co.uk/quotations/Quotes_F.htm (last visited on May 7, 2006)), then it should be treated as such by the international trade laws. *See*, *e.g*, Kerry A. Chase, *Globalization versus Localization: Cultural Protection and Trade Conflict in the World Entertainment Industry* (draft of paper presented at panel "Hollywood and Hegemony: Cinema, Capitalism and World Power" at the annual meeting of the International Studies Association, Westin Bonaventure Hotel, Los Angeles, March 14-18, 2000) 18, n. 40 (citing Senate Committee on Finance, *Review of the Uruguay Round commitments to open foreign markets, hearings before the Committee on Finance, United States Senate*, 102nd Congress, first session, April 17 and 18, 1991, S. hrg. 102-105, pp. 61-2); *see also* House Committee on Ways and Means, North American Free Trade Agreement, hearings before the Committee on Ways and Means and its Subcommittee on Trade, U.S. House of Representatives, 102nd Congress, second session, September 9, 15, 17, and 22, 1992, Serial 102-135, pp. 179-180 ("Valenti told Congress that 'if Canada . . . [insists] that a cultural exclusion be part of that North American Free Trade Agreement, our government must walk away from that table, or sign an agreement with Mexico only.'"); *see also* PAUL WEILER, RADICALLY MODERATE LAW REFORM, INSULATING TAX PAYERS FROM BOTH TEAMS AND STUDIOS, 19 (forthcoming) ("Hollywood leader, Jack Valenti once remark[ed] that since television is just a 'toaster with pictures, . . . if we're now guaranteeing free trade for the toaster, we should be doing the same thing for television pictures.'"). *See also*, speech delivered by FCC Chairman Reed E. Hundt to the National Press Club, (Washington, D.C. July 27, 1995) ("Putting his point more colorfully, [former FCC Chairman] Mark [Fowler] said the TV is just a 'toaster with pictures.'"), *available at* http://www.fcc.gov/Speeches/Hundt/spreh517.txt (last visited May 7, 2006).

sion that a feature film is not a good is that while the carrier medium of a film possesses a physical form, the message conveyed in the film can only be perceived by the mind.[162] Canada could point out that Section 9 of the Uniform Commercial Code in the U.S. (the UCC) essentially is based on this concept with respect to computer software. This provision of the UCC, which concerns secured transactions, provides that a software program, other than one embedded into a machine or other physical good, is a "general intangible" rather than a good and hence does not serve as adequate security for a debt.[163] In light of all of the arguments

162. This is in contrast even to a periodical, at least when the carrier medium for the periodical is a magazine. When one holds a magazine, s/he does not need to imagine the news articles and photographs contained therein. They are all reflected on the printed page.

163. Uniform Commercial Code [hereinafter the UCC], Art. 9, § 9-102(1). Article 2, Section 2-105 of the UCC more generally provides that goods are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." UCC Art.2, § 2-105. Note also that when computer software was first added to the U.S. tariff code, duties were assessed on software imported from all countries only on the value of the carrier medium. *See*, *e.g*., N.Y. A81783 (Customs ruling in 1996 that software was classified under HTS subheading 8524.91.0030 and was dutiable at the rate of 5.8 cents per square millimeter of recording surface), *available at* http://rulings.cbp.gov – CROSS Customs Rulings Online Search System (last visited May 4, 2006). Other countries disagreed with this approach, and charged duties on the entire value of a software program, and "[h]istorically, the World Trade Organization Committee on Customs Valuation sanctioned the practice of valuing carrier media bearing data or instructions (*i.e*., software) for use in data processing equipment either inclusive or exclusive of the value of the software recorded on carrier media." PriceWaterhouseCoopers, *Trade Intelligence:Americas* 11 (January/February 2006), *available at* http://www.pwc.com/us/eng/tax/its/M060043WMSNewsletterFin.pdf (last visited May 4, 2006). After the Ministerial Declaration on Trade in Information Technology Products was signed by a number of WTO Members, including the U.S. and Canada, however, the issue of whether all or only part of a software program constitutes a "good" essentially became moot under the trade laws, as the WTO Members agreed in the ITA to reduce to zero all duties assessed on information technology products, including software. *See* WT/MIN(96)/16, Singapore, December 13, 1996, 96-5438 [hereinafter the ITA], *available at* http://www.wto.org/english/docs_e/legal_e/itadec_e.doc) (last visited May 4, 2006); *see also* subheading 8524.99.4000 of the HTS, UNITED STATES INTERNATIONAL TRADE COMMISSION 33 (2006) (software is classifiable under this subheading and is dutiable at the rate of zero for countries entitled to the most favored nation (MFN) rate of duty), *available at* http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0602c.85.pdf (last visited on May 5, 2006). Today, the U.S. still assesses duties on software imported from countries not entitled to the MFN rate of duty at the rate of 86.1 cents/square millimeter of recording surface. *See id*. Even so, the fact that the U.S., with respect to such countries, has chosen to assess duties only on the value of the floppy disc rather than the entire value of a software program contained on a disc can be interpreted as simply a preference to encourage trade in a new technology, rather than as evidence that the U.S. agrees that software programs do not constitute "goods." *Cf.* Rita Hayes, U.S. Ambassador to the WTO, *Statement to WTO on Electronic Commerce Proposal*, WTO General Council meeting, at 7-8 (February 19, 1998).

> I am not discussing how we define what is an electronic transmission, that is, whether it is a good, a service, or something in between. While it may prove to be fascinating theoretically, I am not proposing that we debate at this time the nature of electronic transmissions. There should be WTO work in this area and we want to work with others on ideas . . . The growth of this environment has brought us into the Information Age. And

set forth above, however, should the U.S. challenge Canada's PSTC film incentives in a WTO proceeding, Canada's reference to this provision of the UCC likely would not be accorded much weight. This is especially the case, given that the U.S. Government itself has in the past treated computer software to be a product for purposes of the U.S. trade laws.[164] Moreover, the U.S. Government currently collects duties (at the rate of 2.7% *ad valorem*) on the full value of a feature film (rather than solely on the value of the carrier medium) when it is recorded on a CD or DVD.[165] If only the CD or DVD containing a feature film is a "good" when a feature film is imported into the U.S. on a CD or DVD, the U.S. Government should be assessing duties only on the value of that CD or DVD.[166]

In summary, as discussed above, it appears that the PSTC film incentives constitute a "subsidy" as that term is defined in Article 1 of the SCM Agreement and the incentives are provided in connection with the

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> part of this environment has been that these electronic transmissions are not considered as importations for customs duty purposes.

Id., *available at* http://www.geoscopeie.com/espaces/e998USinfotec.html (last visited May 4, 2006).

164. *See* CASE Software of Singapore decision, 54 Fed. Reg. 37013 (1989).

165. *See* subheading 8524.39.8000 of the HTS, 32, UNITED STATES INTERNATIONAL TRADE COMMISSION (2006), *available at* http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0602c.85.pdf (last visited May 4, 2006); *see also* NY R02791 (Customs ruling that DVDs containing early childhood education information are classified under HTS subheading 8524.39.8000 and are dutiable at the rate of 2.7%), *available at* http://rulings.cbp.gov – CROSS Customs Rulings Online Search System (last visited April 21, 2006).

166. Assessment of duties on the entire value of the CD or DVD containing a film (rather than simply on the value of the carrier medium) on the ground that the film as well as the carrier medium is a good is consistent with the GATT 1994, Article IV, which treats cinematographic films as goods. That is, the images recorded on cinematographic film are tangible in the sense that they are perceptible to the human mind but they cannot be viewed or touched any more easily than can the images recorded on a CD or DVD.

Canada's PSTC films incentives clearly are provided in connection with the production of the initial recording of a film in a tangible format. It is this tangible product that is produced in Canada and then is copyrighted and stored by the owner of the film in a secure film vault. Accordingly, the issue of whether the electronic transmission of a feature film is a product is beyond the scope of this article. As indicated above, an electronic transmission currently is not considered to be an "importation" and the WTO members have agreed for the time being not to assess duties on an electronic transmission. *See* paragraph 46 of WTO Ministerial Declaration, Hong Kong, WT/MIN(05)/DEC (December 18, 2005) ("We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until our next Session."), *available at* www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm (last visited May 6, 2006). This does not necessarily mean, however, that an item such as a feature film that can be electronically transmitted across borders but can then be reconstituted into a physical form in the importing country is not a "good." *See*, *e.g.*, Hayes, *supra* note 163. In general, it would seem that anything that can be perceived by the human mind, has the capability of being manifested in a physical form, and can be copied and counted, should be considered to be a good. This proposed definition of a good, however, is also beyond the scope of this article.

manufacture or production of feature films, which are goods. Assuming that these criteria are met, the SCM Agreement[167] is applicable and it specifically provides that the incentives are inconsistent with Canada's WTO obligations if they constitute either a prohibited subsidy or an actionable subsidy that is provided to a specific industry and adversely affects the interests of another WTO Member.[168] Thus, these two types of subsidies are addressed further below.

C. Canada's PSTC Film Incentives Most Likely Do Not Constitute Prohibited Subsidies

Prohibited subsidies are considered to be illegal *per se* under the SCM Agreement, meaning that they are considered to be so trade-distorting by definition that an explicit demonstration of injury or "adverse effects" caused by these subsidies to the domestic industry of a complaining WTO Member is not required. There are two types of prohibited subsidies: import substitution subsidies and export subsidies.[169] An import substitution subsidy is a subsidy "based in substance or in fact upon the use of domestic, as opposed to imported, components."[170] Similarly, an export subsidy is a subsidy "based in substance or in fact upon a firm's export performance."[171]

There is no evidence that Canada's PSTC film incentives are conditioned either upon the use of Canadian-origin components or upon the

167. *See* SCM Agreement, Articles 1, 2, 3, 5.

168. Note that on October 20, 2005, the great majority of members of the United Nations Educational, Scientific and Cultural Organization (UNESCO) signed the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions,* CLT-2005/Convention Diversite-Cult Rev., adopted at Paris (October 20, 2005) [hereinafter the Convention]. One of the main purposes of the Convention is to exempt "cultural products and services" from the international trade laws. In particular, Article 6.2 of the Convention provides that countries should be permitted to subsidize their cultural products and services, including feature films, at least to some extent, without violating any international agreement such as the SCM Agreement. The U.S. and Israel voted against this Convention, and Australia and a few other countries abstained. The U.K. signed the Convention, but made so many reservations that it is not clear how the Convention would apply with respect to the U.K. All other UNESCO members signed the Convention. This Convention is not binding on the WTO (*see* Convention, Article 20), and it would take several years for the WTO Members to amend the SCM Agreement so as to exempt cultural products. At the same time, the Convention indicates that most countries desire some type of recognition that "cultural products" and "cultural services" are different than other products and services and should be accorded special treatment under the international trade rules. Even if the SCM Agreement were amended to provide that countries could subsidize the production of their own distinct cultural products, however, Canada's PSTC film incentives still would be illegal under the SCM Agreement to the extent that they subsidize the creation of U.S.-developed films.

169. *See* SCM Agreement, Articles 3.1, 3.2.

170. SCM Agreement, Article 3.2.

171. SCM Agreement, Article 3.1.

exportation of the films produced with the benefit of the PSTC film incentives. Thus, it is unlikely that Canada's PSTC film incentives are prohibited subsidies, and hence prohibited subsidies are not discussed further in this article.

D. Canada's PSTC Film Incentives Most Likely do Constitute Actionable Subsidies that are Provided to a Specific Industry and Cause Adverse Effects

Government benefits meeting the definition of a "subsidy" under Article 1 of the SCM Agreement but not constituting "prohibited subsidies" as defined above are referred to as "actionable subsidies."[172] 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[173] and cause "adverse effects to the interests of other Members."[174] As discussed below, 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. Hence, it appears likely that Canada's PSTC film incentives contravene Canada's obligations under the SCM Agreement.

1. Canada's PSTC Film Incentives are Provided to a Specific Industry

Article 1.2 of the SCM states that a subsidy is not actionable under the SCM Agreement unless it is "specific" in accordance with the provisions of Article 2. Article 2.1(a), in turn, provides that a subsidy " is specific to an ... industry ... [w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises ...."

The various PSTC film incentive programs in Canada state that the incentives are limited to Canadian operations producing certified film projects.[175] Without question, then, the PSTC film incentives are provided to a specific industry – namely, the Canadian film industry.

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172. SCM Agreement, Part III. (Note that non-actionable subsidies, as set forth in Part IV of the SCM Agreement, were discontinued as of December 31, 1999, per Article 31 of the SCM Agreement).

173. *See* SCM Agreement, Articles 1.2, 2.

174. SCM Agreement, Article 5.

175. *See*, *e.g*, Canada Income Tax Law, Subsection 125.5 (2006) (Foreign film companies wishing to avail themselves of these incentives must establish a Canadian operation, enter into a joint venture with a Canadian film company, or subcontract the film production in question to a Canadian film company).

2. Canada's PSTC Film Incentives Clearly Appear to be Causing Adverse Effects to the U.S. Feature Film Industry

The SCM Agreement provides that "adverse effects" to the interests of another WTO Member may be demonstrated by a showing of:

> (a) injury to the domestic industry of another Member[ ];
>
> (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994 [ ]; [or]
>
> (c) serious prejudice to the interests of another Member.[ ][176]

It is possible that paragraph (b), above, is not relevant in this case. Thus, the possibility of establishing adverse effects under that paragraph is not discussed further in this article. On the other hand, it clearly appears that the PSTC film incentives in Canada are causing adverse effects to the U.S. feature film industry under both paragraph (a) and paragraph (c), above. "Injury" in paragraph (a), above, "mean[s] material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry . . . ."[177] "Serious prejudice" in paragraph (c), above, "includes the threat of serious prejudice"[178] and essentially means that the products from the subsidizing WTO Member are causing or threatening to cause the market share of that Member to increase and the complaining Member(s) to decrease in various markets.[179] Each of these two prongs of the

176. SCM Agreement, Article 5, paragraphs (a)-(c).

177. SCM Agreement, Article 15, n. 45 ("Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."); *see* SCM Agreement, Article 5, n.ote 11 (The term "injury" is used in Article 5 of the SCM Agreement in the same sense that it is used in Part V (encompassing Articles 10 – 23) of the SCM Agreement).

178. SCM Agreement, Article 5, note 13.

179. *See* SCM Agreement, Article 6.3(d) (By its terms, paragraph (d) of Article 6.3 of the SCM Agreement makes clear that market share data is determinative); SCM Agreement, Article 6.4 ("For the purpose of [SCM Article 6] paragraph 3(b), the displacement or impeding of exports shall include any case in which . . . it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product . . . ."); *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, Wt/DS59/R, WT/DS64/R, adopted on July 2, 1998 [hereinafter *Indonesia – Autos*], paras. 14.210-14.211 ("[With respect to whether "serious prejudice" can be found under Article 6.3(a) of the SCM Agreement,] market share data may be highly relevant evidence for the analysis of such a claim."), *available at* http://www.wto.org/docsonline/gen-home.asp (follow "Search for Documents: "Simple Search" hyperlink; then enter "WT/DS54/R" into Document Symbol" search field 9 (last visited May 6, 2006)). Certainly, market share data also is relevant on the fourth test for a finding of "serious

"adverse effects" test is discussed further, below.

a. Material Injury

Again, the SCM Agreement[180] provides that the determination of injury in this context "shall ... be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry." [181] In addition, Article 15.1 of the SCM Agreement stipulates that such a determination shall "involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[ ] and (b) the consequent impact of these imports on the domestic producers of such products."

More specifically, Articles 15.2 and 15.4 of the SCM Agreement clarify that:

> With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.
>
> . . .
>
> The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital

prejudice," set forth in paragraph (c) of Article 6.3 of the SCM Agreement, which is "the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market." *See* SCM Agreement, Article 6.3(c).

180. *See* SCM Agreement, n. 11 (The term "injury" is used in Article 5 in the same sense that it is used in Part V of the SCM Agreement).

181. SCM Agreement, n. 45.

> or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes.
>
> This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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.[182] So long as the subsidized imports in question are one of the causes of the injury or threat thereof (and the harm caused by other factors is not attributed to the subsidized imports), the subsidy program in question is inconsistent with the SCM Agreement.[183]

As indicated, this article focuses on the harm that the PSTC film incentives provided y the Canadian governments to feature film producers are causing to the U.S. Therefore, each of the various indicators of harm mentioned above and discussed further below focuses on the harm occurring in that industry. To begin with, though, the product in the U.S. that is "like" the subsidized Canadian-origin feature films must be ascertained. [184]

(1) Like Product to Subsidized Feature Films

Article 15, note 46 of the SCM Agreement provides that:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[185]

Furthermore, with respect to ascertaining whether a foreign and a domestic product are "like products," almost all GATT and WTO Panels[186] have followed the approach set forth in the Report of the Working

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182. SCM Agreement, Article 15.5; *see also* JACKSON, DAVEY & SYKES, s*upra* note 34, at 728.

183. *Id*.

184. *See* SCM Agreement, Articles 6.3, 15.1 ("Serious prejudice" and "material injury" analyses concern the harm caused by a subsidy to the industry in the complaining WTO Member that produces a "like product").

185. SCM Agreement, Article 14, note 46.

186. *See*, *e.g*, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R,

Party on *Border Tax Adjustments*, which was then adopted by the GATT Contracting Parties in 1970.[187] The relevant section of *Border Tax Adjustments* provides:

> [T]he interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[188]

Additional criteria considered by other WTO Panels on the issue of "like products" include whether the two products possess the same tariff classification and how producers of the two products have analyzed market segmentation.[189]

When a U.S.-developed feature film is produced in Canada rather than in the U.S. on account of the exceedingly generous PSTC film incentives provided by the Canadian governments, the same feature film would not actually be produced in the U.S. Thus, two separate copies of the same feature film, one of Canadian-origin and one of U.S.-origin, cannot be compared. One can compare, however, a feature film that is produced in Canada with the same feature film, had it been produced in the U.S. The feature film produced in Canada would not be identical to the feature film that otherwise would have been produced in the U.S. To be sure, though, the feature film, had it been produced in the U.S. would possess characteristics closely resembling those of the subsidized feature film. That is, the feature film, whether produced in Canada or the U.S., would portray the same story and contain essentially the same scenes. Certain scenes and actors probably would be different. As discussed above, however, the leading actors typically would be the same, whether the feature film is produced in Canada or the U.S. There is no evidence that the ultimate customer of feature films, the movie-going public, perceives that U.S.-developed feature films produced in Canada are dissimilar to U.S.-developed feature films produced in the U.S. Moreover, if the movie-going public were to ever perceive such a difference, U.S.

WT/DS11/R, adopted on November 1, 1996, at 11 (H.1 Article III:2) (citing Report of the Working Party on *Border Tax Adjustments*, *infra* note 187).

187. Report of the Working Party, *Border Tax Adjustments*, L/3464, GATT B.I.S.D. (18th Supp.), December 2, 1970, *available at* http://www.worldtradelaw.net/reports/gattpanels/bordertax.pdf (last visited May 4, 2006).

188. *Id*. at 97, para. 18.

189. *Indonesia –Autos, supra* note 179, at paras. 14.177, 14.197.

film producers in all likelihood would no longer shoot their films in Canada. Accordingly, a U.S.-developed feature film produced in Canada and the same feature film produced in the U.S., would appear to be "similar" and hence "like" in accordance with the above-quoted broad definition of "like products" in Article 15, note 46 of the SCM Agreement.

Moreover, with respect to a U.S.-developed feature film produced in Canada and the same feature film produced in the U.S., they would have the same physical characteristics, end use (high-quality film entertainment lasting approximately two hours), and tariff classification under the HS. Furthermore, as there is no evidence that the movie-going public discerns any difference between a U.S.-developed feature film produced in Canada and a U.S.-developed feature film produced in the U.S., it would appear that both the public and the producers of the feature films consider such films to be interchangeable. The factor of "consumers' tastes and habits" would therefore also indicate that a feature film produced in Canada is "like" the same feature film produced in the U.S.

In fact, all U.S.-developed feature films produced in the U.S. possess characteristics closely resembling U.S.-developed feature films produced in Canada and subsidized by the Canadian governments. They possess the same physical features and tariff classification, and they all have the same end use of entertaining people with a feature-length film portraying U.S.-developed stories, cultural values, and themes. It even appears that, to an extent, the movie-going public considers such feature films as a group to be interchangeable with one another. This is demonstrated when a person is unable to view one feature film, either at the theatre or the movie rental store, s/he will often chose another feature film to view instead.[190] Significantly, there is no evidence that the country of production of the film – U.S. or Canada – affects a person's choice of which feature film to view.

At the same time, it appears that people do not necessarily substitute a TV program for a feature film, especially as TV programs tend to

190. *See* review of the movie *Last American Virgin*, posted on Permalink, *A Small Victory: One Man's Underrated Film is Another's Piece of Crap* (August 9, 2003). This movie often gets tied in with the other teen sex movies of the 80's; *Valley Girl* and *Fast Times at Ridgemont High.* People often confuse the abortion story in Virgin with the abortion story in *Fast Times*. And they confuse the soundtracks of all the movies and sometimes they think Nick Cage was in Virgin, but he was in Valley Girl. They are all simply the same movie with interchangeable characters and plot lines, but only one had Jeff Spicoli."), *available at* www.asmallvictory.net/archives/004180.html (last visited May 4, 2006).

be shorter in duration than a feature film.[191] To date, these two different types of film products have been sold through different distribution channels.[192] In addition, film producers, at least until very recently, have tended to segment the film market into "feature films" and "TV programs," as is evidenced by the common division of film companies that produce both types of films into the "Feature Film Division" and the "TV Division."[193] Thus, U.S.-developed feature films produced in Canada do not appear to be "like" U.S.-developed TV programs produced in the U.S.

In light of all of the above, it appears that the proper domestic industry in the U.S. to investigate to determine whether the PSTC film incentives provided to Canadian producers of feature films (including U.S. companies with operations in Canada) are causing material injury or a threat thereof in the U.S. is the U.S. feature film production industry. Therefore, all of the factors mentioned in Article 15 of the SCM Agreement as being relevant on the issue of material injury and discussed below focus on the harm suffered by that industry.

(2) Significant Increase in Subsidized Imports

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. The figures compiled in the

191. *See*, *e.g.*, The Mark Cuban Weblog, *The Problem with unlimited on demand video* (April 11, 2006).

> Cut to the movie industry. The movie industry is non linear. Movies come out and essentially are available as PPV with the delivery mechanism being the theater or on DVD. But as with any non linear network, the user has to proactively choose the content rather than just turning to a channel and have it available to them . . . TV is about getting away from hassles and relaxing. Its about choosing to be entertained, educated or informed. Its not about working to do any of these. Its lean back experiences.

Id., *available at* http://www.blogmaverick.com (last visited May 4, 2006).

192. Historically, advertisers rather than viewers have paid for TV programs, and the available TV programs simply have been broadcast at pre-announced times so that viewers can "tune in" if they are interested in any particular program. In contrast, viewers have paid for movies, and the viewers in one way or another have had to "order" a particular movie to watch. *See*, *e.g.*, Matthew Honan, *Here Comes the iTunes Movie Store*, Macworld (March 27, 2006) ("[NPD Techworld analyst Ross] Rubin . . . notes that films and TV shows have two very different distribution models. '[TV shows] were not really competing with any other media, the incremental revenue provided a way to monetize access that didn't exist before. With movies it's a little different,' . . . [with] existing distribution outlets, such as pay per view."), *available at* http://playlistmag.com/features/2006/03/27/moviestore/index.php (last visited May 4, 2006).

193. *See*, *e.g*, Warner Brothers is divided into many divisions, two of which are "Warner Bros. Pictures Inc." and "Warner Bros. Television Distribution Inc." *See* description of Warner Brothers' divisions, *available at* http://www.warenrbros.co.uk/main/privacy/privacy_list.html (last visited May 4, 2006).

major reports documenting this phenomenon are discussed below. 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.[194]

(a) CFTPA Reports

The most comprehensive figures published in Canada regarding the feature film production industry since enactment of the PSTC Programs are those found in the annual *Profile* reports published by the Canadian Film and Television Production Association (CFTPA) (hereinafter referred to collectively as the "CFTPA Reports" or individually as the "CFTPA *Profile [Year]* Report").[195] The CFPTA *Profile 2006* Report can be accessed directly from that home page, and past CFTPA Profile Reports can be accessed by choosing "Newsroom" and then "Archives," starting from that home page.

The figures stated in the CFTPA Reports, as summarized below in Exhibit 1, reveal that total feature film production in Canada grew from $420 million in 1997, just prior to enactment of the federal PSTC Program, to $1.04 billion by the beginning of 2004. This represents a growth rate of 148% in the Canadian feature film production industry during that time period. During 2004 (the last year for which final annual figures are publicly available in Canada), total feature film production in Canada decreased to $801 million, which decrease, according to the Canadian federal government, was attributable in part to (1) competing film subsidies offered by third countries; (2) competing film subsidies offered by the U.S. state and federal governments; (3) unusual external conditions such as the SARS panic; and (4) an unfavorable exchange rate vis-à-vis the U.S. dollar.[196] As a result, in 2005, several of the Canadian provinces increased their PSTC incentive percentages significantly, and there is some evidence that these more generous incentives have already had some effect in halting this downward trend.[197] In any case, the growth rate in the Canadian feature film production industry between 1997 and the beginning of 2005 was still 110%, as revealed in the CFTPA Reports.

The tremendous growth in Canada's feature film production industry clearly is attributable to the growth in "foreign location production,"

194. *See supra* Part IV (U.S. Film Industry).

195. For general information on the CFTPA Report, see http://www.cftpa.ca.

196. Department of Canadian Heritage, *Study of the Decline of Foreign Location Production in Canada* 1 (March 2005).

197. *Id.*

which is defined as the shooting in Canada of feature films that were developed elsewhere.[198]This foreign location production sector grew approximately 350% between 1995 and 2005.[199] Exhibit 1 demonstrates that, in 1997, foreign location shooting constituted only 51% of total feature film production in Canada. Following implementation of the PSTC Program in 1998, however, this percentage rose to 80% by 2003, before dropping slightly to 76% in 2004. Furthermore, the Canadian Government reports that its generous tax incentives, in particular its PSTC film incentives, are largely responsible for this significant growth in foreign location shooting.[200]

Exhibit 1 also demonstrates that the production of U.S.-developed feature films in Canada for the most part has been growing steadily since commencement of the Canadian federal PSTC Program, until very recently, in 2004. In 1997, U.S. film companies spent approximately $202 million on the production of feature films in Canada. Then, with the exception of a slight decrease in production expenditures during 2000-2001 attributable to the 9/11 terrorist attacks and U.S. companies' subsequent fears of doing business abroad as well as a writers' strike in Hollywood, the production expenditures of U.S. film companies in Canada increased 290% between 1997, and the beginning of 2004. During 2003 alone, U.S. film companies spent approximately $789 million shooting feature films in Canada. The shooting of U.S.-developed feature films in Canada dropped to $576 million in 2004, but, again, the enactment of even more generous PSTC tax incentives in several of the Canadian provinces in 2005 seems to have at least slowed this downward trend.

198. *See*, *e.g.*, CFTPA Profile 2005 Report, at 17 (detailing growth in both foreign location production and Canadian production in Canadian feature film production industry); CFTPA Profile 2006 Report, at 69 ("Foreign location production is film or video production shot in Canada by U.S. or foreign studios and independent producers. In this type of production, the U.S. or foreign producer retains the copyright, but Canada benefits in the form of direct and spin-off jobs and economic activity."); Department of Canadian Heritage, *supra* note 196, at 3 ("Foreign location production . . . is film or video production taking place in Canada, but financed by a non-Canadian owned and controlled company.").

199. Department of Canadian Heritage, *supra* note 196, at 4.

200. *Id*. at 9.

EXHIBIT 1 [201]

	Production of Feature Films in Canada (U.S. Dollars, Millions)								
	1997	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**1997-2004**
All Canadian Films	420	530	760	714	632	824	1041	801	5722
% Growth from 1997							148%	110%	110%
Total Foreign Location Production	213	382	561	549	476	630	830	606	4247
% Growth from 1997							290%	185%	185%
% For Location of all Canadian Films	51%	72%	74%	77%	75%	76%	80%	76%	74%
U.S. Foreign Location Production	202*	363*	533*	522*	452*	598*	789*	576*	4035*
% Growth 1997-2004							290%	185%	185%

201. Annual *Profile* reports published by Canadian Film and Television Production Association (CFTPA) for these years. Note that CFTPA reports figures in accordance with Canada's fiscal year, which begins on April 1 of each year. Accordingly, the figures reported for each year cover nine months of the year indicated and three months of the following year. For example, the "1997" figures are for the twelve-month period commencing on April 1, 1997 and ending on March 31, 1998. These reports are available at http://www.cftpa.ca. The CFPTA *Profile 2006* Report can be accessed directly from that home page, and past CFTPA Profile Reports can be accessed by choosing "Newsroom" and then "Archives," starting from that home page (last visited on May 7, 2006).

As the 2001-02 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2001 to March 31, 2002, at 20 (2002), the 2002-03 Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2002 to March 31, 2003, at 16 (2003), and the 2003-04 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2003 to March 31, 2004, at 16 (2004) all state that the overwhelming majority (95%) of foreign location production is U.S.-developed, each of the figures highlighted with an asterisk is simply 95% of the applicable total foreign location production figure. CAVCO is part of the Department of Canadian Heritage, and all of CAVCO's Activity Reports are available on-line at http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/act_reports_e.cfm (last visited May 7, 2006).

(b) Department of Canadian Heritage Reports

Figures published by the Department of Canadian Heritage, as set forth in Exhibit 2 below, confirm that approximately $830 million in total foreign location production expenses were incurred in Canada to produce feature films in 2003. Of this figure, approximately 95%, or approximately $800 million, was attributable to U.S.-developed feature films produced in Canada during that year. As of the spring of 2006, the Department of Canadian Heritage had not yet published figures for 2004. Assuming, according to figures published in the CFTPA Reports discussed above, that production expenditures incurred by U.S. film companies in producing feature films in Canada in 1997 totaled approximately $200 million, then the CAVCO Reports substantiate that approximately $600 million in feature film expenditures migrated to Canada from the U.S. between 1997 and the end of 2003.

EXHIBIT 2 [202]

	Feature Film Production in Canada (U.S. Dollars, Millions)					
	1998	**1999**	**2000**	**2001**	**2002**	**2003**
Total Foreign Location Production	382	561	549	476	629	830
U.S. Foreign Location Shooting	363*	533*	522*	452*	598*	789*

202. Department of Canadian Heritage, *Study of the Decline of Foreign Location Production in Canada* 29 (March 2005) (Annex D) (citing CFTPA *Profile 2005* and Association of Provincial Funding Agencies (APFA)). This report is available at www.pch.gc.ca/progs/ged-gol/index_e.cfm (at this home page, choose "Publications") (last visited May 7, 2006).

As the 2001-02 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2001 to March 31, 2002, at 20 (2002), the 2002-03 Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2002 to March 31, 2003, at 16 (2003), and the 2003-04 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2003 to March 31, 2004, at 16 (2004) all state that the overwhelming majority (95%) of foreign location production is U.S.-developed, each of the figures highlighted with an asterisk is simply 95% of the applicable total foreign location production figure. CAVCO is part of the Department of Canadian Heritage, and all of CAVCO's Activity Reports are available on-line at http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/act_reports_e.cfm (last visited May 7, 2006).

(c) CEIDR Reports

The tremendous growth in the production of U.S.-developed feature films in Canada following Canada's enactment of the PSTC Program in 1997 is also demonstrated by a U.S. source, the Center for the Entertainment Industry Data and Reports (CEIDR), in three reports that the CEIDR published in 2000, 2001, and 2002.[203] These reports, hereinafter referred to as the CEIDR Reports, cover feature film production in the U.S. and Canada (including all feature-length films that grossed at least $500,000 at the box office) during the production years 1998 - 2001. These figures, as compiled in the CEIDR Report for 2001 (published in 2002), are reproduced in Exhibit 3, below.

These figures demonstrate that total feature film production expenditures incurred in Canada grew from $430 million in 1998 to $1.047 billion in 2001, resulting in an overall 144% increase in the production of feature films in Canada during that four-year period.[204] Furthermore, the CEIDR Reports document that this approximate $617 million growth in feature film production in Canada was accompanied by an approximate $683 million loss in feature film production in the U.S. during those four years. This $683 million loss in the U.S. represented a loss of 17.4% of the U.S. feature film production industry during those years alone, according to the CEIDR Report for 2001.[205]

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203. Stephen Katz & Associates, *1999 Motion Picture and Movie-of-the-Week Production Survey* (2000); The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From The U.S. to Canada: Year 2000 Production Report* (2001); The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From The U.S. to Canada and Beyond: Year 2001 Production Report (2002)*. All of these reports can be found at www.ceidr.org (last visited on March 17, 2006).

204. *See* U.S. DEPARTMENT OF COMMERCE *supra* note 5, at 19 (The CFTPA, Department of Canadian Heritage, and CEIDR Report figures are also substantiated in part by a U.S. Department of Commerce estimate that $355 million was paid to Canadians working on the production of U.S-developed feature films in the year 2000).

205. The Center for Entertainment Industry Data & Research, *The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report, supra* note 201, at 3.

EXHIBIT 3 [206]

	Feature Film Production in the U.S. and Canada (U.S. Dollars, Millions)					
	1998	**1999**	**2000**	**2001**	**Absolute Growth**	**% Growth**
Budgets of Features Produced in U.S.	3928	3554	3365	3244		
1998-2001					-683	
1998-2001						-17.40%
Budgets of Features Produced in Canada	430	413	1022	1047		
1998-2001					+617	
1998-2001						+144%

(d) Los Angeles County Economic Development Corporation Reports

The Los Angeles County Economic Development Corporation (the LAEDC) published a report in November 2005[207] that provides strong evidence that the outsourcing of the U.S. feature film production industry has continued unabated since 2001. Exhibit 4, shown below, reproduced from the above report, illustrates that "location production days" in the Los Angeles area decreased from a high of 46,808 in 2000 to a low of 43,976 in 2001, then increased very slightly to 44,415 in 2002, and then decreased again to 44,231 in 2003. The number of location production days then increased to 52,707 in 2004, but according to this report, this recent increase in location production days was due primarily

206. Center for the Entertainment Industry Data & Research, *The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report* 4 (2002). All of these reports can be found at www.ceidr.org (last visited on March 17, 2006).
207. *Film Industry Profile*, *supra* note 2.

to "a jump in activity due to [reality] TV production."[208] "Location production days" are defined as off-studio lot film production activities (including TV and feature film production) in the City of Los Angeles, unincorporated areas of Los Angeles County, and the cities of Diamond Bar, South Gate and West Hollywood. Included within these figures are also production days in the Angeles National Forest and the facilities of the Los Angeles Unified School District.[209]

As the figures in Exhibit 4 include TV production as well as feature film production, they do not reveal the true state of the feature film industry. However, as TV production in the U.S. has started to increase in recent years on account of reality TV, as indicated above, the figures most likely mask a more serious outsourcing trend for the U.S. feature film production industry. Furthermore, as indicated, these figures by definition do not include feature films shot by the major studios, and, as stated above, by 2004, 45% of major studio feature films were filmed outside of the U.S.[210]

Furthermore, the LAEDC's description of the state of the film production industry in the Los Angeles area during 2001-2004 only tells part of the story, as filming takes place in many other areas of the U.S., and Los Angeles clearly has lost production to other states on account of those states' generous film incentives. At the same time, the overwhelming majority (87.5%) of California's film industry workers works and lives in Los Angeles County,[211] and in 2002 California itself employed between 58% and 70% of all U.S. film workers[212] and generated between 69% and 81% of film industry earnings nationwide.[213] Thus, as the Los Angeles area clearly is the center of film production in the U.S., the substantial decrease in feature film production in the Los Angeles area appears to provide even further evidence that there has been a significant outsourcing of the U.S. feature film production industry to other countries, including Canada.

208. *Id*. at 4.

209. *Id.*

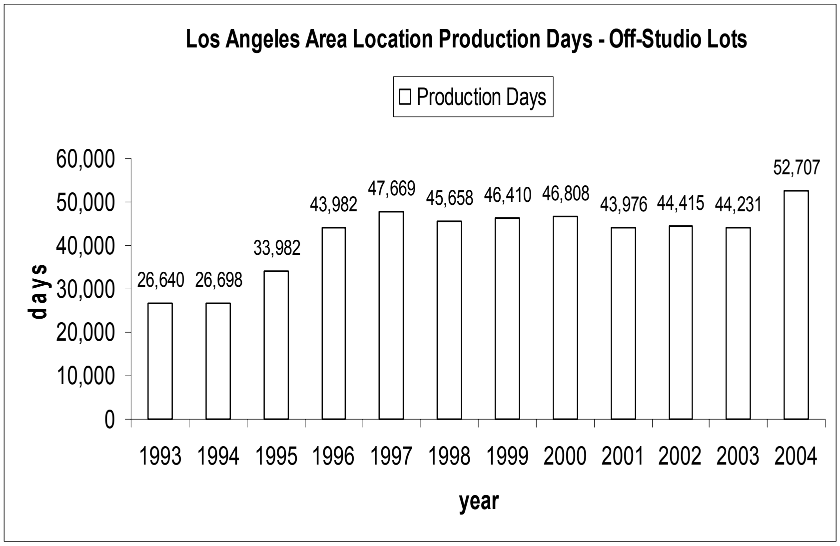
210. *What is the Cost of Run-Away Production?*, *supra* note 2, at 15.

211. *Film Industry Profile*, *supra* note 2, at 4.

212. *What is the Cost of Run-Away Production?*, *supra* note 2, at 2 (different percentages based on different figures reported by the U.S. Department of Commerce, Bureau of the Census, and the MPAA).

213. *Id*.

EXHIBIT 4 [214]



(e) Anecdotal Evidence

Overwhelming anecdotal evidence confirms the above statistics documenting the significant decline of the feature film production industry in the U.S. For example, citing off-shore production of film projects, the Directors Guild of America (DGA) removed the five cities of Atlanta, Boston, Dallas, Miami and Orlando from its list of "production centers" in mid-2002.[215] A DGA spokesman said that there simply was not sufficient work in these cities "to merit continuing the production center designation." [216] Similarly, for several years, North Carolina was third in the nation behind California and New York in terms of total film production revenue from all sources (feature films, television, commercials, and industrial films).[217] For example, in 1999, total direct spend-

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214. Los Angeles Economic Development Corporation, *Film Industry Profile of California/Los Angeles County* 4 (November 29, 2005), *available at* http://www.laedc.info/pdf/Film-2005.pdf (last visited May 7, 2006).

215. The Center for Entertainment Industry Data and Research, *The Migration Of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report*, *supra* note 203, at 10 (citing Dave McNary, *DGA Scratches 5 Cities From List*, DAILY VARIETY (May 28, 2002)).

216. *Id.*

217. FTAC Letter, *supra* note 2, at 17 (citing Bashirah Muttalib, *N.C. Prod'n Breezy in '00*, DAILY VARIETY (June 21, 2000); Bashirah Muttalib, *Watering WB's "Tree:" N.C. Beats Out Vancouver For New Series*, DAILY VARIETY (June 19, 2003)).

ing on film-making there came to approximately $300 million.[218] By 2002, it was down 23% to $230.8 million.[219]

The DGA maintains figures regarding the U.S. share of feature films produced under DGA contracts, and this data reveals that, in 2003, of 154 feature films released under DGA contracts, 20 were filmed in Canada, 8 in Europe, 3 in Australia or New Zealand and 6 in the U.K./Ireland.[220] The DGA's figures also illustrate that the U.S. share of total feature productions declined each year from 2001 to 2003.[221]

At the other end of the spectrum from big-budget films shot under DGA contracts are small-budget independent films. Evidence regarding the outsourcing of this type of film is just as alarming. At a meeting of independent film producers, held in Beverly Hills on June 17, 2004,[222] Tom Berry, president of Reel One Entertainment, explained that he intended to make 8 movies in 2004, all in Canada. Crystal Sky president-CEO Steven Paul said that five years ago, he made all of his movies in the U.S., but now he produces most of his 8-10 projects a year out of the country. Andrew Stevens, president-CEO of Andrew Stevens Entertainment, reported that he was planning to shoot 12 pictures that year, but only 2 to 4 of them were to be made in the U.S. Nu Image reported that it was planning to produce 12 features in 2004, but only two of them would be shot in the U.S. As Nu Image company co-chairman Avi Lerner said, "It's all about money[,]"clearly meaning that U.S. filmmakers can make more money by producing their films outside of the U.S on account of foreign countries' exceedingly generous film subsidies.

Again, by 2004, a number of other countries had copied Canada's successful film subsidy programs and the outsourcing of the U.S. entertainment industry picked up even more steam. A review of the June 10, 2004 issue of the magazine *Production Weekly*, for example, listed a total of 52 feature films with scheduled start dates. [223] Of these 52 features, 28 were scheduled to be shot in the Untied States, 20 were scheduled to be shot in foreign countries (including 5 in Canada) and 4 were to be shot in unknown locations." [224]

218. *Id.*

219. *Id.*

220. *Id*. at 12.

221. *Id.*

222. Representatives of FTAC attended this meeting and recorded the comments attributed to the various independent film producers at this meeting. These comments were subsequently reported in the FTAC Letter, *supra* note 2, at 17.

223. FTAC Letter, *supra* note 2, at 16-17 (citing Production Weekly, *Issue #421*, *available at* http://www.productionweekly.com (last visited June 10, 2004)).

224. *Id*.

All of the above figures demonstrate that the outsourcing of the U.S. feature film production industry to other countries, especially Canada, has been quite significant. Furthermore, as more and more U.S.-developed feature films are shot in Canada and are then imported into the U.S. for marketing, distribution and the occasional performance of post-production services, importations into the U.S. of subsidized, Canadian-origin feature films have also increased significantly.[225] Accordingly, the first prong of the material injury test – increasing imports of the subsidized product – is met.

(3) Effect of Subsidized Imports on U.S. Prices

Typically, one part of a film company in the U.S. does not shoot a movie and then sell it to another part of that same company for distribution. Thus, such U.S. "sale prices" are not available for comparison to the price of U.S.-developed feature films produced in Canada and then imported into the U.S. for distribution. In any event, though, an arm's length price for a feature film produced in Canada and then imported into the U.S. and an arm's length price in the U.S. for a feature film produced in the U.S. and then sold to another company in the U.S. for distribution would cover the costs of film production plus a reasonable profit figure. Furthermore, as the profit figure included in both such prices would be derived rather than actual in any case, the proper analysis for determining the effect of the increasing imports of subsidized feature films produced in Canada on U.S. "prices" essentially would involve a review of the effect of those subsidies on the costs of shooting a feature film in the U.S. When viewed in this manner, there is no question that the 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.

One source reports that the average budget for a feature film produced in the U.S. declined by $3.9 million (13%) from $31.2 million in 2000 to $27.3 million in 2001.[226] Anecdotal evidence strongly suggests

225. In the future, more and more feature films may be transmitted to the U.S. via electronic means, and today, electronic transmissions are not considered to be "importations" and customs duties are not assessed on such submissions. *See supra* note 167. Therefore, in the future, it may be difficult to establish that importations of subsidized feature films into the U.S. are increasing. This is beyond the scope of this article, however, as most feature films produced outside of the U.S. today are transmitted to the U.S. in a tangible format. *See supra* Part IV (US. Film Industry). At the same time, given that a feature film can be reconstituted into a physical product following its electronic transmission, a WTO Panel or the Appellate Body still could rule, in the context of the SCM Agreement, that electronic transmissions of subsidized feature films into a country constitute importations. *See supra* note 167.

226. The Center for Entertainment Industry Data and Research, *The Migration of Feature Film*

that this downward pressure on the costs of production in the U.S. has continued, and every cost component has been affected. For example, as is discussed below, wages and salaries, as well as various fringe benefits, of feature film production workers in the U.S. have decreased. Similarly, as explained below, businesses 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. Even so, many of these businesses nonetheless have gone out of business entirely. Finally, as is discussed above, state and local governments have provided all kinds of incentives and subsidies, such as reduced fees for film permits and land rentals, grants, loan guarantees, and tax incentives to the U.S. movie houses in order to entice them to retain film production in the U.S. Again, even the federal government, in the Jobs Creation Act of 2004,[227] provided a tax incentive for U.S. movie companies to film at least smaller-budget films in the U.S. 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. This phenomenon is discussed in detail below.

(a) Reduced Wages, Salaries and Fringe Benefits of Film Production Workers

Numerous employees in the feature film production industry have lost their jobs in the industry in recent years. Those workers, of course, no longer receive any type of wage, salary or fringe benefit from the film industry. In fact, many former film production workers in the U.S. are no longer even eligible for unemployment insurance payments as they have been out of work for so long.[228] The magnitude of lost jobs in the U.S. feature film production industry is discussed below in the section entitled "Actual and Potential Negative Effects on Employment."[229]

Production From the U.S. to Canada and Beyond: Year 2001 Production Report, *supra* note 203, at 1. In Canada, for the same period, there was a slight decline of $0.8 million (-3%) from $27.6 million in 1998 to $26.8 million in 2001, as Canada began to suffer its own runaway production problem. *Id.*

227. American Jobs Creation Act of 2004, 108 Cong. § 244 (2004).

228. *See supra* note 16 (Author's interview with FTAC members Gene Warren, Tim McHugh, and Ann Champion, Burbank, California, (July 9, 2005)).

229. *See infra* Part VI, Section D.2.a.(4).(d) (Actual and Potential Negative Effects on Em-

In addition, many of those individuals who have been able to obtain work in the U.S. feature film production industry have had to make significant wage, salary, and benefit concessions in order to obtain this work. The Screen Actors Guild (the SAG), for example, reports that its members for several years have had to forego wage increases and at times even agree to reduce their wage rates and overall benefits in order to decrease the production costs for U.S. feature film makers. Some cities, such as New York City, have even boasted on their websites that film industry employees have agreed to take wage cuts in order to retain feature film production locally.[230]

The Hollywood Entertainment Labor Council reported in 2002 that SAG members were losing not only current wages, but also future residual payments and contributions to their health and pension funds, to outsourced film production.[231] In 2004, the SAG announced that it was even raising the eligibility requirements for its health plan.[232] Among the reasons cited for this action were not just the expected skyrocketing costs of prescriptions and medical treatment but runaway production and its resulting decline in contributions to the plan's funding from current members' earnings.[233]

Of course, the major stars typically do not sacrifice their salaries or benefit packages in order to retain feature film production in the U.S. They simply relocate to the applicable foreign country for the duration of film shoots. Recently, though, even some of these people have been affected by the increasing imports of subsidized feature films from Canada and other countries. For example, Arnold Schwarzenegger, when he was running for Governor of California in 2003, agreed to take a massive $8.4 million reduction to his salary for starring in *Terminator Three*, so that Warner Brothers would agree to shoot the movie in California rather than in Canada.[234]

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ployment).

230. The City of New York Mayor's Office of Film, Theatre and Broadcasting, *available at* http://www.nyc.gov/html/film/html/incentives/made_ny_incentive.shtml (last visited June 14, 2005, however, language no longer appears on website).

231. The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report, supra* note 203, at 10 (citing Dave McNary, *Cannes heat on SAG Rule 1*, DAILY VARIETY (May 19, 2002)).

232. FTAC Letter, *supra* note 2, at 18 (citing Dave McNary, *SAG forced to cut back health plan*, DAILY VARIETY (July 31, 2001)).

233. *Id*.

234. *See* Internet Movie Database, *Terminator Three*, *available at* http://www.imdb.com/tital/tt0181852/news (published on March 7, 2002) (last visited on March 30, 2006). Since becoming Governor of California, Swartzenagger has also formed a commission, together with Governor Pataki of New York, to investigate methods of retaining film production in the U.S., including granting additional state and local tax incentives to film companies that shoot their films in those states.

(b) Reduction of Other Direct Costs of Film Production

A wide variety of feature film production support companies, such as film development laboratories, talent agencies, costume rental companies, and hotels and restaurants have suffered serious economic harm as a result of outsourced feature film production. These companies, like the film production workers themselves, have attempted to reduce their fees and costs in order to retain feature film production in the U.S., but many such companies have gone out of business in any case. Many examples of the hardships faced and concessions made by these companies are discussed below in the section entitled "Utilization of Capacity." These price reductions offered by such support companies clearly contribute to the depression of the costs of feature film production in the U.S.

(c) Reduction of Feature Film Production Costs through Government Subsidies in U.S.

As discussed above, a number of state and local governments in the U.S., in an effort to retain feature film production in the U.S. (and also to develop their own feature film production industries), have provided a wide range of types of assistance to film companies. These subsidies include, for example, reduction or elimination of fees for items such as police protection, reduced costs for stage and studio rentals, low interest loans, loan guarantees, reduction or elimination of various taxes, including, for example, reduction or elimination of sales taxes charged by businesses such as hotels and restaurants catering to the film industry, and outright grants of funds.

Warner Brothers, for example, received from North Carolina, New Hanover County, and Wilmington an outright grant of $750,000 to maintain the production of the television series "One Tree Hill" in Wilmington instead of move it to Canada.[235] Obviously, such subsidies reduce the costs of producing films in the U.S. as the reduction of U.S costs is the rationale for the provision of the subsidies in the first place. Again, though, U.S. taxpayers, in particular those living in locations especially affected by runaway production, ultimately have to pay for these government services and subsidies. By way of example, "[a]lthough steadily employed on the [One Tree Hill] show, one local

235. FTAC Letter, *supra* note 2, at 14 (citing Bashirah Muttalib, *Watering WB's 'Tree:' N.C. Beats Out Vancouver for New Series*, DAILY VARIETY (June 19, 2003)).

taxpayer [in the Wilmington area even] referred to . . . [the $750,000 payment to Warner Brothers] as "extortion."[236]

Similarly, the State of Wyoming attempted to raise $900,000, at the request of a line producer at Focus Films, in order to entice it to film Brokeback Mountain (Annie Proulx's novel about Wyoming) in that state. However, Wyoming was able to raise only $100,000, and Focus Films concluded this was an insufficient amount and filmed this movie in Calgary, Canada, instead, where it received significantly more generous subsidies.[237] As stated above, by late 2004, even the U.S. Government had established a tax incentive for feature film producers who shoot smaller-budget films in the U.S.

The above-discussed sacrifices made by film production workers, owners and workers in film support companies, and U.S. taxpayers to retain feature film production in the U.S. have been quite substantial. Also, without question, these sacrifices have lowered the costs of producing feature films in the U.S. 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.

(4) Impact of the Subsidized Imports on the Domestic Industry

The great majority of economic factors and indices that should be analyzed, according to the SCM Agreement, indicate that the subsidized Canadian-origin feature films have seriously detrimentally affected the U.S. feature film production industry. Data on "cash flow" and "the ability to raise capital or investments" in the U.S. feature film industry is not readily available, so these factors are not addressed. In addition, the number of feature films produced in the U.S. and maintained in U.S. film makers "inventory" decreases by definition when the number of U.S.-developed feature films produced in the U.S. declines. Accordingly, the decline in the "inventory" of such films maintained by U.S. film producers is not discussed separately from the decrease in the "output" of the U.S. feature film production industry. Each of the other factors listed in Article 15.4 of the SCM Agreement as bearing on the issue of material injury, is discussed in turn, below.

236. *Id.*
237. *Id.* at 15.

(a) Actual and Potential Decline in Output

The production of U.S.-developed feature films in Canada has grown significantly in recent years. It is reasonable to assume that the great majority of this production otherwise would have occurred in the U.S. In 2004, the production of U.S.-developed feature films in Canada did decrease, but it appears that this decrease has largely been made up for by increases in production of U.S.-developed films in other countries. Furthermore, given the recent increase in several Canadian provinces' production incentive percentages, the Canadian federal government believes that Canada has had some success in stemming its own runaway production problem. Accordingly, the output of the feature film production industry in the U.S. has been negatively affected on account of Canada's PSTC film incentives. Also, the U.S. feature film production industry has actually suffered an absolute decline in recent years. This measure of the impact of subsidized feature film imports from Canada appears to demonstrate material injury to the U.S. feature film production industry.

(b) Market Share

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. The U.S.' decline in world market share is demonstrated in Exhibits 5 and 6. In particular, these Exhibits illustrate that the U.S. feature film industry has declined from a 70% share of the world market in 1998 to a 58% share of the world market in 2001. During these same years, Canada' share of the world market increased from 8% to 19%.

EXHIBIT 5 [238]

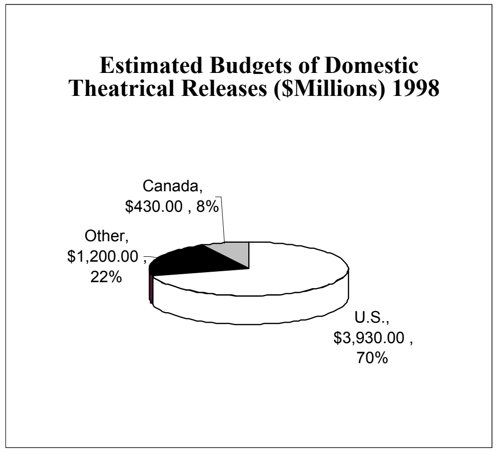
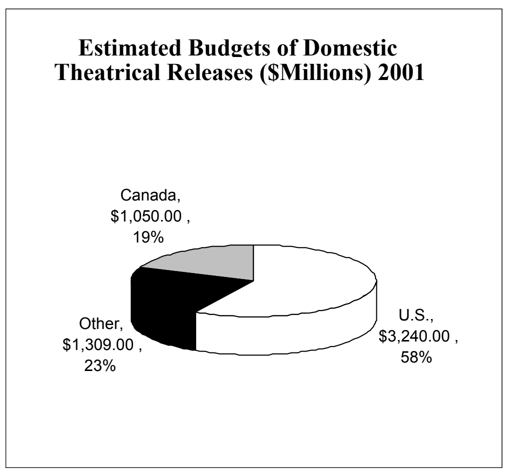


EXHIBIT 6 [239]



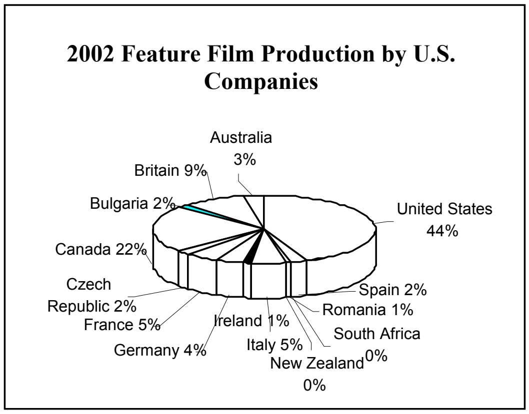
This transfer in world market share from the U.S. to Canada appears to have continued until recently, when Canada itself suffered a decrease in the production of feature films, primarily U.S.-developed feature films. Additionally, as noted above, it doesn't appear that the U.S.' share of the world market has increased as a result. Rather, it seems that

238. The Center for Entertainment Industry Data and Research, *The Migration Of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report* 10 (2002).

239. *Id.*

Canada since 2004 has simply shared the production of U.S.-developed films with a number of third countries. Exhibits 7, 8 and 9[240] indicate that, by 2004, only 35% of U.S.-developed feature films were being produced in the U.S. (Note that Exhibits 5 and 6 illustrate the percentage of worldwide feature film production contributed by the U.S, Canada, and all other countries as a group, while Exhibits 7, 8 and 9 show solely where U.S.-developed feature films have been produced in recent years).

EXHIBIT 7 [241]



240. These exhibits were produced on May 15, 2005 through data base searches conducted using the international movie data base maintained at www.imdb.com, and they are based on the number of feature films rather than budget data. Specifically, the "pro' version of imdb was used, and the "Advanced Search" function was utilized. For each release year, the movies released by U.S. film companies were queried. For "country and box office," the "U.S." was entered. For "filming location," each country concerned (such as "Australia" or the "U.S") was entered separately. For "type of title," "feature film" was entered. Again, as stated above, no effort was made not to double-count films that were produced in multiple foreign locations, so the data compiled overstate the outsourcing of the U.S. feature film industry to that extent. To repeat, though, feature films are not commonly shot in multiple foreign locations. In addition, it should be emphasized that the data reflected in each of these exhibits concerns the previous production year, as films released in a particular year typically were produced during the previous year. For example, the data reflected in Exhibit 9 concern feature films produced during 2003 and released in 2004. Finally, note that while the author is not aware of any manner in which the IMDB data base is incomplete or inaccurate, as it is not known how or when data is entered into the data base, there is no guarantee that the data contained therein is either complete or accurate.

241. Data base search conducted on May 15, 2005 using the international movie data base maintained at www.imdb.com and based on numbers of films rather than budget data. As U.S.-developed feature films constitute the great majority of feature films exhibited in the U.S, Canada, and numerous third countries, Exhibits 7, 8 and 9 provide further support, even if indirect support, for the conclusion that the U.S. has continued to lose significant market share in the U.S., Canada, various third countries, and the worldwide market for feature films. Hence, this second measure of the impact of the subsidized imports from Canada also indicates that the feature film production industry in the U.S. has been materially injured by Canada's PSTC film incentives.

EXHIBIT 8 [242]

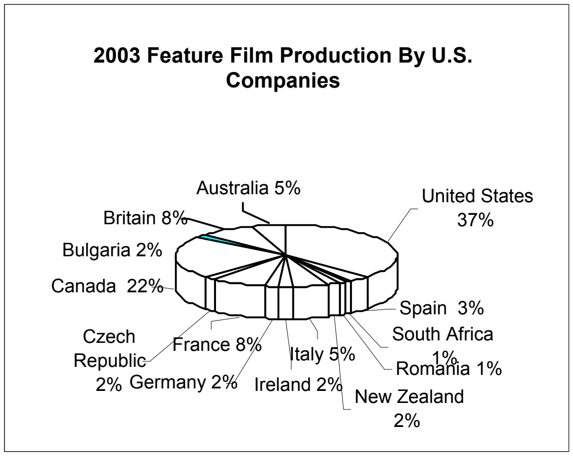
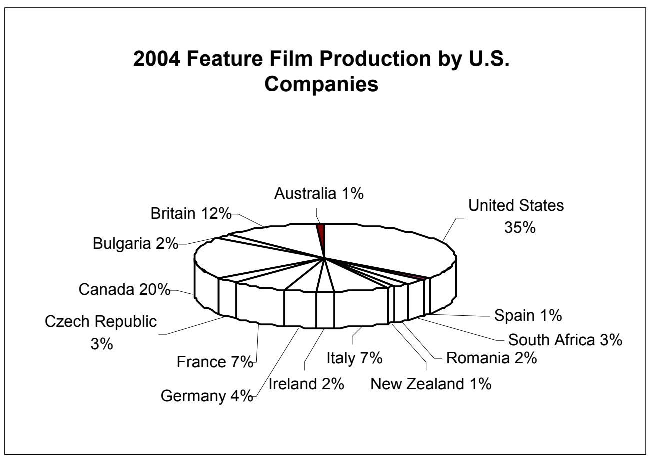


EXHIBIT 9 [243]



(c) Factors Affecting Domestic Prices

As demonstrated above, "domestic prices" or, in other words, the costs of producing feature films in the U.S., have declined or at least been suppressed, so as to make feature films produced in the U.S. more competitive when compared with subsidized feature films produced in other countries, including Canada. Accordingly, this factor also demon-

242. *Id.*
243. *Id.*

strates that the subsidized imports from Canada are causing material injury to the U.S. feature film production industry.

(d) Actual and Potential Negative Effects on Employment

"We are creating the jobs your children want." This is the rallying cry that the Canadian Government has used over the last few years to develop taxpayer support for the PSTC Programs established for the film industry.[244] This strategy involves moving jobs from the U.S. to Canada, and it clearly has been exceedingly successful. As discussed further below, both government agencies and private groups in Canada and the U.S. evidence this fact.

CFTPA, in its annual *Profile* Reports, reveals that the number of direct jobs producing U.S.-developed feature films in Canada has grown from 3,528 employees in 1997 to 12,200 employees in 2003. The CFTPA also estimates that for every direct job in the industry, 1.6 indirect jobs in Canada are also created. Indirect jobs include, for example, jobs in the hotel, restaurant, and retail sale business catering to the film industry. Thus, the CFTPA reports that the number of such indirect jobs associated with the production of U.S.-developed feature films in Canada has grown from 5,645 in 1997 to 19,520 in 2003. The total number of direct and indirect jobs associated with the feature film industry that were outsourced from the U.S. to the Canadian feature film industry, then, grew from 9,173 in 1997 to a whopping 31,720 in 2003. This represents a 246% growth in U.S.-developed feature film jobs in Canada over the course of this six-year period. This transfer of direct and indirect jobs in the feature film industry from the U.S. to Canada is illustrated in Exhibit 10.

As indicated above, in 2004, Canada experienced its own decrease in feature film production, in particular the production of U.S.-developed feature films. As Exhibit 10 indicates, CFTPA figures reveal that, during 2004, approximately 21,960 jobs (8,100 direct jobs and 12, 960 indirect jobs) were lost from the U.S. to Canada. Thus, feature film production jobs certainly are still being lost to Canada, but at a reduced amount. Furthermore, as has been discussed above, there is some evidence to suggest that Canada has at least started to reverse this downward trend in its own feature film production industry.

244. FTAC Letter, *supra* note 2, at 8.

EXHIBIT 10 [245]

	Jobs Created in Canada and Lost in U.S. in Feature Film Industry ($U.S. Millions)								
	1996	1997	1998	1999	2000	2001	2002	2003	2004
Direct Jobs	3,864	3,528	6,708	9,680	9,200	8,148	10,712	12,200	8,100
Indirect Jobs	6,182	5,645	10,733	15,488	14,720	13,037	17,139	19,520	12,960
Total Jobs	10,046	9,173	17,441	25,168	23,920	21,185	27,851	31,720	21,060

The CEIDR Report for 2001 (published in 2002) confirms that the magnitude of the job loss in the U.S. feature film production industry is quite significant. Specifically, it states that 27,313 jobs were lost in the U.S. feature film industry in that year alone.[246] The CEIDR Report for 2001, in fact, reveals that, in each of the four years covered by its studies, 1998-2001, an average of 25,000 jobs per year were lost in the U.S. feature film production industry. [247]

As discussed above, California and the Los Angeles area in particular have been especially hard hit by the outsourcing of the U.S. feature film production industry. According to the California Employment Development Department, jobs in the feature film and video production industry in California fell from a high of 127,400 in 1999 to a low of 105,800 in 2002, and then rose only slightly to 106,300 in 2003.[248] There was an increase to 118,600 in 2004.[249] Similar job losses in the motion picture and video production industry in Los Angeles County during these years were reported by the U.S. Department of Labor, Bureau of Labor Statistics.[250]

Statistics for the entire film industry (including TV shows, MOWs, and commercials) are even more alarming. Jack Kyser, chief economist

245. CFTPA *Profile 2005 Report*, at 17 and CFTPA *Profile 2006 Report*, at 53, 55, in conjunction with the Association des producteurs de films et de télévision du Québec (APFTQ) and the Department of Canadian Heritage and Nordicity Group Ltd. (Total number of direct and indirect jobs created in foreign location production attributed to feature film production in accordance with ratio that foreign location feature film production bears to total foreign location production).

246. The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report*, *supra* note 203, at 3.

247. *Id.*

248. *See Film Industry Profile*, *supra* note 2, at 11 (citing California Employment Development Department statistics).

249. *Id.*

250. *Id.* at 12-13.

for the LAEDC, "found a loss of 32,400 [total film] . . . business jobs in the Los Angeles area between 1999's peak employment figure of 146,000 and the final 2003 figure of 113,600, which was lower than his original prediction for the year of 116,100. Film industry employment in Los Angeles has been declining steadily every year in between, without any recovery: in 2000, it fell to 138,900, in 2001 to 126,100, and in 2002 to 121,000 . . . ."[251] "The problem with the film industry, [according to Kyser,] is that everyone sees it in the light of 'Entertainment Tonight' and 'Access Hollywood' – all the glitz and glamour – and they don't see that the bulk of the industry is below the line and that's what's hurting."[252]

UCLA Anderson Forecast senior economist Christopher Thornberg confirmed Kyser's figures and predictions regarding the precipitous decline of the Hollywood film industry (including TV productions). In September of 2003, he stated that "I don't think the industry will leave Los Angeles, but it looks as if local production jobs are slowly declining and moving elsewhere. Los Angeles and New York remain the centers for the industry's deal-making, financing and advertising."[253] Of course, as FTAC spokespeople (who, again, are dedicated to retaining film production in the U.S.) have noted:

> The physical production of a feature film or television project is incredibly labor intensive, requiring large numbers of specialized, highly skilled workers and artists in positions which far outnumber Thornberg's "management jobs" with a studio or production company. A shift in these numerous middle class jobs from cities in the United States to foreign locations has severe adverse economic impact, and is a serious problem.[254]

When U.S. film workers lose their jobs, they obviously are harmed by the loss of the direct wages and salaries that they otherwise would have derived from those jobs. In addition, "SAG members have lost residual payments, important safety protections, and significant contributions to their health and pension funds . . . because of work done out of the country . . . ."[255] And, again, some industry workers have been out

251. FTAC Letter, *supra* note 2, at 14-15, (citing Dave McNary, *H'w'd Jobs Outlook 'Less than Inspiring*, DAILY VARIETY (February 9, 2003)); Jesse Hiestand, *L.A.'s Showbiz Exodus Eases Off: 2,500 Jobs May Be Lost in '04, About a Third of '03 Drop*, Hollywood Reporter (February 9, 2004); Dave McNary, *Jobs Picture Remains Grim*, DAILY VARIETY (July 21, 2003)).

252. *Id.* at 14.

253. *Id.* at 14 (citing Dave McNary, *Showbiz Jobs Dip in 3Q*, DAILY VARIETY (December 11, 2003); Dave McNary, *BizJobs Leaving, StudySez*, DAILY VARIETY (September 24, 2003).

254. *Id.* at 14.

255. The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report*, *supra* note 203, at

of work so long that they no longer even qualify for unemployment insurance.[256]

That film production workers have been suffering greatly in the U.S. is further illustrated by the fact that requests by such employees to the Directors' Guild Foundation for short-term, no interest loans have been increasing.[257] Similarly, a number of film workers have applied for financial aid to the Motion Picture Fund in the past several years.[258] A number of Hollywood film industry veterans report that they have been able to survive only because they have been able to sell or refinance their mortgages in Southern California where real estate values have been escalating.[259]

It certainly appears that the 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. This factor of "Actual and Potential Negative Effects on Employment" illustrates, perhaps more dramatically than any other factor, that the subsidized feature film imports from Canada seem to be causing material injury to the U.S. feature film production industry.

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256. *See supra* note 16 (Author's interview with FTAC members Gene Warren, Tim McHugh, and Ann Champion, Burbank, California, (July 9, 2005)).

257. FTAC Letter, s*upra* note 2, at 18 (citing Letter to Directors Guild members from Delbert Mann, Directors Guild Foundation Chairman of the Board (October 2002)).

258. FTAC Letter, *supra* note 2, at 18.

259. *Id*. Again, even Canadian film industry employees have started to feel the sting of outsourced production, now that other countries around the world have copied Canada's successful film subsidy programs. In some cities, Canadian film workers have been out of work for several weeks or months, and some Canadian film employees have made concessions on salary rates and benefit levels in order to retain work in Canada. This boom-bust cycle is not surprising, of course, as "foreign subsides do not create new jobs, they merely relocate existing jobs from one country to another[,]," (FTAC Letter, *supra* note 2, at 20), and, as Telefilm Canada executive director Wayne Clarkson put it succinctly recently, "[b]uilding [the Canadian film] . . . industry based on foreign production [was] . . . like building [a] house on quicksand . . . ." CFTPA *Profile 2005 Report* (*see supra* Part VI.D.2.a.(2).(a) (CFTPA Reports), at 6; *see also The Razor's Edge: Canadian Producers in the Global Economy*, *available at* http://www.cftpa.ca/newsroom/pdf_profile/profile2004-english.pdf (January 2004) (last visited May 4, 2006).

(e) Actual and Potential Negative Effects on Wages

As discussed above, wages 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, as SAG and other employee representatives have made clear. Examples of SAG members and other industry employees agreeing to wage decreases or at least wage freezes in order to retain feature film production in the U.S. were discussed above. In the spring of 2006, the producers of *Home of the Brave*, which was being filmed in Spokane, Washington, moved the production in the middle of filming up to Vancouver, Canada, on account of a labor dispute over whether union wage rates should be paid to certain below-the-line workers.[260] This action demonstrates very dramatically that U.S. film workers have very little bargaining power to resist wage decreases. If a producer isn't happy with the wages rates in the U.S., there is always the opportunity for the producer to escape to Canada or another country, where government subsidies dramatically reduce the effective wage rates for below-the-line workers. Hence, this factor, like all of those discussed above, indicates that the increasing subsidized feature film imports from Canada are materially injuring the U.S. feature film production industry.

(f) Utilization of Capacity

Given the great decline of the feature film production industry in the U.S., capacity in the industry is underutilized. This is demonstrated by the great numbers of unemployed feature film workers (discussed above), little-used stages and sound studios in several cities around the U.S., and the number of companies that have stopped catering exclusively to the film industry or have gone out of business entirely. The underutilization of capacity in the industry is also demonstrated by the fact that the major movie studios have removed five cities from their list of "production centers," a large number of state and regional film offices

260. *See Union Dispute Brings Movie Shoot to Vancouver*, ASSOCIATED PRESS (March 28, 2006), *available at* http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060328/movie_vancouver_0603 (last visited March 31, 2006).

have closed completely, and almost every state has cut funding for its film office.[261]

As indicated above, there are a great many anecdotal examples of companies dedicated to the film industry suffering financially or closing their doors. For example, in June of 2004, the Oregon Film Office reported that "[o]ur film lab just closed, smaller grip and lighting companies have closed, and one of the two remaining is on the ropes. Our crew depth has gone from three crews deep to one and a half because crews have left for other areas or left the business altogether."[262] Similarly, the Washington Film Office reported in June of 2004 that "[w]e have several vendors who are holding on by a thread, including equipment suppliers and talent agencies. Half of our crew base has either moved to LA or gotten out of the business entirely."[263]

FTAC spokespeople reported during the same time period that

> [i]n Hollywood, long-established businesses which service the motion picture industry with rentals of various items have gone out of business or, if surviving, report huge losses. Some typical examples: Alpha Medical, which rents medical equipment solely for film industry use as props and set dressing, says it has downsized its staff from 25 to 15 employees.[264] Independent Studio Services, a well-known prop rental and fabrication company, reports its sales are down $1.5 million and that 2003 was the first year it has ever lost money. It has downsized from 90 to 25 regular employees and has had to reduce the size of its physical plant. Nights of Neon, a neon fabrication and rental company which also does some business outside the film industry, has lost 50% of its studio business, and has contracted in size from 10 to 5 employees.[265]

FTAC also has noted that training opportunities for young actors in the U.S. are disappearing. As indicated above, Canada's actors' union, ACTRA, offers a workshop to teach Canadian actors how to use American accents, so that fewer American actors need be hired on any film production in Canada. As a result, young actors in the U.S. who normally would have received training in minor roles in U.S. feature films

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261. The Center for Entertainment Industry Data and Research, *The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report, supra* note 203, at 10-11.

262. FTAC Letter, *supra* note 2, at 15 (quoting June 18 2004 e-mail from Veronica Rinard, Oregon Film & Video Office in response to a request for information on state losses from outsourced production).

263. *Id.* (quoting June 18, 2004 e-mail from Suzy Kellett, Washington State Film Office, in response to a request for information on state losses from outsourced production).

264. *Id.* at 18.

265. *Id.* at 19.

now are not receiving that training, and the pool of talented young U.S. actors is shrinking.[266] The evaporation of jobs for promising new U.S. actors was demonstrated quite clearly during the filming of the U.S.-developed movie *Cold Mountain* in Romania. Reportedly, American tourists were grabbed off the streets and offered parts in the movie because there were not enough American actors available in Romania to fill the spots.[267]

All of these examples of the underutilized capacity in the U.S. feature film industry also lead to the conclusion that the subsidized feature film imports from Canada are causing material injury to the U.S. feature film production industry.

(g) Producer Profits

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. If producers' profits were the only criterion for a showing of material injury listed in the SCM Agreement, the MPAA might have a point. 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.

Furthermore, the WTO Panel in *Indonesia –Autos,*[268] considered whether the United States could claim it was suffering "serious prejudice" in the context of the SCM Agreement solely on the basis that certain U.S. companies were producing automobiles outside of the U.S. for sale in Indonesia, where they had to compete with automobiles subsidized by the Government of Indonesia. The WTO Panel in that case ruled emphatically in the negative on that question, on the ground that the WTO rules do not protect national companies but rather national industries and national products.[269] The strongest evidence that the MPAA's argument is incorrect is that Article 16.1 of the SCM Agreement provides that, in a determination of "material injury," the term "domestic industry" may be interpreted as excluding those producers

266. *Id*.

267. *Id*. (citing Phelim McAleer, *That Big Break Awaits in Romania*, Los Angeles Times (January 2, 2004)).

268. WT/DS54/R, WT/DS55/R, WT/DS59, WT/DS64/R (adopted on July 2, 1998).

269. *Id*. at paras. 14.198-14.204, 15.1(e).

who are related to the exporters or importers or are themselves the importers of the allegedly subsidized product. Hence, the fact that film producers' profits increase when they shoot their films outside of the U.S. essentially is irrelevant. In any case, the factor of producers' profits is the only factor discussed that indicates that the subsidized imports from Canada are not materially injuring the U.S. feature film production industry.

In summary, the PSTC film incentives that Canada is providing are quite substantial, and the great majority of the above-discussed factors show significant contractions in the U.S. feature film production industry, especially since commencement of the PSTC Program in Canada in 1998. As stated above, in order for a WTO Member's subsidies to be found to contravene the SCM Agreement, those subsidies need be only one cause of the material injury or threat of material injury being suffered by the relevant domestic industry in another WTO Member.[270] In light of all of the above, the conclusion seems inescapable that the PSTC film incentives in Canada are causing or, at the very least, are threatening to cause material injury to the U.S. feature film production industry. Accordingly, Canada's PSTC film subsidies (especially when considered in conjunction with film subsidies provided by other countries)[271] likely are causing "adverse effects" to the U.S. feature film industry on this basis and hence likely are inconsistent with Canada's obligations under the SCM Agreement.

b. Serious Prejudice

Additionally, it appears that Canada's PSTC film incentives are seriously prejudicing the U.S. feature film production industry. To repeat, " '[s]erious prejudice to the interests of another Member' is used in . . . [the SCM] Agreement in] the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice."[272] Furthermore, Article 6.3 of the SCM Agreement provides that serious prejudice exists where:

> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
>
> (b) the effect of the subsidy is to displace or impede the exports of a

270. JACKSON, DAVEY & SYKES, *supra* note 34, at 728.

271. Subsidies provided by various countries can be aggregated in a material injury determination. *See* SCM Agreement, Article 15.3.

272. SCM Agreement, Article 5, n. 13.

> like product of another Member from a third country market;
>
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market; or
>
> (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[ ] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.[273]

As indicated, the relevant industry in a "serious prejudice" analysis is that industry in the complaining WTO Member that produces a "like product," just as in the case of a "material injury" analysis. As explained above, in the section entitled "Like Product to Subsidized Feature Films," the industry in the U.S. producing a like product to the feature films subsidized by the Canadian governments is the feature film production industry. Accordingly, the serious prejudice analysis provided in this article focuses on that industry. Note further, that, for the purpose of Article 6, paragraph 3(b):

> [T]he displacement or impeding of exports shall include any case in which . . . it has been demonstrated that there has been a change in the relative shares of the market to the disadvantage of the non-subsidized product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). ["]Change in relative shares of the market" shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been in the case in the absence of the subsidy.[274]

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273. SCM Agreement, Article 6.3, paras (a)-(d).

274. SCM Agreement, Article 6.4. Note that serious prejudice will *not* be found in any case where there is a "voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Members have been autonomously reallocating exports of this product to new markets)[.]" SCM Agreement, Article 6.7(e). This latter provision could be interpreted to cover the instant situation, where many U.S. film companies are voluntarily choosing to reduce their feature film production in the U.S. and instead conduct their production operations in Canada and other countries. However, the WTO Panel in *Indonesia – Autos*, *supra* note 179, at para. 14.203, found that each of the various para-

To repeat, if any one of the four effects set forth in paragraphs (a) – (d), above, has occurred in connection with the U.S. feature film production industry as a result of Canada's combined PSTC film subsidies, Canada's PSTC film incentives are causing "serious prejudice" to the U.S. feature film production industry. In fact, however, it appears that most, if not all, of these effects are occurring as a result of Canada PSTC film incentives.

As indicated above, market share data can be determinative on the issue of whether serious prejudice is demonstrated on the basis of paragraph (b) of Article 6.3 of the SCM Agreement.[275] Market share data is also highly relevant on the issue of whether serious prejudice is illustrated on the basis of paragraph (a) of Article 6.3 of the SCM Agreement.[276] As the above section regarding "material injury" to the U.S. feature film production industry makes clear, during each of the four years 1998 – 2001, Canada's share of the world market for feature film production increased and the U.S.' share of the world market for feature film production decreased. Specifically, in 1998, Canada's share of the world's feature film production market was 8%, and by the end of 2001, its share of this market was 19%. In contrast, the U.S. share of the world market for feature film production in 1998 was 70%, and at the end of 2001, it was 58%. Again, Exhibits 5 and 6, above, illustrate this 11% increase in Canada's market share of the worldwide feature film production industry and the concomitant 12% loss in the U.S.' share of this market.[277]

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graphs of Article 6.7 clearly assumes that the product allegedly being replaced by the subsidized product has, in fact, first been produced in the complaining Member (in this case, the U.S.). In other words, the provisions of Article 6.7 refer to restrictions on domestic exports, not restrictions on domestic production. This is consistent with Article 16.1 of the SCM Agreement, which provides that the "domestic industry" in an analysis of "material injury" can exclude domestic producers who are "related[ ] to the exporters or importers or are themselves the importers of the allegedly subsided product or a like product from other countries . . . ." Again, the SCM Agreement protects products that are produced within a particular WTO Member, not producers who are located within that WTO Member. *Indonesia – Autos, supra* note 179, at paras. 14.198-14.204, 15.1(e).

275. *See Indonesia – Autos*, s*upra* note 179, at paras. 14.208-14.211.

276. *Id*.

277. The Canadian Government has been candid that "foreign location production" has been responsible for the phenomenal growth in its own feature film industry, with "foreign location production" being defined by the Canadian Government as "the production of a feature film in Canada where the copyright of that film is owned by a non-Canadian." *See supra* notes 198-200. It has also pointed out that the overwhelming majority (often reaching 95%) of foreign location projects over the last decade have been U.S.-developed projects. *See 2001-02 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2001 to March 31, 2002, at 20 (2002); 2002-03 Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2002 to March 31, 2003, at 16 (2003), and 2003-04 CAVCO Activity Report: Activities and Programs Administered by CAVCO for the Period April 1, 2003 to March 31, 2004*, at 16 (2004) (stating that the overwhelming majority (95%) of foreign location production is U.S.-developed).

Comprehensive market share data for the worldwide feature film production industry since 2001 has not been readily available in the last few years.[278] Still, private industry groups in Canada, as well the Canadian federal government, have claimed that the feature film production industry in Canada continued to grow during the 2002 – 2003 period. Specifically, according to these sources, the volume of Canadian feature film production grew from $US 824 million in 2002 to $US 1.04 billion by the end of 2003.[279] Again, during those same years, it appears that the volume of U.S. feature film production declined. This latter point is difficult to confirm, as national U.S. statistics on the industry have not been published. [280] What does appear to be true, however, is that feature film production industry in the Los Angeles area declined significantly during those years, and the Los Angeles area unquestionably is the center of feature film production in both California and the U.S. as a whole. Specifically, California's share of production of U.S.-developed feature

As most feature films shown in many countries of the world are U.S.-developed (note: not necessarily produced), the fact that Canada has produced a greater percentage of U.S.-developed films should result in Canada obtaining a larger percentage of many countries' feature film market during each of those years. *See*, *e.g.*, *France proposes 'European Cinema Weeks' to Fight Hollywood Domination*, Associated Press (November 18, 2005) (French Culture Minister Renaud Donnedieu de Vabres asked in an address in 2005 that Europeans promote European films in the form of 'European cinema weeks', "in order to see more European films and because 70 percent of films shown in EU movie theatres are American"), *available at* http://www.breitbart.com/news/2005/11/18/051118191 730.tms64jw7.html (last visited May 4, 2006); *The Business of Media Violence*, Media Awareness Network (2006) ("Already, almost 80% of movies sold overseas came from the U.S. movie industry. Increasingly, U.S. firms are buying up screens and production entities around the word."), *available at* http://www.mediaawareness.ca/english/issues/violence/business_media_violence.cfm (last visited May 4, 2006); Minoru Sugaya, *The Development of Film Policy in Canada and Japan*, 28 Keio Communication 53, 64 (2006) ("[T]he share of Canadian films in the box office sale between January and September 2004 was 4.8 percent, while that of U.S. films was 87.2 percent."), *available at* www.mediacom.keio.ac.jp/publication/pdf2006/review28/02_Minoru%20SUGAYA.pdf (last visited May 4, 2006).

278. In early 2006, The Center for Entertainment Industry Data and Reports (CEDIR) began compiling a new report regarding the status of the entire U.S. film industry as of the end of 2005. This report should be publicly available soon. Author's Interview with Steve Katz, author of this new CEIDR Report (April 8, 2006); *see also* Scott Kaye, *Report on the June 2005 National Executive Board Meeting*, International Cinematographers Guild (July 20, 2005) ("Our [National Executive Board] NEB adopted a resolution calling for the commission of a new [CEIDR] report, spending up to $15,000 to help fund it . . . ."), *available at* www.cameraguild.com/news/guild/05_07_20_executive_board_meeting.html (last visited May 4, 2006); *Local 44 Newsreel*, Volume 16, Issue 8, Newsletter of IATSE Local 44 (November, 2005) ("The recent SAG election that put several new members on their board and elected an active, progressive President has resulted in SAG's donation of $10,000 to fund the CEIDR report . . . . "), *available at* www.local44.com/content/newsreel/05NOVEMBER%202005%20NEWSREEL%20for%20web.pdf (last visited May 4, 2006).

279. *See supra* Part VI, Section D.2.a.(2)(a) (discussing CFTPA Reports).

280. A decline in film production in Los Angeles, for example, could be countered by a gain in film production in New York City.

films decreased by 5.5% from 31% in 2000 to 25.5% by the end of 2003.[281] In 2000, California produced 212 out of U.S.-developed 683 feature films. By 2003, it only produced 151 out of 593 US.-developed feature films.[282]

As discussed above, during 2004, Canada suffered a decline in its own feature film production industry.[283] At the same time, the U.S. feature film production industry does not appear to have been the beneficiary. To a large extent, it appears that third countries were able to entice U.S. film producers to shoot more films in their locales, to the detriment of both the U.S. and the Canadian feature film production industries.[284] The Los Angeles Economic Development Corporation reported in March of 2005 that 45% of *all* major studio films were shot outside the U.S. in 2004,[285] and Exhibits 7, 8 and 9 (produced based on data contained in the international movie data base maintained at http://www.imdb.com) indicate that a whopping 65% of all U.S.-developed feature films were produced outside of the U.S. by the 2004 release year.[286] While these exhibits overstate the outsourcing of the U.S. feature film production industry for the reasons discussed above in Section VI.D.2.a.(4)((b) (Market Share), the sizeable magnitude of the phenomenon and the consequent significant decrease in the U.S. share in the worldwide market for the production of feature films are unmistakable.

Again, in late 2004 and early 2005, government representatives throughout Canada warned that the various Canadian governments might need to increase their PSTC film incentives in order to retain feature film production in Canada.[287] Then, a number of the provinces followed suit

281. *What is the Cost of Run-Away Production?*, *supra* note 2, at 15 (citing *Hollywood Reporter*).

282. *Id*.

283. CFTPA *Profile 2006 Report* at 39, 55.

284. *Id*. at 9-10. The CFTPA *Profile 2006* Report states that total foreign location production in Canada decreased 23% in 2004. Specifically, foreign location production for feature films decreased from $US 830 million to $US 606 million. *See supra* Exhibit 1. The Department of Canadian Heritage stated "a U.S. reaction against so called 'runaway' production and the implementation of competitive state incentives" contributed to a decline in foreign location production between 2002-03 and 2003-04. In addition, its report noted "increased global competition" factored into the decreased production. Department of Canadian Heritage, *Study of the Decline of Foreign Location Production in Canada* 1 (March 2005).

285. *What is the Cost of Run-Away Production?*, *supra* note 2, at 15 (citing *Hollywood Reporter)*.

286. *See supra* Part VI, Section D.2.a.(4).(b) (Market Share).

287. The Department of Canadian Heritage reported that in late 2004 and early 2005, several Canadian provinces "increased their respective tax incentives for foreign location production." Department of Canadian Heritage, s*upra* note 284, at 1. Canada estimates such increases in provincial subsidies, added to the federal subsidy, "will help stem the decline experienced recently." *Id*. In an

and increased their PSTC tax benefits in 2005, and Canadian industry experts hope that these even more generous subsidies have at least stated to reverse the decline of Canadian feature film production.[288]

In summary, the feature film production industry in Canada has experienced phenomenal growth since the commencement of the federal PSTC program in 1998, and the U.S. feature film production industry clearly has experienced a significant decline during that same time period. Moreover, the various Canadian governments have been forthright that their PSTC film incentives have been largely responsible for this shift in feature film production activities in North America.[289] Both private industry groups in Canada and the Canadian federal government have explained that the feature film production industry started to decline in Canada in 2004, in part because of a combination of (1) competing film subsidy programs offered by governments in third countries; (2) competing film subsidy programs offered by the federal and state governments in the U.S.; (3) unusual external conditions such as the SARS panic; and (4) an unfavorable exchange rate vis-à-vis the U.S. dollar making production in Canada more expensive.[290]

In light of all of the above, the connection between Canada's PSTC film incentives and the growth of the Canadian feature film production industry through production of U.S.-developed projects is clear. In addition, as most feature films shown in Canada and many other countries are, in fact, U.S.-developed films,[291] it should not be difficult for the U.S. to demonstrate that 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.[292] Accordingly, the

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effort to retain foreign location production, the Canadian federal government raised its own incentive from 11% to 16%. *See*, *e.g.*, Brendan Kelly, *Fear of Flight, Canada Grapples With Its Own Runaway Production,* VARIETY (September 7, 2004), *available at* http://www.variety.com/article/VR1117910185?categoryid=1753&cs=1 (last visited May 7, 2006).

288. Department of Canadian Heritage, *supra* note 287, at 1 (noting current and anticipated levels of foreign location production in provinces for 2005-06 were positive). *See* Appendix B for a summary of the major PSTC film incentive programs in Canada, current as of March 2005.

289. The Canadian film industry has grown substantially due to the tax incentives it provides for foreign location production. *See supra* note 129. Ninety-five percent of Canadian foreign location originates from the United States. *See*, *e.g.*, 2003-04 CAVCO ACTIVITY REPORT: ACTIVITIES AND PROGRAMS ADMINISTERED BY CAVCO FOR THE PERIOD APRIL 1, 2003 TO MARCH 31, 2004, 16 (2004).

290. Department of Canadian Heritage, *supra* note 287, at 1 (explaining contributing factors for loss of total foreign location production, including television and feature film production); *see* CFTPA *Profile 2006* Report, at 55 (showing sudden loss in feature film foreign location production).

291. *See supra* note 275.

292. The "imports" referred to in Articles 6.3(a) and (b) of the SCM Agreement must refer to products produced in the complaining WTO Member, rather than simply products of any origin ex-

U.S. should be able to establish that its own feature film production industry has been "seriously prejudiced" on the basis of the adverse effects set out in paragraphs (a) and (b) of Article 6.3 of the SCM Agreement, as set forth above.

In addition, as has been discussed at length above, the PSTC film subsidies have, in fact, caused significant suppression of the production costs (prices) of feature films produced in the U.S. so that they can compete with the U.S.-developed feature films that are produced in Canada with the benefit of the PSTC incentives. Thus, the U.S. also should be able to establish serious prejudice on the basis of the adverse effect set out in paragraph (c) of Article 6.3 of the SCM Agreement.

Finally, as a feature film is not a "primary product," the serious prejudice test set forth in paragraph (d), above, arguably is irrelevant. Still, it is noteworthy that, as discussed above, Canada's share of the worldwide market for feature films clearly increased during the 1998-2001 period, while the U.S.' share of the worldwide market for feature films decreased during this period.[293] In addition, as just discussed above, this trend appears to have continued, at least through 2003. Accordingly, if paragraph (d) is relevant, the U.S. should also be able to establish serious prejudice to the U.S. feature film production industry based on paragraph (d). Thus, given the combined effects of paragraphs (a) – (d) of Article 6.3 of the SCM Agreement, it appears very likely that the U.S. should prevail on a claim that the Canadian PSTC film incentives are causing, or at the very least, are threatening to cause, serious prejudice to the U.S. feature film production industry.

It is also noteworthy that, when the SCM Agreement first went into effect, the SCM Agreement provided that "the total *ad valorem* subsidization [ ] of a product exceeding 5 per cent[ ] . . . establishes a *presumption* of serious prejudice . . . ."[294] This presumption of serious prejudice based on a 5% *ad valorem* subsidization figure was abolished as of December 31, 1999 pursuant to Article 31 of the SCM Agreement,[295] but it is still useful to attempt to calculate the *ad valorem* subsidization figure in this case to determine whether this 5% subsidization figure is met.

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ported from that country. Again, the WTO Appellate Body in *Indonesia – Autos,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted on July 2, 1998) made clear that the SCM Agreement protects products made in the complaining WTO Member, not companies based in the complaining WTO Member that choose to produce their products outside of that country. *See supra* note 267.

293. *See supra* Part VI, Section D.2.a.(4).(b) (Market Share).

294. SCM Agreement, Article 6.1 (emphasis added.)

295. *See*, *e.g.*, TN/RL/GEN/14, *available at* www.wto.org/docsonline/SearchDocuments/SimpleDocuments (last visited March 10, 2006).

This *ad valorem* subsidization figure is to be calculated " . . . in accordance with Annex IV of the [SCM] Agreement[,][296] which provides, *inter alia*, that:

> 1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.
>
> 2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[297]
>
> 3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of *that* product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.
>
> . . .
>
> 6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated . . . . [298]

As discussed above, the Canadian PSTC film subsidies are based on a percentage of "qualifying labor costs" incurred in Canada during the production of a film. Hence, as the subsidies are tied to the production of a given product - a film – Annex IV of the SCM Agreement indicates that the "value of the product" for each relevant company should be cal-

296. SCM Agreement, Article 6, n. 14.

297. In the case of tax-related subsidies, the value of the product is to be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned. Annex IV, paragraph 2; SCM Agreement, n. 64. Given the reference to a "fiscal year," this particular provision appears to refer to an income tax-related subsidy. *Id.* As stated, in the case of the Canadian PSTC film subsidies, the tax credits are technically earned by Canadian film companies when the companies produce the films in question and utilize Canadian labor in the films. However, some or all of the funds are provided to the film companies at or near the commencement of filming. Hence, it makes more sense to calculate the 5% subsidization rate in accordance with each recipient firm's "sales" of the product in the most recent 12-month period for which sales data is available.

298. SCM Agreement, Annex IV, paras 1-3, 6.

culated, as set forth in paragraph 3, above. This paragraph, again, provides that the subsidization figure should be calculated in accordance with the total value of that company's "sales of subsidized films" in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted. Reference to the preceding 12-month period of sales in this paragraph is an acknowledgment of the fact that subsidies based on the production or sale of a particular product would in most cases will be granted to recipient firms *following* the production or sale of that product. In other words, it takes into account the time gap between the production/sale of the product and the payment of the corresponding subsidy. As stated above, however, in the case of the PSTC incentives, however, a large portion of the incentive is provided to the film maker prior to or at the commencement of production, with any remaining amount due to the film company provided at the end of production.[299]

Given that the Canada's PSTC film subsidies are directly tied to the production costs of the films produced by each recipient firm, the subsidization figure arguably should be calculated with reference to those production costs, rather than with reference to the "sales" of those films to the companies importing the films into the U.S. This is particularly the case, as it is possible that the phrase "production costs" simply was inadvertently omitted from paragraph 3, above, when both "production" and "sales" were referred to at the beginning of the paragraph.

Moreover, U.S. film companies often establish a separate entity for the production of any feature film, whether it is produced in the U.S. or Canada.[300] The copyright to the film usually is not transferred to the Canadian entity, and accordingly the Canadian entity generally does not make a profit by "selling" the film itself to the U.S. copyright owner.[301] The Canadian entity is simply paid a processing fee, and at the conclusion of production, the separate corporate entity established for the film generally is abolished.[302] In any case, it would also be exceedingly difficult to derive an arm's length price for a U.S.-developed film produced in Canada, as the finances of U.S. film companies are notorious for being shrouded in mystery and all but impossible to decipher.[303]

299. *See supra* note 78, at 13-19 (discussing Canada Revenue Agency's processing of PSTC claims).

300. *See*, *e.g*., Jean Ross, *BudgetBbrief*, *California Budget Project* 3 (August 2005), *available at* http://www.cbp.org/2005/0508_bbmoviecredits.pdf. (last visited May 7, 2006).

301. *Id*.

302. *Id*.

303. *See*, *e.g*, Pierce O' Donnell, Dennis McDougal, *Fatal Subtraction: The Inside Story of Buchwald v. Paramount,* Audio Literature (2d ed., June 1996) (an inside review of movie industry finances detailing humorist Art Buchwald's and partner Alain Bernheim's lawsuit against Para-

For all of these reasons, it makes sense to calculate the subsidization figure with respect to production costs, rather than sales revenues. Furthermore, it should not be difficult for the U.S. to establish that the total subsidization of each subsidized film shot in Canada is quite significant and certainly totals more than 5% of the production costs, in at least the great majority of cases.

To begin with, it is clear from the face of both the federal and provincial PSTC laws that each such government is prepared to provide subsidies amounting to substantially more than 5% of the production costs of each film. Again, at the present time, the federal government provides a tax credit equal to 16% of the qualifying labor costs incurred in Canada and it does not impose any upper limit on the percentage of production costs that it will reimburse. The provincial governments provide additional subsidies of between 18% and 50% of qualifying labor costs, and while some of the provincial governments do have an upper limit on the percentage of production costs that can be reimbursed, the lowest such maximum is 15% of production costs enforced by the Province of Prince Edward Island.[304] Therefore, it is certainly possible for the subsidies provided with respect to any film to total significantly more than 5% of the production costs incurred in Canada.

Furthermore, as discussed above, both the federal and provincial governments in Canada advertise that their combined PSTC subsidies will cover a significantly higher percentage of the production costs of a film,[305] and numerous articles and studies have reported that the PSTC subsidies constitute between 7% and 15% of the production costs of a film shot in Canada.[306] CAVCO, for example, indicates that qualifying labor costs are approximately 50% of a typical budget associated with a PSTC film presented for CAVCO approval, and thus, according to

mount Pictures based on Paramount's refusal to pay them any proceeds from the movie *Coming to America* (starring Eddie Murphy) on the basis that the box office blockbuster allegedly had failed to make any profit).

304. *See* Appendix B.

305. *See*, *e.g.*, CANADIAN AUDIO-VISUAL CERTIFICATION OFFICE (CAVCO) , *Film or Video Production Services Tax Credit (PSTC)*, *available at* http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm (August 02, 2004) (last visited March 28, 2006); British Colombia Film Commission, *Tax Credits*, *available at* http://www.bcfilmcommission.com/finance (last visited March 28, 2006).

306. *See*, *e.g.*, The Center for Entertainment Industry Data and Research, *The Migration Of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report, supra* note 203, at 10; Department of Information Technology and the Arts (DCITA), *Final Destination: A Comparison of Film Tax Incentives in Australia and Canada* 2-4 (June 2003), *available at* www.dcita.gov.au/home/publications (last visited May, 2006); U.S. DEPARTMENT OF COMMERCE, *supra* note 5, at 19; Directors Guild of America, *Runaway Production Update – October 2004* (October 2004), *available at* http://www.dga.org/thedga/leg_rp_updte-101104-a.php3 (last visited May 7, 2006).

CAVCO, the federal PSTC subsidy prior to 2003 alone would have been equal to 11% of 50%, or 5.55% of total production costs, and the federal PSTC subsidy alone after 2003 would have been equal to 16% of 50% , or 8% of total production costs.[307] Also, movie house executives at both the major and the independent studios have justified their outsourcing of film production to Canada by pointing to the substantial percentage of production costs covered by the PSTC subsidies.[308]

Most important, application of a simple mathematical formula makes clear that the 5% subsidization figure is almost certainly met with respect to any U.S.-developed, subsidized feature film produced in Canada. This calculation is based on the fact that labor costs – funds spent on the wages and salaries of those working to produce the film - constitute approximately 50% of the production costs of a film.[309] Also, below-the-line labor costs[310] – those labor costs that tend to move to another country – typically constitute 60% of the total labor costs on a film.[311] Consequently, it is reasonable to assume that approximately 30% of the budget of a feature film is comprised of below-the-line or "qualifying labor costs" (60% multiplied by 50%). Finally, today, as discussed above, the lowest combined federal and provincial subsidy rate is 34% (16% on the federal level plus 18% on the provincial level for British Colombia and Ontario[312] of "qualifying labor expenses" (those labor expenses incurred in Canada)).

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307. *See*, *e.g.*, 2003-04 CAVCO ACTIVITY REPORT: ACTIVITIES AND PROGRAMS ADMINISTERED BY CAVCO FOR THE PERIOD APRIL 1, 2003 TO MARCH 31, 2004, *supra* note 72, at 5-6.

308. *See*, *e.g.*, FTAC Letter, *supra* note 2, at 17 (reporting the comment "It's all about money," allegedly made by Avi Lerner, co-chairman of Nu Image, at a June 17, 2004 meeting in Beverly Hills, in explaining why Nu Image was planning to shoot only two of its 12 features in 2004 in the U.S.).

309. U.S. DEPARTMENT OF COMMERCE, *supra* note 5, at 72, *available at* http://www.ftac.org/html/2a-dgasag.html (last visited May 5, 2006) (assuming that qualifying labor expenditures in Canada total approximately 50% of production costs); 2003-04 CAVCO ACTIVITY REPORT: ACTIVITIES AND PROGRAMS ADMINISTERED BY CAVCO FOR THE PERIOD APRIL 1, 2003 TO MARCH 31, 2004, *supra* note 73, at 5-6 (indicating that approximately 50% of budgets presented for CAVCO approval consist of qualifying labor costs.)

310. The Monitor Company, *supra* note 5, at 28 (citing John W. Cones, Film Finance and Distribution: A Dictionary of Terms).

> Below-the-line [labor costs are] . . . [f]ilm budget items relating to the technical expenses and labor . . . involved in producing a film, i.e., relating to mechanical, crew, extras, art, sets, camera, electrical, wardrobe, transportation, raw film stock, printing, and post-production . . . The phrase "below-the-line" refers to the location of the specific expense items/person on the budget.

Id.

311. Department of Information Technology and the Arts (DCITA), *supra* note 306, at 4 (Approximately 60% of a film's budget is attributable to below-the-line costs).

312. *See* Appendix B.

Hence, without even investigating individual film costs, one would expect to find that at least 10.2% (34% of 30%) of the production costs of a U.S.-developed film produced in Canada today is subsidized by the applicable Canadian governments. For all of the above reasons, it appears very likely that the 5% subsidization figure is met, if production costs are used in the calculation of the 5% subsidization figure.

In conclusion, then, the U.S. should be able to establish that Canada's PSTC film subsidies are causing material injury or a threat thereof, as well as serious prejudice or a threat thereof, to the U.S. feature film production industry. Accordingly, the U.S. should be able to establish that Canada's PSTC film incentives constitute actionable subsidies provided to a specific industry that are causing adverse effects to the interests of the U.S. and hence they are not in compliance with Canada's obligations under the SCM Agreement.

VII. Remedies, Obstacles, and Recommendations

As is discussed above in Section VI, the evidence demonstrates that Canada's PSTC film incentives are inconsistent with its obligations under the SCM Agreement, because they cause adverse effects to the feature film production industry in the U.S. For this same reason, the U.S. Government could impose countervailing tariffs on the subsidized films when they enter the U.S., in accordance with 701 of the Tariff Act of 1930, as amended.[313] This section of the Tariff Act of 1930, as amended, is referred to as "Section 701." Hence, U.S. interested parties could both request the Office of the U.S. Trade Representative (the USTR) to have the U.S. initiate a dispute resolution proceeding in the WTO as well as file a countervailing duty petition with the U.S. Department of Commerce under Section 701 (referred to as a "Section701 petition"). Furthermore, a domestic interested party could file a petition under Section 301 of the Trade Act of 1974[314] with the USTR as a method of prompting the U.S. Government to initiate a WTO dispute resolution proceeding against Canada. Such a petition is referred to as a "Section 301 petition," and this section of the Trade Act of 1974 is referred to as "Section 301." Each of these three remedies will be discussed in turn, below. Then, various obstacles facing interested parties in successfully pursuing these remedies are discussed. Finally, recommendations on how domestic interested parties may best proceed to challenge these subsidies are provided.

313. 19 U.S.C. § 1671 (2005).
314. 19 U.S.C. § 2411(a) (2005).

A. Remedies

1. Initiate a WTO Proceeding

Interested parties in the U.S., in particular those feature film workers who have been harmed by the Canadian PSTC film subsidies, could request that the USTR initiate a proceeding against Canada under the dispute settlement mechanism of the WTO, including the special dispute settlement procedures set forth in the SCM Agreement.[315] Such a request need not follow any particular format, but the U.S. Government, in response to such a request, has complete discretion as to whether to pursue a dispute proceeding against another country in the WTO.[316] The USTR is not even obligated to respond in any fashion to such a request. In fact, it is not unusual for such a request filed by domestic interested parties to languish at the USTR for several years.[317] The USTR might also be especially tempted in this case to ignore such a request, as the powerful MPAA appears to oppose any challenge to the subsidies.[318] The USTR can self-initiate a dispute proceeding in the WTO.[319]

315. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (Apr. 5, 1994) (detailing the dispute over settlement procedures of the WTO). Additional dispute settlement procedures applicable to a WTO member's subsidy program that allegedly is inconsistent with the SCM Agreement on the ground that it adversely affects the interests of another WTO Member are found in the SCM Agreement, *supra* note 19, Article 7.

316. Uruguay Round Agreements Act, Public Law 103-465, December 8, 1994, Section 102(c)(1)(A) (providing that only the United States has a cause of action or a defense under any of the Uruguay Round Agreements).

317. *See*, *e.g.*, *USTR's Zoellick Says WTO Biotech Case Aims to Quell Fears*, International Information Programs (May 13, 2003) (U.S. biotech industry waited many years for the U.S. bring a case in the WTO against the EU challenging the EU's moratorium on the importation of biotech foods into the EU, as U.S. Trade Representative Robert Zoellick acknowledged when the U.S. finally brought a case in 2003. At that time, he stated that "after nearly five years the United States is finally acting to challenge in the World Trade Organization (WTO) the European Union (EU) moratorium on food derived from biotechnology because harm from the EU stalling has begun to spread globally"), *available at* http://usinfo.state.gov/ei/Archive/2003/Dec/31-726528.html (last visited May 2, 2006).

318. *See*, *e.g.*, MPAA's Motion to Dismiss Petition for the Imposition of Countervailing Duties Pursuant to § 701 of the Tariff Act of 1930, as Amended (2001); Staff report to Mary J. Alford, City Manager, Burbank, California, Runaway Production – *Consideration of the Film and Television Action Committee Resolution* (March 15, 2005) (reviewing reasons for the MPAA's opposition to Burbank City Council's resolution in favor of Section 301 petition), *available at* http://www.ci.burbank.ca.us/agendas/ag_council/2005/sr031505_5.html (last visited May 7, 2006).

319. 19 U.S.C. § 2412(b) (2005).

2. File a Section 301 Petition

Interested parties in the U.S., in particular those feature film workers who have been harmed by Canada's PSTC film subsidies, could also file a Section 301 petition with the USTR.[320] The USTR can self-initiate a Section 301 action,[321] but, in practice, the USTR rarely does so. There are two subparts of Section 301 that are relevant – Subpart (A) and Subpart (B). Each of these subparts is discussed separately.

a. Section 301(A)

Section 301(A) provides a method for the USTR to identify unfair trade practices harming U.S. producers and request reform of those practices by the responsible foreign governments, backed up by the threat of sanctions.[322] Under Section 301(A), the USTR would determine whether an act, policy, or practice of a foreign country: (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the U.S. under, any trade agreement, or (ii) is unjustifiable and burdens or restricts U.S. commerce.[323] In the instant case, the petitioners would allege that Canada's PSTC film subsidies are inconsistent with Canada's obligations under the SCM Agreement because the subsidies adversely affect the U.S. feature film production industry.[324]

After a Section 301 petition is filed, the USTR is required to decide within 45 days whether to "initiate an investigation."[325] Hence, the main advantage of a Section 301(A) action is that it would force the USTR to take some action regarding Canada's PSTC film subsidies. However, it is important to point out that the USTR still could decide not to initiate an investigation of Canada's PSTC film subsidies.[326]

Technically, reasonably tight time limits apply for the completion of Section 301 investigations.[327] Today, however, the USTR must extend the deadlines for every Section 301 investigation, because the U.S. has agreed to suspend any investigation initiated under Section 301 until the completion of a WTO dispute proceeding on the same issue. Specifically, in the WTO Panel on *U.S. – Sections 301-310 of the Trade Act*

320. 19 U.S.C. § 2412(a)(1) (2005).

321. 19 U.S.C. § 2412(b)(1) (2005).

322. *See* 19 U.S.C. § 2411 (2005).

323. 19 U.S.C. §§ 2412(a)(1)(B)(i), (ii) (2005).

324. *See supra* Part VI, Section D.2.(Canada's PSTC Film Incentives Clearly Appear to be Causing Adverse Effects to the U.S. Feature Film Industry).

325. 19 U.S.C. § 2412(a)(2) (2005).

326. 19 U.S.C. § 2412(a)(3) (2005).

327. 19 U.S.C. § 2412(a)(4) (2005).

of 1974,[328] the U.S. asserted that its Statement of Administrative Action (the SAA) accompanying passage of the Uruguay Round Agreements Act[329] had clarified that the U.S. would not conduct a Section 301 investigation in such a manner as to unilaterally determine whether another country is violating a WTO Agreement such as the SCM Agreement.[330] Based on this assertion, the Panel in this case approved Section 301 actions as being consistent with the WTO dispute resolution scheme.[331]

Hence, if the USTR did agree to initiate a Section 301 investigation of Canada's PSTC film subsidies, it would then hold its investigation in abeyance, initiate a dispute resolution proceeding against Canada in the WTO, and then finally conclude its own investigation based on the WTO decision. In essence, therefore, a Section 301(A) petition today is simply a method of forcing the USTR to consider initiating a dispute proceeding against another country in the WTO.

b. Section 301(B)

Interested parties in the U.S., in particular the feature film workers who have been harmed by Canada's PSTC film subsidies, could also file a Section 301(B) petition with the USTR.[332] In such a case, these parties would be asking that the USTR investigate whether "an act, policy, or practice of a country is unreasonable or discriminatory and burdens or restricts United States commerce."[333] The USTR in such a case would also have to decide whether action to correct the foreign practice would be appropriate and feasible.[334]

Under Section 301(B), however, the USTR possesses even broader discretion regarding whether to initiate an investigation and impose sanctions against foreign countries.[335] Therefore, domestic interested parties are more likely to obtain relief via a Section 301(A) petition than a Section 301(B) petition.

3. File a Section 701 Petition

Lastly, interested parties in the U.S., in particular the feature film workers who have been harmed by Canada's PSTC film subsidies, could

328. United States – Sections 301-310 of the Trade Act of 1974, WT/DS/152/R, adopted on December 22, 1999.

329. Public Law 103-465, December 8, 1994.

330. *See* International Information Programs *supra* note 317, at para. 4.539.

331. *Id*. at VIII (Conclusions).

332. 19 U.S.C. § 2412(a)(1) (2005).

333. 19 U.S.C. § 2411(b)(1) (2005).

334. 19 U.S.C. § 2411(b)(2) (2005).

335. *See id.*

file a petition with the International Trade Administration of the U.S. Department of Commerce (the DOC) requesting that it initiate an investigation into whether countervailing duties should be imposed on the imports of subsidized feature films into the U.S.[336] Again, such actions are brought under Section 701.[337] In such a case, the International Trade Commission (the ITC) would first conduct a preliminary injury investigation into whether the PSTC film subsidies are materially injuring the U.S. feature film production industry.[338] If the ITC's preliminary injury investigation results in a positive determination, then the DOC would conduct a preliminary subsidy investigation to determine if the subsidies are actionable.[339] Next, assuming that the DOC's investigation results in a positive determination, the DOC would proceed to conduct the final subsidy investigation, and then finally the ITC would conduct the final injury investigation.[340] However, the U.S. has no power to order Canada to abolish the subsidies at the conclusion of a Section 701 duty proceeding. Rather, the U.S. would calculate and impose a proper tariff rate to counter the subsidies received by each Canadian film maker exporting feature films to the U.S.

In a petition requesting a countervailing investigation, the domestic interested parties would have to demonstrate to the DOC that at least 25% of the employees in the industry support the filing of the petition.[341] This issue of standing arose in 2001, when FTAC and several film industry unions filed a Section 701 petition with the DOC.[342] Predictably, the MPAA opposed FTAC's petition, based in part on this issue of standing, arguing that the petitioners had shown that only 23.5% of film workers in the U.S. supported the filing of such a petition at that time.[343] The petitioners then withdrew their countervailing duty petition and they have not refiled it since. Still, workers in the U.S. film industry clearly seem to support the imposition of some type of trade sanction against countries that provide illegal film subsidies.[344]

336. 19 U.S.C. § 1671a(b) (2005).

337. 19 U.S.C. § 1671 (2005).

338. 19 U.S.C. § 1671b(a)(1)(A)(i) (2005).

339. *See* 19 U.S.C. § 1671b(b) (2005).

340. *See* 19 U.S.C. § 1671d (2005).

341. 19 U.S.C. § 1671a(c)(4)(A)(i) (2005).

342. MPAA's *Motion to Dismiss Petition for the Imposition of Countervailing Duties Pursuant to § 701 of the Tariff Act of 1930, As Amended* (2001).

343. *Id*.

344. *See supra* note 16 (Author's interview with FTAC members Gene Warren, Tim McHugh, and Ann Champion, Burbank, California, (July 9, 2005)); *see also* FTAC's website, *available at* http://www.ftac.org/html/support.html (last visited May 11, 2006), which lists the various entertainment trade unions that support trade sanctions against Canada with respect to its film subsidies.

It appears that the issue of standing could be overcome and a Section 701 petition could be successfully filed. In addition to the issue of standing in Section 701 cases, however, countervailing investigations often take several years to conclude. Furthermore, even assuming that countervailing duties would be warranted, the imposition of such duties on the importation of Canadian-origin feature films into the U.S. may be counterproductive in the long run. This is the case, because if a countervailing tariff were imposed, the Canadian governments could simply respond by granting even more generous subsidies, which Canadian Government spokespersons appear willing to consider.[345] While yet another countervailing investigation could then be initiated and further countervailing tariffs imposed, this could simply result in yet another escalation in the PSTC subsidy rates. In other words, there is the strong possibility that this remedy would accomplish nothing more than another subsidy spiral. At the same time, the imposition of countervailing duties on feature film exports to the U.S. could cause Canada to abolish the PSTC film incentives or at least make them less generous.

Finally, it would be difficult to assess the countervailing duties on the importation of feature films from Canada. The countervailing duty rate for each film would be extremely high, and there would be a great outcry from the MPAA, with the MPAA most likely claiming it would have to raise movie ticket prices as a result of the imposition of such a high tariff. Also, such a high tariff would lead to significant attempts by U.S. importers to circumvent the tariff, for example by electronically transmitting more films to the U.S., as such transmissions today generally are not considered importations[346] and furthermore are difficult to trace. All in all, the practical hurdles to establishing and collecting a countervailing tariff are formidable.

B. Obstacles

1. MPAA Opposition

The MPAA argues that Canada's PSTC film subsidies are consistent with Canada's obligations under the SCM Agreement, and that, in any case, it would be counterproductive for the U.S. to challenge the

345. *See FTAC Letter*, *supra* note 2, at 12 (citing Canadian Film and Television Production Association, *Profile 2003: An Economic Report on the Canadian Film and Television Production Industry; Risky Business: Canadian Producers in the Global Economy* 8 (2003), *available at* http://www.cftpa.ca/newsroom/pdf_profile/profile2003-english.pdf (last visited May 7, 2006).

346. *See supra* notes 163, 167.

subsidies.[347] The MPAA's most commonly voiced argument in this regard is that the producers constitute the "movie industry," and the shareholders of the producers are not adversely affected by the subsidies.[348] Surely, though, as indicated above, corporate shareholders are only one component of any particular industry in a country, especially as the economic well-being of the shareholders is not necessarily consistent with the economic well-being of other components of a national industry, such as the workers in that industry. In fact, the WTO Panel in *Indonesia – Certain Measures Affecting the Automobile Industry,*[349] ruled that the WTO laws protect national *products* rather than national *companies,* and thus the SCM Agreement did not protect the U.S. in that case because no producers of *U.S.-origin* automobiles were being harmed by Indonesia's automobile subsidy program.[350] This decision provides strong support for the conclusion that, under the SCM Agreement, the shareholders in an industry, at most, should be treated as only one component of a domestic industry. That the SCM Agreement is intended to protect much more than just industry shareholders is also demonstrated by the long list of factors which Article 15.4 of the SCM Agreement states should be considered on the issue of whether the domestic industry producing a "like product" in a complaining WTO Member is being materially injured by foreign subsidies.[351] Again, if company profits were the only relevant factor, the WTO Members need not have included any of the other factors listed in Article 15.4 of the SCM Agreement.[352]

Furthermore, the MPAA could argue that a film is a "service" rather than a "good" and thus claim that neither the SCM Agreement nor U.S. countervailing duty law applies to Canada's PSTC film subsidies.[353] On the other hand, as discussed above, the MPAA has argued at various times that a film is a "good" for tax purposes.[354] The MPAA members, of course, also routinely copyright their films, and a movie

347. *See*, *e.g.*, Staff report to Mary J. Alford, City Manager, Burbank, California, *Runaway Production – Consideration of the Film and Television Action Committee Resolution* (March 15, 2005), *available at* http://www.ci.burbank.ca.us/agendas/ag_council/2005/sr031505_5.html (last visited May 9, 2006) (reviewing reasons for the MPAA's opposition to Burbank City Council's resolution in favor of Section 301 petition).

348. *See*, *e.g.*, MPAA's *Motion to Dismiss Petition for the Imposition of Countervailing Duties Pursuant to §701 of the Tariff Act of 1930, As Amended* (2001).

349. *Indonesia – Autos, supra* note 179.

350. *Id*. at paras. 14.198 - 14.201.

351. These factors include economic indicators such as the utilization of capacity, product prices, wages, employment, and investment in the industry in the complaining member. SCM Agreement, *supra* note 18, at Part V, Article 15.4.

352. *Id*.

353. *See supra* Part VI, Section B (Canada's PSTC Film Incentives are Provided in Connection with the Manufacture, Production or Export of Goods – Namely, Feature Films).

354. *See supra* note 160.

can be copyrighted in the first place only if it is capable of being manifested in some physical form.[355] The MPAA has even succeeded in getting the USTR to initiate a Section 301(C) action known as a "Special 301 action" against foreign countries that allow their nationals to download copies of the MPAA's movies via the internet, thereby allegedly infringing their copyrighted movies.[356] If a movie is only a service, it is difficult to comprehend how it can be copied.

In light of all of the above, the MPAA's support for Canada's PSTC film subsidies is more likely explained by the fact that these subsidies are extremely financially rewarding for the MPAA members.[357] Accordingly, the MPAA members and other U.S. film makers can be expected to continue to take advantage of these subsidies and continue to outsource feature film production to other countries, if they are permitted to do so.

2. Lack of International Alliance of Theatrical Stage Employees (IATSE) Leadership Support

The leadership of one of the entertainment industry labor unions, the International Alliance of Theatrical Stage Employees (IATSE), currently does not support a legal challenge to Canada's PSTC film subsidies.[358] This is the case, even though many IATSE members themselves do support such a challenge.[359] The leadership of the IATSE maintains that IATSE is an international union,[360] and, for this reason, the leadership supports IATSE members in Canada who are benefiting from the new film industry jobs in Canada. Therefore, the IATSE leadership explains, it doesn't oppose Canada's PSTC film subsidies. It is possible, however, that the reason that the IATSE leadership does not oppose for-

355. 17 U.S.C. § 102(a) (2005).

356. *See*, *e.g.*, http://www.ftac.orghtml/impact.php (last visited May 7, 2006). Similarly, the studios' recent triumph in the U.S. Supreme Court case of *Metro-Goldwyn-Mayer Studios, Inc. v. Groktster, Ltd*., 125 S. Ct. 2764 (2005), is based on the premise that one's electronic copying of a song via the internet constitutes copyright infringement.

357. *See* MPAA, Members Page, *available at* http://www.mpaa.org/AboutUsMembers.asp (listing members as Buena Vista Pictures Distribution, Sony Pictures Entertainment Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corp., Twentieth Century Fox Film Corp., Universal City Studios LLLP, and Warner Bros. Entertainment Inc) (last visited March 10, 2006).

358. IATSE, Made in USA, *available at* http://www.iatse.org/indexold.html (unofficial site noting that official position is "members of our union are not being harmed" by runaway productions) (last visited November. 6, 2005).

359. *Id; see also* http://www.ftac.org/html/support.html (listing the various IATSE locals and other entertainment trade unions that support trade sanctions against Canada with respect to its film subsidies) (last visited May 5, 2006) .

360. IATSE National, Welcome to IATSE, http://www.iatse-intl.org/about/welcome.html (last visited November 6, 2005).

eign film subsidies is that IATSE makes more money through the payment of the initial dues paid by a new Canadian member of IATSE than through the payment of on-going dues from a long-time U.S. member.[361]

While most large unions, like IATSE, have international alliances with their fellow members in other countries, it is extremely unusual for the leadership of a union in the U.S. to actually *support* the outsourcing of a U.S. industry which is putting its own U.S. members out of work. Moreover, as a union is supposed to be a democratic institution and thus is supposed to represent the interests of its members, one could argue that the failure of the IATSE leadership in the U.S. to represent its members' interests can be ignored and what matters is the fact that individual IATSE members support a challenge to Canada's PSTC film subsidies. This is especially the case, as a number of other entertainment industry labor unions have endorsed a U.S. challenge to the PSTC film incentives.[362] Given that the U.S. Government is not required to pursue a legal challenge to the PSTC film incentives, however, the failure of the IATSE leadership to support such a challenge is a not insignificant obstacle to such a challenge.

3. Recent Data on the U.S. Feature Film Industry

During the last few years, neither U.S. government agencies nor U.S. private entities have published comprehensive data on the state of the entire U.S. feature film production industry. Various Canadian entities have published annual figures on the growth of the Canadian feature film production industry and the concomitant decline of the U.S. feature film production industry, and these figures have been presented in this article.[363] Interested parties in the U.S., however, should not rely solely on data published in Canada to support their legal challenge to Canada's PSTC film subsidies.

In the spring of 2006, the Center for Entertainment Industry Data Reports (CEIDR) commenced work on a thorough review of the entire U.S. film industry through 2005.[364] This report should be publicly available soon,[365] and it is possible that it will provide much of the data that is needed for a legal challenge to Canada's PSTC film subsidies.

361. *See*, *e.g*., posting by "Charles," *Addressing Union Problems* (July 7, 1999). "I'm sure that the recent [IATSE] layoffs put a crimp into the lucrative aspect of new members and the revenues that initiation fees and new membership dues generate." *Id.*, *available at* www.animationnation.com/wwwboard/messages/514.html (last visited May 7, 2006).

362. *See supra* note 356.

363. *See supra* Part VI, Section D.2 (Canada's PSTC Film Incentives Clearly Appear to be Causing Adverse Effects to the U.S. Feature Film Industry).

364. *See supra* note 275.

365. *Id*.

C. Recommendations

1. Compile Recent Data on Adverse Effects to U.S. Feature Film Production Industry

As the U.S. Government has the discretion not to pursue a legal challenge to Canada's PSTC film incentives, it is very important that interested parties in the U.S. present a very compelling case demonstrating the adverse effects that the subsidies are causing to the U.S. feature film production industry. The data presented in this article, much of which was published by Canadian private and government agencies, document such adverse effects. However, the most up-to-date data available in both Canada and the U.S. on these adverse effects to the U.S. feature film industry should be compiled and summarized in order to prepare the strongest possible legal challenge to the PSTC film incentives. Again, the report published by CEIDR and covering the period through 2005 may provide much, if not all, of this data.

2. Document Union Support, Particularly from IATSE, for a Legal Challenge to the PSTC Film Incentives

As stated above, the leadership of IATSE, one of the entertainment labor unions, does not support a legal challenge to the PSTC film incentives.[366] While the U.S. Government might initiate a legal challenge to the incentives without the MPAA's support, there is a significant chance that it would not do so if IATSE, in addition to the MPAA, opposes a legal challenge to the incentives.

Therefore, if rank and file IATSE members do indeed support a legal challenge to the incentives (which, again, appears to be the case and of course is logical), it is recommended that interested parties in the U.S. first attempt to compile proof of these IATSE members' support. This proof should be included with any request filed by interested parties to initiate a legal challenge to the incentives.

3. Prepare Response to MPAA's Opposition

The MPAA most likely will oppose any legal challenge to the PSTC film incentives. The MPAA's main arguments are discussed above.[367] Thus, interested parties in the U.S. should be prepared to pro-

366. *See supra* note 355.
367. *See supra* Part VII, Section B.1 (MPAA Opposition).

vide counterarguments to the MPAA's main arguments. This article has discussed some of the possible counterarguments.[368]

4. File a Section 301(A) Petition

It is recommended that interested parties in the U.S. file a Section 301 petition with the USTR as a method of requesting the initiation of a WTO dispute resolution proceeding challenging the consistency of Canada's PSTC film incentives with the SCM Agreement.[369] This recommendation is based on the fact that the USTR must respond to a Section 301 petition and need not respond to a request for the commencement of a WTO dispute resolution proceeding *per se*.[370] At the present time, FTAC and a group of entertainment unions are planning to file a Section 301(A) petition with the USTR on the issue of Canada's film incentives.[371] They have even been successful in getting several city councils, including the City Councils of Santa Monica, Burbank, West Hollywood, and Glendale to pass a resolution in favor of such a filing.[372]

Unless the USTR declines to initiate an investigation of the PSTC film incentives under Section 301A, it is recommended that interested parties not file a Section 701 countervailing duty petition with the DOC. While a Section 701 petition ultimately might prompt Canada to abolish the PSTC film incentives or at least make them less generous, there are many disadvantages to a Section 701 petition.[373]

VIII. CONCLUSION

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.

368. *Id*.; *see also supra* Part VI, Section B (Canada's PSTC Film Incentives are Provided in Connection with the Manufacture, Production or Export of Goods – namely, Feature Films).

369. This procedure is outlined above. *See supra* Part VII, Section A.2 (File a 301 Petition).

370. 19 U.S.C. § 2412(a)(2) (2005).

371. *See* FTAC's website, *available at* http://www.ftac.org (last visited May 13, 2006); *see also supra* note 16 (Author's interview with FTAC members Gene Warren, Tim McHugh, and Ann Champion, Burbank, California, (July 9, 2005)).

372. *See* Mark R. Madler, *City Backs Production Probe*, BURBANK LEADER (April 30, 2005); Film and Television Action Committee, *FTAC Wins Again*, found at http://www.ftac.org (last visited November 6, 2005); *available at* http://www.weho.org/download/index.cfm?fuseaction=download&cid=3624 (last visited March 22, 2006) (City of West Hollywood City Council meeting agendas, including original agenda for July 18, 2005 meeting); *see also generally*, http://www.ftac.org/html/support.html (last visited May 7, 2006).

373. *See* Part VII, Section A.3 (File a Section 701 Petition).

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. In addition, it likely would be counterproductive for the U.S. Government to either impose countervailing tariffs on imported, subsidized feature films or provide further domestic subsidies to the feature film industry. These latter actions in all likelihood would simply lead other governments to raise their film subsidy rates yet again.

In particular, 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. First, though, interested parties in the U.S should compile up-to-date evidence of the adverse effects that the U.S. feature film production industry is suffering, secure proof of union support, especially IATSE support, for a WTO dispute proceeding, and prepare counterarguments to the MPAA's likely opposition to such a proceeding.

The MPAA's opposition to a legal challenge to the Canadian subsidies should not dissuade interested parties from challenging these subsidies. While film producers benefit financially from the subsidies, the subsidies harm not only current and former industry workers, but also U.S. taxpayers paying the price of maintaining competing federal, state and local film subsidies in the U.S., as well as all U.S. citizens wishing to retain a vibrant U.S. feature film production industry.

During the Uruguay Round of Multilateral Trade Negotiations culminating in the establishment of the WTO in 1995, the U.S. took the position that U.S. workers should focus on providing high-paying services and high technology goods containing intellectual property, and they should leave the production of labor-intensive, low-tech goods to workers in other countries.[374] Accordingly, the U.S. did not push for minimum labor standards in the WTO, which are applicable primarily to the production of low-tech goods. As a result, many U.S. companies have continued to outsource the production of low-tech goods to other countries where lower wage rates prevail. If the U.S. in those negotiations also agreed that high-tech items containing intellectual property, such as feature films and computer software, are services that are not protected by the SCM Agreement and hence other countries can subsidize their production with impunity, the U.S. arguably made a bad bargain during the Uruguay Round.

In summary, Canada and other WTO Members should not be permitted to circumvent the SCM Agreement simply because the share-

374. *See*, *e.g.*, Tad Crawford, *The Copyright Impact of the World Trade Organization*, ALLWORTH PRESS (noting goal of United States was to strengthen copyright protection), *available at* http://www.allworth.com/articles/article01.htm (last visited November 6, 2005).

holders of U.S. movie houses benefit from these countries' unfair trade practices as well. A decision to forego a challenge to the foreign film subsidies in order to satisfy the MPAA would go a long way toward confirming the conviction of the WTO's critics that the WTO rules exist solely to protect the interests of wealthy and powerful corporate shareholders. In contrast, 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 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.

IX. APPENDICES

Appendix A				
U.S. Feature Films Produced in Canada – 2000**				
Year	**Title**	**Production**	**Distributors**	**Budget**
2000	A Rumor of Angels	Motion Picture Corporation of America	Cinetel Films	$17.2M *
2000	American Psycho	Edward R. Pressman Film Corporation	Columbia TriStar Home Entertainment	$8M
2000	Bait	Castle Rock Entertainment	Warner Bros.	$35M
2000	Battlefield Earth	Battlefield Productions LLC	Warner Bros.	$73M
2000	Beautiful Joe	Beautiful Films	Columbia TriStar Home Video	$17.2M *
2000	Best in Show	Castle Rock Entertainment	Warner Bros. Domestic Television	$6M
2000	Bless the Child	Paramount Pictures	Paramount Home Video	$40M
2000	Bonhoeffer: Agent of Grace	NFP Teleart Berlin (I)		$17.2M *
2000	Bruiser	Romero-Grunwald Productions	Lions Gate Films	$5M
2000	Chain of Fools	Bel Air Entertainment	Warner Bros.	$20M

2000	Dracula 2000	Dimension Films	Dimension Films	$28M
2000	Duets	Beacon Communications LLC	Buena Vista Pictures	$15M
2000	Epicenter	PM Entertainment Group Inc.	PM Entertainment Group Inc.	$17.2M *
2000	Fear of Flying	Trimark Pictures	Trimark Pictures	$17.2M *
2000	Final Destination	Hard Eight Pictures	New Line Cinema	$23M
2000	Finding Forrester	Columbia Pictures Corporation	Columbia Pictures	$43M
2000	Frequency	New Line Cinema	New Line Home Video	$31M
2000	Get Carter	Carter Productions LLC	Warner Bros.	$40M
2000	Ginger Snaps	Copper Heart Entertainment	20th Century Fox Home Entertainment	$5M
2000	Gossip	Outlaw Productions	Warner Bros.	$14M
2000	How to Kill Your Neighbor's Dog	Lonsdale Productions	Artistic License	$7.3M
2000	Isn't She Great	Mutual Film Corporation	Universal Home Entertainment	$36M
2000	Lakeboat	Panorama Entertainment	Cowboy Booking International	$17.2M *
2000	Marine Life	Alliance Atlantis Communications	Crescent Releasing Ltd.	$17.2M *
2000	Mercy	Franchise Pictures	Columbia TriStar Home Video	$17.2M *
2000	Mission to Mars	Touchstone Pictures	Buena Vista Pictures	$90M
2000	MVP: Most Valuable Primate	Film Incentive B.C.	Keystone Family Pictures	$17.2M *
2000	My 5 Wives	Blue Rider Pictures	Artisan Entertainment	$17.2M *
2000	No Alibi		Motion International	$17.2M *

2000	Nostradamus	John Aaron Productions	Regent Entertainment	$17.2M *
2000	Reindeer Games	Dimension Films	Buena Vista Home Video (BVHV)	$36M
2000	Romeo Must Die	Silver Pictures	Warner Bros.	$25M
2000	Run the Wild Fields	Showtime Networks Inc.	Hallmark Entertainment	$17.2M *
2000	Scary Movie	Brillstein-Grey Entertainment	Dimension Films	$19M
2000	Screwed	Robert Simonds Productions	Universal Home Entertainment	$10M
2000	Seventeen Again	Showtime Networks Inc.	Showtime Networks Inc.	$17.2M *
2000	Shanghai Noon	Roger Birnbaum Productions	Buena Vista Pictures	$55M
2000	Skipped Parts	Skipped Parts Productions	Trimark Pictures	$17.2M *
2000	Snow Day	Nickelodeon Movies	Paramount Pictures	$13M
2000	Something Between Us			$17.2M *
2000	Steal This Movie	Lakeshore International	Trimark Video	$17.2M *
2000	The 6th Day	Phoenix Pictures	Columbia TriStar Home Video	$82M
2000	The Art of War	Amen Ra Films	Warner Bros.	$40M
2000	The Bone Ripper	Franchise Pictures	Columbia TriStar Home Video	$17.2M *
2000	The Guilty	Dogwood Pictures Inc.	Eagle Pictures S.p.a.	$17.2M *
2000	The Highwayman		Lions Gate Films	$17.2M *
2000	The Ladies Man	SNL Studios	Paramount Pictures	$11M
2000	The Loser	Branti Film Productions	Columbia Pictures	$20M
2000	The Magic of Marciano	Cape Atlantic Productions	Outrider Pictures	$4.5M
2000	The Skulls	Newmarket Capital Group LLC	MCA/Universal Pictures	$15M

2000	The Spreading Ground	Alpine Pictures Inc.	Smooth Pictures	$17.2M *
2000	The Weight of Water	Canal+	Lions Gate Films	$16M
2000	The Whole Nine Yards	Franchise Pictures	Warner Bros.	$24M
2000	Thomas and the Magic Railroad	Destination Films	Destination Films	$19M
2000	Trixie	Pandora Cinema	Columbia TriStar Home Video	$17.2M *
2000	Turn It Up	New Line Cinema	New Line Cinema	$9M
2000	Urban Legends: Final Cut	Original Film	Sony Pictures Entertainment	$15M
2000	Waking the Dead	Gramercy Pictures	USA Entertainment	$8.5M
2000	Where the Money Is	Gramercy Pictures	Universal Pictures	$18M
2000	X-Men	20th Century Fox	Twentieth Century Fox Film Corporation	$75M

2000 Total of Budgets: $1395.5M

*Average budget used for the film in light of missing budget information. The average was compiled using the available budget numbers for the year.

** The feature films listed herein were the result of a search made using information at http://www.IMDB.com. The search parameters were "earliest release between January 2000 and December 2000, and only movies, and USA country and filming locations match 'Canada', and display Production Companies, Distributors, budget, sorted by Title."

Appendix A

U.S. Feature Films produced in Canada - 2001**

Year	Title	Production	Distributors	Budget
2001	3000 Miles to Graceland	3000 Miles Productions	Warner Bros.	$62M
2001	Along Came a Spider	David Brown Productions	Paramount Pictures	$28M
2001	America's Sweethearts	Face Productions	Columbia Pictures	$48M

2001	Angel Eyes	Franchise Pictures	Warner Bros.	$38M
2001	Antitrust	Hyde Park Entertainment	Metro-Goldwyn-Mayer Distributing Corporation	$30M
2001	Blow	Apostle	New Line Cinema	$30M
2001	Blue Hill Avenue	Asiatic Associates	Artisan Entertainment	$1.2M
2001	Bones	Hannah Rachel Production Services.	New Line Cinema	$16M
2001	Camouflage	Camouflage Productions Inc.	Sunland Studios Inc.	$19.4M *
2001	Cats & Dogs	Mad Chance	Warner Bros.	$60M
2001	Chasing Holden	Christopher Eberts Productions	Lions Gate Films Home Entertainment	$19.4M *
2001	Don't Say a Word	Further Films		$50M
2001	Down to Earth	3 Art Entertainment	Paramount Pictures	$30M
2001	Driven	Champs Productions Inc.	Warner Bros.	$72M
2001	Exit Wounds	Silver Pictures	Warner Bros.	$33M
2001	Finder's Fee	MysticArts Pictures	Lions Gate Films	$19.4M *
2001	Focus	Carros Pictures	Paramount Classics	$19.4M *
2001	Freddy Got Fingered	New Regency Pictures	Twentieth Century Fox Film Corporation	$15M
2001	Get Over It	Ignite Entertainment	Miramax Films	$10M
2001	Glitter	20th Century Fox	Twentieth Century Fox Film Corpo-	$22M

			ration	
2001	Harvard Man	Kushner-Locke Company	Cowboy Pictures	$5.5M
2001	Head Over Heels	Universal Pictures	Universal Pictures	$14M
2001	Hedwig and the Angry Inch	Killer Films	Fine Line Features	$6M
2001	Heist	Franchise Pictures	Warner Home Video	$35M
2001	Iris	Mirage Enterprises	Miramax Films	$5.5M
2001	Jason X	Crystal Lake Entertainment Inc.	New Line Cinema	$14M
2001	Jet Boy			$19.4M *
2001	Josie and the Pussycats	Marc Platt Productions	MCA/Universal Pictures	$22M
2001	Kill Me Later	Amazon Film Productions	Lions Gate Films	$19.4M *
2001	Knockaround Guys	Lawrence Bender Productions	New Line Cinema	$19.4M *
2001	L.A.P.D.: To Protect and to Serve	Fries Film Group	Trinity Home Entertainment Inc.	$19.4M *
2001	Little Shop of Erotica		Private Screenings	$19.4M *
2001	MVP 2: Most Vertical Primate	2nd Banana Productions Inc.	Keystone Entertainment	$19.4M *
2001	On the Line	Miramax Films	Miramax Films	$10M
2001	One Eyed King	Cutting Edge Entertainment	Lions Gate Films	$6.5M
2001	Out Cold	Donners' Company	Buena Vista Pictures	$11M
2001	Out of Line	Curb Entertainment	Curb Entertainment	$19.4M *
2001	Picture Claire	Alliance Atlan-	Serendipity	

		tis Motion Picture Production	Point Films	$19.4M *
2001	Prozac Nation	Giv'en Films	Miramax Films	$9M
2001	Rat Race	Alphaville Films	Paramount Pictures	$48M
2001	Replicant	777 Films Corporation	Artisan Entertainment	$17M
2001	Riding in Cars with Boys	Parkway Pictures (I)	Columbia Pictures	$48M
2001	Saving Silverman	Columbia Pictures Corporation	Sony Pictures Entertainment	$22M
2001	Say It Isn't So	20th Century Fox	Twentieth Century Fox Film Corporation	$25M
2001	Scotland, Pa.	Abandon Pictures	Sundance Channel Home Entertainment	$19.4M *
2001	See Spot Run	Robert Simonds Productions	Warner Home Video	$16M
2001	Serendipity	Simon Fields Productions	Miramax Films	$28M
2001	Snowbound	Nomadic Pictures	Buena Vista Pictures	$19.4M *
2001	Spy Game	Beacon Communications LLC	Universal Pictures	$92M
2001	Swordfish	Jonathan Krane Group	Warner Home Video	$80M
2001	Tangled	Ben's Sister Productions	Buena Vista Home Video (BVHV)	$19.4M *
2001	Tart	Interlight	Lions Gate Films	$3.3M
2001	Texas Rangers	Greisman Productions	Dimension Films	$38M

2001	The Bunker	Millennium Pictures	MTI Home Video	$19.4M *
2001	The Caveman's Valentine	Franchise Pictures	MCA/Universal Pictures	$19.4M *
2001	The Pledge	Franchise Pictures	Warner Bros.	$45M
2001	The Proposal	Front Street Productions	Buena Vista Home Video (BVHV)	$19.4M *
2001	The Safety of Objects	Killer Films	IFC Films	$19.4M *
2001	The Score	Eagle Point Production	Paramount Pictures	$68M
2001	The Shipping News	Miramax Films	Miramax Films	$35M
2001	The Ties That Bind	CineSon Entertainment	Universal Studios Home Video	$22M
2001	The Whole Shebang	Original Voices Inc.	2 Match	$19.4M *
2001	Thir13en Ghosts	13 Ghosts Productions Canada Inc.	Warner Bros.	$20M
2001	True Blue	Sandstorm Films	Columbia TriStar Home Video	$19.4M *
2001	Valentine	Cupid Productions Inc.	Warner Bros.	$10M
2001	Viva Las Nowhere	Franchise Pictures	Viva Las Nowhere Productions	$19.4M *
2001	Who Is Cletis Tout?	Itasca Pictures	Paramount Classics	$19.4M *

2001 Total of Budgets: $1747.2M

*Average budget used for the film in light of missing budget information. The average was compiled using the available budget numbers for the year.

** The feature films listed herein were the result of a search made using information at http://www.IMDB.com. The search parameters were "earliest release between January 2001 and December 2001, and only movies, and USA country and filming locations match 'Canada', and display Production Companies, Distributors, budget, sorted by Title."

Appendix A				
U.S. Feature Films produced in Canada - 2002**				
Year	**Title**	**Production**	**Distributors**	**Budget**
2002	40 Days and 40 Nights	Milo Productions	Miramax Films	$17M
2002	Abandon	Bedford Falls Productions	Paramount Pictures	$25M
2002	Ascension	Zuno Films	Canyon Cinema	$500K
2002	Avenging Angelo	Cinema Holdings	Columbia TriStar Home Video	$24.5M *
2002	Ballistic: Ecks vs. Sever	Dante Entertainment	Warner Bros.	$70M
2002	Behind the Red Door	Blue Rider Pictures	DEJ Productions	$24.5M *
2002	Blade II	Amen Ra Films	New Line Cinema	$55M
2002	Cabin Fever	Black Sky Entertainment	Lions Gate Films	$1.5M
2002	Catch Me If You Can	Amblin Entertainment	DreamWorks Distribution LLC	$52M
2002	Cheats	Bender-Spink Inc.	Destination Films	$24.5M *
2002	Chicago	Miramax Films	Miramax Films	$45M
2002	City of Ghosts	Banyan Tree	MGM Home Entertainment	$17.5M
2002	Confessions of a Dangerous Mind	Kushner-Locke Company	Miramax Films	$29M
2002	Cypher	Gaylord Films	Buena Vista Home Video (BVHV)	$7.5M
2002	D-Tox	Capella Interna-	Columbia	$55M

		tional	TriStar Home Entertainment	
2002	Daybreak	Stainless Steel Productions Gullwing Entertainment Inc.		$24.5M *
2002	Death to Smoochy	Mad Chance	Warner Home Video	$55M
2002	Edge of Madness	Lions Gate Films	Lions Gate Films	$24.5M *
2002	Even Steven	A Dreamin' Production		$24.5M *
2002	FeardotCom	ApolloMedia	Warner Bros.	$42M
2002	Federal Protection	Chariot Communications Inc.	DEJ Productions	$24.5M *
2002	Ghost Ship	Dark Castle Entertainment	Warner Bros.	$35M
2002	Halloween: Resurrection	Dimension Films	Buena Vista International	$15M
2002	I Spy	C-2 Pictures	Columbia Pictures	$70M
2002	Insomnia	Alcon Entertainment	Buena Vista International	$46M
2002	Interstate 60: Episodes of the Road	Seven Arts Pictures	Screen Media Films LLC	$7M
2002	John Q	Burg/Koules Productions	New Line Cinema	$36M
2002	Julie Walking Home	Art Oko Film	First Look Home Entertainment	$5M
2002	K-19: The Widowmaker	National Geographic Society	Paramount Pictures	$100M
2002	Life or Something Like It	Davis Entertainment	20th Century Fox Netherlands	$24.5M *
2002	Lone Hero	Home Box Office (HBO)	DEJ Productions	$24.5M *
2002	Minority Report	Amblin Entertainment	Twentieth Century Fox	$102M

			Corporation	
2002	My Big Fat Greek Wedding	Big Wedding	IFC Films	$5M
2002	My Little Eye	Universal Pictures	Focus Features	$24.5M *
2002	Narc	Cruise/Wagner Productions	Cutting Edge Entertainment	$7.5M
2002	National Lampoon's Van Wilder	Myriad Pictures Inc.	Artisan Entertainment	$6M
2002	No Good Deed	Seven Arts Pictures	Columbia TriStar Home Video	$12M
2002	Paid in Full	Dimension Films	Dimension Films	$24.5M *
2002	Pressure	Curb Entertainment	Curb Entertainment	$24.5M *
2002	Resident Evil	New Legacy	Columbia TriStar Home Entertainment	$32M
2002	Rollerball	Atlas Entertainment	MGM Home Entertainment	$70M
2002	Snow Dogs	Galapagos Productions	Buena Vista Pictures	$35M
2002	Stark Raving Mad	A Band Apart	Columbia TriStar Home Entertainment	$5M
2002	The Adventures of Pluto Nash	Castle Rock Entertainment	Warner Bros.	$100M
2002	The Burial Society	Davis Entertainment Filmworks	Regent Releasing	$1.5M
2002	The House Next Door		Trinity Home Entertainment Inc.	$24.5M *
2002	The Mallory Effect	Fire Fly Films		$24.5M *
2002	The Santa Clause 2: The Mrs. Clause	Boxing Cat Films	Buena Vista Pictures	$60M

2002	The Sum of All Fears	Paramount Pictures	Paramount Home Video	$68M
2002	The Tuxedo	Blue Train Productions	DreamWorks Distribution LLC	$60M
2002	They	Focus Features	Dimension Films	$17M
2002	Trapped	Columbia Pictures	Columbia Pictures	$30M
2002	Triggermen	Ballpark Productions Ltd.	Franchise Pictures	$12M
2002	Try Seventeen	Emmett/Furla Films	Try Seventeen Productions Inc.	$24.5M *
2002	Undercover Brother	Imagine Entertainment	Universal Pictures	$25M
2002	Virginia's Run	Holedigger Films Inc.	Virginia's Run Productions Inc.	$24.5M *
2002	WiseGirls	Anthony Esposito	Lions Gate Films Home Entertainment	$11M
2002	Wish You Were Dead	New Line Cinema	Alive & Kicking Productions	$24.5M *
2002	You Stupid Man	ApolloMedia	01 Distribuzione	$24.5M *

2002 Total of Budgets: $1886M

*Average budget used for the film in light of missing budget information. The average was compiled using the available budget numbers for the year.

** The feature films listed herein were the result of a search made using information at http://www.IMDB.com. The search parameters were "earliest release between January 2002 and December 2002, and only movies, and USA country and filming locations match 'Canada', and display Production Companies, Distributors, budget, sorted by Title."

Appendix A				
U.S. Feature Films produced in Canada - 2003**				
Year	**Title**	**Production**	**Distributors**	**Budget**
2003	A Guy Thing	Metro-Goldwyn-Mayer (MGM)	MGM Home Entertainment	$20M
2003	After School Special	Motion Picture Corporation of America	Barely Legal Productions LLC	$24.1M *
2003	Agent Cody Banks	Dylan Sellers Productions	MGM Home Entertainment	$26M
2003	Beyond Borders	Camelot Pictures	Paramount Pictures	$35M
2003	Blizzard	Holedigger Films Inc.	MGM Home Entertainment	$24.1M *
2003	Bulletproof Monk	Flypaper Press	Metro-Goldwyn-Mayer Distributing Corp.	$52M
2003	Cold Creek Manor	Cold Creek Manor Productions	Buena Vista Pictures	$24.1M *
2003	Crime Spree	Hannibal Pictures	DEJ Productions	$10M
2003	Dreamcatcher	Castle Rock Entertainment	Warner Bros.	$68M
2003	Elf	Guy Walks into a Bar Productions	New Line Cinema	$33M
2003	End Game	Cloud Ten Pictures	Cloud Ten Pictures	$24.1M *
2003	Fast Food High	Accent Entertainment Corporation	CCI Entertainment	$4.5M
2003	Final Destination 2	New Line Cinema	New Line Cinema	$26M
2003	Freddy Vs. Jason	Avery Pix	New Line Cinema	$25M
2003	Good Boy!	Jim Henson Pictures	MGM Home Entertainment	$18M
2003	Gothika	Columbia Pictures Corporation	Warner Home Video	$40M

2003	Honey	Marc Platt Productions	Universal Pictures	$17M
2003	Hope Springs	Buena Vista Pictures	Buena Vista Pictures	$24.1M *
2003	House of the Dead	Mindfire Entertainment	Artisan Entertainment	$7M
2003	How to Deal	Focus Features	New Line Cinema	$16M
2003	How to Lose a Guy in 10 Days	Paramount Pictures	Paramount Pictures	$50M
2003	It's All About Love	CoBo Fonds	Strand Releasing	$24.1M *
2003	Levity	Columbia Pictures Corporation	Studio Canal	$7.5M
2003	Lost Junction	Bigel/Mailer Films	MGM Home Entertainment	$24.1M *
2003	My Boss's Daughter	Dimension Films	Buena Vista Home Video (BVHV)	$14M
2003	Open Range	Beacon Pictures	Buena Vista Pictures	$26M
2003	Paycheck	Davis Entertainment	Paramount Home Entertainment	$60M
2003	Rhinoceros Eyes	Directors Program	Madstone Films	$24.1M *
2003	Scary Movie 3	Brad Grey Pictures	Dimension Films	$45M
2003	Shanghai Knights	All Knight Productions LLC	Buena Vista Pictures	$50M
2003	Shattered Glass	Baumgarten Merims Productions	Lions Gate Films	$6M
2003	Spinning Boris	Showtime Networks Inc.	Showtime Networks Inc.	$24.1M *
2003	Stealing Sinatra	Ron Ziskin Productions Inc.	Showtime Networks Inc.	$24.1M *
2003	The Core	Core Prods. Inc.	Paramount Pictures	$74M
2003	The Event	Emotion Pictures	ThinkFilm Inc.	$24.1M *

2003	The Human Stain	Lakeshore Entertainment	Miramax Films	$24.1M *
2003	The In-Laws	Franchise Pictures	Warner Bros.	$24.1M *
2003	The Italian Job	De Line Pictures	Paramount Home Entertainment	$60M
2003	The League of Extraordinary Gentlemen	20th Century Fox	Twentieth Century Fox Film Corporation	$78M
2003	The Lizzie McGuire Movie	Teen Life Productions	Buena Vista Pictures	$17M
2003	The Recruit	Birnbaum/Barber	Buena Vista Pictures	$24.1M *
2003	Timeline	Donners' Company	Paramount Home Video	$80M
2003	Water's Edge	Front Street Productions	Lions Gate Films	$24.1M *
2003	Willard	Hard Eight Pictures	New Line Cinema	$22M
2003	Wrong Turn	DCP Wrong Turn Productions	Twentieth Century Fox Film Corporation	$10M
2003	X2	20th Century Fox	Twentieth Century Fox Film Corporation	$110M

2003 Total of Budgets: $1468.5M

*Average budget used for the film in light of missing budget information. The average was compiled using the available budget numbers for the year.

** The feature films listed herein were the result of a search made using information at http://www.IMDB.com. The search parameters were "earliest release between January 2003 and December 2003, and only movies, and USA country and filming locations match 'Canada', and display Production Companies, Distributors, budget, sorted by Title."

Appendix A

U.S. Feature Films produced in Canada - 2004**

Year	Title	Production	Distributors	Budget
2004	A Different Loyalty	Lions Gate Films	Lions Gate Films	$13M
2004	A Fate Totally Worse Than Death	The Bubble Factory	Universal Home Entertainment	$22.2M *
2004	A Hole in One	Beech Hill Films		$22.2M *
2004	A Home at the End of the World	Hart-Sharp Entertainment	Warner Independent Pictures	$6.5M
2004	Adam & Evil	Extraordinary Films Ltd.	Velocity Home Entertainment	$22.2M *
2004	Against the Ropes	Paramount Pictures	Paramount Pictures	$22.2M *
2004	Blade: Trinity	Marvel Enterprises	New Line Cinema	$65M
2004	Catwoman	DiNovi Pictures	Warner Bros. Pictures Inc.	$85M
2004	Cavedweller	Showtime Networks Inc.	Showtime Networks Inc.	$22.2M *
2004	Cellular	Electric Entertainment	New Line Cinema	$25M
2004	Christmas with the Kranks	1492 Pictures	Columbia Pictures	$60M
2004	Confessions of a Teenage Drama Queen	Confessions Productions	Buena Vista Pictures	$15M
2004	Connie and Carla	Spyglass Entertainment	Universal Pictures	$22.2M *
2004	Dawn of the Dead	New Amsterdam Entertainment Inc.	Universal Pictures	$28M
2004	Day of the Scorpion	Gum Spirits Productions		$1K
2004	Godsend	2929 Productions		$22.2M *
2004	Harold & Kumar	Endgame Enter-	New Line Cin-	$9M

	Go to White Castle	tainment	ema	
2004	Head in the Clouds	Arclight Films	Sony Pictures Classics	$22.2M *
2004	I, Robot	20th Century Fox	Twentieth Century Fox Home Entertainment	$105M
2004	Jersey Girl	Beverly Detroit	Miramax Films	$35M
2004	Mean Girls	Broadway Video	Paramount Pictures	$17M
2004	Miracle	Mayhem Pictures	Buena Vista Pictures	$22.2M *
2004	My Baby's Daddy	Brillstein-Grey Entertainment	Miramax Home Entertainment	$22.2M *
2004	My Brother's Keeper	Little Ricky Productions Inc.		$22.2M *
2004	New York Minute	DiNovi Pictures	Warner Bros.	$30M
2004	Noel	Neverland Films Inc.	Screen Media Films LLC	$22.2M *
2004	Pursued	Andrew Stevens Entertainment Inc.	First Independent Pictures	$22.2M *
2004	Riding the Bullet	Motion Picture Corporation of America (MPCA)	Innovation Film Group (IFG)	$5M
2004	Saved!	Infinity International Entertainment	MGM Home Entertainment	$5M
2004	Scooby Doo 2: Monsters Unleashed	Mosaic Media Group	Warner Bros. Pictures Inc.	$22.2M *
2004	Secret Window	Columbia Pictures Corporation	Columbia Pictures	$40M
2004	See This Movie	Camp Kellner Media	Illuminare Entertainment	$22.2M *
2004	Shall We Dance	Miramax Films		$40M

2004	SuperBabies: Baby Geniuses 2	ApolloMedia	Sony Pictures Home Entertainment	$22.2M *
2004	Taking Lives	Atmosphere Pictures	Warner Bros.	$22.2M *
2004	The Aviator	Appian Way	Miramax Films	$116M
2004	The Butterfly Effect	Bender-Spink Inc.	New Line Cinema	$13M
2004	The Chronicles of Riddick	One Race Productions	Universal Pictures	$110M
2004	The Day After Tomorrow	20th Century Fox	Twentieth Century Fox Film Corporation	$125M
2004	The Karate Dog	Crystal Sky Worldwide	Screen Media Ventures LLC	$22.2M *
2004	The Lazarus Child	Eagle Pictures S.p.a.	Warner Bros.	$22.2M *
2004	The Notebook	Avery Pix	New Line Cinema	$30M
2004	The Perfect Score	MTV Films	Paramount Home Video	$22.2M *
2004	The Prince and Me	Lions Gate Films	Lions Gate Films	$22.2M *
2004	The Terminal	Amblin Entertainment	DreamWorks Distribution LLC	$60M
2004	Vendetta: No Conscience, No Mercy	Shooting Spree Films	Ardustry Home Entertainment LLC	$22.2M *
2004	Walking Tall	Burke/Samples/Foster Productions	MGM Home Entertainment	$56M
2004	We Don't Live Here Anymore	Front Street Productions	Warner Independent Pictures	$3M
2004	Welcome to Mooseport	Mooseport Productions	Fox Film Corporation	$26M
2004	What Lies Above	Shavick Entertainment Inc.		$22.2M *

2004	White Chicks	Gone North Productions Inc.	Columbia Pictures	$22.2M *
2004	Wicker Park	Lakeshore Entertainment	MGM Home Entertainment	$30M

2004 Total of Budgets: $1685.4M

*Average budget used for the film in light of missing budget information. The average was compiled using the available budget numbers for the year.

** The feature films listed herein were the result of a search made using information at http://www.IMDB.com. The search parameters were "earliest release between January 2004 and December 2004, and only movies, and USA country and filming locations match 'Canada', and display Production Companies, Distributors, budget, sorted by Title."

Appendix A

U.S. Feature Films produced in Canada - 2005**

Year	Title	Production	Distributors	Budget
2005	A History of Violence	Bender-Spink Inc.	New Line Cinema	$32M
2005	Alone in the Dark	AITD Productions	Lions Gate Films	$20M
2005	An American Haunting	AfterDark Films	Freestyle Releasing LLC	$14M
2005	An Unfinished Life	Initial Entertainment Group (IEG)	Miramax Films	$30M
2005	Are We There Yet?	Cube Vision	Columbia Pictures	$32M
2005	Assault on Precinct 13	Biscayne Pictures	Rogue Pictures	$20M
2005	Aurora Borealis	entitled entertainment		$14.6M *
2005	Blood + Kisses	Llama Pictures		$500K
2005	Bob the Butler	Bob Productions Ltd.	First Independent Pictures	$14.6M *
2005	Booth	Pony Canyon Enterprises (I)		$14.6M *
2005	Brokeback Mountain	Focus Features	Focus Features	$14M

2005	Cake	First Look Media	Lions Gate Films	$14.6M *
2005	Capote	A-Line Pictures	Sony Pictures Classics	$7M
2005	Chasing Ghosts	The Syndicate	Sony Pictures Home Entertainment	$2M
2005	Cheaper by the Dozen 2	20th Century Fox	Twentieth Century Fox Film Corporation	$14.6M *
2005	Cinderella Man	Imagine Entertainment	Universal Pictures	$88M
2005	Dark Water	Pandemonium Productions	Buena Vista Pictures	$30M
2005	Darkest Hour	Moviehouse Pictures		$300K
2005	Deepwater	Halcyon Entertainment	Deepwater LLC	$14.6M *
2005	Devour	Bigel/Mailer Films	Sony Pictures Home Entertainment	$14.6M *
2005	Edison	Edison Productions Inc.		$25.1M
2005	Elektra	20th Century Fox	Twentieth Century Fox Film Corporation	$43M
2005	Fantastic Four	1492 Pictures	Twentieth Century Fox Film Corporation	$100M
2005	Fever Pitch	ELC Productions Ltd.	Twentieth Century Fox Film Corporation	$39.7M
2005	Fierce People	Industry Entertainment	Lions Gate Films	$14.6M *

2005	Four Brothers	Di Bonaventura Pictures	Paramount Pictures	$40M
2005	Get Rich or Die Tryin'	Cent Productions Inc.	Paramount Pictures	$40M
2005	Herbie: Fully Loaded	Robert Simonds Productions	Buena Vista Pictures	$50M
2005	Ice Princess	Skate Away Productions Ltd.	Buena Vista Pictures	$14.6M *
2005	Insecticidal	Way Below the Line Productions		$14.6M *
2005	It Waits	Centaurus Films		$1.2M
2005	Just Friends	Bender-Spink Inc.	New Line Cinema	$14.6M *
2005	King's Ransom	Alter Ego Entertainment	New Line Cinema	$14.6M *
2005	Land of the Dead	Atmosphere Entertainment MM LLC	Universal Home Entertainment	$15M
2005	Left Behind: World at War	Columbia Pictures Corporation	Columbia Pictures	$4.6M
2005	Mem-o-re	3210 Films		$3.5M
2005	Missing in America	Angel Devil Productions Inc.	First Look Home Entertainment	$14.6M *
2005	Neverwas	Kingsgate Films	Neverwas Productions Inc.	$14.6M *
2005	Pokemon: Destiny Deoxys	4 Kids Entertainment	Miramax Home Entertainment	$14.6M *
2005	Rent	1492 Pictures	Sony Pictures Releasing	$40M
2005	Runt	Joseph A. English Productions		$500K
2005	Santa's Slay	Media 8 Entertainment	Lions Gate Films	$14.6M *
2005	Saw II	Twisted Pictures	Lions Gate Films	$4M
2005	Slow Burn	Bonnie Timmermann Productions	DEJ Productions	$14.6M *

2005	Tamara	Armada Pictures	Lions Gate Films	$4.75M
2005	The Ballad of Jack and Rose	Elevation Film-works	IFC Films	$1.5M
2005	The Big White	Ascendant Pic-tures	Ascendant Pic-tures	$18M
2005	The Deal	Front Street Pro-ductions	Front Street Productions	$14.6M *
2005	The Exorcism of Emily Rose	Firm Films	Screen Gems Inc.	$20M
2005	The Fog	David Foster Pro-ductions	Columbia Pic-tures	$18M
2005	The Greatest Game Ever Played	Fairway Films Ltd.	Buena Vista Pictures	$14.6M *
2005	The Jacket	2929 Productions	Warner Bros. Pictures Inc.	$29M
2005	The Long Week-end	Gold Circle Films	Gold Circle Films	$14.6M *
2005	The Man	New Line Cinema	New Line Cin-ema	$14.6M *
2005	The Pacifier	Spyglass Enter-tainment	Buena Vista Pictures	$56M
2005	The Perfect Man	Marc Platt Pro-ductions	Universal Pic-tures	$10M
2005	The Prize Win-ner of Defiance, Ohio	ImageMovers	DreamWorks SKG	$14.6M *
2005	The Sisterhood of the Traveling Pants	17th Street Pro-ductions	Warner Bros. Pictures Inc.	$25M
2005	Three Bad Men	Iron Horse Enter-tainment	Iron Horse En-tertainment	$650K
2005	Two for the Money	Cosmic Enter-tainment	Universal Pic-tures	$20M
2005	Underclassman	Miramax Films	Miramax Films	$14.6M *
2005	When Hearts Run Wild	Arabella Films LLC		$10M

2005	Where the Truth Lies	Serendipity Point Films	ThinkFilm Inc.	$25M
2005	White Noise	Endgame Entertainment	Universal Pictures	$14.6M *

2005 Total of Budgets: $1284.7M

*Average budget used for the film in light of missing budget information. The average was compiled using the available budget numbers for the year.

** The feature films listed herein were the result of a search made using information at http://www.IMDB.com. The search parameters were "earliest release between January 2005 and December 2005, and only movies, and USA country and filming locations match 'Canada', and display Production Companies, Distributors, budget, sorted by Title." However, these figures may be incomplete, as they were compiled during 2005.

Appendix B

Canadian Provincial Production Incentives

PROVINCE	PSTC	SPECIAL PROVISIONS
ALBERTA	N/A	20% of production costs (this is a non-recoupable grant, not a tax credit)
BRITISH COLUMBIA	18% of eligible BC labour	6% regional bonus 15% digital animation or video effects bonus
MANITOBA	45% of eligible MB labour	Additional 5% if 50% of shooting days are 40 km or more outside of Winnipeg's centre Additional 5% if third film shot within 2-year period
NEW BRUNSWICK	40% of eligible NB labour	Capped at 50% of production costs.
NEWFOUND LAND	40% of eligible labour	Capped at 25% of production costs
NOVA SCOTIA	40% of eligible NS labour	40% for productions shot outside Halifax 50% bonus for returning within a 2-year period
ONTARIO	18% of eligible ON labour	3% regional bonus

PRINCE EDWARD ISLAND	35% - 50% of eligible labour *(this is a rebate, not a tax credit)*	Capped at 15% of production costs
QUEBEC	20% of eligible QC labour	N/A

* Canadian Audio-Visual Certification Office (CAVCO), Department of Canadian Heritage, *Study of the Decline of Foreign Location Production in Canada*, March 2005, at Annex B, p. 25.

Appendix B
Canadian Provincial Incentives*

Canadian Provincial Production Incentives

PROVINCE	PSTC	SPECIAL PROVISIONS
SASKATCHEWAN	35% of eligible SK labour	Capped at 50% of production costs 5% regional bonus
YUKON	35% of eligible YK labour *(this is a rebate not a tax credit)*	50% travel rebate 35% training rebate

* Canadian Audio-Visual Certification Office (CAVCO), Department of Canadian Heritage, *Study of the Decline of Foreign Location Production in Canada*, March 2005, at Annex B, p. 25.

Appendix C

Major U. S. Production Incentives*

STATE	INCENTIVE	DESCRIPTION
ARIZONA	Income tax credit	20% transferable income tax credit on in-state production expenditures on projects spending $3 million or more (10% when spending under $3 million). 50% sales and use tax rebate on purchase or lease of tangible property on productions spending $1 million or more. To qualify, a production must hire a minimum number of AZ residents.
FLORIDA	Film industry rebate program	15% reimbursement of qualified Florida expenditures for production spending at least $850,000. Funded at $10 million per year.
GEORGIA	Income tax credit	9% transferable income tax credits on all costs spent in Georgia, plus: 3% credit on wages paid to GA residents, plus: 2% credit for TV productions that spend more than $20 million annually, plus: 3% credit for productions in distressed areas.
ILLINOIS	Transferable wage credit	25% transferable income tax credit on first $25,000 of wages paid to Illinois residents.
LOUISIANA	Investor tax credit, employment and labor tax cred, sales & use tax exclusion	25% transferable tax credit on Louisiana spending (if spending exceeds $8 million, otherwise 10% credit) plus: 10% credit on total aggregate payroll of Louisiana residents (excluding salaries in excess of $1 million) plus: 4% sales and use tax exclusion.

*Current as of June 10, 2005. Source: California Film Commission, reported in Los Angeles County Economic Development Corporation, *What Is the Cost of Run-Away Production? Jobs, Wages, Economic Output and State Tax Revenue at Risk When Motion Picture Productions Leave California*, August 2005, Appendix A – Production Incentives.

Appendix C

Major U. S. Production Incentives*

STATE	INCENTIVE	DESCRIPTION
MARYLAND	Film production activity	Wage rebate up to $12,500 per eligible employee for projects spending over $500,000. Funded at $4 million per year.
MONTANA	Refundable tax credit	12% refundable tax credit on up to $50,000. in wages paid to Montana residents. 8% credit on total in-state spending.
NEW YORK	Film production tax credit	10% refundable tax credit of qualified expenditures, capped at $100 million over 4 years. City of New York offers the same incentive with a refundable tax credit equal to 5% of qualified expenditures capped at $37.5 million for 3 years.
OKLAHOMA	Rebate program	15% of eligible in-state costs. Capped at $2 million per year. Sales tax exemption on tangible property and services.
OREGON	Production investment fund sales exemption labor rebate	10% rebate on in Oregon costs, capped at $250,000 per film production. No sales tax on all purchases. 6.2% rebate on Oregon wages (pending).

*Current as of June 10, 2005. Source: California Film Commission.

Appendix C

Major U. S. Production Incentives*

STATE	INCENTIVE	DESCRIPTION
PENNSYLVANIA	Income tax credit.	20% assignable tax credit of qualified Pennsylvania costs when spending 60% of production costs in state ($10 million annual cap).
PUERTO RICO	Production project tax credit	40% transferable labor tax credit (paid to Puerto Rican residents). At least 50% of the shooting must take place in Puerto Rico.
RHODE ISLAND	Transferable tax credit, investor tax credit (non transferable)	25% tax credit for all Rhode Island spending when spending is over $300,000. Investor will receive 15% tax credit for budgets between $300,000 and $5 million. For budgets over $5 million, investor will receive 25% tax credit.
SOUTH CAROLINA	TRANSFERABLE TAX REBATES	15% rebate of total aggregate payroll for employees who are subject to South Carolina withholding, if in-state spending is at least $1 million. Plus: 7% sales tax exemption for purchases of in-state goods and services. Plus: 15% rebate program for in-state purchases/rentals. Capped at $10 million annually.

*Current as of June 10, 2005. Source: California Film Commission.

Appendix D
Sample of Other International Production Incentives*

Australia

The Australian Federal Government has a refundable tax offset worth 12.5% of the production's Qualifying Australian Production Expenditure. This is claimed by the production company through the company's tax return. A fact sheet, guidelines and application forms are available from *See* http://www.dcita.gov.au/filmtaxoffset.

In addition, the Australian State Agencies offer generous financial support and assistance through payroll tax rebates or exemptions, cast and crew wage rebates, location attraction grants and the provision of free or subsidized public service resources.

Contact details for all States
available at http://www.ausfilm.com.au

Melbourne Incentives

In addition to the Australian Government's 12.5% film tax offset, the Melbourne Film Office offers two highly competitive financial incentive programs.

Available at
http://www.film.vic.gov.au/programs/Program_Pages/MFO_Incentive.shtml

Queensland Incentives

There are many financial benefits in basing your next production in Queensland, including the generous suite of incentives offered by the Queensland Government through the PFTC. These include:

*Payroll Tax Rebates
*Head of Department Rebates
*Cast & Crew Salary Rebates

Furthermore, a 12.5% refundable tax offset is available from the Australian Federal Government for projects that spend a minimum $15M AUD on qualifying production activity in Australia.

Available at http://www.pftc.com.au

South Australia Incentives

A 10% employment rebate is available on all eligible SA labour expenditure on any eligible film or television production. The employment rebate is not a tax rebate and therefore is not tied to a year-end tax return. It can be paid in installments, with the first (potentially largest) installment paid on the first day of principle photography. This means that the production is provided with additional cash flow when it is most useful – during the shoot. This rebate is in addition to the 6% payroll tax exemption and the tax offset rebate. The 10% employment rebate is available for drama productions intended for television or theatrical release that have not received production investment from the SAFC and is available to projects with at least 50% of the shoot occurring in South

Australia.

A payroll tax exemption on eligible productions shot in SA reduces the film's payroll total by approximately 6 per cent. Note that this is an up-front exemption, not a rebate. To be eligible for the exemption, projects must be produced wholly or substantially within South Australia, employ SA residents, and provide significant economic benefits to the State.

Source: Data as of March 6, 2006. Association of Film Commissioners International, *International Incentives*, March 2006, found at http://www.afci.org/documents/InternationalIncentives.pdf (accessed April 26, 2006).

Production queries regarding the South Australian Film & Television Employment Rebate can be directed to the Head of Studio Services, Rory McGregor at mcgregorr@ safilm.com.au or 088348 9308.

Available at http://www.safilm.com.au/content.aspx?p=16

Belgium

Belgium provides a tax shelter for qualifying films.

Available at http://www.vaf.be/frames.asp?page=1&lang=1

Available at en.antwerpen.be/acfo

Brazil

Available at http://www.minasfilmcommission.com.br

Available at http://www.riofilme.com.br

Canada

TAX CREDITS

The Canadian Federal Government's Film or Video Production Services Tax Credit is primarily for foreign production and has been increased to 16% of Canadian labour costs from 11%.

The Canadian Film or Video Production Tax Credit amounts to 25% of expenditures for services provided by Canadians. In order to qualify for this tax credit, either the director or screenwriter and one of the two highest paid actors must be Canadian. Moreover, the production must earn at least six points based on key personnel being Canadian.

CO-PRODUCTION

Canada has entered into co-production treaties that are in effect for

58 countries. The treaties set minimum standards for financial and creative participation, and are administered by Telefilm Canada. Qualifying co-productions are eligible for all government incentives and benefits accorded Canadian Films. For more information contact: Canadian Audio-Visual Certification Office (CAVCO)

Toll Free: (888) 433-2200

Available at http://www.pch.gc.ca/cavco

Calgary (Province of Alberta) Incentives

Productions in the Calgary region can access provincial and federal programs providing eligibility requirements are met.

Available at http://www.calgaryeconomicdevelopment.com

British Columbia Incentives

Available at http://www.filmcolumbiashuswap.com

New Brunswick Incentives

40% Labour Tax Credit

Available at http://www.nbfilm.com

Okanagan (Province of British Columbia) Incentives

Productions in British Columbia can access a variety of provincial and federal tax credit programs and if eligibility requirements are met, a producer can combine them to access exceptional savings. Please contact us for details.

Available at http://www.okanaganfilm.com/tax_incentives/index.htm

* Sample of feature film incentives available outside the U.S. as of March 2006. Source: Association of Film Commissioners International, *International Incentives*, March 2006, *available at* http://www.afci.org/documents/InternationalIncentives.pdf (accessed April 26, 2006).

Ontario Incentives

The province of Ontario offers an 18% refundable tax credit on Ontario labour through the Ontario Production Services Tax Credit (OPSTC), in addition to the Canadian government 16% rebate.

Also available is the Ontario Computer Animation and Special Effects Tax Credit, (OCASE), a refundable tax credit to Ontario-based Canadian and foreign-controlled corporations of 20% of qualifying Ontario labour expenditures for film and television digital animation and digital visual effects.

Available at http://www.omdc.on.ca/English/Tax-Incentives.html

Yukon Incentives

Available at http://www.reelyukon.com.

Fiji

Tax Rebate (similar to Australian tax offset): If a fully-funded production expends in Fiji a minimum F$250,000 of qualifying Fiji expenditure representing at least 35% of the budget, then it can claim back 15% of its Fiji expenditure.

Available at http://www.fijiaudiovisual.com

France

In the Co-production Framework, many sources of financing are available through French producers.

Available at http://www.filmfrance.net

Germany

Bavaria Incentives

Funding can be applied for at FilmFernsehFonds Bayern GmbH
Available at http://www.fff-bayern.de
Available at http://www.film-commission-bavaria.de

Berlin Brandenburg Incentives

In Germany, a German producer or the German Co-producer can ask for money at the regional film funding institution. The Berlin Brandenburg Film Commission BBFC is a department of the Medienboard, which is the regional film funding institution in Berlin and Brandenburg.

On top of that there are strong production service companies like Studio Babelsberg that can co-finance due to state guarantees. For further information, please, contact the Berlin Brandenburg Film Commission BBFC.

Available at http://www.medienboard.de

Hamburg Incentives

See FilmFörderung Hamburg's website for funding guidelines.

Available at http://www.ffhh.de.

* Sample of feature film incentives available outside the U.S. as of March 2006. Source: Association of Film Commissioners International, *International Incentives*, March 2006.

Available at http://www.afci.org/documents/InternationalIncentives.pdf

Schleswig-Holstein Incentives

Available at http://www.m-s-h.org

Ireland

18% tax break on Irish spend
Experienced Irish co-producers
No sales tax
12.5% corporate tax rate
Network of Film Commissions offering free support
Available at http://www.filmboard.ie

County Louth

Our unique position means producers can avail of both Section 481 in the Republic of Ireland and Sale and Leaseback in the North of Ireland without leaving the Film Commission region. There are many financing schemes including Made in N.I. Lottery Fund and the Regional Support Fund Loan which can work in our region. You won't need to move Production Office!

Available at http://www.filmcommission.ie

Italy

Campania Incentives

Local Film Fund: (70.000 euros per Feature Film); (20.000 euros per Documentary Film) and (3.000 euros per Short Film) Other programs include: tax rebate, free shooting permits and authorizations, and lots and lots of discounted services.

Available at http://www.campaniafilmcommission.org

Jamaica

15% rebate on all goods and services purchased in Jamaica
http://www.investjamaica.com

Netherlands

Rotterdam Incentives

The office of the Rotterdam Film Commissioner, established in 1999, strives to be a facilitative focus for the increasing number of domestic and foreign producers who wish to film and work in the Rotterdam region. It provides information about locations, studios, local services that are available, and professionals active in the film industry. It mediates during the establishment of contacts and applications for financial support and is an intermediary between producers and municipal services. The office does this free of charge and with a minimum of unnecessary red tape.

Available at http://www.rff.rotterdam.nl

New Zealand

The Large Budget Screen Production Grant (LBSPG) scheme whereby an eligible project will be granted a sum totalling 12.5% of the Qualifying New Zealand Production Expenditure (QNZPE). Where the value of the QNZPE is between NZ$15 million and NZ$50 million, QNZPE must be at least 70 per cent of the film's total production expenditure.

* Sample of feature film incentives available outside the U.S. as of March 2006. Source: Association of Film Commissioners International,

International Incentives, March 2006, found at http://www.afci.org/documents/InternationalIncentives.pdf.

Where the value of the QNZPE is NZ$50 million or more it will qualify for the grant regardless of the percentage ratio of QNZPE to the screen production's total production expenditure.

For television series, individual episodes, which have completed principal photography within any 12 month period and with a minimum average spend of NZ$500,000 per commercial hour, may be bundled to achieve the total of NZ$15 million.

Available at http://www.filmnz.com/grantscheme/index.html

Spain

Barcelona Incentives

Available at http://www.barcelonafilm.com

Tenerife Incentives

The Canary Islands Special Zone offers special incentives to those companies that set up a company in the Canary Islands

Available at http://www.tenerifefilm.com

Sweden

Dalarna Incentives

For free during tree days we can offer you full support with location scouting. We can also help you with all the preparations including transports, living arrangements, organising permits, information from local contacts and authorities, all in order to get the production off to a successful start.

Available at http://www.filmidalarna.se

United Kingdom

Productions which qualify as British films are eligible to apply for national funding and for the benefits of the UK's tax relief structures. There are two ways that a film may qualify as British – either via Schedule 1 or an official coproduction. Sale and leaseback is currently the mechanism through which the UK's tax breaks are channelled. Section 48 allows benefits for films with budgets of less than £15,000,000 and

Section 42 allows benefits for films with any budget. The UK Government recently announced plans for the future of UK tax relief for film:

Section 48: A new tax credit for qualifying films with budgets of under £20m will replace Section 48 in 2006. The relief will apply to 100% of the film's budget and will be worth approximately 20% of production costs. Section 48 will continue to be available for films in production by 1st April 2006 and completed by 1st January 2007.

Section 42: Section 42 will be replaced in 2006 with a new tax credit similar to the proposed replacement for Section 48. Section 42 will continue until the new relief is in place.

http://www.ukfilmcouncil.org.uk (Select Filming in the UK, British Qualification)

Guernsey - Channel Islands Incentives

For short shoots the Film Commissioner will act as a Location Manager and pre-shoot will act as a location scout. The services of the commission are free and there is no permitting scheme operating in the Islands. Many locations are available free of charge.

Available at http://www.guernseyfilms.com

* Sample of feature film incentives available outside the U.S. as of March 2006. Source: Association of Film Commissioners International, *International Incentives*, March 2006, *available at* http://www.afci.org/documents/InternationalIncentives.pdf (accessed April 26, 2006).

E**ngland – North West Vision Incentives**

Free film liaison service with experienced staff

Funding and co-production opportunities

On-line crew and facilities database and searchable locations library (from April 05)

Printed production guide

Competitive facility & crew rates (30% cheaper than London)

Film Friendly infrastructure

International airport

Available at http://www.northwestvision.co.uk/funding

Scotland Film Incentives

Scottish Screen runs a range of funding schemes, from script development and short film funds, to production funding and new media initiatives. Funding is to support the Scottish film industry, and there are always co-funding opportunities with Scottish producers. So far there have been a number of successful co-productions with European countries.

Available at http://www.scottishscreen.com

Puerto Rico

40% Tax Credit

Available at http://www.puertoricofilm.com

Venezuela

Available at http://www.diatriba.net/venezuelafilmcommission

* Sample of feature film incentives available outside the U.S. as of March 2006. Source: Association of Film Commissioners International, *International Incentives*, March 2006.

Available at
http://www.afci.org/documents/InternationalIncentives.pdf