C.D. Howe Institute
Institut C.D. Howe

Backgrounder

October 8, 1998

Advertising Canada's Culture:
Why the New Policy on Magazines Is Not Up to the Task

by

Daniel Schwanen

Today, the Canadian government plans to introduce legislation banning the sale by foreign-owned publishers of any advertising directed at Canadian consumers. The legislation would effectively prevent the presence of "split-run" editions of foreign magazines — that is, magazines with editorial content broadly similar to their foreign original but with advertising aimed at a Canadian audience — in the Canadian market-place. It is expected that a foreign publisher's liability for violating the new law will include huge fines and possibly even seizure of publications or other assets.

The new measure replaces a prohibitive tax on advertising aimed at the Canadian marketplace and contained in split-run magazines that the World Trade Organization (WTO) struck down last year. The object of the new policy, however, remains the same as the old one: to maintain the market share of Canadian magazine publishers, by preventing the flow of advertising revenues to potential new split-run entrants into the market. (*Time Canada* and the Canadian edition of *Readers' Digest* will continue to be exempted from such measures, as they have been since the 1970s.)

Some commentators have suggested that the new policy might not be consistent with Canada's constitutional protection of freedom of expression and of the press. While I do not address this question here, I do ask whether the measure is consistent with the spirit of Canada's trade obligations and, more fundamentally, whether it makes sense from the point of view of Canada's overall cultural and economic policy objectives. I believe that the proposal could be harmful on all these counts and, therefore, that it should be rethought.

To begin on a technical point, could the measure withstand another WTO challenge? The federal government maintains that, since the new measure concerns advertising, it is essentially not covered by the WTO. This argument would certainly be true of any law or regulation governing the advertising *industry* in Canada or the *type of advertising* that can be undertaken in Canada. But since this measure would make non-Canadian publishers (goods producers) subject to severe penalties for distributing a magazine containing Canadian advertising — a type of good that Canadian publishers can sell perfectly legally — it is not clear the WTO would perceive it as a measure concerning services, rather than a quantitative barrier to trade that is also discriminatory in nature.

Indeed, according to the WTO Appellate Body, advertisements are physical and integral components of magazines. It does not appear that the WTO decision was meant to deny Canada the ability to support its magazine industry or even to tilt the playing field in favor of Canadian-content magazines. Rather, the WTO ruled that Canada could not do so by ensuring Canadian magazines an arbitrarily fixed share of the market by blocking split-run magazines from the market altogether. To forbid foreign publishers from selling advertising in Canada would run contrary to this principle and to the general position that Canada has taken toward Japan and other countries when they maintain measures that nominally affect the regulation of commercial services but that, in fact, discriminate against foreign products.

Furthermore, in attempting to enforce such a policy, how would Canada prevent a transaction between a US publisher and a US firm wishing to advertise in Canada? If Canada plans to impose fines or perhaps even seize a foreign publisher's Canadian assets to prevent a legal product (advertising) of a legal transaction (in the United States) from reaching Canada, how would this square with this country's views on the extraterritorial application of domestic laws, as in the case of, for example, the Helms-Burton legislation in the United States?

While compliance with both the spirit and letter of international trade obligations should not be Canada's primary consideration in setting cultural policy objectives, it is nevertheless an important one in deciding how these objectives are to be pursued. To flout the spirit, if not the letter, of a rules-based system from which most Canadians benefit, and to which Canadians have historically subscribed, would diminish Canada's position in other disputes to which it may be a party and invite retaliation from its trading partners in cultural or other sectors.

More fundamentally, the merits of the new measure are questionable on both cultural and economic grounds. As did its predecessor, the new measure could actually expose Canadians more than would otherwise be the case to US issues, goods, and services. Since Canadians will not, of course, stop purchasing non-split-run foreign magazines in large quantities, they will see, in the absence of advertising from Canadian firms or organizations in foreign magazines, US advertising that reflects US issues and social values and the US marketplace, instead of advertising pertaining to Canadian issues, services, and products.

No clear upside for Canadian culture would stem from this policy, for two reasons. First, the measure is aimed at supporting Canadian publishers regardless of whether the product is of specific interest to Canadians — a "Canadian" magazine could focus on the Hollywood entertainment industry, for example. Second, the correlation between a specific market share for Canadian-owned magazines (now near a historical high) and the strength of Canadian culture remains, to say the least, a matter of conjecture.

As well, with Canadian advertisers' being denied access to the Canadian readership of foreign magazines, both they and their public will bear an undeniable economic cost in terms of reduced access to each other — that is, there will be an adverse economic impact in terms of the knowledge of, and demand for, products and services offered by Canadians to other Canadians. There will also likely be an adverse impact on Canadian-based advertising agencies. Indeed, one could argue that, since total magazine advertising revenues are low in Canada, the introduction of competition from split-run magazines could cause them to grow significantly.

Canada should vigorously defend its right to promote its culture through subsidies, tax breaks, and sensible content requirements and definitions aimed at ensuring the continued availability to Canadians of products from their own culture, and, in general, a fair competitive environment for domestic cultural productions that are demonstrably of special value to Canadians. Canada should also insist that government policy be able to treat magazines containing Canadian stories aimed at Canadians differently in certain respects from those produced for a foreign audience. But by clinging to measures that increasingly restrict access to information, that threaten Canada's commercial interests, and that possibly accelerate, rather than prevent, cultural assimilation, the federal government instead risks taking Canada down a path toward poorer cultural and economic health, and is diminishing the chances of arriving at a negotiated agreement with other countries on the proper line to draw between free trade and culture.

Backgrounder © is an occasional publication of the C.D. Howe Institute. Its purpose is to comment briefly on policy issues of immediate concern to Canadians.

As with all C.D. Howe Institute publications, the views expressed here are those of the author and do not necessarily reflect the opinions of the Institute's members or Board of Directors. Daniel Schwanen, the author of this issue, is a Senior Policy Analyst at the C.D. Howe Institute.

Copies of *Backgrounder* are available free of charge from the C.D. Howe Institute: 125 Adelaide Street East, Toronto, Ontario M5C 1L7 (tel.: 416-865-1904; fax: 416-865-1866; e-mail: cdhowe@cdhowe.org; internet: www.cdhowe.org).