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Beyond Culture vs. Commerce Decentralizing Cultural Protection to Promote Diversity Through Trade

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Beyond Culture vs. Commerce
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“A society that surrenders to others the means to depict itself would soon be an enslaved society.”

-- Francois Mitterand
President of France

“You make wonderful cheeses. Keep it up and let us, alone, make films.”

-- Jack Valenti
President, Motion Picture Association of America

Evil empire invades distant land, crushes resistance with superior technology, and enslaves inhabitants through insidious mind-control. The preceding sentence may resemble the plot of a Hollywood movie; yet, to some, it serves as an allegory for the real-life battle over cultural diversity in which Hollywood itself is cast in the role of evil empire. The struggle to secure the planet from US cultural imperialism has run headlong into conflict with world trade law.¹ For the past three decades, culture defenders and free traders have fought a pitched battle over global regulation of audiovisual industries, a collision of seemingly incompatible worldviews whose destructive repercussions policy-makers and scholars have struggled to contain.² The battle has played out at multiple levels of

¹ See Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1366-77 (2000).

² For a sampling of recent commentary, see Mira Burri-Nenova, *Trade and Culture in International Law: Paths to (Re)Conciliation*, 44 J. WORLD TRADE (2010); Christopher Bruner, *Culture, Sovereignty, and Hollywood*, 40 NYU J. Int'l L. & Pol'y 351 (2008); Claire Wright, *Reconciling Cultural Diversity and Free Trade in the Digital Age: A Cultural Analysis of the International Trade in Content Items*, 41 AKRON L. REV. 399, 430-32 (2008); TANIA VOON, *CULTURAL PRODUCTS AND THE WTO* (2007); PATRICIA GOFF, *LIMITS TO LIBERALIZATION: LOCAL CULTURE IN A GLOBAL MARKETPLACE* (2007); Chi Carmody, *Creating "Shelf Space": NAFTA's Experience with Cultural Protection and Its Relevance for the WTO*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 287, 291-92 (2007); Christoph B. Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INTL. ECON. L. 553 (2006); Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INTL. ECON. L. 515, 523-524 (2006); Stephen Azzi, *Negotiating Cultural Space in the Global Economy: The United States, UNESCO, and the Convention on Cultural Diversity*, 60 INTL. J. 765, 773-83 (2005); Paolo Guerrieri, P. Iapadre, & Georg Koopman, eds., *CULTURAL DIVERSITY AND INTERNATIONAL ECONOMIC INTEGRATION: THE GLOBAL GOVERNANCE OF THE AUDIO-VISUAL SECTOR* (2005); CHRISTOPH GRABER, MICHAEL GIRSBERGER, & MIRA NENOVA, *FREE TRADE VERSUS CULTURAL DIVERSITY IN THE FIELD OF AUDIOVISUAL SERVICES* (2004).

international trade law, investment treaties, and UNESCO conventions. Now, the culture-trade war threatens to engulf e-commerce.³

Yet, do culture and commerce really conflict? By assuming that trade is incompatible with cultural diversity, European cultural protectionists have fostered a defensive mindset that has proven self-defeating. Cultural protection has failed in Europe, with Hollywood emerging more dominant than ever.

Fortunately, there is a better way. The extraordinary flowering of Korean popular culture in recent decades—commonly known as the “Korean Wave”—can be traced directly to a set of decentralized policies enacted by South Korea’s government in the 1990s. This Article argues that cultural protection should be fundamentally reconceived based on Korea’s example. In place of the European “state patronage” model that predominates today, the Article advocates an alternative approach that embraces globalization and seeks to expand markets (rather than supplant them) using decentralized, non-discriminatory tools. Adopting a “diversity through trade” model would more effectively advance the goals of cultural protection and avoid the need for further distortions of international trade law.

This Article accepts that much of the world is committed to the project of cultural protection.⁴ Concern over cultural diversity is unsurprising in a world where Hollywood movies account for more than 80% of global box office sales and American popular culture is pervasive.⁵ Such global dominance makes for one of the few bright spots in America’s otherwise dismal balance of trade and generates vital “soft power” that underpins US hegemony.⁶ Yet, for countries on the receiving end, Hollywood’s dominance assumes a more sinister guise. Like the “conquistadors who destroyed Inca and Aztec civilizations,” American popular culture is said to threaten a “mental colonization” that would

³ Peter Hettich, *You Tube to be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN L REV. 1447 (2008); *infra* notes 51-53 and accompanying text.

⁴ Of the WTO’s 150 members, only the US, Albania, New Zealand and Central African Republic have committed to fully liberalize audiovisual services, and the vast majority have made no commitments at all (reserving the right to engage in unrestricted protection). Christoph Graber, *Audiovisual Media and the Law of the WTO*, in GRABER, GIRSBERGER & NENOVA, *supra* note 2, at 15, 23-24.

⁵ Wright, *supra* note 2, at 430-32.

⁶ *Id.* Creative content industries rank second (behind aircraft manufacturing) as a share of US total exports. Bruner, *supra* note 2, at 356 (describing audiovisual industries as “the jewel in America’s trade crown”).

enslave the rest of the world to American thought and values.⁷ The very underpinnings of the nation state are imperiled.⁸

Such apocalyptic rhetoric bewilders Americans, who typically respond by appealing to free market principles and consumer autonomy. The US argument essentially amounts to: “if your consumers don’t like our movies and TV shows, they don’t have to watch them.”⁹ Attempts by governments to come between consumers and their living room screens are seen as paternalistic, bordering on outright censorship. Americans also accuse other countries of using cultural concerns as a smokescreen for economic self-interest, casting the issue as one of free trade vs. protectionism.¹⁰

Cultural defenders retort that “culture is not a commodity.” They insist trade should yield, calling for a “cultural exception” to legitimize trade discrimination in the name of cultural diversity.¹¹ Governments also make ample use of existing loopholes and lacunae in world trade law to protect domestic industries. As a result, audiovisual markets worldwide are riven with tariffs, subsidies, quotas, and other barriers.¹²

The fallout from this long-running battle has spread far beyond the industries affected. Cultural concerns have repeatedly hindered wider efforts to advance trade liberalization.¹³ Culture also serves as a potent lightning rod that mobilizes globalization’s opponents.¹⁴ As we stand on the cusp of a digital convergence of technologies that could revolutionize cultural interchange, some foresee diversity concerns vanishing in a digital cornucopia.¹⁵ However, Europe’s protectionist instincts have only

⁷ Simona Fuma Shapiro, *The Culture Thief*, THE NEW RULES 8 (Fall 2000).

⁸ See Victoria de Grazia, *Mass Culture and Sovereignty: The American Challenge to European Cinemas, 1920–1960*, 61 J. MOD. HIST. 53, 53 (1989); see also Catherine Lalumière, *The Battle of “Cultural Diversity,”* 38 LABEL FRANCE (2000) (equating cultural identity with “entire reason for living”).

⁹ Such arguments ignore collective action problems and externalities. Consumers may insufficiently value cultural diversity in making individual purchasing decisions, in the same way that commuters crowd freeways in their SUVs even though they would prefer that society invest in environmentally friendly mass-transit alternatives. Baker, *supra* note 1, at 1361.

¹⁰ *Id.* Cf. Shapiro, *supra* note 8, at 3 (quoting US trade official: “[w]hen we’re talking about cinema, it’s largely a commercial issue and not a cultural issue”).

¹¹ See VOON, *supra* note 2, at 63, 95.

¹² See *id.* at 220.

¹³ See *infra* notes 26-27, 44-53 and accompanying text.

¹⁴ Joel Paul, *Cultural Resistance to Global Governance*, 22 MICH J. INT’L L. 1, 6 (2000).

¹⁵ See *infra* note 358 and accompanying text.

sharpened with the advent of online content.¹⁶ To defuse such anxieties before they do lasting damage, it is time to move beyond the sterile impasse of “culture vs. trade.” The real question is not whether to protect cultural markets, but how.¹⁷ Korea’s example points the way forward.

The argument that follows unfolds in four parts. Part I examines the theoretical and legal underpinnings of cultural protectionism, explains its focus on audiovisual media, and calls attention to the threat that European protectionism poses to digital technologies and e-commerce. Part II critiques the “state patronage” model of cultural protectionism widely practiced in Europe and elsewhere. It catalogues the shortcomings of patronage, namely that it: (1) overrides market feedback from audiences; (2) ignores distribution, producing films that never get shown; (3) involves cumbersome bureaucracies; (4) caters to narrow, elitist tastes; and (5) neglects export markets. Part II concludes that European patronage has failed due to fundamental defects in design.

Part III considers how cultural protection might be reinvented to avoid such shortcomings. Part III-A presents South Korea’s “Korean Wave” as an exemplar of cultural policy that, unlike state patronage, is: (1) market-based; (2) distribution-focused; (3) decentralized; (4) non-discriminatory; and (5) export-oriented. Part III-B demonstrates that South Korea’s approach has fostered higher quality, more diverse, and more authentic domestic filmmaking, consistent with the goals of cultural protectionism. Part III-C then examines case studies from film industries in India, Hong Kong, and Nigeria that amplify and confirm the advantages of the Korean model.

Lastly, Part IV distills some general lessons as to how cultural protectionism can be reinvented in the decentralized, market-based image exemplified by the Korean Wave. Part IV-A first addresses national policy, describing the twin lodestars of the Korean model as: (1) keeping filmmakers responsive to audiences and (2) expanding export revenues to capture economies of scale. Activating the full potential for global markets to foster cultural diversity, however, may require multilateral initiative. To this end, Part IV-B proposes a novel “diversity quota” that would unleash a global market for diverse filmmaking. By defining “diverse” solely by reference to production budgets, the quota is designed to be consistent with existing standards of world trade law.

¹⁶ See *infra* notes 52-53 and accompanying text.

¹⁷ Whether or not one accepts that culture *is* different, the reality is that almost a century of American arguments against cultural protectionism have fallen on deaf ears. Indeed, even the US has belatedly acknowledged that audiovisual markets present “unique issues” that justify special protection. See VOON, *supra* note 2, at 48; Communication from the United States, Council for Trade in Services, S/CSS/W/21 (Dec. 18, 2000).

I. The Backstory: State of Play in the “Trade & Culture” Debate

A. Definitions & Rationales

The status of culture remains one of the major unresolved issues in world trade law.¹⁸ A basic precept of free trade holds that goods should circulate in global markets without distinctions based on national origin. In directly or indirectly favoring domestic products, cultural protection runs counter to trade rules forbidding discrimination.¹⁹ Hollywood loses untold billions to such protection and naturally cries foul.²⁰

Defenders of cultural protection demur. They claim that cultural goods embody externalities that market pricing fails to capture and that therefore the norms of free trade should not apply.²¹ To legitimize such practices, cultural defenders have sought to enact a broadly-defined “cultural exception” within world trade law.

1. Defining the Scope of Cultural Protection

Such efforts raise obvious definitional concerns. Culture is notoriously hard to pin down as a concept.²² Critics of cultural protection protest that anything can be deemed to have “cultural” value.²³ Taken to an extreme, a broadly defined cultural exception could potentially swallow the rule of free trade.²⁴ In practical terms, however, the audiovisual sector represents the principal battlefield being contested.²⁵ As far back as the original 1947 GATT, trade negotiators insisted on a special rule enabling “screen quotas” for domestic films—a cultural exception provision that

¹⁸ Baker, *supra* note 1, at 1368.

¹⁹ See GATT Article III (National treatment). Other standard weapons in the protectionist arsenal such as quotas and subsidies run similarly afoul of GATT rules. See GATT Article XI (forbidding import quotas); WTO Agreement on Subsidies and Countervailing Measures, Article 5 (restricting subsidies).

²⁰ Bruner, *supra* note 2, at 355.

²¹ In general, home-grown culture is associated with positive externalities (*see infra* note 27), while imported content is seen as having negative effects. Cf. Charlene Gubash, *Soap Opera Upends Traditional Arab Gender Roles*, MSNBC WorldBlog, July 31, 2008, available at <http://worldblog.msnbc.msn.com/archive/2008/07/31/1236952.aspx> (last visited Mar. 5, 2010) (describing disruptive effect of imported television show).

²² In its broadest anthropological definition, culture embraces every aspect of human society. Bruner, *supra* note 2 at 361-63.

²³ Cf. Tomer Broude, *Taking ‘Trade and Culture’ Seriously: Geographical Indications And Cultural Protection In WTO Law*, 26 U. PA. J. Int’l Econ. L. 623, 624 (2005) (quoting claim that “[e]ach bottle of [imported] wine that lands in Europe is a bomb targeted at the heart of our rich European culture.”); Paul, *supra* note 15, at 40-41 (observing that Japan protects rice and beef as “cultural”).

²⁴ Paul, *supra* note 14, at 34-35.

²⁵ Broude, *supra* note 23, at 632.

remains *sui generis* to this day.²⁶ European demands to extend such quota allowances to television almost torpedoed the launch of the WTO.²⁷ While that standoff was eventually finessed, audiovisuals continue to command center stage in multilateral negotiations and supply the principal target of cultural protectionism at the national level. As a practical matter, this clear policy focus allows us to sidestep definitional ambiguities: For present purposes, we will consider the domain of cultural protectionism as limited to audiovisuals.

2. What Are We Protecting and Why?

This begs two questions: why culture? and why audiovisuals, in particular? These questions can be answered partly based on the underlying economics of creative content production, which is subject both to economies of scale and consumer preferences for home-grown content. Particularly when it comes to full-length feature films, the high fixed costs to produce original content compared to the marginal costs of exhibiting it favors countries such as the US whose producers can rely on a large, wealthy domestic audience as their “home base.”²⁸ Hollywood’s resultant scale economies support bigger budget productions that enjoy a competitive advantage in global markets.²⁹ Unsurprisingly, other countries regard the playing field as stacked against them.

²⁶Article IV allows GATT signatories to impose “screen quotas” reserving cinema exhibition time to domestic films. Article XX(f), allowing restrictions on export of “cultural treasures” (i.e. antiquities), and Article XX(a), allowing exceptions based on public morals, also enable forms of cultural protection. However, neither sanctions overt preference for domestic industries in the way that Article IV does. See VOON, *supra* note 2, at 164-166.

²⁷ The argument revolved around whether audiovisual broadcasts constituted goods vs. services, and whether they should be subject to a special exception. The impasse was defused only by an eleventh hour “Agreement to Disagree” that left the issue essentially unresolved. *Id.*

²⁸ The comparative export advantage of big markets can be traced to a moderate cultural discount effect: i.e. a preference by audiences for local content over foreign imports that acts as a barrier, but not an insuperable one. The higher budget productions supported by big country markets allows them to export movies whose enhanced audience appeal overwhelms the natural preferences of audiences in smaller market countries for films in their own language or attuned to their domestic culture. See S. WILDMAN & S. SIWEK, INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS 26-28, 33, 75 (1988).

²⁹ Once the movie has been made, it does not cost much more to exhibit it to a broad audience vs. a narrow one. Costs to set up and maintain distribution networks are subject to similar scale economies that give global players—namely the major Hollywood studios—an advantage pushing their products. Hollywood also benefits from its concentration of talent & equipment in a geographic cluster that allows cost-sharing and other positive spillovers. *Id.*

Yet, such comparative advantages are normally taken as arguing in *favor* of free trade, not an excuse to override the market.³⁰ Rather than explaining the cultural exception, such competitive concerns therefore merely underline the privileged status claimed for culture. Instead, a fuller explanation lies in the intimate links between culture and national sovereignty. Cultural imperialism touches an emotional nerve in a way that other traded goods do not.

This “cultural sovereignty” perspective helps to explain the sometimes apocalyptic rhetoric deployed by cultural protectionists.³¹ Such concerns also explain the primacy of audiovisual industries in this debate. Audiovisuals represent powerful mass media regarded as exerting lasting influence on audiences.³² Governments instinctively seek to control such natural instruments of power and resist foreign challenges to their authority.³³

Yet, culture is not a zero-sum game. The free flow of ideas across borders is normally regarded as a good thing that leaves everyone richer for the exchange. Indeed, the “marketplace of ideas” is as much as a political ideal as an economic one.³⁴ Furthermore, there is no such thing as a “pure” national culture to begin with: All cultures draw from a diverse blend of traditions and influences. And culture is constantly evolving. To some critics, the very idea of “protecting” a national culture is like trying to save endangered butterfly by pinning them on the wall.³⁵

Advocates of cultural protection reject such accusations and the static vision of culture that they presuppose. At least implicitly, their interventions engage culture as much in terms of process as outcome. This dynamic conception views culture as an exercise in collective meaning-making by which a community defines its cultural landscape through discursive practices. In other words, culture is not a “thing,” but a

³⁰ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (1776). Rather than condemning such comparative advantages as “unfair,” we embrace them as the basis for mutually profitable exchange. DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION ch. 7 (1819).

³¹ See *supra* notes 7-8 and accompanying text.

³² “[F]ilm motivates thought and action and assures a high degree of attention and retention as compared to the printed word. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have a strong impact on the minds of the viewers [that] cannot be equated with other modes of communication.” Supreme Court of India, available at http://en.wikipedia.org/wiki/Central_Board_of_Film_Certification.

³³ MARTIN DALE, THE MOVIE GAME: THE FILM BUSINESS IN BRITAIN, EUROPE AND AMERICA 116, 222 (1997).

³⁴ See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 73 (1960) (arguing that truth can be best tested through a competitive marketplace of ideas).

³⁵ See Baker, *supra* note 1, at 1366-68 (critiquing “museum” view of culture).

set of shared understandings reached through the production and consumption of expressive works. This “dialogic” understanding of culture does not privilege any particular canon or tradition as authentic except to the extent it continues to have salience within the relevant community.³⁶

The rationale for cultural protection in turn derives from the value placed on self-determination. While culture need not be hermetically sealed from external influences, retaining a degree of autonomy allows each country to define its own narrative. To participate in this semiurgical process, members of the constituent citizenry need the ability to assign shared meanings by reference to a body of cultural works that they themselves have produced. Seeking a middle ground between cultural autarchy and cultural domination, protectionists therefore seek to preserve a space for each culture to evolve on its own terms rather than having the process driven by cultural imports whose foreign content frames the agenda.³⁷

Cultural defenders typically offer three specific rationales to justify this value on autonomous cultural development: (1) national identity; (2) democratic discourse; and (3) human heritage.³⁸ The national identity rationale highlights the role of culture as a force for social cohesion: Cultural protection becomes an exercise in nation-building. The democratic discourse rationale posits culture as a pre-political space for public discourse that helps set agendas, clarify values, and highlight areas of consensus or conflict.³⁹ Cultural protection focuses on securing “shelf space” for a national conversation. Finally, the human heritage rationale posits cultural diversity as a global public good. It analogizes cultural diversity to biodiversity, with cultural protection akin to a nature preserve that shelters fragile ecosystems from invasive alien influences.

Each of these rationales has been subject to an extensive critical literature whose points and counterpoints will not be reproduced here. Instead, we will take these rationales at face value in order to assess the extent to which cultural protectionist policies have been successful in achieving their own stated objectives. It is worth noting that at least two of these rationales—national identity and democratic discourse—dovetail

³⁶ *Id.* at 1370-71.

³⁷ The idea is therefore not to give a monopoly to domestic works, but merely to reserve “shelf space” for them in a marketplace otherwise dominated by imports. *See Azzi, supra* note 2, at 773-83.

³⁸ *See Voon, supra* note 2, at 51-72.

³⁹ Neil Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 273 (1998). Note this analysis applies to works of entertainment, not just journalism. *See id.* at 266 (explaining that “attempts to present information and opinion in a systematic ‘objective’ manner, distilled from entertainment values, may simply lose the audience.”).

nicely with cultural protectionism's emphasis on audiovisuals. To mold identities and stimulate public discourse you need to reach a broad spectrum of the populace; audiovisuals are a natural mass media. Furthermore, these rationales suggest a focus on popular culture, as such works are likely to have the greatest impact both in terms of audience size and resonance with the prevailing zeitgeist.⁴⁰ Cultural production narrowly targeted at elites is unlikely to win hearts and minds on scale sufficient to achieve protectionism's aims.⁴¹ Therefore, in allocating shelf space for homegrown audiovisuals, popular works deserve pride of place.⁴²

B. Legal Impasse & Proposed Solutions

1. Legal Uncertainty & Impasse

Until now, the US has been successful in fending off demands for a broad cultural exception in the WTO, thereby denying cultural protectionism formal sanction in world trade law.⁴³ However, the US has hardly won the argument. The impasse continues to generate international rancor that causes significant collateral damage.⁴⁴ Meanwhile, the status quo satisfies no one. Hollywood continues to forfeit billions in lost sales to protectionist barriers. Countries that want to protect their cultural industries have ways to do so under existing trade law. Yet, they must navigate a crazy quilt of overlapping rules and exceptions whose contours

⁴⁰ Baker, *supra* note 1, at 1369. To the extent one considers diversity as defined by individual works, the "diversity as human heritage" rationale might seem to point in a different direction. A more plausible explanation for the preoccupation with *audiovisual* diversity, however, would stress the effect that audiovisuals have upon the broader cultural landscape. In other words, the diversity value of audiovisuals lies not in the works themselves, but rather in their systemic effects influencing hearts and minds (the "ecosystem" rather than the "species"). Accordingly, the motive forces at play differ little from the national identity and democratic governance rationales, and a popular culture focus again becomes appropriate.

⁴¹ Similarly, "frivolous" works of entertainment may prove more effective than serious discourse. Netanel, *supra* note 39, at 266.

⁴² As we will see, a key criticism of protection regimes based on state patronage is that their bias toward elite works has been counterproductive. *See infra* notes 194-99 and accompanying text.

⁴³ Paul, *supra* note 15, at 33-35. The US has accepted cultural exceptions in regional/bilateral trade agreements. *See* Hahn, *supra* note 2, at 523-524 (discussing CAFTA, NAFTA, and Australian FTA).

⁴⁴ The collapse of the MAI Agreement on foreign investment be directly traced to unresolved demands for a "cultural exception" provision. Voon, *supra* note 2, at 31-33. The result was the abandonment of years of negotiation over a complex international instrument covering a wide range of investment activities largely unrelated to culture. Other free trade agreement continue to face similar resistance on cultural grounds. *See* Won-Mog Choi, *Screen Quota and Cultural Diversity: Debates in Korea-US FTA Talks and the Convention on Cultural Diversity*, 2 *ASIAN J. WTO & WTO & INT'L HEALTH L. & POL'Y* 267, 271 (2007).

remain shrouded in uncertainty.⁴⁵ Legal jeopardy looms against those who push the boundaries too far or who fail to reserve their rights.⁴⁶

Frustrated by the WTO stalemate, cultural protectionists have looked elsewhere to advance their agenda.⁴⁷ Cultural exception provisions continue to be written into regional and bilateral trade agreements.⁴⁸ Meanwhile, the 2005 UNESCO Convention on Cultural Diversity represents a deliberate attempt to outflank trade law by developing binding international norms in a more hospitable forum.⁴⁹ Potential conflicts between the Convention and WTO law have only added to the legal uncertainty surrounding regulation of cultural markets.⁵⁰

Nor is the status quo sustainable. E-commerce and digital communications have presented a host of unresolved issues in recent WTO dispute resolution.⁵¹ As the US pushes its trading partners to commit to full digital liberalization, European resistance has been escalating.⁵² Already, a spate of unilateral European interventions

⁴⁵ The WTO has separate rules for goods vs. services, each with their own exceptions and limitations, although the boundary between the two regimes can be murky. See VOON, *supra* note 2, at 104-119. While states can define their commitments to liberalize services *à la carte* on a sectoral and modal basis, doing so entails navigating an arcane system of scheduled opt-ins and opt-outs that do not readily match emerging technologies and business models. *Id.* at 222-23.

⁴⁶ GATS scheduling can become a game of “gotcha” with unanticipated consequences as both New Zealand and South Korea found to their chagrin. *Id.* at 225. Likewise, the maximum level of subsidies permissible is a guessing-game. States may trigger countervailing duties whenever their subsidies adversely affect foreign competitors. See Claire Wright, *Hollywood Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 AKRON L. REV. 739, 745-46 (2006) (arguing Canadian film subsidies would be actionable). Moreover, trade commitments are cumulative. Cultural exceptions in one agreement may be trumped by commitments made under another as Canada unhappily discovered. See Carmody, *supra* note 2, at 291-92 (2007). Fear of such unanticipated consequences makes countries hesitate to liberalize even where doing so would seem advantageous. VOON, *supra* note 2, at 226.

⁴⁷ Azzi, *supra* note 2, at 773-83.

⁴⁸ See Hahn, *supra* note 2, at 523-24.

⁴⁹ Azzi, *supra* note 2, at 773-83. Cf. Larry Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004).

⁵⁰ The interaction between the Convention and WTO treaties has attracted considerable commentary. The Convention itself does not purport to alter preexisting obligations, but as a clear signal of the global value placed on cultural diversity, it is not without effect as soft law. Graber, *supra* note 2, at 553.

⁵¹ See Sacha Wunsch-Vincent, *Trade Rules for the Digital Age*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 497, 498 (Marion Panizzon, Nicole Pohl & Pierre Sauve, eds.) (2008).

⁵² See Mira Burri-Nenova, *Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, 12 J. INT’L ECON. L. 17, 53 (2009) (describing European paranoia about US trade agreements that grandfather cultural exceptions for

threatens to cripple the promise of the digital economy.⁵³ These conflicting courses make a showdown over regulation of online culture all-but inevitable.

2. Bridging the Gap – A New Approach

A broad spectrum of proposals to resolve the impasse over the cultural exception have been placed on the table. Most focus on the legal deadlock in the WTO while sidestepping the underlying ideological dispute.⁵⁴ Such proposals typically conceive of cultural protection as practiced under the European model of state patronage. Rather than questioning whether such an inwardly-focused approach makes sense, they assume that cultural diversity is inherently at odds with trade and seek to cabin the scope of cultural exceptionalism to minimize the conflict. Given the entrenched polarization of this debate, such “split-the-baby” formulas end up being equally unpalatable to all sides. The WTO’s consensus rulemaking affords them slim prospect of adoption.

This Article takes a different approach. It takes a step back from the legal complexity engulfing the cultural exception to address a threshold question that few have asked: Does trade in audiovisual goods necessarily reduce cultural diversity?⁵⁵ In fact, South Korea’s “Korean Wave” offers a compelling example to the contrary that underscores the extent to which Eurocentric bias that has distorted the “trade and culture” debate. South Korea’s experience—bolstered by case studies from other diverse film

“old media” while leaving digital new media open to American colonization). Cultural protectionists also fear the impending technological obsolescence of existing safeguards. *See infra* notes 118-119 and accompanying text. As a result, Europe has increasingly dug in its heels resisting GATS liberalization, Wunsch-Vincent, *supra* note 51, at 499, and pressed the cause of cultural diversity in internet governance. Konstantinos Komitits, *Aristotle, Europe And Internet Governance*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 57, 61-70 (2008).

⁵³ The EU Audiovisual Media Services Directive represents a first step toward regulating diversity online. Hettich, *supra* note 3, at 1449. European cultural concerns have also animated a string of recent Trans-Atlantic clashes between US e-commerce businesses and European regulators. *See, e.g.* Paul McNamara, *Conviction of Google Execs in Italy Sheer Madness; Case That Never Should Have Been Brought Ends with Jail Sentences*, NETWORK WORLD, Feb. 24, 2010; Steve Lohr & James Kanter, *Cultural Bent Hangs Over Oracle’s Battle for Sun*, N.Y. TIMES, Nov. 11, 2009, at B1; *Here We Go Again; Technology Firms and Antitrust*, ECONOMIST, Dec. 19, 2009 at 119; Matthew Saltmarsh, *Google Loses in French Copyright Case*, N.Y. TIMES, Dec. 29, 2009; David Gelles & Ben Hall, *Sarkozy Considers Tax on Google*, FINANCIAL TIMES, Jan. 8, 2010, at 14; Anupam Chander, *Trade 2.0*, 34 YALE J. INT’L. 281 (2009) (describing Yahoo! case as exemplifying culture clash between France and the United States). While these examples span a gamut of disparate issues, the cultural subtext is never far beneath the surface.

⁵⁴ *See* VOON, *supra* note 2, at 51-53 (summarizing proposals); Burri-Nenova, *supra* note 52, at 46-48 (same).

⁵⁵ For a notable exception, *see* TYLER COWEN, CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD’S CULTURES (2002).

industries in India, Hong Kong, and Nigeria—reveals the potential for diversity through trade. These audiovisual success stories reveal untapped global demand for diverse content, belying the received wisdom that catering to export markets required stripping content of cultural specificity. Nigeria’s experience also highlights the game-changing potential of digital technologies. Set against the failure of European cultural protection, these case studies in diverse filmmaking argue strongly for a reconceptualization of cultural protection policy. In a recent submission, the US Trade Representative gestured in this direction.⁵⁶ However, a full-blown articulation of such an alternative vision has yet to be produced.

This Article undertakes that challenge. It advocates an approach to cultural protection that embraces global markets as opportunities rather than threats. Such an approach would defuse much of the tension that pervades the cultural exception debate and—crucially—would obviate the need for changes in WTO law. Most importantly, a decentralized, market-oriented approach patterned on Korea’s example would better achieve the underlying goals of cultural protectionism and avoid significant drawbacks of European patronage regimes. Before elaborating further on the Korean alternative, it is therefore worth exploring why European patronage falls short of the mark.

II. A Critique of European State Patronage

Governments around the world protect their audiovisual industries. However, the tool kit of protectionism was pioneered in Europe, and Europeans remain among its most dedicated practitioners. European protectionism is based on a “state patronage” model, whereby the state assumes a dominant role in funding audiovisual production. State patronage has become the leading model for cultural protection even beyond Europe.

European patronage regimes tend to be suspicious of market forces and inclined toward *dirigiste* policies. Production is emphasized over distribution, and bureaucracy is pervasive. Patronage regimes also incline toward elitism and insularity. Their belief that markets do not properly value European films legitimizes policies to shelter domestic filmmakers from competition. The result becomes a self-fulfilling prophecy.

Consider the example of France. Heir to a glorious legacy of cultural achievement, France has emerged a leading champion of cultural protection. The French government lavishes subsidies on its national culture to the tune of \$4.4 billion per year.⁵⁷ However, for all its spending,

⁵⁶ See Communication from the United States, *supra* note 17.

⁵⁷ Time Magazine, Nov., 2007, at 71 (noting France spends five times more on culture than the United States as a share of GDP).

France's creative industries continue to cede ground, and its cultural preeminence recedes further into memory.⁵⁸

The decline of French cinema has been particularly galling.⁵⁹ France invented modern commercial cinema and dominated the global industry in its infancy. France's 1960s "New Wave" directors revolutionized filmmaking again, earning lasting international prestige. As French cinema lost ground to Hollywood, however, the French government introduced an array of policies to prop up its domestic industry. France today operates Europe's most comprehensive and sophisticated audiovisual patronage regime. French film subsidies account for almost half the total spent by European governments; its film industry remains the largest in Continental Europe.⁶⁰ Yet, the more the French government has intervened, the farther behind its filmmakers have slipped.

In the 1930s, France's "golden era" of filmmaking, domestic studios held their own against Hollywood with minimal state support. The 1960s "New Wave" directors received some state aid, covering around 20% of production costs. By the late 1980s, French filmmakers could count on direct and indirect subsidies to defray as much as 80% of their costs.⁶¹ Yet, as Figure 1 shows, domestic films have steadily lost market share to Hollywood in recent decades. Tellingly, the decade in which subsidies rose the most steeply—the 1980s—is also the period when market share

⁵⁸ See *id.* (cover story entitled *The Death of French Culture*).

⁵⁹ See Jonathan Buchsbaum, "The Exception Culturelle Is Dead." *Long live Cultural Diversity: French Cinema and the New Resistance*, 47 *FRAMEWORK: J. CINEMA AND MEDIA* 5, 16 (2006) (describing cinema as "most valued asset" in France's cultural patrimony).

⁶⁰ COWEN, *supra* note 53, at 78 (stating "problems of European cinema are, in large part, the problems of French cinema").

⁶¹ DALE, *supra* note 32, at 123; Tyler Cowen, *French Kiss-Off: How Protectionism Has Hurt French Films*, Reason Online, <http://www.reason.com/news/show/30691.html> (July 1998).

decline was the greatest.

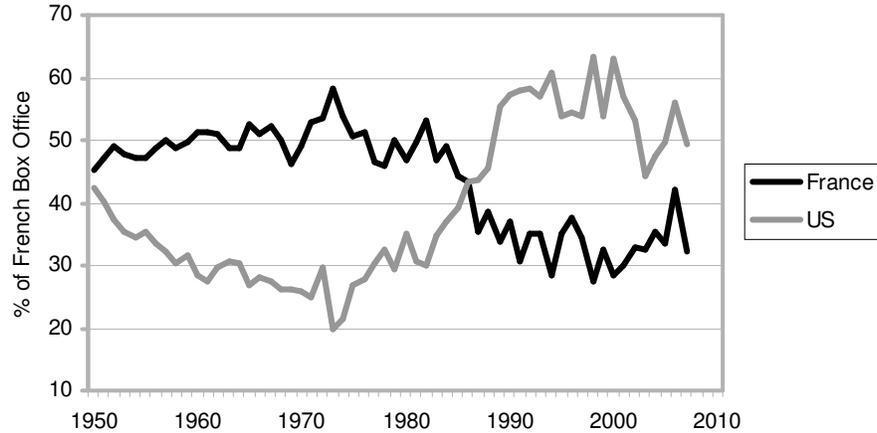


Figure 1: Share of French Domestic Film Market

Nor is France alone in this predicament. French patronage has been widely replicated across Europe, both at the national and European levels. Other European film industries have fared far worse.⁶² A legacy of artistic and commercial success has given way to “stale and uninspiring works” that have forsaken mainstream audiences for the self-imposed ghetto of art-house cinema.⁶³ Defenders of European patronage argue that the results would be even worse without government action. In fact, patronage policies may be doing as much harm as good.⁶⁴

A. Lack of Market-Orientation

By attenuating the link between filmmakers and paying audiences, Europe has created a “subsidy trap” that marginalizes much of European film into commercial irrelevancy.⁶⁵ Filmmakers no longer respond to box office imperatives but instead depend on government largesse to fund their projects.⁶⁶ The result has been a steep decline in revenues. Between 1960 and 1995, the annual box office earnings of European films declined by

⁶² See DALE, *supra* note 32, at 120-21 (charting comparative declines).

⁶³ Victor Henning & Andre Alpar, *Public Aid Mechanisms in Feature Film Production: the EU MEDIA Plus Programme*, 27 MEDIA, CULTURE & SOCIETY 229, 231 (2005).

⁶⁴ Emmanuel Cocq & Patrick Messerlin, *The French Audio-Visual Policy: Impact and Compatibility with Trade Negotiations*, Hamburgisches Welt-Wirtschafts-Archiv, 18 (2003) (accusing patronage of destroying “the culture it was meant to protect”).

⁶⁵ DALE, *supra* note 32, at 225.

⁶⁶ Jonathan Buchsbaum, *After GATT: Has the Revival of the French Cinema Ended?*, 23 FRENCH POLITICS, CULTURE & SOCIETY 34, 42 (2005) (condemning culture of dependency that ensures mediocrity).

88% in real terms, falling from \$4 billion to .5 billion, while Hollywood's European box office take remained at a constant \$2.5 billion.⁶⁷

Several factors have reinforced this decline in commercial filmmaking. First, beginning in the 1960s, European governments began to deliberately steer subsidies toward "cultural" films at the expense of commercial genres.⁶⁸ Indeed, to get funded, film-makers often "have to prove that their project isn't 'commercial.'"⁶⁹ Unsurprisingly, the films that get funded this way rarely succeed at the box office.⁷⁰

Second, the ready availability of patronage to front production costs has changed European filmmaking from a speculative exercise in venture capital to a more self-indulgent mentality in which market imperatives take a back seat.⁷¹ In addition to government grants, filmmakers can count on ready funding from television: European governments typically require TV stations to devote a share of gross revenues to backing European films. While nominally exchanged for pre-purchased broadcast rights, such forced "investment" amounts to an indirect subsidy as payments exceed market value.⁷²

Patronage elevates producers and directors over other players in the industry. The result is a fragmented industry dominated by independents yielding a high volume of relatively low-budget productions.⁷³ Such

⁶⁷ DALE, *supra* note 32, at 173.

⁶⁸ DALE, *supra* note 32, at 177. Not all subsidies are selective in this way. Some countries also award "automatic" subsidies tied to box office performance. However, across Europe, the thrust of state aid shifted sharply to cultural selective subsidies from the late 1960s through 1980s. DALE, *supra* note 32, at 57; *infra* note 370.

⁶⁹ DALE, *supra* note 32, at 226.

⁷⁰ Such selective subsidies are typically awarded in the form of soft loans, repayable only to the extent the film makes money. In the early 1960s, the repayment rate in France was around 40-50%, a figure that had dropped to 10-15% by the end of the decade. DALE, *supra* note 32, at 187; Patrick A. Messerlin & Emmanuel Cocq, *Preparing Negotiations in Services: EC Audiovisuals in the Millennium Round 22* (paper presented at the World Services Congress on Services, Atlanta, Nov. 1-3 1999). The repayment rate for Europe as a whole is less than 10%. European ThinkTank on Film and Film Policy, *Public Policies for Film: Challenges in a Changing Context*, 6 (Sept. 2008) [hereinafter *European ThinkTank*].

⁷¹ This lack of market discipline is reflected in the much higher proportion of European film projects that proceed from development into production. By comparison, Hollywood green-lights fewer projects, and devotes far more resources (10% vs. 2% of overall budgets) to evaluating and refining projects at the pre-production stage. Henning & Alpar, *supra* note 63, at 238.

⁷² See Buchsbaum, *supra* note 59, at 18; DALE, *supra* note 32, at 227. While television pre-purchases typically pursue a mix of both cultural and commercial aims, their effect is to distract filmmakers from a focus on the box office. See *infra* notes 114-177 and accompanying text.

⁷³ Henning & Alpar, *supra* note 63, at 235-37; Allen J. Scott, *French Cinema: Economy, Policy and Place in the Making of a Cultural-Products Industry*, 17 THEORY,

fragmentation hampers the competitiveness of European film.⁷⁴ Worse, front-loaded funding removes the incentive of producers to even try for box office success.⁷⁵ Independent filmmakers earn their living by taking a cut from the pre-financing packages they assemble. With little or no ‘skin in the game,’ they remain relatively indifferent to the fate of the end products,⁷⁶ as do their government and television paymasters.⁷⁷ As a result, almost a third of French feature films receives little or no theatrical exhibition, with 20% relegated directly to television.⁷⁸

Compared to their US counterparts, producers are also far less apt to rein in directorial fancies that undermine commercial appeal.⁷⁹ As a result, European films have earned a reputation for emphasizing talk over action and intellectual rather than emotional appeal.⁸⁰ At the same time, the escalating budgets of popular films has meant that even commercially-minded independents struggle to compete for exhibition slots.⁸¹ Moreover, because micro studios lack the wherewithal to amortize losses and gains across multiple projects, they are vulnerable to highly

CULTURE & SOCIETY 1, 5 (2000) (ascribing lack of integration in French film industry to “comparatively easy access” that independent producers have to state-sponsored funding; see also *European ThinkTank*, *supra* note 70, at 11 (describing aim of independent producers to make as many films as possible).

⁷⁴ Small budgets means less investment in development, production, promotion, and merchandising tie-ins, all of which contribute directly to market success. Henning & Alpar, *supra* note 63, at 236-238.

⁷⁵ Scott, *supra* note 17, at 30 (producers more concerned with “obtaining financial subsidies than . . . attracting audiences”); Buchsbaum, *supra* note 59, at 12 (describing “logic of pre-financing” instead of box office).

⁷⁶ DALE, *supra* note 32, at 227; Buchsbaum, *supra* note 66, at 42, 46 (describing “*casino à la française*, where the players never lose”).

⁷⁷ Bizarrely, French law forbids television channels from acquiring a direct financial interest in the box office revenues of films they fund. The patron’s goal is instead to fund films that impress the cultural establishment and capture prestigious festival prizes. DALE, *supra* note 32, at 231-32. Such indifference to commercial considerations begins at film schools whose instruction emphasizes critical theory over practical economics. *Id.* at 206-07.

⁷⁸ Messerlin & Cocq, *supra* note 70, at 8 n.13.

⁷⁹ Reed Martin, *The French Film Industry: A Crisis of Art and Commerce*, 30 COLUM J. WORLD BUS. 6, 13 (1995). In part, such indulgence reflects the European “cult of the *auteur*,” which glorifies directors as creative masterminds. Scott, *supra* note 17, at 6. However, institutional structures reinforce this practice including the award of selective subsidies directly to directors and copyright laws that vest directors with creative control. DALE, *supra* note 32, at 187, 200-01.

⁸⁰ Cowen, *supra* note 61 (describing French films as the cinematic equivalents of the *nouveau roman*, a style of fiction that emphasizes introspection at the expense of narrative development).

⁸¹ Henning & Alpar, *supra* note 63, at 237; Buchsbaum, *supra* note 59, at 12.

unpredictable demand for creative products.⁸² Eighty percent of European studios make only one movie per year.⁸³ Accordingly, many play it safe with paint-by-number formula films made for television and purchased as cheap filler to meet domestic content quotas.⁸⁴

Indeed, much of European cinema has effectively become a made-for-television enterprise—hardly a recipe for quality.⁸⁵ Even by this low standard, Europe’s recent output fails to measure up. Television stations in France tellingly prefer to rerun classic pre-patronage films during primetime hours instead of airing more recent works. Meanwhile, newer films struggle to achieve secondary broadcasts once their pre-purchase rights have been exercised, content quotas notwithstanding.⁸⁶

Meanwhile, government subsidies have all but crowded out private financing options.⁸⁷ Europe’s few remaining commercial studios (mostly French) do produce a clutch of big budget films in-house. Europe also has more than its share of giant media conglomerates who remain active in distributing audiovisual content. Tellingly, however, these private companies prefer to direct their external investment into Hollywood co-productions rather than participate in Europe’s state-sponsored film sector.⁸⁸ This leaves independent filmmakers few alternative sources of funding, except to turn to Hollywood. Doing so, however, typically means foregoing all the benefits of government support—a price few are willing to accept.⁸⁹

Far from rescuing European film, subsidies have left the industry a shadow of its former commercial self. The main achievement of European patronage has been to replace private funding with a state-sponsored dependency on subsidies.⁹⁰ Granted, lack of commercial success does not necessarily mean that patronage has failed to fulfill its cultural goals. However, the chronic failure of European films to attract audiences serves

⁸² Messerlin & Cocq, *supra* note 70, at 5 (describing volume production as a form of risk management).

⁸³ Henning & Alpar, *supra* note 63, at 236.

⁸⁴ See *infra* notes 107-110 and accompanying text.

⁸⁵ The captive market created by European domestic content quotas only exacerbates the problem. Messerlin & Cocq, *supra* note 70, at 11.

⁸⁶ *Id.* at 7-8, 10-11. Such preferences persist despite the “massive” rate at which the classic films are continually rerun and despite the strong preference for “new releases” in other markets. *Id.*; Buchsbaum, *supra* note 59, at 16.

⁸⁷ See DALE, *supra* note 32, at 201-02 (availability of private bank loans and completion bond vanished in wake of public sector alternatives).

⁸⁸ DALE, *supra* note 32, at 127, 164.

⁸⁹ See *infra* note 188 and accompanying text.

⁹⁰ The patient remains alive on life support, but its prospects of recovery are far from sanguine. Henning & Alpar, *supra* note 63, at 241.

as a reality check that raises questions as to the cultural relevancy of such works.

B. Emphasis on Production over Distribution

The ripple effects of European patronage reach across the entire audiovisual industry. Fragmented production and shrinking audiences sets off a vicious cycle of diminished revenues and reduced competitiveness. The costs of patronage have been compounded by a neglect of Europe's distribution sector. The vast majority of European film subsidies go directly to production, paying filmmakers to churn out movies without worrying about what happens once they are made.⁹¹ Moreover, European policies on distribution actually makes matters worse.

Distribution has long “been considered the weak link in the [European film] industry.”⁹² In Hollywood, vertically integrated studio-distributors invest in films and actively promote their release. Such distributors capture valuable market feedback on “consumer trends and marketing possibilities.”⁹³ They are “natural figures to have a direct interest in the promotion of films and in their success in theaters.”⁹⁴ Yet, European distributors have been largely marginalized.⁹⁵ To be effective, distributors require organizational capacity and geographic scope, both of which benefit from economies of scale.⁹⁶ In championing national filmmaking, European patronage has balkanized its distribution section and prevented the horizontal and vertical integration that its film industries desperately need to be globally competitive.⁹⁷

Other distribution-related aspects of European cinema have suffered from similar neglect. A lack of investment in movie houses has led to

⁹¹ Europe-wide, around 80% of public funding goes directly to support production of individual films. *European ThinkTank*, *supra note* 70, at 8. Only around 7% goes to support theatrical film distribution, with slight additional funding for promotions (mostly at film festivals). *Id.* at 8, 10.

⁹² Buchsbaum, *supra note* 66, at 38; DALE, *supra note* 32, at 158.

⁹³ *Id.* Such market intelligence can inform development of film projects, a process which European cinema underemphasizes. Henning & Alpar, *supra note* 63, at 238.

⁹⁴ Buchsbaum, *supra note* 66, at 38.

⁹⁵ *Id.* at 38, 42; DALE, *supra note* 32, at 227; *European ThinkTank*, *supra note* 70, at 11. In the 1980s, French distributors accounted for around 30% of film financing. By the late 1990s, their contribution had fallen to under 6%. During this same period, financing from television pre-purchases almost quadrupled from around 10% to as much as 40%. Cocq & Messerlin, *supra note* 64, at 14; Buchsbaum, *supra note* 66, at 38.

⁹⁶ Scott, *supra note* 17, at 4. The ability of distributors to bridge the gap between producers and markets is particularly vital where production is fragmented as in Europe. *Id.*

⁹⁷ Henning & Alpar, *supra note* 63, at 236; *European ThinkTank*, *supra note* 70, at 22.

rundown venues that deter audiences.⁹⁸ Europe was relatively late in building modern multiplex theaters and lags the US in digital projectors.⁹⁹ European films also suffer from meager promotional budgets compared to their well-funded Hollywood rivals.¹⁰⁰ Instead, European films are forced to rely on reviews by critics to generate publicity, reinforcing their tendency to value praise from cultural elites over popular audiences.¹⁰¹

European patronage also affects the distribution sector directly. European patronage is partly funded by a tax on box office tickets, which increases prices, further depressing sales.¹⁰² Moreover, while Europe has started to steer more aid to the distribution sectors, much of this funding has proven counter-productive. An emphasis on art-house cinema and film festivals contributes to the marginalization of European film.¹⁰³ Propping up national distributors reinforces industry fragmentation.¹⁰⁴ Governments also micro-manage film marketing in intrusive and sometimes perverse ways.¹⁰⁵ Most notably, France imposes an outright ban on television advertising for motion pictures, which denies French movies one of their best means to attract audiences to new releases.¹⁰⁶

⁹⁸ DALE, *supra note* 32, at 173.

⁹⁹ Anne Jäckel, *The Inter/Nationalism of French Film Policy*, 15 MODERN & CONTEMPORARY FRANCE 21, 23 (2007).

¹⁰⁰ On average European movies devote 3-6% of their budget to advertising compared to US averages of 30% or more. Compare Henning & Alpar, *supra note* 63, at 238, with MPAA 2007 EIM Statistics at 7.

¹⁰¹ DALE, *supra note* 32, at 179-80 (describing European critics' scorn for popular filmmaking).

¹⁰² DALE, *supra note* 32, at 172-73; Messerlin & Cocq, *supra note* 70, at 12

¹⁰³ DALE, *supra note* 32, at 177, 221; *European ThinkTank*, *supra note* 70, at 8. France earmarks subsidies for "art house cinema," "challenging films," and "venues in underserved parts of the country." CNC Report #310 (May 2009) at 147. France also stages more film festivals than any other country. Jäckel 24. Festivals are also proliferating across the European continent. *European ThinkTank*, *supra note* 70, at 23 (more than 700 annually). While film festivals can facilitate marketing and distribution deals for mainstream cinema, cross-overs between the two realms is far from assured. Mostly, festivals cater to hard-core cinephiles and only run in a single venue for a few weeks so hardly substitute for mainstream theatrical release. *Id.* State patrons also chronically neglect funding for marketing. France devotes a paltry .3% of its film subsidies to promotion.

¹⁰⁴ Henning & Alpar, *supra note* 63, at 242-43; DALE, *supra note* 32, at 158.

¹⁰⁵ See Buchsbaum, *supra note* 66, at 39-41 (giving examples of *dirigiste* regulation); Messerlin & Cocq, *supra note* 70, at 7 (same).

¹⁰⁶ Henning & Alpar, *supra note* 63, at 229, 238.

Domestic content quotas for European television have also had perverse implications for European film distribution.¹⁰⁷ Such quotas effectively create a captive market for European film accounting for half its revenues.¹⁰⁸ Combined with forced investment in broadcast rights, such mandates, in theory, afford European film access to mass audiences in their living room.

In practice, however, reliance on television has proven a mixed blessing. The pre-purchase deals that TV dangles distract filmmakers from focusing on theatrical distribution. Moreover, it encourages smaller productions that are unlikely to be theatrically competitive at the box office. Because television stations have enormous content holes to plug, their priority is finding low cost filler to meet their quotas, rather than maximizing audiences for any particular show.¹⁰⁹ As result, television pours funds into a multiplicity of low-budget productions, most of which are destined for late-night broadcast slots with scant prospects of an audience.¹¹⁰

In essence, TV has become the primary distribution vehicle for European film, serving as a substitute for theatrical release rather than a complement to it.¹¹¹ Trading box office for TV has served European film badly. While television surpasses cinema in total revenues, the value per unit content is much lower. Film exhibition is not only a more prestigious, premium sector in its own right, it sits atop a cascading stream of downstream revenues.¹¹² A successful movie launch generates substantial publicity and popular attention that in turn drives DVD sales, pay-per-view, soundtracks, video games, theme parks, and product merchandising. Studio libraries of hit films pay dividends lasting for decades.¹¹³ Moreover, domestic box office success is crucial to securing export prospects.

¹⁰⁷ The European Union's Television Without Frontiers Directive requires a minimum of 50% of broadcast hours be devoted to airing European-made content. *See infra* note 385.

¹⁰⁸ COWEN, *supra* note 3, at 78; DALE, *supra* note 32, at 170-71.

¹⁰⁹ Messerlin & Cocq, *supra* note 70, at 11. At one time, for example, Canal Plus, a French pay-TV station, invested in 80% of France's annual film production. Buchsbaum, *supra* note 59, at 18.

¹¹⁰ Buchsbaum, *supra* note 59, at 16. French TV stations are actually *required* to earmark a percentage of their pre-purchases to small-budget films, the threshold amount for which has not been adjusted for inflation. *Id.*

¹¹¹ COWEN, *supra* note 3, at 78-79 ; DALE, *supra* note 32, at 204. In essence, the European film industry has become a made-for-TV enterprise. *Id.* at 203. By contrast, television remains a minor facet of Hollywood's total revenue streams. *Id.* at 234; COWEN, *supra* note 3, at 79 .

¹¹² DALE, *supra* note 32, at 25.

¹¹³ *Id.*; European ThinkTank, *supra* note 70, at 9.

By contrast, television broadcasts (even primetime) do not offer nearly the same payoffs. TV confers a much lower profile, less engaged audiences, is less receptive to innovation, and does not open doors to foreign distribution in the way that theatrical releases can.¹¹⁴ The economics of television center on delivering high volumes of predictable, standardized fare to intersperse between paid advertising.¹¹⁵ Made-for-television movies rarely generate works of lasting cultural influence.¹¹⁶ As such, TV quotas divert film production to a less prestigious outlet that drastically reduces both downstream revenues and cultural impact.¹¹⁷

By hitching its fortune to the television industry, European film has also become dependent on a shrinking revenue base as proliferating channel capacity and competition from other digital media fragment audiences depressing advertising revenues.¹¹⁸ Moreover, the switch to “on demand” content delivery platforms threatens to render content quotas obsolete.¹¹⁹ Theatrical film exhibition is not facing the same imminent threat.¹²⁰ Yet, by failing to invest in new production and distribution technologies to enhance the theatrical experience, Europe risks falling

¹¹⁴ Hyangsun Lee, *An Economic Analysis of Protective Policies: A Case Study of the Korean Screen Quota System* 11 (May 29, 2009), available at http://www.allacademic.com/meta/p14967_index.html; COWEN, *supra* note 3, at 79. Watching TV is a more passive activity than going to the movies. Many TV viewers simply watch whatever is on (or channel surf between competing offerings) without giving the programs their entire attention. The quality and production values of TV shows are also significantly lower than that of theatrically released film. TV coverage also gets much less media space than movies do. COWEN, *supra* note 3, at 78-79.

¹¹⁵ DALE, *supra* note 32, at 3; Fabrice Lalevée & Florence Lévy-Hartmann, *The Support for the French Cinematographic Production: Who Benefits from the French “Cultural Exception”?* 12 (Groupe d’Economie Mondiale à Sciences Po, Working Paper No. GEMWP-2007-01, 2007); Isabelle Vanderschelden, *Strategies for a “Transnational”/French Popular Cinema*, 15 MOD. & CONTEMP. FRANCE 41 (2007).

¹¹⁶ COWEN, *supra* note 3, at 78-79. Not only is the content quality lower, but it is less likely to have cultural impact owing to the passive nature of the medium. *Id.* at 78.

¹¹⁷ Some see television exposure as detracting from the reputation of European film overall. See Buchsbaum, *supra* note 66, at 37 (describing “banalization” of French film by virtue of constant TV exposure); *id.* at 48 (bemoaning TV’s “maleficent influence”).

¹¹⁸ *European ThinkTank*, *supra* note 70, at 12.

¹¹⁹ Once the consumer has more than a few choices, they can effectively watch what they want, whatever the quota target might be. Moreover, with non-linear content delivery (“on demand”), the broadcasters no longer even controls the content on any particular channel.

¹²⁰ Although television led to an initial decline in movie attendance, Hollywood has fought back with higher budget productions, special effects, and upgraded exhibition technologies (surround sound, 3-D) to keep its edge. Moreover, cinema-going remains a social ritual for which no home viewing system can adequately substitute. *Hollywood in the recession: One-dimensional*, ECONOMIST 63, July 11, 2009.

further and further behind Hollywood.¹²¹ Television represents a dangerous distraction from that challenge.

C. Centralized bureaucracies

Compounding its other flaws, state patronage has spawned red-tape and inefficiency. At best, the “bureaucratization of culture” serves as a dampener on innovation.¹²² At worst, patronage invites bureaucratic meddling, industry capture, or outright corruption.

Culturally selective subsidies require extensive bureaucracies to establish criteria, procedures and personnel to sort through competing applications and identify worthy recipients. Multiple sources of patronage have bred a proliferation of process. In addition to state mechanisms, television stations employ their own committee review processes, as do the patronage regimes emerging at the European supranational level. The Council of Europe’s Eurimage and the European Community’s Media programs now administer “a vast superstructure of public funding, almost as comprehensive as national funding systems.”¹²³ Many European regions offer their own subnational subsidies.¹²⁴ As with most bureaucracies, patronage regimes tend to grow more complex over time. Each new program brings another layer of red-tape.¹²⁵

These multiple levels of committee review represent “the true ‘battlefield’ of European cinematic culture.”¹²⁶ France alone has more than 160 forms of support, including 50 dedicated to feature-length films.¹²⁷ The official guide to these programs runs to 318 pages.¹²⁸ In their “opacity and complexity,” such “Byzantine” structures reward

¹²¹ Scott, *supra note* 17, at 28.

¹²² TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 40 (1998).

¹²³ DALE, *supra note* 32, at 221; Henning & Alpar, *supra note* 63, at 232-34.

¹²⁴ Germany’s federal system has always devolved cultural policies to its *Länder*. DALE, *supra note* 32, at 189-192. However, even centralized states such as France increasingly feature regional aid initiatives for filmmakers.

¹²⁵ Government has a finger in every pie from film education to archives; state patronage now extends to every phase and facet of the audiovisual lifecycle from script development to post-production to export assistance. Scott, *supra note* 17, at 12; DALE, *supra note* 32, at 231.

¹²⁶ DALE, *supra note* 32, at 231.

¹²⁷ Lalevée & Lévy-Hartmann, *supra note* 115, at 6. In addition, France and other European countries have entered into numerous bilateral agreements supporting international co-productions, each of which has unique provisions and prerequisites. Taking advantage of these agreements typically requires advice of legal counsel. DALE, *supra note* 32, at 185.

¹²⁸ Messerlin & Cocq, *supra note* 70, at 8 n.12.

insiders and repeat players who know how to work the system.¹²⁹ Committee members often lack “either the time or the skills to properly evaluate scripts and therefore depend above all on direct acquaintance with the applicant or personal recommendations.”¹³⁰ In many cases, awards go to those with the strongest lobby rather than the best ideas.¹³¹ Patronage becomes a spoils system exploited by a “quasi-rentier” class that, at worst, devolves into outright corruption.¹³²

Even where committee members act with the best of intentions, the results can skew in undesirable directions. Committee members often bring conflicting artistic and ideological agendas. The need to balance these diverging visions, as well as an intrinsic conservatism, leads decisions to gravitate toward bland, consensus picks.¹³³ Committees “are mainly concerned to know that the project has the right ‘cultural’ feel to it, and is not likely to ruffle any important feathers.”¹³⁴ As a result, the system tends to resist infusion of new blood and/or radical visions that might keep European cinema fresh and relevant.¹³⁵

¹²⁹ Buchsbaum, *supra note* 66, at 42; Cocq & Messerlin, *supra note* 64, at 14, at 22; DALE, *supra note* 32, at 233.

¹³⁰ DALE, *supra note* 32, at 229. Dale explains that committee members are often political appointees who lack direct experience in industry they oversee. *Id.* at 128.

¹³¹ *Id.* at 233; Harvey B. Feigenbaum, *Regulating the Media in the United States and France*, 27 J. ARTS MGMT., L., & Soc’y 283, 289 (1998).

¹³² Scott, *supra note* 17, at 31; Messerlin & Cocq, *supra note* 70, at 4; DALE, *supra note* 32, at 233 (describing abuses ranging from “the casting couch” to bribery kickbacks). Italy, in particular, has had notorious corruption scandals related to audiovisual funding. *Id.* at 197-98, 233.

¹³³ Cocq & Messerlin, *supra note* 64, at 12; Tyler Cowen explains how multiple vetoes on committee cancel each other out. This conservative tendency is reinforced by accountability to politicians: fear of provoking political heat has a chilling effect. TYLER COWEN, *GOOD & PLENTY: THE CREATIVE SUCCESSES OF AMERICAN ARTS* 135 (2006).

¹³⁴ DALE, *supra note* 32, at 229. Such distortions affect television pre-purchases as well, which is expected to serve a public “cultural” remit. *Id.* at 204-05, 231. While nominally private, commissioning editors at TV stations remain subservient to the government’s cultural mission. *See id.* at 234 (describing government influence over appointment of TV editors). Moreover, the bias toward bland uniformity is particularly pronounced in the case of television. The “bulk rate” mentality of television programming strongly favors standardized offerings that hew to well-trodden formulae over more experimental fare. Vanderschelden, *supra note* 115, at 41; Lalevée & Lévy-Hartmann, *supra note* 115, at 12.

¹³⁵ While Europe’s cultural establishment may champion *advante garde* art, it tends to be hostile to truly revolutionary visions. COWEN, *supra note* 133, at 99-100. Instead, the relatively few newcomers who break in tend to be drawn from a narrow circle of metropolitan elites who went to the “right” schools and can hobnob with the cultural aristocracy. DALE, *supra note* 32, at 233. Of course, Hollywood has its A-lists and film royalty as well. However, the boundaries are more permeable and mobility constant. The bottom-line question is: can you make money for us, not did you go to the right school and wear the right tie?

To reverse such tendencies to stifle cultural dynamism, reforms in recent decades have sought to help independent filmmakers and nurture new talent, with mixed success.¹³⁶ Directing funding to independents reinforces industry fragmentation. France also earmarks special subsidies for “first films” by new directors. Yet, Cocq and Messerlin calculate that new directors receiving “first film” funding from 1987-1996, in fact, fared no better in establishing long-term careers than those who did not.¹³⁷

In fact, tinkering with the European patronage system may be doing more harm than good. The continuing industry decline has prompted a steady stream of reports and studies proposing various reforms.¹³⁸ The standard response of policy-makers has been to implement recommendations for new programs, while ignoring calls to overhaul the old ones (which vested interests inevitably oppose).¹³⁹ Each new change engenders unintended consequences, which in turn demands further tweaks.¹⁴⁰ As new programs pile atop the old, a system of mindboggling complexity has emerged as a barrier to entry in its own right.

On paper, such complexity may give the illusion of decentralized funding and the promise of diversified access¹⁴¹; in practice it does the opposite. As funding pours through an ever broader array of spigots, outlays from any given source have diminished. Filmmakers therefore have to assemble a patchwork of grants and loans from multiple sources, each with its own application process and committee review.¹⁴² Whereas Hollywood studios provide one-stop-shop solutions to financing, production, and distribution, aspiring European filmmakers must navigate an increasingly Kafkaesque maze in which applying for funding consumes more time than making the actual movies.¹⁴³ Moreover, because the same

¹³⁶ For example, EU television quotas mandate that 10% of programming be produced by “independents.” And a percentage of television pre-purchases is reserved for “small-budget” films. Yet, failure to index the threshold amount to inflation has led such allocations to steadily decline in real terms.

¹³⁷ Cocq & Messerlin, *supra note* 64, at 23.

¹³⁸ Buchsbaum, *supra note* 66, at 38-40. Such audiovisual analyses have become a cottage industry. In France alone, between 2000 and 2006, no less than 17 comprehensive industry studies were undertaken (not counting parliamentary inquiries). Lalevée & Lévy-Hartmann, *supra note* 115, at 5.

¹³⁹ *Id.* (“The new instruments overlay the old ones . . . intertwined without any rationality”); Messerlin & Cocq, *supra note* 70, at 4 (describing resistance to reform).

¹⁴⁰ Buchsbaum, *supra note* 66, at 41; Buchsbaum, *supra note* 59, at 12.

¹⁴¹ See Scott, *supra note* 17, at 17.

¹⁴² DALE, *supra note* 32, at 226-29. In this way, the fragmentation of patronage mirrors the fragmentation of industry.

¹⁴³ See Joongi Kim, *The Viability of Screen Quotas in Korea: The Cultural Exception under the International Trade Regime*, 26 KOREAN J. INT’L & COMP. L. 199, 232 (1998); DALE, *supra note* 32, at 225-26. Applicants are rewarded for their public relations skills, while quirky geniuses are overlooked. COWEN, *supra note* 133, at 100.

establishment figures sit on multiple committees, the potential diversity benefits of parallel funding are never realized. Instead, such administrative redundancy acts as a barrier to entry that stifles creativity.¹⁴⁴

As a result, European cinema has failed to refresh its talent base and blunted its innovative edge.¹⁴⁵ The once-revolutionary techniques of New Wave filmmaking have become hackneyed clichés.¹⁴⁶ Meanwhile, Hollywood provides a constant lure, siphoning off European talent, leaving behind an aging cadre of filmmakers.¹⁴⁷ Between 1960 and 1993, the average age of French directors increased from 28 to 55 years old.¹⁴⁸

So far, this story could be taken as a cautionary tale about *dirigiste* state policies blunting market competitiveness. In purely market terms, it is easy to argue that patronage amounts to a negative value proposition.¹⁴⁹ However, it is worth emphasizing that the costs of patronage go beyond those quantifiable in economic terms. Patronage regimes do not just produce culture less efficiently, they also affect the *kind* of works produced, raising obvious concerns over state censorship.

D. Discriminatory Funding

By nature, patronage regimes represent an exercise in positive censorship. By funding some artists but not others, the state determines whose voices get heard.¹⁵⁰ As a natural instrument of state control, cultural patronage risks authoritarian abuse.¹⁵¹ In some countries, the link between cultural funding and state ideology can be blatant.¹⁵² Even where

¹⁴⁴ DALE, *supra note* 32, at 232-33. The more committees a filmmaker has to get past to secure funding the less the opportunity for truly innovative, idiosyncratic visions to survive the gauntlet of bureaucratic review.

¹⁴⁵ Cocq & Messerlin, *supra note* 64, at 22-23; DALE, *supra note* 32, at 161; COWEN, *supra note* 122, at 39-40. Some would argue that institutional culture by nature is oxymoronic. COWEN, *supra note* 133, at 143 (citing Dubuffet).

¹⁴⁶ Martin, *supra note* 79, at 9.

¹⁴⁷ DALE, *supra note* 32, at 159 (describing how frustration with obstacles in Europe leads young filmmakers to vote with their feet); Martin, *supra note* 79, at 10. Over 40% of name directors in Hollywood come from Europe. DALE, *supra note* 32, at 161.

¹⁴⁸ DALE, *supra note* 32, at 122, Martin, *supra note* 79, at 16. Italy's talent drain has been even more severe. DALE, *supra note* 32, at 161.

¹⁴⁹ Command and control economics loses to free market is hardly headline news. Nor is the notion that trade protection breeds inefficiency.

¹⁵⁰ DALE, *supra note* 32, at 122. Where government is only one participant in a diverse cultural marketplace, such concerns can be tolerated. However, under the monopsonistic conditions of state patronage, the threat to free speech becomes more pressing.

¹⁵¹ Messerlin & Cocq, *supra note* 70, at 4.

cultural protection is framed in ostensibly non-ideological terms, the very process of selecting works deemed worthy of state support invites value-judgments about speech content that are deeply problematic.¹⁵³

While European patronage has been relatively free of ideological biases, it does exert a conservative influence on questions of taste and morality and favors projects with overtly national themes (such as historical dramas).¹⁵⁴ Beyond that, European governments have largely delegated the administration of patronage to the cultural establishment. Here, the problem becomes less one of state censorship than of “capture by a small intellectual elite” whose idiosyncratic preferences determine subsidy allocations.¹⁵⁵

The result has been a virtual abandonment of commercial film genres. Cultural subsidies almost never go to detective stories or thrillers—genres historically favored by European audiences, and these films rarely get made as a result.¹⁵⁶ Obscure symbolism, extended dialogue and introspection are favored over plot-driven action.¹⁵⁷ Such systematic content discrimination may not amount to authoritarian thought control, but it is hardly democratic. Audiences are force-fed “cultural broccoli” whose unpalatability to popular taste is paraded as a badge of honor vindicating the superiority of elites.¹⁵⁸

¹⁵² Venezuela’s domestic content quota requires music radio stations to play “traditional Andean folk music”; Kazakhstan’s state-owned film company lavished funds on its “Genghis” movie to burnish national mythology; India required traditional *raga* music to be used as soundtracks for Bollywood movies. Such essentialized notions of authenticity invite a reactionary paternalism rife with potential for abuse. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing With Fire*, 70 J. GENDER, RACE, JUSTICE 69, 84-85 (2000).

¹⁵³ Even such an ostensibly liberal democratic regime as Canada has been embarrassed by accusations of censorship whereby a conservative government made recognition of “Canadian values” (as a prerequisite for subsidies) a proxy for ideological bias, rejecting films with gay themes as “un-Canadian.”

¹⁵⁴ Jäckel, *supra note* 99, at 21. European-wide patronage programs impose their own distinct biases favoring so-called “Euro-pudding” films embodying bland pan-European ideals divorced from identifiable national traditions. Henning & Alpar, *supra note* 63, at 237; Jäckel, *supra note* 99, at 29.

¹⁵⁵ Feigenbaum, *supra note* 131, at 284; DALE, *supra note* 32, at 233-34. Formal criteria for administering subsidies tend to confer substantial discretion to committee personnel to impose their own preferences. DALE, *supra note* 32, at 233. Committees composed of cultural elites select recipients of funding and, in turn, look to judgments by other elites (critics, festival juries—very often drawn from the same pool) to validate their choices. DALE, *supra note* 32, at 177, 187.

¹⁵⁶ *European ThinkTank*, *supra note* 70, at 17; Henning & Alpar, *supra note* 63, at 231; DALE, *supra note* 32, at 168, 180 (lamenting the atrophy of these quintessentially European genres).

¹⁵⁷ COWEN, *supra note* 3, at 99-100.

¹⁵⁸ Cf. PIERRE BOURDIEU, *DISTINCTION* (Richard Nice trans.) 32-34 (1984).

Other biases are perhaps less deliberate. An aging cadre of directors has meant a dearth of youth-oriented fare, ensuring a declining audience base.¹⁵⁹ The centralization of patronage regimes in capital cities results in a preoccupation with metropolitan concerns.¹⁶⁰ Such solipsistic tendencies further limit the popular appeal of European cinema.¹⁶¹ These self-inflicted injuries are particularly grievous when it comes to export markets, a sector which European patronage has consistently neglected.

E. Not Global

A recurrent criticism of European patronage is that it is overly defensive, concentrating on securing home markets rather contributing to global discourse.¹⁶² At first blush, faulting cultural protectionists for focusing on their home markets is like blaming the Pope for being Catholic. Some would say the whole point is to foster *national* culture and keep globalization at bay. Protectionists also argue that catering to global audiences compromises the authenticity of the stories being told in that inside references and plays on language do not translate well. There is some truth to this. Some cultural content undoubtedly exports better than others: Hollywood blockbusters emphasize action-oriented storylines with universal themes to maximize their global appeal.¹⁶³ Nonetheless, for Europe, the choice between domestic vs. export markets represents a false dichotomy.

European cinema need not compete with Hollywood in catering to global mass market. High-tech action blockbusters leave plenty of space for intelligently crafted middlebrow fare.¹⁶⁴ Indeed, Europe dominated this niche in the 1960s, when European films became the darling of art house cinema in the US.¹⁶⁵ The more recent success of the American Indie movement shows commercial demand remains for smaller-bored

¹⁵⁹ Martin, *supra* note 79, at 15-16; DALE, *supra* note 32, at 180.

¹⁶⁰ COWEN, *supra* note 3, at 142. Germany is the exception because cultural patronage is primarily provincial responsibility. DALE, *supra* note 32, at 189-91.

¹⁶¹ See DALE, *supra* note 32, at 217 (“Seduced by the siren song of juries whose erudite members support one another in mutual gratification, the [filmmaker] ends up forgetting the basics: to move the man in the street.”).

¹⁶² See, e.g. Scott, *supra* note 17, at 17, 27. This criticism points to a tension between the inward-focused “national sovereignty” view of cultural protection vs. the more global human heritage rationale. See *European ThinkTank*, *supra* note 70, at 8.

¹⁶³ Martin, *supra* note 79, at 14 (summarizing attributes of Hollywood movie). Likewise, a trend toward action films at the expense of comedies reflects the influence of export markets. More generally, commercial industries stand accused of “dumbing down” culture to pander to the least common denominator. COWEN, *supra* note 3, at 12.

¹⁶⁴ COWEN, *supra* note 3, at 99.

¹⁶⁵ Marin, *supra* note at 11. At that time, foreign films accounted for 10% of the US box office. Today, European films are lucky to scrape above 1%. Henning & Alpar, *supra* note 63, at 232.

films with sophisticated storytelling.¹⁶⁶ However, the Continental Europeans have all-but ceded this market.¹⁶⁷ Indeed, European films are scarcely shown even in neighboring European countries. The box office share of European films in European markets *outside* their home country struggles to break single digits.¹⁶⁸

Figure Two shows the decline of inter-European exports.

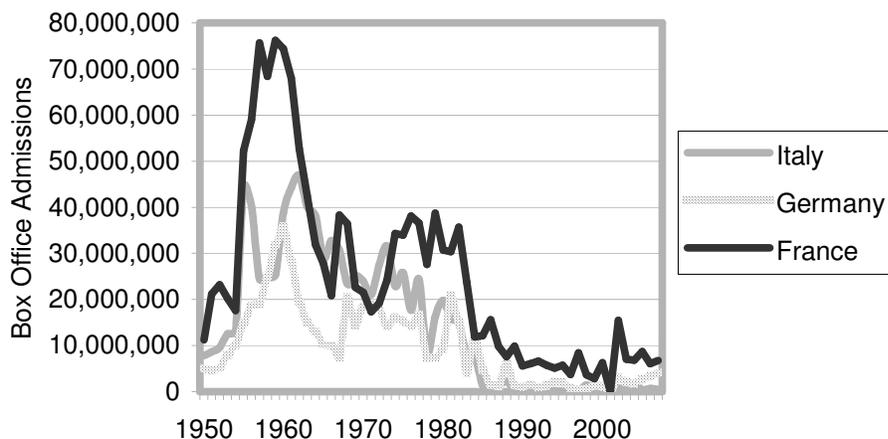


Figure 2: Declining Sales for Italian, German and French Films in Neighboring markets.

A myopic focus on domestic audiences all-but ensures competitive failure. Producing high quality feature-length films requires enormous fixed cost investments. However, the marginal cost of producing and distributing each additional copy upon completion is modest. Confining filmmakers to the home market puts a ceiling on the amount of revenues their products can generate. A smaller revenue base translates into lower production and marketing budgets leaving European filmmakers hopelessly outgunned when it comes to competing with Hollywood.¹⁶⁹ On average, European films attract just one per cent of the audience of a typical Hollywood film.¹⁷⁰ Government subsidies alone cannot make up the shortfall, even discounting the costs they impose in bureaucracy and content discrimination.

It is not that European filmmakers cannot make movies that appeal to both domestic and foreign audiences. Rather, they have been encouraged

¹⁶⁶ There are also more distribution options for niche films today. *See infra* notes 346-351 and accompanying text.

¹⁶⁷ Martin, *supra* note 79, at 12.

¹⁶⁸ Henning & Alpar, *supra* note 63, at 231-32.

¹⁶⁹ Scott, *supra* note 17, at 29; Marin, *supra* note at 16; COWEN, *supra* note 3, at 76 (“In essence, Hollywood is now competing with the native European producers in each individual country, rather than with cross-European exports”).

¹⁷⁰ DALE, *supra* note 32, at 119 (noting that this differential is growing).

not to try. Prior to 1980, Italy and France used to export over half their local production; today the ratio is less than one in five.¹⁷¹ All the market distorting effects of patronage regimes described above apply doubly when it comes to exports. A focus on national stories pitched at insider elites limits the cross-border appeal of European film.¹⁷² Stitching together patronage funding at home distracts producers from pursuing international distribution.¹⁷³ Overproduction of domestic films crowds out other European imports.¹⁷⁴ Industry fragmentation means small productions lack the budget to compete internationally.¹⁷⁵ Distributors concentrating on “national fortresses” lack transnational capacity.¹⁷⁶ National patrons perennially shortchange export promotion.¹⁷⁷

Efforts to promote European-wide production and distribution have also suffered the usual drawbacks of patronage regimes: market distortions,¹⁷⁸ sclerotic bureaucracies,¹⁷⁹ rent-seeking insiders,¹⁸⁰ and elitist cultural values.¹⁸¹ Worse, such efforts seem to have perversely reinforced industry fragmentation.¹⁸²

In the early postwar years, European filmmakers used to pool talent from across the continent through co-productions. In 1965, 45% of European films were bi- or multi-national ventures, effectively creating

¹⁷¹ DALE, *supra note* 32, at 169-171.

¹⁷² Vanderschelden, *supra note* 115, at 38; DALE, *supra note* 32, at 174. Similarly, made-for-TV movies do not lend themselves to export. COWEN, *supra note* 3, at 79.

¹⁷³ DALE, *supra note* 32, at 230.

¹⁷⁴ Messerlin & Cocq, *supra note* 70, at 10. This becomes a self-reinforcing phenomenon: while Hollywood celebrities are known everywhere, European audience increasingly lack familiarity with the stars of other European cinema so that the latter no longer serve as a draw. Henning & Alpar, *supra note* 63, at 229.

¹⁷⁵ Henning & Alpar, *supra note* 63, at 248. Exporting films often requires specialized expertise in marketing, licensing, addition of dubbing or subtitles that small distributors lack. *European ThinkTank*, *supra note* 70, at 22.

¹⁷⁶ *Id.* at 236; DALE, *supra note* 32, at 118. Television broadcasts are similarly confined to national territory. Cocq & Messerlin, *supra note* 64, at 4.

¹⁷⁷ Scott, *supra note* 17, at 29; *European ThinkTank*, *supra note* 70, at 22. Moreover, efforts at international outreach tend to emphasize film festivals in lieu of mainstream distribution, which further marginalizes European content. *Id.* at 22-23.

¹⁷⁸ DALE, *supra note* 32, at 217, 221 (criticizing the European Community Media programs for reinforcing dependency on state subsidies and distracting filmmakers from popular audiences)

¹⁷⁹ *Id.* 221-11.

¹⁸⁰ *Id.* at 210, 221-22.

¹⁸¹ *Id.* at 211, 221 (criticizing Media), 223 (Eurimage).

¹⁸² Henning & Alpar, *supra note* 63, at 241-43, 246-48 (criticizing Media for keeping small producers and distributors “alive on life support”).

the nucleus of a pan-European cinema.¹⁸³ The rise of national patronage regimes “shifted films to a more parochial outlook.”¹⁸⁴ Although recent policy shifts have prompted a revival of co-productions, their character has changed. Co-productions today tend to be driven by the need to stitch together multiple state funding sources rather than any underlying artistic or commercial logic.¹⁸⁵ As a result, they no longer deliver the same payoffs in cross-border distribution and box office drawing power.¹⁸⁶

European filmmakers also used to partner with Hollywood’s European subsidiaries, thereby gaining access to US capital, distribution networks, marketing, and technology. Many of the classic European films in the postwar decades benefited from US backing.¹⁸⁷ The emergence of national patronage regimes effectively stopped such collaborations by barring subsidies from flowing to non-European ventures.¹⁸⁸ Such blacklisting of US finance has had perverse consequences in terms of what get funded.¹⁸⁹ It hurts European filmmakers far more than Hollywood.¹⁹⁰ Instead, the main effect of such prohibitions has been to entrench indigenous oligopolies, hamper innovation, and further marginalize European cinema.¹⁹¹

¹⁸³ DALE, *supra note* 32, at 167; Jäckel, *supra note* 99, at 24, 26.

¹⁸⁴ *Id.*

¹⁸⁵ *European ThinkTank*, *supra note* 70, at 20-21; DALE, *supra note* 32, at 185. Unsurprisingly, France has emerged as a co-production hub given its rich array of subsidies on tap. Jäckel, *supra note* 99, at 26.

¹⁸⁶ Henning & Alpar, *supra note* 63, at 244.

¹⁸⁷ See DALE, *supra note* 32, at 259-66 (listing examples).

¹⁸⁸ DALE, *supra note* 32, at 184-85, 220. Directors who collaborate with Hollywood face informal penalties as well. For example, some attribute the exclusion of *Amélie* from the Cannes film festival, despite its widespread critical acclaim, to French director Jean-Pierre Jeunet’s Hollywood ties.

¹⁸⁹ See Jäckel, *supra note* 99, at 27 (describing denial of subsidies to *Very Long Engagement*, an adaptation of a French historical novel, filmed in France by a French director in French, because Warner Brothers was a minority investor, while Oliver Stone’s *Alexander*, a Hollywood production filmed in English, obtained funding based on Stone’s French passport from his mother).

¹⁹⁰ The notion that foreign capital will taint European culture is belied by a long list of quintessentially European films made with US backing. See *id.* at 259-66; Patrick Messerlin, *Regulating Culture: Has it “Gone with the Wind,”* 287, available at http://www.pc.gov.au/_data/assets/pdf_file/0020/9191/abros.pdf (describing “British touch” of UK films with US backing).

¹⁹¹ See DALE, *supra note* 32, at 220 (criticizing “indulg[ence] in gesture politics”); Buchsbaum, *supra note* 59, at 17 (describing conflict between large studios who fear competition from Hollywood vs. independents who would welcome US finance); Martin, *supra note* 79, at 9 (lack of innovation).

F. Summary

European cinema suffers a crisis of confidence. A loss of global competitiveness has bred an inward, defensive mindset in which market failures are rationalized through a patina of cultural superiority propped up by massive injection of state funding. Far from strengthening European film, subsidies have given rise to an ossified “national cinema” drained of creative and commercial dynamism. Failure to export have forced filmmakers to subsist on a dwindling revenue base even as the budgets of their Hollywood competitors have soared.¹⁹²

Moreover, the effects of these structural disadvantages are cumulative over time. Hollywood attracts a critical mass of talent from around the world precisely because it is a global center of cinematic creativity, finance and technology. Europe may turn out an occasional string of memorable films, but more often than not these come from maverick filmmakers operating outside the patronage system.¹⁹³ Moreover, over the long haul, its national filmmakers cannot compete with Hollywood’s star power, scale economies, and global marketing clout.

State patronage consumes enormous resources for which European taxpayers bear the ultimate cost. It is unclear what value they are getting for their money. Ultimately, cultural protection is worthless if it means “protecting” films that no one watches.¹⁹⁴ Yet, European patronage is engineered to do just that: force-feed subsidies that create an escalating stockpile of throwaway productions relegated to the TV graveyard.¹⁹⁵

Faced with such criticism, European cultural elites tend to respond with a Gallic shrug. “Culture is not determined by the weekly box office,” they sniff.¹⁹⁶ Hollywood blockbusters succeed because they pander to vulgar consumer tastes.¹⁹⁷ One should not “mistake art for entertainment.”¹⁹⁸ Such responses are far too glib. Cultural value may not

¹⁹² Europe makes more than twice as many movies annually as the United States but generates only a small fraction of Hollywood’s global revenue stream. UNESCO Institute for Statistics, *Analysis of the UIS International Survey on Feature Film Statistics*, at 4 (April 2009). Even with 80% subsidies from the state, European filmmakers must make do with budgets averaging a tenth of Hollywood’s. DALE, *supra* note 32, at 221-23.

¹⁹³ DALE, *supra* note 32, at 242-44.

¹⁹⁴ Feigenbaum, *supra* note 118, at 20.

¹⁹⁵ Buchsbaum, *supra* note 59, at 16; DALE, *supra* note 32, at 168 (analogizes the unwatched spools of subsidized celluloid to the infamous wine lakes and butter mountains amassed through European agricultural subsidies).

¹⁹⁶ Time, *supra* note 57, at 73 (quoting French filmmaker: “American culture is nothing more than a consumer product.”).

¹⁹⁷ COWEN, *supra* note 3, at 12.

¹⁹⁸ Time, *supra* note 57, at 72.

be synonymous with market preferences, but neither are they antitheses.¹⁹⁹ Divorcing films from audiences is a recipe for cultural irrelevancy. The commercial failure of European film risks losing the battle for hearts and minds to Hollywood.

Such shortcomings might perhaps be ameliorated if European films truly amounted to cultural gems whose lasting value or influence transcended box office returns. Yet, the caliber of European film output hardly justifies such lofty claims to cultural supremacy. As subsidies have risen, the European films have fallen behind in terms of quantifiable measures of cultural impact: Awards at prestigious international film festivals epitomize the cultural currency that European mandarins profess to recognize. Yet, the share of awards garnered by European films has declined markedly since patronage became pervasive. In the 1960s and 1970s, France, Italy and the United States all captured roughly the same total number of awards at the Berlin, Venice and Cannes Film Festivals (42, 37, and 45, respectively), and France and Italy surpassed the US if you exclude actor/actress awards (24: 27: 17). In the 1990s and 2000s, the United States enjoyed a commanding advantage, garnering almost 50% more awards than runner-up France (66:47 with actors, or 46:32 without) and more than triple Italy's prize haul.²⁰⁰ In other words, the shift to culturally selective funding (and higher subsidies) has led to *less* culturally significant films measured by Europe's own standards—exactly the opposite result intended.

Cannes, Berlin and Venice Festival Prizes (Counting Actor/Actress Awards)

	1960	1970	1980	1990	2000	TOTAL
USA	18	27	25	35	31	136
FRANCE	29	13	31	26	21	120
ITALY	17	20	15	10	8	70

Cannes, Berlin and Venice Awards (Excluding Actor/Actress Awards)

USA	2	15	9	26	20	72
FRANCE	16	8	20	17	15	76
ITALY	15	12	8	8	3	46

Hollywood can succeed in making both blockbusters and art films because its commercial revenues support a vibrant cinematic ecology whose concentration of talent, business savvy, and technical capabilities benefit filmmakers at all levels. In essence, the mass market blockbusters support the creative infrastructure on which smaller, more culturally

¹⁹⁹ Scott, *supra note* 17, at 27.

²⁰⁰ Data compiled from festival websites.

ambitious filmmakers piggyback.²⁰¹ If Europe produced more popular hits, it could afford to make better cultural films as well.²⁰² Nor are two mutually exclusive: Many of Europe's acknowledged cinematic masterpieces were commercial successes.²⁰³

The failings of European cultural protectionism are unsurprising. They reflect basic design flaws in the patronage model. Patronage proponents keep thinking they can reconfigure the apparatus to make it work: add a tax here, a subsidy there, tweaking criteria and formulae until the heavens align.²⁰⁴ Such attempts resemble Ptolemaic epicycles—elaborate efforts to perfect a system built upon a flawed paradigm.²⁰⁵

What is needed is a new model. The pervasiveness of state patronage as a global model has perpetuated a constricted vision of cultural policy that has needlessly exacerbated the conflict with world trade law. We need to expand our conception of cultural protection to work with markets, not against them. This does *not* mean pulling the plug and embracing laissez faire policies that cast European film to the (Hollywood) wolves. It does mean converting state support from a closed, state-centric regime into a system of decentralized incentives that embrace globalization rather than resist it.

As it happens, there is a country whose cultural protectionist regime has made this shift with stunning success: South Korea. By learning from the Korean example, we can rid ourselves of the Eurocentric bias that has distorted global debate over culture and move toward a more effective model of protection that minimizes trade conflicts.

III. Reinventing Cultural Protection through Decentralized Policy

The abysmal track-record of cultural protectionism based on state patronage argues strongly for rethinking the role of the state in cultural markets. Rather than injecting state funding directly into audiovisual productions in ways that preempt feedback from paying audiences, the government should play a supporting role that aims to underwrite the market through indirect subsidies, but not supplant it. To insulate production decisions from bureaucratic meddling and red-tape, subsidies should be decentralized, with safeguards against content discrimination. Distribution should be emphasized over production. Moreover, a

²⁰¹ COWEN, *supra* note 3, at 96.

²⁰² DALE, *supra* note 32, at 169, 243.

²⁰³ DALE, *supra* note 32, at 169.

²⁰⁴ See, e.g. Messerlin, *supra* note 190, at 316-17 (advocating competition between patrons); *Meet the Directors*, INDEPENDENT (tax on popcorn); *European ThinkTank*, *supra* note 70, at 20 (proposing audience reeducation).

²⁰⁵ See generally THOMAS KUHN, *PARADIGMS IN SCIENTIFIC THOUGHT* (1962).

concerted effort should be made to tap into global markets to expand the revenue base sustaining domestic industries.

South Korea provides the best example of such decentralized, market-based cultural policies. The Korean experience refutes the notion that trade liberalization is incompatible with cultural diversity. It suggests almost the exact opposite: that trade can strengthen a culture rather than weaken it. South Korea's liberalized policies have spawned a dramatic cultural renaissance in recent decades. Its revitalized audiovisual industries have achieved record sales both at home and abroad. Their commercial success has sustained a remarkable flowering of domestic cultural expression.

A. The Korean Wave Rises

The “Korean Wave” refers to the surge of popularity that South Korean popular culture has enjoyed in recent decades.²⁰⁶ Korean TV, film and pop music have all become hot commodities, as well as powerful brand ambassadors of a hip new Korean national image.²⁰⁷ Korea is one of the very few countries whose domestic film industry can hold its own against Hollywood imports. Korean television dramas have won legions of fans (and prime-time billing) across much of Asia. While numerous factors contributed to Korea's transformation from cultural backwater to regional superstar, its genesis can be readily traced to changes in government policy.

For much of the 1960s and 1970s, South Korea operated one of the world's most protected cultural regimes including a period of outright censorship under military rule.²⁰⁸ Strict quotas limited audiovisual imports and restricted their distribution.²⁰⁹ Such regulatory barriers bequeathed an essentially captive market to domestic producers. At the same time, a government licensing regime restricted entry and tightly controlled the subject matter and range of permissible expression.²¹⁰ Domestic film studios made money by churning out low budget productions based on formulaic Hollywood-style plots, while simultaneously producing more culturally worthy, morally/ideologically

²⁰⁶ See Doobo Shim, *Hybridity and the Rise of Korean Popular Culture* 28 MEDIA, CULTURE, & SOC'Y 25, 25 (2006).

²⁰⁷ For simplicity, “Korea” and “Korean” will henceforth refer to The Republic of Korea—popularly known as South Korea.

²⁰⁸ Prior to 1995, the state did not offer much financial support of its audiovisual industries. Dal Yong Jin, *Cultural Politics in Korea's Contemporary Films under Neoliberal Globalization*, 28 MEDIA, CULTURE, & SOC'Y 5, 5 (2006).

²⁰⁹ Film restrictions included import license quotas, print quotas, and a ban on foreign distributors. See Lee, *supra note* 113, at 13.

²¹⁰ *Id.*

sound fare to appease state censors.²¹¹ Either way, pushing product past state censors was more important than achieving artistic or commercial success. The explicit linkage of import licenses to domestic production meant that producing “quota quickies” was merely a means to the more commercially significant end of acquiring distribution rights to Hollywood product.²¹² Audience preferences counted for little in this equation.²¹³

Things began to change in the 1980s with the restoration of democratic rule and a gradual liberalization of social and economic policies. Under pressure from US trade negotiators, South Korea lifted many of its restrictions on foreign audiovisual content.²¹⁴ Opening the door to foreign competition had the drastic short-term consequences that cultural protectionists would predict. Korea’s audiovisual industries were flattened by a tidal wave of imported content.²¹⁵ The share of the domestic box office sales garnered by Korean films plummeted from an average 38% market share in the early 1980s to less than 16% in 1993.²¹⁶

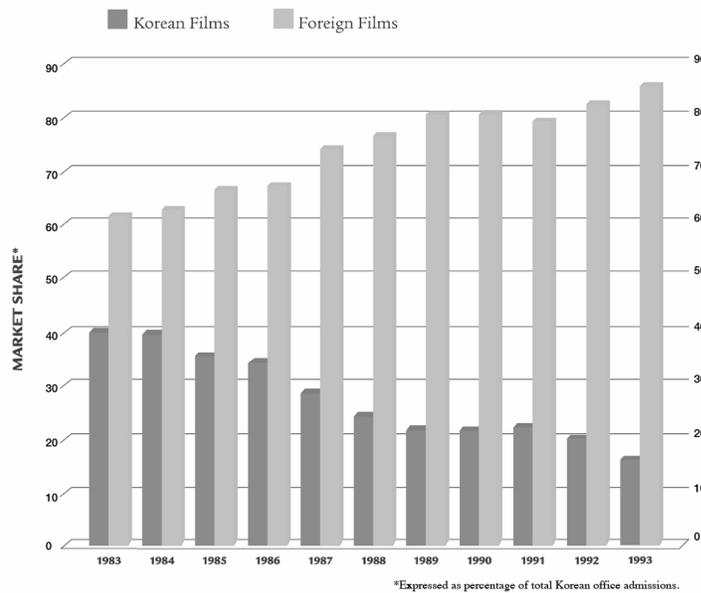


FIGURE 3 – Decline of the South Korean Film Industry, 1983-1993

²¹¹ *Id.* “Culture” itself was framed largely as a dialogue with the past, which prioritized folk arts and traditional culture. Jin, *supra note* 208, at 15.

²¹² Basically the import license system functioned according to the formula “make one, get one.” Kim, *supra note* 142, at 202 & n.10.

²¹³ *Id.*

²¹⁴ See Lee, *supra note* 113, at 15; Jin, *supra note* 208, at 8.

²¹⁵ The US market share peaked at 72.3% in 1993. Jin, *supra note* 208, at 9.

²¹⁶ Lee, *supra note* 113, at 15-16. Annual domestic film production halved between 1991 and 1994, dropping from 121 to 63.

Alarmed by the collapse of its domestic content industry, Korea's new democratic rulers embarked on an ambitious cultural policy to revive it. Crucially, the government recognized that to succeed the industry had to be placed on a more commercial footing.

1. Market Oriented

In contrast to the previous authoritarian regimes which had approached culture as an expression of national identity, Korea's policy-makers viewed culture as a business opportunity.²¹⁷ An influential 1994 government White Paper offered the example of the Hollywood blockbuster, *Jurassic Park*, whose global revenues in box office, TV syndication, merchandizing, etc. were calculated to be equal to 1.5 million foreign sales of Hyundai cars. "The comparison of a film to Hyundai cars—which at that time were considered the 'pride of Korea'—was apt enough to awaken the Korean public to the idea of culture as an industry."²¹⁸ Film became a commercial enterprise, with artistic merit and cultural authenticity taking a back seat. Policy-makers saw audiovisuals as a "strategic sector" to develop primarily through industrial rather than cultural policy.²¹⁹

Korean policy-makers developed a comprehensive strategy to enhance the competitiveness of its domestic industry.²²⁰ Under the slogan "Learning from Hollywood," Korea strove to replicate the business structures of US commercial filmmaking and emulate its production, marketing and distribution techniques.²²¹ Studios invested in state-of-the-art cinematographic equipment.²²² Domestic film distributors adopted sophisticated business methods to fend off Hollywood rivals.²²³

Government initiatives, bolstered by legislation passed in 1995 and 1997, deployed a variety of funding to support to the restructuring efforts. Compared to the patronage regimes pioneered in Europe, Korea's total expenditures remained relatively modest.²²⁴ Moreover, crucially, Korea

²¹⁷ Jin, *supra note* 208, at 15-16, 19 (describing a shift from focus on cultural identity to focus on economic potential).

²¹⁸ Shim, *supra note* 206, at 32.

²¹⁹ Audiovisuals were deemed "cultural software," a necessary complement to the consumer electronic hardware that Korean manufacturers were rapidly churning out. See Jin, *supra note* 208, at 10.

²²⁰ Jin, *supra note* 208, at 16; Shim, *supra note* 206, at 33.

²²¹ Shim, *supra note* 206, at 32-33 (describing promotion of "vertically integrated media conglomerates").

²²² Jin, *supra note* 208, at 16 (describing Samsung's use of computer techniques and helicopter camera-work). Lee, *supra note* 113, at 21 (film budget stats).

²²³ Jin, *supra note* 208, at 18.

²²⁴ Lee, *supra note* 113, at 17; Compare Jin, *supra note* 208, at 11 (describing a \$125 million fund established to promote Korean cinema over five years, beginning

eschewed any direct involvement with funding specific productions. Instead, Korean relied on indirect subsidies that operated as a catalyst to private investment or focused on upgrading technical capabilities.

Korean policy-makers looked initially to the *chaebol*, South Korea's giant industrial conglomerates such as Samsung and Daewoo to jump-start the domestic audiovisual industry. A combination of informal suasion and tax incentives induced the *chaebol* to open film and TV subsidiaries. By recruiting skilled managers and imposing business discipline backed by rigorous audience research, the *chaebol* brought a newly professional orientation to the industry.²²⁵

The *chaebol*, however, represented only part of Korea's emerging creative infrastructure. Tax incentives and other regulatory reforms encouraged a broader base of private investment in film production.²²⁶ When the *chaebol* were forced to contract and abandon their film interests in the aftermath of the Asian financial crisis in 1997, Korean filmmakers were thus able to continue to tap venture capital and even raised money through innovative "netizen funds," whereby investors purchased individual shares online priced at just a few dollars each to finance a forthcoming movie production.²²⁷ Production budgets rose enabling more ambitious storytelling and special effects to attract growing audiences.²²⁸ In essence, by channeling state subsidies indirectly through private investors in the form of tax write-offs, Korea avoided the monopsonistic distortions caused by European patronage, ensuring that production remained responsive to audiences rather than bureaucratic fiat. Diversifying the audiovisual industry's financing had the further benefit of supporting a variety of filmmaking styles.²²⁹

1999), with CNC report #310, May 2009, at 13 (showing France spends more than triple that amount on its domestic film industry every year).

²²⁵ Shim, *supra note* 206, at 33 (describing "an unprecedented entry of fresh talent, such as MBAs and graduates from prestigious universities, into film companies."); *id.* (describing how audience data drove "[e]ach stage in the film-making process," from scriptwriting to final edits).

²²⁶ Jin, *supra note* 208, at 11 (describing government reclassification of the movie business from a service industry to manufacturing, enabling film producers to borrow from banks for the first time in decades).

²²⁷ Jin, *supra note* 208, at 12. Netizen investors, mostly in their 20s, were often members of online fan clubs or other movie discussion sites. When investors in these funds scored a few early hits, such funds became popular, creating a speculative bubble during the "DotCom" era. *Id.* at 12-13.

²²⁸ Lee, *supra note* 113, at 20-21 (describing average film productions costs rising from less than \$1 million in 1996 to almost \$4 million by 2003). Average audience size rose almost sixfold in the same period. *Id.* at 23.

²²⁹ Dal Yong Jin, *Reinterpretation of Cultural Imperialism: Emerging Domestic Market Versus Continuing U.S. Dominance* 29 MEDIA, CULTURE, & SOC'Y 753, 758 (2007).

Korean policy-makers also invested in upgrades to Korea's creative infrastructure that would benefit the industry as a whole. Korea built cutting-edge production facilities that were open to all domestic producers.²³⁰ It provided funding to send Korean students to foreign film schools.²³¹ It recruited foreign experts to consult on new technologies and business models and sponsored programs to train audiovisual workers in modern production techniques. More recently, it has invested in digital technologies and beefed up copyright enforcement to combat piracy of domestic content.²³² In short, Korea pursued an industrial policy focused on enhancing production and distribution capabilities. As with its decentralized financing, Korea's targeting of capabilities allowed it to indirectly subsidize audiovisual production without detracting from the primacy of audiences as the ultimate consumer.

2. Distribution-focused

In addition to decentralized finance and infrastructural investments, the third major policy intervention Korea put in place in the 1990s was a resuscitated screen quota. Screen quotas require movie theaters to reserve a minimum quantum of exhibition time for national films to be screened to domestic audiences.²³³ Against the overall trend of Korea's audiovisual liberalization, Korea's screen quota stands out as the one significant trade barrier that Korea kept.²³⁴

Korea's decision in 1993 to begin actively enforce its screen quota marked the beginning of a striking reversal of its film industry's decline.²³⁵ From their nadir of a 15.9% domestic market share that year, Korean-made films rebounded to claim over 50% within a decade.

²³⁰ Feigenbaum, *supra note* 131, at 284, 291.

²³¹ Shim, *supra note* 206, at 33.

²³² *Korea's Digital Wave Travels Far*, FDI MAGAZINE, Oct 3, 2005; Woongjae Ryoo, *Globalization, or the Logic of Cultural Hybridization: the Case of the Korean Wave*, 19 ASIAN J. COMM'N 8 (2009).

²³³ During this period, the mandatory screening requirement was 146 days per year, although a slight reduction was possible if theaters screened Korean films during the high-demand season. Lee, *supra note* 113, at 16. This meant reserving about 30% of screen time for Korean films, leaving 70% for market-based selections. Kim, *supra note* 142, at 234.

²³⁴ Korea also belatedly introduced a domestic content quota for TV, analogous to its screen quota for film. As discussed below, however, there is reason to doubt the need for or effectiveness of such TV quotas.

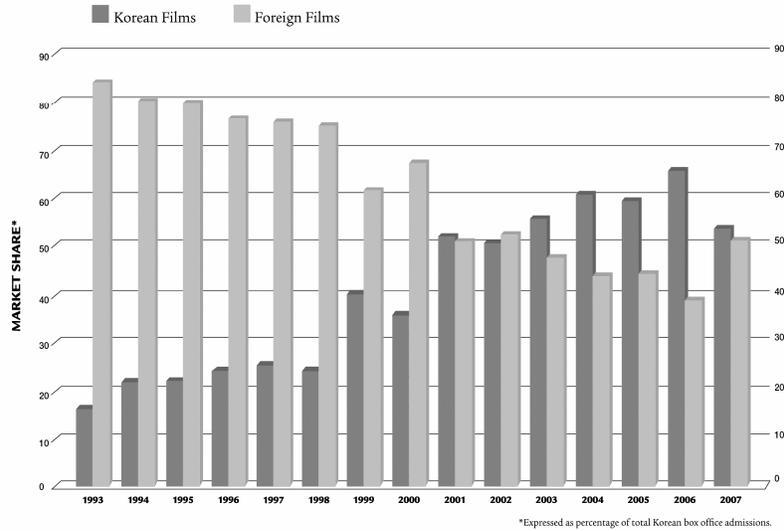


Figure #4: Korean Film Rises Anew: 1993-2007

Admittedly, correlation is not causation. Commentators disagree as to the extent to which Korea's screen quota was instrumental in the industry's recovery.²³⁶ Some argue that other factors such as increased film budgets or expanding domestic cinema capacity played a larger role.²³⁷ Skeptics also argue that whatever early benefits the screen quota afforded have been rendered superfluous now that the Korean film industry regularly exceeds the quota through market performance.²³⁸

Without attempting to resolve this causal debate, it worth observing that a screen quota does promise several theoretical benefits. By guaranteeing domestic producers access to the local market, the quota reduces the risks entailed in filmmaking and encourages private investment.²³⁹ In this respect, the higher budgets cited by quota skeptics as an alternative explanation for Korea's success do not constitute an independent variable: Studio financiers were likely more willing to fund

²³⁶ Compare Lee, *supra* note 113, at 28, with Yongjae Choi, *Does Screen Quota Really Promote Local Film Production?*, 3 KOREA ASSOC'N FOR TELECOMM. POL'Y 119 (2007), available at <http://www.katp.or.kr/download/15200554.pdf>; see also Byung-il Choi, *Culture and Trade in the APEC: Case of film industry in Canada, Mexico and Korea*, Korea Institute for International Economic Policy 39-40 (2002); MARK RUSSELL, *POP GOES KOREA: BEHIND THE REVOLUTION IN MOVIES, MUSIC, AND INTERNET CULTURE* 68-69 (2008).

²³⁷ Shi Young Lee, Eun-mee Kim, & Young Il Kim, *The Effect of the Korean Screen Quota System on Box Office Performance*, 42 J. WORLD TRADE 335, 343 (2008); Choi, *supra* note 239, at 39-40.

²³⁸ Lee, Kim, & Kim. *supra* note 240, at 340-43.

²³⁹ As a creative industry, film production is a high-risk business. By assuring domestic producers a reasonable chance to have their films distributed, the quota eliminates some of that uncertainty, making it easier to attract investment and financing. Lee, *supra* note 113, at 19-20.

high budget productions given greater assurance that their films would be exhibited. Screen quotas can also improve export prospects by ensuring opportunities for domestic films to “prove themselves” in their home market, thus making them more of a known quantity for foreign distributors.²⁴⁰

In recent years, the domestic market share of Korean movies has easily exceeded the quota floor. Even so, the screen quota arguably retains more than symbolic value. As noted, filmmaking is a risky business, hostage to the uncertain alchemy of creative talent and capricious audience tastes. Anything that reduces such uncertainty encourages investment.²⁴¹ If nothing else, the clamor of concern provoked by the recent reduction of the screen quota underscores its salience as a psychological safety net.²⁴² Accordingly, there is a plausible case that the screen quota has played a non-trivial role in underpinning Korea’s success.

Korea’s reliance on the screen quota presents a sharp contrast with the production subsidies favored by European patronage. As we saw, the latter results in production of movies that elite paymasters favor while doing nothing to ensure that audiences actually watch them (and discouraging producers from even getting them distributed). By contrast, screen quotas operate explicitly at the distribution level. Rather than funding the creation of cultural artifacts for their own sake, such quotas only have value to the extent realized through market returns. By preserving the link to paying audiences and encouraging distribution, Korea’s screen quota thus offers clear advantages over European patronage.

Korea’s screen quota also has clear advantages as a cultural protectionist instrument over the domestic content quotas for television relied on in Europe. South Korea is unusual in employing a screen quota as its weapon of choice. Widely used in the early postwar decades, screen quotas have gone out of fashion. In Europe, most countries have either repealed or ceased to actively enforce them. By contrast, quotas on television content are much more pervasive, perhaps reflecting the quasi-public nature of broadcasters, which reduces the political costs of imposing such requirements.²⁴³

²⁴⁰ Lee, *supra note* 113, at 28 (noting “box-office success in domestic markets is generally used as the best indicator of the film’s potential success in other countries”).

²⁴¹ Commentators also argue the quota serves as a check on anticompetitive practices by Hollywood distributors such as block-booking that could otherwise be difficult to deter. Kim, *supra note* 142, at 231, 235; Lee, *supra note* 113, at 7.

²⁴² Jin, *supra note* 208, at 19.

²⁴³ Governments broadcast monopolies are contingent upon certain public trust functions. By contrast, privately owned cinemas are liable to protest screen quota

While both types of quotas promote distribution of domestic audiovisuals, screen quotas focus on film exhibition, which represents the more prestigious, high-value sector of the industry. Successful movie launches generate substantial follow-on revenues from DVD sales to improved export prospects. Accordingly, to the extent screen quotas induce greater investment and innovation in domestic film-making, a great deal of value can potentially be captured downstream. By contrast, as we saw, television quotas foster lower quality productions that do not offer nearly the same payoffs. Indeed, television quotas risk diverting filmmakers from the high-value exhibition sector. Moreover, television quotas are being rendered obsolete by new digital “on demand” delivery platforms.²⁴⁴ Accordingly, Korea’s emphasis on screen quotas for film confers significant strategic advantages over TV quotas.

The main drawback with screen quotas concerns uncertainty as to the optimal level at which to fix the quota.²⁴⁵ Set too low, the quota becomes meaningless. Set too high, it insulates domestic producers from foreign competition to a point at which production quality may suffer.²⁴⁶ Overly aggressive quotas also hurt exhibition revenues, discouraging investment in domestic cinemas.²⁴⁷ Ideally, the quota should serve as a pace-setter to encourage investment, but not get too far ahead of industry capacity or market demand.²⁴⁸ Because filmmaking is such an uncertain business hostage to vagaries of supply and demand, fine-tuning the quota level can therefore present a challenge, particularly where the quota is tied to production in only one country. Part IV proposes a novel global diversity that substantially alleviates such uncertainty.²⁴⁹

3. Decentralized

Both Korea’s screen quota and tax incentives function in a decentralized manner to stimulate domestic investment with minimal government. Unlike direct subsidies, which require cumbersome

mandates as interfering with their livelihood, property, or freedom of speech. Cf. Kim, *supra* note 142, at 205 & n. 18.

²⁴⁴ See *supra* note 119 and accompanying text.

²⁴⁵ See Lee, *supra* note 113, at 31. Poorly calibrated quotas have led to a variety of unintended consequences including a proliferation of pornographic films in Brazil. *Id.*

²⁴⁶ See Carolyn Hyun-Kyung Kim, *Building the Korean Film Industry’s Competitiveness: Abolish the Screen Quota and Subsidize the Film Industry*, 9 PAC. RIM L. & POL’Y J. 353, 374 (2000).

²⁴⁷ Lack of cinema capacity means less domestic screening opportunities, while badly run-down venues can depress audience demand, both of which disproportionately harms domestic productions.

²⁴⁸ Cf. Lee, *supra* note 113, at 7 (recommending 30% quota based on empirical study).

²⁴⁹ See *infra* notes 391-97 and accompanying text.

bureaucracies to administer, compliance is largely self-enforced, with minimal red-tape. The tax incentives can be claimed on individual returns. Likewise, responsibility for implementing the screen quota initially falls upon private cinemas. A civic-watch group conducts external monitoring, backed by government penalties.²⁵⁰

Korea's infrastructural investments have been more "hands on" in terms of bureaucratic involvement. In this respect, they are subject to the usual hazards of *dirigiste* policy.²⁵¹ However, South Korea's government has mitigated some of these concerns by self-consciously casting itself in a supporting role focused on enhancing industry-wide capabilities. Korea eschews direct subsidies to mainline productions, focusing instead on the infrastructural investment. As we saw, Korean policy-makers resisted the temptation to elevate the *chaebol* into "cultural champions. Instead, Korea's decentralized policies serve to diversify its creative base and nurture new talent.²⁵² Such creative diversification offset Korea's initial emphasis on vertical integration and positioned Korea well to survive the Asian economic crisis in the 1997.²⁵³

4. Non-discriminatory

The firewall protecting Korea's audiovisual policies from content-discrimination was both a deliberate policy decision and also a structural consequence of the commercially oriented and decentralized policies described above. Unlike European patrons who imposed elite conceptions of cultural value, Korean policy-makers insisted that the market remain the ultimate arbiter. Focusing on production capabilities and business models provided a value-neutral way for the government to offer support without being tempted to influence content. Laundering subsidies through private investors similarly insulated against state bias. Likewise, Korea's (cinema) screen and television quotas were open to all domestically-produced content rather than singling out particular works deemed of cultural value. The bluntness of such quotas limits the scope for bureaucratic meddling. By relying on such decentralized and/or indirect mechanisms, Korea could promote the production and dissemination of domestic audiovisual content while avoiding the market distortions created by European state patronage as to the type of content being incentivized.

²⁵⁰ Choi, *supra* note 239, at 23-24.

²⁵¹ Kim, *supra* note 249, at 360.

²⁵² See Korean Film Council, *The Guide to Korean Film Industry and Production* 363 (2008) (describing subsidies of independent, short films as a way to nurture promising directors who move on to bigger things).

²⁵³ Jin, *supra* note 231, at 758-59.

5. Globalized

From the start, Korean policy-makers set their sights on realizing the export potential of the audiovisual industry.²⁵⁴ They recognized the critical importance of economies of scale to sustain production quality and compete with Hollywood.²⁵⁵ Encouraging vertically integrated media conglomerates led by the *chaebol* and network broadcasters gave Korean industry the heft and connections necessary to sustain export capabilities.²⁵⁶ Co-production agreements with neighboring states opened new distribution channels.²⁵⁷ Meanwhile, the independent sourcing requirement ensured a diversity of product offerings to compete for foreign distribution rights.²⁵⁸ Korea's relatively low-priced, high quality productions soon won them fans across the region and even in countries as geographically and culturally remote as Iran and Mexico.²⁵⁹ The success of Korean television dramas paved the way for film and music exports, as shared emblems of Korea's emerging identity as a pop culture dynamo.

Korean policy-makers also took specific measures to promote exports. They sponsored film festivals to showcase Korean talent and to expose Korean filmmakers to the best of global cinema.²⁶⁰ Korea's culture ministry also actively coordinated joint publicity and marketing campaigns for its popular culture industries.²⁶¹ Korean officials helped to open the door to co-production agreements with neighboring states.²⁶² Government provided export insurance to lubricate overseas deals.²⁶³ Korean officials also lobbied trade partners to respect copyrights on Korean content.²⁶⁴

In sum, Korea's support of its audiovisual industries comprised a proactive set of government policies that diverged sharply from the

²⁵⁴ See Jin, *supra* note 208, at 9-10.

²⁵⁵ Lee, *supra* note 113, at 28. Market clout helped also helped negotiate collaborative relations with Hollywood. See *infra* notes 257 & 267.

²⁵⁶ See Jin, *supra* note 231, at 758-59; Jin, *supra* note 208, at 10.

²⁵⁷ See Jin, *supra* note 231, at 759. In addition to regional tie-ups, Korean filmmakers have entered into several production and distribution deals with media companies in Europe and Hollywood, including DreamWorks, MCA, and Canal Plus. See Jin, *supra* note 208, at 14-15.

²⁵⁸ Jin, *supra* note 231, at 758-59.

²⁵⁹ Lee, *supra* note 113, at 30 (citing market shares in North America and Europe).

²⁶⁰ See Shim, *supra* note 206, at 34. Unlike Europe, however, Korean policy-makers never viewed festival exhibition as a substitute for mainstream cinema.

²⁶¹ Shim, *supra* note 206, at 22. The culture ministry was also involved in cross-marketing promotions related to tourism. *Id.* at 7.

²⁶² *Id.* at 23.

²⁶³ *Id.*

²⁶⁴ *Id.*

European pattern of protectionism. Korea's emphasis on commercial rather than culture values ensured that filmmakers responded to audience demand rather than government fiat. Eschewing direct patronage, Korean policy-makers relied primarily on decentralized, non-discriminatory policies. And embracing globalization, Korean policy-makers actively pursued export markets that would allow its domestic producers to reap the economies of scale essential to long-term competitiveness.

6. Assessment

The results have been nothing less than spectacular. Korean movie blockbusters have consistently topped domestic box office charts since 1999.²⁶⁵ Korean films have been shown worldwide, winning both audience and critical acclaim. Export revenues skyrocketed from \$400,000 to \$76 million from 198_ to 1996.²⁶⁶ Major US companies such as Fox and Columbia have signed deals for global distribution rights, and others have purchased screenplay rights for US remakes.²⁶⁷

Meanwhile, Korean dramas have captivated audiences across Asia.²⁶⁸ TV exports increased more than twelvefold from 1995 to 2004, jumping from \$5.5 to \$71.4 million.²⁶⁹ Success breeds success: Greater revenues has meant greater resources to reinvest in ambitious productions and expanded distribution.²⁷⁰ Korean movie stars are now the highest paid outside of Hollywood. What is more, the Korean Wave has had staying power. Although Korean domestic film market share has nudged downward slightly in the last couple of years, South Korea's audiovisual juggernaut continues to steamroll regional competitors and hold its own against Hollywood.

"Kim Chic" has made Korean pop culture the hip new presence across much of East and Southeast Asia, influencing such lifestyle choices as food, fashion, and even plastic surgery.²⁷¹ The regional "infatuation with Korean culture" has inspired fans to study Korean, travel to Korea, and

²⁶⁵ Lee, *supra note* 113, at 21.

²⁶⁶ Korean Film Council, *supra note* 255, at 360.

²⁶⁷ Shim, *supra note* 206, at 29.

²⁶⁸ Hu Jintao, the president of China, is, by his own report, a huge fan of the Korean historical TV epic miniseries, "Jewel in the Palace." *Id.*

²⁶⁹ Jin, *supra note* 231, at 753.

²⁷⁰ Film and TV budgets have risen almost tenfold, leading to more innovative, higher quality productions. Lee, *supra note* 113, at 27-28; Shim, *supra note* 206, at 8.

²⁷¹ Shim, *supra note* 206, at 29 "In the streets of Hanoi and Beijing, it is common to find young members of the 'Korea Tribe,' or Koreanophiles, sporting multiple earrings, baggy hip-hop pants, and the square-toed shoes of Seoul fashion." *Id.*

date Korean men.²⁷² It has also bestowed a halo effect on Korean export industries (many of whom have hired Korean movie stars as their pitchmen).²⁷³ Finally, the positive image garnered by Korea's cultural exports has also had geopolitical ramifications, salving diplomatic strains and burnishing Korea's national identity and regional image.²⁷⁴ In short, South Korea—a country not previously noted for its cultural vitality—has rapidly emerged as a cultural and commercial heavyweight in global production of popular culture.

B. Three Questions from Skeptics

Impressive though these results may be, some hard questions must be answered if we are to accept the Korean Wave as a model for reinventing cultural protectionism:

(1) Does commercial success correlate with cultural value? Has the Korean Wave produced content that serves the goals of cultural protectionism?

(2) How much did government policy matter? Was there really a market failure that required state intervention, or would the Korean audiovisual industry have reached the same outcome on its own?

(3) Does Korea offer an exportable model, or did the Korean Wave depend upon unique circumstances unlikely to be replicated?

We address these three “skeptic’s questions” in turn.

1. Cultural Value

As to first skeptic’s question, “cultural value” is inevitably subjective and can be measured in many ways. However, from the standpoint of the proclaimed goals of cultural protectionism—identity building, democratic discourse, and human heritage—the Korean Wave scores well. By producing compelling stories that command audience attention and advance public discourse, Korea has clearly passed the threshold test of a dialogically-based rationale for cultural protection.²⁷⁵ Korea is one of the few countries in the world where domestic films hold their own against Hollywood competition, and its successful exporting of its pop culture products has contributed to a newly hip identity for the erstwhile Hermit Kingdom.²⁷⁶

²⁷² See Shim, *supra* note 206, at 29-30 (language study); *id.* (film tours); *What is It About Korean Men that Japanese Women Adore?*, THE CHOSUN IBO, July 29, 2004, <http://english.chosun.com/w21data/html/news/200407/200407290028.html>.

²⁷³ Shim, *supra* note 206, at 22.

²⁷⁴ See *id.* at 5, 14 (describing “soft power” accrued in the wake of Korean Wave); Ryoo, *supra* note 235, at 14 (describing vision of democratic society projected).

²⁷⁵ See *supra* notes 34-39 and accompanying text.

²⁷⁶ Ryoo, *supra* note 235, at 14.

But has the Korea Wave's popularity been purchased at the expense of cultural distinctiveness? To the extent its commercial appeal rests solely on repackaged Hollywood formulas we might conclude that, rather than besting the cultural imperialists, Korea has merely joined their ranks. Simply put: is there anything Korean about the Korean Wave?

Clearly, there is. By all accounts, the thematic content of Korea Wave productions are much more authentically Korean and contemporary than the formulaic "quota quickies" that preceded them.²⁷⁷ Rather than simply pander to "universal" consumer tastes, Korean films and TV shows have taken advantage of the new era of democratic freedom to delve into sensitive topics that had previously been off-limits.²⁷⁸

Korean history has proved a rich mine for excavation. Best-selling films have depicted life during Korea's medieval dynasties,²⁷⁹ reenacted the Korean War,²⁸⁰ as well as explored more recent historical events.²⁸¹ Perhaps unsurprisingly, relations with North Korea and themes of conflict and reunification underlie many popular movies.²⁸² Recent movie hits

²⁷⁷ Ryoo, *supra note* 235, at 8 (describing "new script templates that center more fully on distinctively Korean situations . . . less formulaic Hollywood clichés[, and] less predictable storylines").

²⁷⁸ SHIM, *supra note* 206, at 33.

²⁷⁹ Notable among these are *THE KING AND THE CLOWN* (2005), a release about a courtly romance that currently reigns as the #2 all-time bestseller, as well as *DIVINE WEAPON* (2008) (ranking #36), *UNTOLD SCANDAL* (2003) (#38), *LE GRAND CHEF* (2007) (#51), and *ONCE UPON A TIME IN A BATTLEFIELD* (2003) (#54). Wikipedia, Cinema of Korea: All-time Box Office Records, http://en.wikipedia.org/wiki/Cinema_of_Korea#All-time_box_office_records (last visited November 13, 2009) [hereinafter *Korean All-Time Box Office*].

²⁸⁰ Notable Korean War films include *TAEGUKGI: THE BROTHERHOOD OF WAR* (2004), praised for its "unflinching portrayal of . . . the brutality of both the North and South Korean armies," and *WELCOME TO DONGMAKGOL* (2005), which portrays soldiers from both North and South who stumble upon "a secluded and naively idealistic village whose residents are unaware of the outside world." They are, respectively, the #3 and #9 all-time best-selling films in Korea. *Id.*

²⁸¹ For example, *SILMIDO* (2003) and *MAY 18* (2007) provide fictionalized accounts of popular uprisings during South Korea's military dictatorship. *FOREVER THE MOMENT* (2008) celebrates the 2004 Olympic silver medal won by the Korean women's handball team. They rank, respectively, #5, #10 and #31 on the all-time bestseller list. *Id.*

²⁸² *SILMIDO* (#5) describes a fictional plot to assassinate North Korean dictator Kim Il-sung as well as efforts to negotiate peaceful reunification. Derek Elley, *Silmido*, *VARIETY*, Feb. 2008, 2004. Two other landmark films also dealt with North-South relations: *SHIRI* (1999) depicts an elite North Korean hit squad sent into the South. The title refers to a Korean fish, and a key monologue "describes how the waters from both North and South Korea flow freely together, and how the fish can be found in either water without knowing which it belongs to." Richard James Havis, 'Shiri' a Keeper of the Faith, *HOLLYWOOD REPORTER*, Feb. 5-11, 2002. *JOINT SECURITY AREA* (2000), revolves around "an illegal shooting at the politically and militarily sensitive North-South Korean border." Wikipedia, Joint Security Area,

have tackled other politically sensitive topics linked to contemporary events. For example, Korea's all-time box office champion, *THE HOST*, is a monster horror story with a political twist—the mutant amphibian in the film is spawned by the dumping of toxic waste by the US military in Korea—based on an actual incident.²⁸³ Reenactments of real-life crime stories have also been a recurring feature.²⁸⁴ Other films have dealt with modern social issues set in a distinctively Korean milieu.²⁸⁵

Such recognizably Korean stories about lived Korean experiences help to remake Korean identity and adapt its traditions to the modern age. Portrayal of changing gender relationships have also challenged social conventions.²⁸⁶ Similarly, rehashing history has prompted new debate over current geopolitical issues.²⁸⁷ By provoking popular discourse on such issues of contemporary relevance, Korean audiovisuals invite audiences to clarify their belief systems and values, thereby informing policy decisions and contributing to democratic governance.²⁸⁸

[http://en.wikipedia.org/wiki/Joint_Security_Area_\(film\)](http://en.wikipedia.org/wiki/Joint_Security_Area_(film)) (last visited November 13, 2009). They rank #15 and #17, respectively.

²⁸³ Wikipedia, *The Host*, [http://en.wikipedia.org/wiki/The_Host_\(film\)](http://en.wikipedia.org/wiki/The_Host_(film)) (last visited November 13, 2009). The chemical agent used by the American military to combat the monster in the film is also named "Agent Yellow" in a thinly-veiled reference to Agent Orange, a chemical sprayed by the US military in Vietnam with devastating environmental consequences. (US combat troops stationed in South Korea have been a source of recurring tension between the two countries). Further targets of satire woven throughout the film include inept, uncaring government officials and self-righteous protesters. *Id.*

²⁸⁴ Notable films in this genre include *MEMORIES OF MURDER* (2003) and *VOICE OF A MURDERER* (2007), ranked #19 and #45 on the all-time bestseller list. *Korean All-Time Box Office*, *supra* note 279.

²⁸⁵ *FRIEND* (2001), a recordbreaking film now ranked #8, provides a fictionalized version of the director's coming of age in his hometown, Pusan. Wikipedia, *Friend*, [http://en.wikipedia.org/wiki/Friend_\(2001_film\)](http://en.wikipedia.org/wiki/Friend_(2001_film)) (last visited November 13, 2009). An earlier breakthrough movie, *SOPYONJE* (1993) portrays traditional Korean pansori singers trying to make a living in the modern world. Wikipedia, *Seopyeonje*, <http://en.wikipedia.org/wiki/Sopyonje> (last visited November 13, 2009). *MARATHON* (2005) chronicles the true story of an autistic runner whose passion is encouraged by his devoted mother. *THE WAY HOME* (2002) captures the intergenerational tension between a rural grandmother and her city-born grandson. They rank #21 and #29.

²⁸⁶ This phenomenon was particularly notable with respect to the prime-time Korean soap opera, "Winter Sonata," which explored the generational conflicts of young Korean lovers struggling to reconcile their yuppie lifestyles with familial expectations and Confucian tradition. RUSSELL, *supra* note 239, at 118-19.

²⁸⁷ *Id.* (describing nationalistic tensions with Japan).

²⁸⁸ In some cases, the influence of Korean films has had measurable effects: The publicity given to the unresolved murder portrayed in the film *MEMORIES OF MURDER* led to proposals to amend Korea's statute of limitations to give prosecutors more time to solve the case. Wikipedia, *Memories of Murder*, http://en.wikipedia.org/wiki/Memories_of_Murder; Frank Scheck, *Memories of Murder*,

This is not to deny that much of the content of the “Korean Wave” has its frivolous side. Many of the films and TV shows fall within conventional genres of popular culture from romantic comedies to gangster tales to sitcoms and dramas. Gratuitous violence, sexual innuendo, and humor all make their appearance. Particularly in the early years of *chaebol*-dominated filmmaking, critics lamented the “Blockbuster-ization of Korean movies and cultural identity,” dismissing the big budget action films then in vogue as merely “another version of Hollywood.”²⁸⁹ But to focus only on the superficial ingredients of popular storytelling is to miss the underlying cultural content embedded within.²⁹⁰ Nor should the hype surrounding Korea’s biggest blockbusters distract attention from the diversity of audiovisuals being produced.²⁹¹

By expanding its creative infrastructure within a highly competitive, commercial industry, Korea has gained the capacity to innovate at all levels of audiovisual production.²⁹² The best Korean movies more than hold their own on the international “high culture” stage, capturing prizes at Cannes and other prestigious venues.²⁹³ As such, they contribute to the diverse tapestry of human heritage. More importantly, the cultural perspectives offered by Korean movies and TV shows are actually enriching the lives of audiences who watch them around the world.

HOLLYWOOD REPORTER, July 21, 2005. The Pansori singers portrayed in SOPYONJE renewed public interest in what had been a dying art form. Wikipedia, Seopyeonje, <http://en.wikipedia.org/wiki/Sopyonje>. MARATHON brought new awareness in Korea to autism as a disability. Wikipedia, Marathon, http://en.wikipedia.org/wiki/Marathon_%282005_film%29 (web pages last visited November 13, 2009).

²⁸⁹ Jin, *supra note* 208, at 16-17; Shim, *supra note* 206, at 40 (describing blockbusters as causing “concern over a narrowing of diversity”). Jin notes the withdrawal of the *chaebol* and proliferation of mid-sized film companies funded by venture capitalists have produced more culturally authentic fare in recent years. Jin, *supra note* 208, at 18.

²⁹⁰ A great example of this is the *The Host*, whose surface narrative about a man-eating amphibian provides the foil for layers of commentary about environmental protection, US-Korean relations, and generational politics. Wikipedia, The Host, http://en.wikipedia.org/wiki/The_Host_%28film%29 (last visited November 13, 2009); see also Ryoo, *supra note* 235, at 18 (describing Korean film as developing “narratives based on contemporary Korean life.”).

²⁹¹ Lee, *supra note* 113, at 24 (describing diversity within Korean film); Ryoo, *supra note* 235, at 9 (describing Korean filmmaking as a “full-service cinema”).

²⁹² Ryoo, *supra note* 235, at 8.

²⁹³ Lee, *supra note* 113, at 23; Jin, *supra note* note 153, at 18. *Old Boy* won the Grand Prix at the 2004 Cannes Film Festival. Even *The Host* Korea’s #1 all-time champion received critical acclaim, appearing on several lists of 10 best films of 2007 compiled by film critics in Japan, France, and the US. Korea’s overall haul of festival prizes since 2000 compares favorably with many of the state patronage regimes in Europe.

Nor has Korea's emphasis on cultural exports compromised the "Koreanness" of the Korean Wave. On the contrary, by all accounts, the recognizably cultural themes of the Korean Wave have been a big part of their success.²⁹⁴ East Asian audiences, in particular, want to watch movies and shows about people who look like them and face similar issues in life.²⁹⁵ The Confucian values and historical settings of Korean productions are often a big selling point and a source of regional comparative advantage over competing Hollywood products.²⁹⁶ The Korean experience therefore calls into question the claim that exporting audiovisual products requires sacrificing cultural distinctiveness.²⁹⁷ Overall, Korea's audiovisual industry seems to have thrived because of its cultural content, not in spite of it.

2. Government as Catalyst

What about the second skeptic's question—was government dispensable? It is certainly true that much of Korea's success depended upon private initiative and favorable market timing.²⁹⁸ An element of luck undoubtedly factored in as well.²⁹⁹ Yet, the sharp reversal in outcomes from the collapse of Korea's domestic audiovisual industry under the *laissez faire* policies of the 1980s and its dramatic revival in the mid-1990s once Korea reactivated its screen quota and implemented subsidy schemes is suggestive—to say the least—of a significant government role.³⁰⁰ Korea's example highlights the potential for proactive government policy to catalyze investment and encourage market entry by private actors. Perhaps Korea's audiovisual industries would have recovered eventually on their own and gone on to equally dazzling successes without government aid. But not necessarily. Mexico liberalized its film market

²⁹⁴ See Jin, *supra* note 231, at 760; Shim, *supra* note 206, at 39; Ryoo, *supra* note 235, at 18-19.

²⁹⁵ Shim, *supra* note 206, at 39.

²⁹⁶ Ryoo, *supra* note 235, at 19.

²⁹⁷ Cf. Baker, *supra* note 1, at 1413.

²⁹⁸ See *infra* notes 304-07 and accompanying text.

²⁹⁹ One might, for example, point to the arrival of a particularly talented generation of filmmakers. Cf. Shim, *supra* note 206, at 33. One could ascribe the Korean Wave's appeal to the vagaries of fashion, or explain it as an inevitable byproduct of globalization. Cf. RUSSELL, *supra* note 239, at 210-215.

³⁰⁰ A rigorous empirical analysis that could isolate and weigh the relative significance of the complex causal forces at play is unlikely. However, both common sense and contemporary understanding point to the crucial role played by Korea's government in boosting confidence and concentrating minds to achieve the turnaround.

and abolished its screen quota post-NAFTA, and a once flourishing industry was virtually wiped out. It has yet to recover fully.³⁰¹

3. Exportability Beyond Korea

As for the third skeptic's question—is Korea's success generalizable?—skeptics will point to explanatory factors specific to Korea's situation. Some contend that Koreans are the “Italians of Asia,” a people by nature spontaneous and emotive, whose rugged good looks and creative flair make them natural crowd-pleasers.³⁰² The Korean Wave also benefited from favorable timing on many fronts including market conditions (growing demand for audiovisual products),³⁰³ macro-economic forces (e.g. a well timed currency devaluation),³⁰⁴ and social trends (pent-up demand for cultural expression and popular entertainment).³⁰⁵ It is tempting to dismiss the Korean Wave as fluke—and perhaps only temporary.³⁰⁶

However, there is every reason to think that other countries could also benefit from studying Korea's playbook. First, Korea was hardly a natural candidate to excel. Its success contravenes the received wisdom that only big countries with large markets can thrive in global competition.³⁰⁷ South Korea has only 49 million people, and Korean is neither widely spoken outside Korea, nor is there a large Korean

³⁰¹ Annual film production plummeted from 100 to less than ten. Only reimposition of the screen quota a decade later brought it back from the dead. Choi, *supra* note 239, at 42-44.

³⁰² Korean male leads portrayal of “macho tough guys with sensitive souls” have, by some accounts, redefined standards of masculinity in East Asia. *See supra* note 275.

³⁰³ The Korea Wave arrived during an era of media liberalization across Asia. Newly launched or privatized TV stations (broadcast, cable, satellite) created a sudden demand for content that Korea's audiovisual exports filled. *See* Jin, *supra* note 231, at 761-62. At home, rising level of cinema attendance reflected the new-found prosperity of Korean audiences who, having sacrificed leisure activities during Korea's drive to industrialize, were now eager to indulge in cultural pursuits.

³⁰⁴ The Asian financial crisis accentuated the cost advantage of Korean products vis-à-vis competing Hollywood offerings. Jin, *supra* note 231, at 757. In addition, Korean filmmakers benefited from a speculative bubble during the dotcom era, during which venture capital and “netizen” investor funds poured into the audiovisual industry with irrational exuberance. *Id.*

³⁰⁵ Korea's return to democracy in the late 1980s encouraged filmmakers to explore previously forbidden topics. Domestic audiences responded eagerly, as artistic expression dovetailed with the cultural yearnings described above. *See supra* note 303.

³⁰⁶ Skeptics note that Korea's domestic market share has dipped slightly in recent years, and that its dominance is being challenged by regional upstarts from Thailand to China. RUSSELL, *supra* note 239, at 68-69.

³⁰⁷ *Cf.* WILDMAN & SIWEK, *supra* note 27, at 75.

diaspora community.³⁰⁸ Other top film producing nations have either much larger populations or economies, or both.³⁰⁹

Second, many of the favorable conditions that benefited Korea either are present elsewhere or else could be replicated through appropriate policy changes. The emergence of a newly affluent consumer class with disposable income to spend on entertainment represents a global phenomenon. Media liberalization is continuing worldwide, and distribution channels are proliferating, creating an insatiable demand for content. Meanwhile, Hollywood's cost structure continues to mushroom out of control, even as digital technologies lower its competitors' costs.³¹⁰ Korea is hardly the only place recovering from an authoritarian past, and even where free speech prevails, the lack of a competitive domestic audiovisual base often means there is pent-up demand for local content. As for Koreans being naturally charismatic, an element of faddishness underlies such appraisals. Other countries have time yet to enjoy their 15 minutes of fame.³¹¹

The Korean approach may not work for everyone.³¹² Contexts vary, and policy needs to adapt. However, for most countries, replicating the functional parameters of the Korean model represents the best chance to at least put themselves in position to compete. Indeed, while South Korea's successful implementation of decentralized, market-based policies remains the single best example of cultural protectionism in a trade-friendly guise, other audiovisual industries have prospered under analogous conditions. The following case studies from India, Hong Kong, and Nigeria echo and amplify the lessons from the Korean Wave.

C. Other Case Studies

1. Diversity as a Selling Point: Bollywood Goes Global

All three countries feature commercially vibrant film industries that export widely. India boasts the world's largest film industry measured by

³⁰⁸ About seven million people overseas claim Korean ancestry. http://en.wikipedia.org/wiki/Korean_diaspora.

³⁰⁹ The top ten producers by output in 2006 were India, USA, Japan, China, France, Germany, Spain, Italy, South Korea, and the UK. South Korea has a smaller population and economy than all of them. Except for India and China, they are also wealthier per capita. UNESCO, *supra note* 191, at 7-10.

³¹⁰ COWEN, *supra note* 3, at 99.

³¹¹ Koreans may be especially talented at doing the sensitive machismo shtick, but sensitive machismo is not the only way to sell pictures. Other countries need to locate their own niches. Every culture has its stories to tell; it's just a matter of finding the right idiom.

³¹² See COWEN, *supra note* 3, at 101 (markets are fickle). The claim here is not that the Korean model guarantees success. This Article argues only that decentralized, market-based policies represent a more effective approach than alternative models such as state patronage.

annual production and ticket sales.³¹³ Nigeria ranks in the top three by audience and volume of production. Until recently, Hong Kong ranked among the top five producers and as an exporter was second only to Hollywood.³¹⁴ They each produce movies catering to popular audiences squarely in the commercial mainstream, but differentiate them from competing Hollywood offerings through a distinctive style of filmmaking that showcases significant aspects of their respective cultural heritage.³¹⁵ In other words, rather than sacrificing culture on the altar of commercialism, these industries have made cultural diversity a source of competitive strength: As with the Korean Wave, their films appeal to audiences *because* of the cultural content embedded within them.³¹⁶ Moreover, this phenomenon of “diversity as a selling point” applies just as strongly to their success in export markets, contradicting the received wisdom that globalization pushes inexorably toward homogenization of cultural content.³¹⁷

India’s film industry offers a particularly compelling example because an abrupt change in government policy in the 1990s serves as a kind of natural experiment. In the decades prior, India’s commercial film industry—centered in Mumbai and universally known as Bollywood—was crippled by protectionist policies, heavy-handed regulation, punitive taxation, and severe export controls.³¹⁸ Denied access to conventional

³¹³ ECONOMIST POCKET WORLD IN FIGURES 96 (2009).

³¹⁴ COWEN, *supra* note 2, at 82.

³¹⁵ David Bordwell, PLANET HONG KONG 72-79 (2000) (describing Shaolin kung fu traditions, stylized Peking Opera elements, as well as contemporary and historical themes in Hong Kong movies); Femi Shaka, *Rethinking the Nigerian Film Industry: Technological Fascination and the Domestication Game*, in AFRICAN FILM VIDEO TODAY 41, 47 (Foluke Ogunleye ed. 2003) (noting folkloric elements pervasive in Nigerian films); *Nollywood Dreams*, THE ECONOMIST (describing social commentary); Ashish Rajadhyaksha, *The “Bollywoodization” of the Indian Cinema: Cultural Nationalism in a Global Arena*, in Kavoori & Punathambekar, GLOBAL BOLLYWOOD 17, 34-39 (2008) (describing distinctive cultural content of Indian movies).

³¹⁶ As a case in point, the surprise success of 2009 Academy Award-winning Best Picture *Slumdog Millionaire* lay in its unvarnished portrayal of Mumbai’s urban underside: shanty-settlements, poverty, ethnic pogroms, child abuse, soul-less development, corrupt media, and police brutality. Technically a British production, *Slumdog* was nonetheless filmed in India with a mostly Indian cast, Indian co-director, Indian music, and based on Indian novel. India Knowledge Wharton, *New Investors and Foreign Audiences Are Creating a New Script for Bollywood*, May 21, 2009.

³¹⁷ Bordwell, *supra* note 315, at 81; Shaka, *supra* note 315, at 51; Rajadhyaksha, *supra* note 315, at 42.

³¹⁸ While India never developed a full-blown state patronage regime as in Europe, India’s rulers for years regarded its commercialized film industry as faintly embarrassing. They saw culture as an ideological project to promote nation-building and focused on developing a “parallel cinema” that would serve this “pedagogical mission.” Rajadhyaksha, *supra* note 315, at 17, 30. Government also treated Bollywood as a cash cow to be milked through exorbitant “entertainment taxes” with rates as high as 167%.

finance, the industry increasingly relied on mafia-controlled loan-sharks—in effect a form of private patronage that created a far worse dependency than its European public analogue.³¹⁹

Bollywood movies during this period stagnated into predictable formulas. Sheltered from foreign competition and with the world's largest film-going audiences in their pocket,³²⁰ Bollywood producers churned out an endless stream of “musical melodramas” revolving around handsome, muscular heroes whose struggles to defeat the obligatory snarling villain and win the girl were interspersed with random song and dance numbers bearing little or no relation to the meandering-if-predictable plot.³²¹ Little effort went into character-development or narrative; story-lines were widely recycled, often remakes of Hollywood hits, sometimes with dialogue and even camera angles lifted wholesale.³²²

Reforms starting in the 1990s began to change all of that. Formal industry recognition allowed film studios to issue stock, obtain bank loans, and purchase insurance. “Corporatizing” placed industry finances on a more secure foundation and forced studios to professionalize their operations from top to bottom.³²³ Paralleling Korea's *chaebol*, Indian's industrial conglomerates and venture capitalist began to take interest.³²⁴ Relaxed restrictions on foreign direct investment also brought Western moghuls flocking to India, bringing with them valuable contacts, know-

Tejaswini Ganti, *Mumbai versus Bollywood: The Hindi Film Industry and the Politics of Cultural Heritage in Contemporary India*, in GLOBAL BOLLYWOOD, *supra* note 315, 52, 66; Ariptra Mukherjee, *Audio-visual Policies and International Trade: The Case of India*, in CULTURAL DIVERSITY AND INTERNATIONAL ECONOMIC INTEGRATION, *supra* note 2, at 218, 237.

³¹⁹ Money-laundering kept operations on a strictly cash basis, rife with murky accounting, shambolic management, and fly-by-night production that made Bollywood resemble an “overgrown cottage industry.” Manjeet Kripalani & Ron Grover, *Bollywood: Can New Money Create a World-Class Film Industry in India?*, BUS. WK, Dec. 2, 2002. By the 1980s, the infiltration of mafia finance had progressed to the extent that gangsters began to dictate casting and even story-lines, with occasionally lethal side effects far more sinister than bureaucratic meddling. *Id.*

³²⁰ Regulators restricted foreign competition by limiting import licenses to artistic films, capping imports at 100 per year, and prohibiting dubbing. Mukherjee, *supra* note 318, at 231.

³²¹ *Id.*

³²² Rico Gagliano, *Bollywood's Copycat Film Industry*, MARKETPLACE, Mar. 17, 2008, http://marketplace.publicradio.org/display/web/2008/03/17/bollywood_copycats/.

³²³ See Kripalani & Grover, *supra* note 18; India Knowledge Wharton, *New Investors and Foreign Audiences Are Creating a New Script for Bollywood*, May 21, 2009.

³²⁴ Kripalani & Grover, *supra* note 18; Thussu, *supra* note 316, at 97, 105-106.

how, and investments that hastened the transformation of India's audiovisual industries.³²⁵

As with the Korean Wave, Bollywood's commercial overhaul gave it the resources and institutional capabilities to become more ambitious creatively. Instead of recycling tired formulas built around bankable stars in order to turn out a quick hit, filmmakers began to emphasize storytelling and improved production values.³²⁶ Investing in multiple projects allowed studios to take more chances on innovative and diverse genre films, incorporating fresh directorial visions.³²⁷ By appealing to sophisticated urban audiences who paid top dollar to see new releases in spanking modern cineplexes, Bollywood films gained new respect at home and abroad.³²⁸

Meanwhile, India's removal of export controls opened up a whole world (literally) of untapped markets.³²⁹ Overseas box office revenues leaped tenfold in the decade spanning India's reforms, from a paltry \$10 at the end of the 1980s to \$111 million by 2001, and more than doubling since.³³⁰ Catering to such "premium" markets has reinforced the move upmarket with its emphasis on sophisticated scripts and production values.³³¹ As with Korea, India belies claims that catering to a global audience requires "dumbing down" content and sacrificing cultural authenticity.³³² Bollywood still churns out formulaic, mass market

³²⁵ India Knowledge Wharton, *supra note* 316. Unrestricted competition from Hollywood imports also further pressured Indian filmmakers to raise their game. Rajadhyaksha, *supra note* 9, at 315.

³²⁶ DEREK BOSE, BRAND BOLLYWOOD 23 (2006).

³²⁷ India Knowledge Wharton, *supra note* 316. Among the innovations were films without music (!), films dealing with serious social or historical issues, e.g. "Fire" (lesbianism); "Asoka" (famous king). See Rajadhyaksha, *supra note* 315, at 36-39; Sunder *supra note* 151, at 84-85.

³²⁸ BOSE, *supra note* 24, at 164; India Knowledge, *supra note* 316.

³²⁹ Bollywood has scored hits in such nontraditional markets as China and Japan. K. MOTI GOKULSING & WIMAL DISSANAYAKE, INDIAN POPULAR CINEMA: A NARRATIVE OF CULTURAL CHANGE, 133 (2nd Ed. 2004); Thussu, *supra note* 316, at 100. Indian films are currently exported to around 95 countries. Mukherjee *supra note* 318, at 244.

³³⁰ Shanti Kumar, *Hollywood, Bollywood, Tollywood: Redefining the Global in Indian Cinema*, in GLOBAL BOLLYWOOD, *supra note* 315, at 79, 92; Mukherjee *supra note* 318, at 244; Thussu, *supra note* 316, at 110. A 2005 UNESCO Report forecast up to 50% export growth annually. UNESCO, *supra note* 191, at 6-7.

³³¹ Overseas audiences, as well as wealthier, better educated domestic ones are exposed to global cinema, and thus expect more. Thussu, *supra note* 316, at 104.

³³² Some grumble that "Manhattan-in-Mumbai" films depicting Indian diaspora communities detract from a focus on the indigenous Indian experience. Thussu, *supra note* 316, at 107-108. However, these films are popular in India as well, and for good reason: emigration is very much a fact of life, and one to which almost every urban middle class family has a connection. Likewise, protests over socially controversial issues raised by such films (e.g. divorce, adultery) arguably reflect less a betrayal of

musicals targeted at rural audiences. However, it now sells more sophisticated, plot-driven and/or socially conscious fare that caters to both urban professionals at home and foreign audiences abroad. If anything, recent films have accentuated Bollywood's distinctive style and reaffirmed India's cultural heritage in reaction to globalization.³³³ Rather than dragging the cultural focal point inexorably down to the gutter, export markets have contributed to both the quality and diversity of Indian film.³³⁴

2. Beyond Bollywood: Decentralized Regional Film Aid

The role of India's government in Bollywood's transformation was essentially negative. Beyond removing the disfunctionalities of its prior regime, the state essentially stepped aside and let the market operate. However, Bollywood represents only part of India's diverse film industry. Bollywood is the top producer by market share and the only one whose films enjoy widespread national distribution, but India has several other major regional industries, each based around a regional language.³³⁵ Whereas Bollywood's commercial revival represents a triumph of laissez faire policy, India's provincial authorities have actively intervened to support regional production. In this respect, Indian regional film echoes a different aspect of the Korean experience: use of decentralized support mechanisms. As in South Korea, the success of such mechanisms provides an instructive contrast to European patronage.

India's provinces offer much less support to their local industries than Europe does. However, such aid has arguably been more effective because it comes predominantly in the form of tax rebates for exhibition of local films.³³⁶ Unlike state patronage, the rebates stimulate demand for

Indian values than a marker of social change. Cf. Atticus Narain, "Bring Back the Old Films, Our Culture is in Disrepute" *Hindi Film and the Construction of Femininity in Guyana*, in GLOBAL BOLLYWOOD, *supra* note 315, at 164, 172.

³³³ GOKULSING & DISSANAYAKE, *supra* note 332, at 4-5. In so doing, such films cater to diaspora audiences' nostalgia for "Mother India." *Id.* In fact, the popularity of Bollywood overseas has always sprung from offering a distinct alternative to Western films. In Muslim societies in the Middle East and Africa, the chaste nature of Bollywood romances appeal to conservative morals. The Soviet Union valued Indian movies for their supposed rejection of capitalist values. See Narain, *supra* note 45, at 164. Others value its portrayals of life in a developing country, or are simply enthralled by the song and dance.

³³⁴ See GOKULSING & DISSANAYAKE, *supra* note 332, at 3-4; BOSE, *supra* note 326, at 27 (giving examples of films that bombed at home but recouped earnings overseas).

³³⁵ While Bollywood remains the dominant commercial producer, it accounts for only a quarter of the films India makes annually. By output, Bollywood actually ranks second to the Telugu film industry ("Tollywood"), which churns out over 250 films annually. UNESCO, *supra* note 191, at 9.

³³⁶ Some provinces offer direct production subsidies too, but restrict these to low budget art films. Government of Tamil Nadu, *Policy Notes 2002-2003*,

local content through discounted tickets, rather than merely increasing the supply.³³⁷ As such, they offer another notable example of decentralized, distribution-oriented subsidies in action that enable India to sustain multiple film industries, each of which produce commercially successful films rooted in local culture and politics.³³⁸ Indian regional film thus provides an implicit rebuke to Europe's chronic failures vis-à-vis Hollywood.

3. Size Isn't Everything: Hong Kong's Kung Fu Hustle

India's regions show how decentralized, market-based measures can sustain vibrant filmmaking even in relatively small markets competing against a dominant rival. To be sure, all things being equal, countries with larger domestic market bases have an advantage.³³⁹ However, not all big countries are audiovisual heavyweights. Consider the world's 10 most populous countries: Brazil has 50% more people than Japan but produces less than a tenth as many films.³⁴⁰ Pakistan and Bangladesh both have around 160 million people (as well as many historical and cultural affinities), but despite Pakistan's higher per capita income, its domestic film industry has languished, while Bangladesh's thriving cinema turns out over 100 feature movies per year.³⁴¹

Other factors may also underpin success in nurturing indigenous industries. Countries whose cultural traditions and current realities are far removed from the United States are likely to have an easier time competing with American exports because the "cultural discount" applied to non-indigenous content is greater.³⁴² Perhaps counter-intuitively, poor

http://www.tn.gov.in/policynotes/archives/policy2002_03/ipr2002-03-b.htm (last visited Jan. 21, 2010).

³³⁷ Indian state levy an "entertainment tax" on cinema box office, which can be as much as 60% of ticket prices. Ganti, *supra note* 9, at 66. Rebating tax on local films gives distributors a strong incentive to book local films as they can earn a higher profit margin. Such rebates are market-based and distribution-focused, and operate in a decentralized, non-discriminatory manner.

³³⁸ GOKULSING & DISSANAYAKE, *supra note* 332, at 130-39.

³³⁹ WILDMAN & SIWEK, *supra note* 27, at 101-11.

³⁴⁰ Brazil had 231 million people vs. Japan's 128 million in 2009, but Brazil accounted for only 27 feature films in 2006 against Japan's 417. UNESCO, *supra note* 191, at 2. Brazil does export lots of TV shows, exploiting its clout as an audiovisual giant in this domain. See Jose Marques de Melo, *Development of the Audiovisual Industry in Brazil from Importer to Exporter of Television Programming*, 20 CAN. J. OF COMM. (1995).

³⁴¹ UNESCO, *supra note* 191, at 9. The main reason Bangladeshi industry has thrived while Pakistan's failed is that Bangladesh never banned Bollywood imports and thus had to aim high to keep competitive. *Id.*

³⁴² Greater cultural distance means Western imports come across as more "foreign" and less accessible to local audiences who have a correspondingly stronger preference for indigenous works. Omar Lizardo, *Globalization and Culture: A Sociological*

countries may also have an advantage because they can more successfully compete in the bottom end of the market.³⁴³ Of all the these factors, however, export capacity represents the biggest wildcard in the deck.

Hong Kong provides an extreme example of how export-driven economies of scale can be leveraged to trump domestic market size. In the 1970s and 1980s, Hong Kong was a film exporter second only to Hollywood. Despite a population of only seven million people, Hong Kong kung fu blockbusters dominated box offices across East and Southeast Asia.³⁴⁴ Tapping into this regional audience enabled Hong Kong studios to invest in ambitious, cutting edge productions on a scale far beyond what Hong Kong's tiny domestic market could sustain on its own.³⁴⁵

4. Digital Nollywood: Technology Levels the Playing Field

Hong Kong's success in leveraging export revenues to build its domestic industry may have been exceptional. However, market trends are shifting in ways that lower the barriers to entry to diverse filmmakers.³⁴⁶ In particular, the widespread adoption of digital technologies both reduces the cost of producing and distributing audiovisual content and expands potential revenues that can be captured as well as the timeframe over which such revenue streams remain viable.

The proliferation of new distribution channels has reduced filmmakers dependence on theatrical distribution as the sole means to recover their investment.³⁴⁷ The costs of distributing digital content has become trivial. Online, it costs almost nothing. Far from ruining

Perspective, Centre for the Study of Global Politics & Power (2007) (working paper) available at http://www.trentu.ca/globalpolitics/publicationscentre_working.php.

³⁴³ *Id.*

³⁴⁴ COWEN, *supra* note 53, at 82; WORLD BANK, World Development Indicators, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/POP.pdf> (2008); Sek Kei, *A Brief Historical Tour of the Hong Kong Martial Arts Film*, 31 BRIGHT LIGHTS FILM J. 215, 216 (2001).

³⁴⁵ Some might argue that Hong Kong's small population is besides the point, given the much larger Chinese diaspora community. Yet, Hong Kong hardly had a lock on the overseas Chinese market and does not even share a common language with most of it. Moreover, most of the countries to which Hong Kong exported contained only small Chinese ethnic minorities. (The Mainland Chinese market, in the throes of the Cultural Revolution, was closed during this period). Kei, *supra* note 344, at 219.

³⁴⁶ See J.P. Singh, *Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond*, 8 INT'L STUD. PERSPS. 36, 49 (2007) (describing demand from rising global middle class for non-Western perspectives); Cindy Wong, "Producing Film Knowledge, Producing Films: Festivals in a New World", 17 May 21, 2008 (describing global network of film festivals keen to discover up-and-coming talent).

³⁴⁷ Ananda Mitra, *Bollyweb: Search for Bollywood on the Web and See What Happens!*, in GLOBAL BOLLYWOOD, *supra* note 315, at 268, 271, 277.

Hollywood as it initially feared, video and DVD sales have proven Hollywood's salvation. Bollywood and Hong Kong have also profited mightily from home video sales.³⁴⁸ Ethnic groceries stores stock videos and DVDs catering to diaspora audiences. Mail-order services such as Netflix boast enormous catalogues catering to all manner of specialty interests.³⁴⁹ The advent of on-demand video-streaming could potentially bring even greater revenues.³⁵⁰ Meanwhile, online recommendations tools, social network media, content tagging, and other third party reviewing mechanisms can help spread the word about innovative content, generating valuable "buzz" while bypassing mainstream media.³⁵¹

Digital technologies also reduce the cost of production. Consumer class filming, sound recording, and editing equipment on sale today enable near-professional quality, dramatically reducing the investments required for filmmaking in terms of both capital outlays and man-hours.³⁵² The lower cost thresholds for digital filmmaking make it possible to recoup investments on a much smaller revenue base than a few decades prior.³⁵³

Nigeria's video film industry—widely known as "Nollywood"—provides an intriguing example of a major commercial film industry built almost exclusively around home video distribution.³⁵⁴ From the start, Nollywood has taken advantage of digital technologies for both distribution and production.³⁵⁵ Remarkably, Nollywood has thrived without government support and without even a functioning copyright system.³⁵⁶ It provides a powerful example of how new technologies are

³⁴⁸ *Id.* On Netflix, Bollywood movies account for 100,000 rentals each month. See CHRIS ANDERSON, *THE LONG TAIL* 123 (2006).

³⁴⁹ ANDERSON, *supra* note 348, at 123.

³⁵⁰ See Brook Barnes, *Studio's Quest for Life After DVDs*, N.Y. TIMES, Oct. 26, 2009.

³⁵¹ On Netflix, about 60% of all rentals come from recommendations by its Cinematch system. Clive Thompson, *If You Liked This, You're Sure to Love That*, N.Y. TIMES, Nov. 21, 2008; Burri-Nenova, *supra* note 3, at 36 (describing social media and tagging as effective filtering tools).

³⁵² I.S. Popoola, *Nigeria and the Challenges of Violent Video Films*, in AFRICAN VIDEO FILM TODAY, *supra* note 72, at 129, 131.

³⁵³ You can make and bring to market a decent-looking film on a shoestring budget in a way that was not possible 30 years ago. Patrick J. Ebewo, *The Emerging Video Film Industry in Nigeria: Challenges and Prospects*, 59 J. FILM & VIDEO 46, 49 (2007).

³⁵⁴ E.M. Osei-Hwere, & P.V. Osei-Hwere, *Nollywood: A Multilevel Analysis of the International Flow of Nigerian Video Films*, May 2008, at 7, 9.

³⁵⁵ Osei-Hwere & Osei-Hwere, *supra* note 357, at 9; Shaka, *supra* note 318, at 49.

³⁵⁶ It is wrong, however, to view Nollywood's emergence as purely a market phenomenon. Prior government investment in Nigerian television had created an exceptionally rich pool of highly trained talent and technical expertise whose sudden availability (due to TV privatization) coincided with the launch of Nollywood video production. In other words, state patronage in one audiovisual domain translated into an

enabling the democratization of cultural production, and its success has already spawned regional imitators.³⁵⁷

Extrapolating from such early success of digital filmmaking in Nollywood and elsewhere, it is possible to argue that cultural protectionism will become superfluous as technology and economics tilt decisively in favor of diverse forms of cultural production.³⁵⁸ However, there are just as many reasons to think that digital technologies will entrench the existing advantage of Big Content conglomerates.³⁵⁹ The true diversity potential of the digital era remains unproven.³⁶⁰

Furthermore, markets are sticky, and inertia rules supreme. Even if the playing field is been leveled somewhat, indigenous audiovisual industries are unlikely to pop up overnight in a field of digital dreams. If we accept that cultural diversity is a public good, there remains a strong case for government initiative to catalyze the collective action and investments needed to provide it rather than waiting for the market to deliver on its own.

The case for government involvement has particular force when it comes to developing export markets.³⁶¹ Purely domestic industries will

indirect subsidy for the other. Kaitlin Mara, *Open Business Systems Fill Gap in Mainstream Entertainment Industry*, INTELLECTUAL PROPERTY WATCH, <http://www.ip-watch.org/weblog/2008/09/12/open-business-systems-fill-gap-in-mainstream-entertainment-industry/> (last visited Jan. 22, 2010).

³⁵⁷ Nollywood's regional imitators include Uganda's "Ugowood" and Kenya's "Riverwood." *Id.*

³⁵⁸ See Anderson, *supra* note 348, at 6 (arguing the age of the blockbuster is over). Some argue further that the very notion of commercialized culture industries is passé. See Yochai Benkler, *WEALTH OF NETWORKS* 23-24 (2006) (hailing new era of digital "folk culture").

³⁵⁹ See MATTHEW HINDMAN, *THE MYTH OF DIGITAL DEMOCRACY* (2009) (arguing online technologies favor established voices); Wright, *supra* note 6, at 431-32 (describing how Big Media's marketing clout translates to digital environment); DAN SCHILLER, *DIGITAL CAPITALISM: NETWORKING THE GLOBAL MARKET SYSTEM* (2000) (technology accentuates Big Capital's advantage). Benkler himself warns of efforts by giant content producers to subvert digital technologies to entrench their position. See Benkler, *supra* note 358, at 23-26.

³⁶⁰ See Benkler, *supra* note 358, at 23 (emphasizing contingent nature of digital transformation).

³⁶¹ To be sure, industry groups can organize privately to overcome obstacles. *Cf. Film Exporters of Southern States Form Association: To Tap Non-traditional markets*, *BUSINESSLINE: CHENNAI*, Apr. 21, 2003, at 1. However, government has far more levers to nudge industry in a desired direction. Moreover, government can act as a clearinghouse for information that benefits industry as a whole; it also has a public motivation that individual entrepreneurs may lack. John Cadogan, Adamantios Diamantopoulos & Judy A. Sigauw, *Export Market-Oriented Activities: Their Antecedents and Performance Consequences*, 33 *J. INT'L BUS. STUDIES* 615, 623-24 (2002).

have difficulty competing in an era of globalized content distribution. However, the obstacles to international content distribution are particularly daunting for market actors to negotiate on their own.³⁶² Left unaddressed, these barriers may prevent diverse filmmakers from exploiting the global economies of scale they need to survive. Governments should therefore look for ways to tip global markets to be more receptive to diverse content.

This is not to say that government is all-wise and all-knowing. Obviously, it is not (as the patronage model proves). However, for states that value cultural diversity and care about nurturing indigenous audiovisual capabilities, there is still a place for targeted government interventions in many—if not most—cases. Korea shows the difference that proactive government policy can make.

IV. Policy Recommendations

The rapid evolution of globalization and digital technology make predictions a risky game. Prospects for cultural diversity are probably not quite as glowing as cybertopian hype suggests, nor as bleak as the cultural pessimists' dirges. Most countries will remain committed to engaging in some form of cultural protectionism for the foreseeable future regardless. The more important question is what kind.

A. Domestic Policy

At the national level, the recommendations seem simple: Refashion cultural protectionism from patronage into decentralized, market-based policies.³⁶³ Because every country presents unique circumstances, a standardized template for reform is inadvisable.³⁶⁴ Korean and Indian regional film offer two models of decentralized support; others exist as

³⁶² Christian Volpe Martincus & Jeronimo Carballo, *Is Export Promotion Effective in Developing Countries? Firm-level evidence on the intensive and the extensive margins of exports*, 76 J. OF INT'L ECON 89, 104 (2008). Merely assembling the paperwork and paraphernalia required for international film distribution can confound aspiring filmmakers. *Prepare Your Film For Market*, available at www.creativespace.com/en/community/docs/DOC-1006 (last visited March 1, 2010). Building distribution networks requires specialized expertise and economies of scale. There is also a chicken-and-egg problem in that you need global revenues to be a player, but cannot compete effectively without them. Daniel Lederman, Marcelo Olarreaga, & Lucy Payton, *Export Promotion Agencies Revisited*, WORLD BANK POLICY RESEARCH, at 18-19 (2009).

³⁶³ The market need not constitute the sole criterion of cultural value, but it should remain the dominant one.

³⁶⁴ For example, some countries have underdeveloped finance sectors in which filmmakers have difficulty purchasing completion bonds and export insurance; others have run-down cinemas that could benefit from upgrades and digital conversion. Government should not attempt to solve all problems in the target industry, but rather identify weak links and prioritize accordingly.

well.³⁶⁵ The main thing is to choose policy tools that meet functional criteria: Government should act primarily through indirect mechanisms that target capabilities, encourage private investment, and facilitate distribution. The overriding goal should be to keep filmmakers responsive to audiences rather than bureaucrats.

The comparison between India's regional film support and European patronage is particularly instructive. Regional filmmakers in India thrive in markets of 30 to 80 million people—roughly the same size as the larger European countries.³⁶⁶ Both compete directly against a dominant film producer in their home markets: The position of Indian regional film vis-à-vis Bollywood parallels European cinema's relationship to Hollywood. Roughly 40% of India's populace speak fluent Hindi, which is the same as Bollywood's market share of the national box office.³⁶⁷ By contrast, while English-speakers similarly account for about 40% of the combined European-North American market, Hollywood enjoys a market share double that mark. In both cases, the dominant "Woods" enjoy economies of scale and market power. Yet, such advantages are off-set by the preference of local audiences for local stories—provided they are offered choices of equivalent quality. European patronage has largely failed to deliver this alternative. India's regional players show that the effort is not beyond reach even at far lower subsidy levels than in Europe.

Of all the Continental European film industries, the one that has enjoyed the most consistent commercial success in recent decades is France. French officials often attribute this to higher subsidy levels compared to their neighbors. Yet, Indian regional film shows what matters is not just how much money you spend, but also how.³⁶⁸ In fact, France does have a comparative advantage here as well: it supplements its basic patronage spending with a fairly extensive array of *decentralized* subsidies that comport well with the model advocated in this Article.³⁶⁹

³⁶⁵ See Feigenbaum, *supra* note 118, at 22-23 (investment reinsurance proposal); COWEN, *supra* note 133, at 34 (non-profit tax deduction model); DALE, *supra* note 32, at 298 (tax sheltered film investment vehicles).

³⁶⁶ To take the main two: Tamil Nadu has about 66 million people—roughly the same as France. Andhra Pradesh has about 77 million—slightly less than Germany. Wikipedia, Demographics of India (2001 Census), http://en.wikipedia.org/wiki/Demographics_of_India.

³⁶⁷ Wikipedia, Demographics of India (2001 Census), http://en.wikipedia.org/wiki/Demographics_of_India (last visited December 20, 2009).

³⁶⁸ As argued above, much of European patronage may be counterproductive.

³⁶⁹ France is the only major European film producer that awards the majority of its direct state aid through "automatic" subsidies tied to box office performance as opposed to culturally selective grants. By contrast, over half of the 15 EU Member States in 1995 awarded 90% of subsidies on a selective basis. Cocq & Messerlin, *supra* note 64, at 11. France also supplies a variety of other indirect subsidies on a non-discriminatory basis (Sofica tax shelters, special unemployment benefits for "creatives," infrastructure grants, etc.). *Id.* at 9 & n.14.

France's reliance on such decentralized, market-oriented mechanisms sets it apart from its European peers and arguably explains France's relative success in preserving a commercially viable film industry.³⁷⁰

Such decentralized subsidies keep the focus on building a cultural infrastructure that can sustain itself commercially.³⁷¹ A thriving, profitable industry will ensure the critical mass of creative talent, technical capabilities, finance, and distribution to support a diversity of projects.³⁷² Filmmakers are creative types. There will always be some among them who want to "make art" or "engage in dialogue" with their compatriots. Revenues from blockbusters will indirectly support such projects, just as "made for export" films can sustain a shared infrastructure used to make more locally-oriented fare.

A sterling example of filmmaking along these lines, in fact, can be found in France. Luc Besson's EuropaCorp has been one of the most commercially successful European film studios in recent years and one of the few whose films regularly garner global distribution. Many of Besson's most successful movies are filmed in English, using Hollywood actors and feature action-packed storylines typical of Hollywood blockbusters. Besson is widely reviled by the French cultural establishment for betraying France's *auteur* tradition. Yet, whatever their opinion of his works as cultural artifacts, French industry officials are only too happy to bask in EuropaCorp's box office success, which burnishes figures for the industry as a whole.³⁷³

Cultural protectionists often argue that targeting export markets means making Hollywood "clone" films at the expense of cultural distinctiveness.³⁷⁴ If you just focus on Besson's big-budget hits, the charge seems merited. Yet, this zero-sum calculus is incomplete. It ignores EuropaCorp's smaller-budget films aimed mainly at domestic audiences and much more "French" in sensibility. It also overlooks the benefits of the creative infrastructure that EuropaCorp's global revenues supports. EuropaCorp has built a state-of-the-art production facility housed in a chateau outside Paris that even non-EuropaCorp productions use. Besson has helped to educate a new generation of directors in the art

³⁷⁰ France's decentralized aid partially offsets its greater reliance on direct patronage mechanisms overall.

³⁷¹ This is not to say governments cannot subsidize Masterpiece Theater or the Metropolitan Opera. There is a case for direct government assistance at the margins, especially for truly *avant garde* work where market support is insufficient. Thus, this Article advocates a reweighting of priorities, not a complete break with existing funding patterns.

³⁷² DALE, *supra note* 32, at 159-160; COWEN, *supra note* 3, at 89-90.

³⁷³ Isabelle Vanderschelden, *Luc Besson's Ambition: EuropaCorp as a European major for the 21st Century*, 5 *STUDIES IN EUROPEAN CINEMA* 91, 99 (2008).

³⁷⁴ COWEN, *supra note* 3, at 99-101.

of popular filmmaking. His studio employs an array of technicians and creative talent who contribute to other French films. EuropaCorp has also developed special effects technologies that other French filmmakers have embraced.³⁷⁵ In short, the creative and technical spillovers from Besson's "clone films" benefit French cinema across the board. EuropaCorp, in turn, benefits from the decentralized aspects of French audiovisual finance, if not its culturally selective patronage.³⁷⁶

EuropaCorp's example underscores the extent to which cultural vitality goes hand in hand with commercial prosperity. To make it work, you have to offer audiences content they want to watch. Trying to cram Culture-with-a-capital-"C" down people's throats is like serving Brussels sprouts in a high school cafeteria. You may feel good about it, but it is ultimately futile. Culture is a living, breathing thing. Trust it to grow unfettered.³⁷⁷

EuropaCorp also points to the second key pillar of a successful cultural protection policy: export capacity. As we have seen, export markets are crucial to generating global economies of scale. That exporting films sometimes requires compromises to authenticity should not blind cultural protectionists to its benefits. As EuropaCorp shows, export vs. domestic is not a zero-sum game. Moreover, as the Korean, Nigerian, and Indian cases all testify, cultural distinctiveness can be a selling point. With Hollywood blockbusters converging upon cookie cutter cartoon formulas, plenty of untapped demand remains for diverse content. As an emerging global middle class redirects surplus income to leisure activities, demand for such "long-tail" content will continue to grow.³⁷⁸ In the past, capacity constraints and distribution bottlenecks prevented such demand from being satisfied. Global hits seemed to arise

³⁷⁵ Ali Jaafar, *Transporting Talent: How an international movie franchise turned EuropaCorp into a film school*, VARIETY, May 11-17, 2009, at A44.

³⁷⁶ EuropaCorp is one the biggest recipients of French "automatic" subsidies and also raises money through Sofica tax shelters funded by private investors. Thus, it has no need to genuflect before sacred cows of *auteur* filmmaking. Vanderschelden, *supra* note 373, at 92.

³⁷⁷ This is not to deny that popular culture generates much forgettable dross. *But see* COWEN, *supra* note 122, at 31, 39-40 (describing how critics lack the necessary distance to appraise contemporary culture and prematurely discount the value of cultural innovations when measured against the timeless glories of past achievement). Regardless, efforts to target diversity directly by subsidizing "artistic" or "authentic" content are likely to prove self-defeating and unsustainable without a commercially viable foundation. Cultural protectionism should thus concentrate more on industrial policy than cultural.

³⁷⁸ ANDERSON, *supra* note 348, at 10. Movie-going serves as a form of cultural voyeurism, armchair exploration of an alternative existence. As tastes in travel grow more adventurous in a globalized age, so will tastes for exotic filmmaking.

from diverse filmmakers only by accident.³⁷⁹ Yet, digital technologies now offer filmmakers more options to get their products to market.

Pursuing diversity through trade will finally move us beyond the “culture vs. commerce” impasse.³⁸⁰ Not only will an export-oriented cultural protectionism inherently lead to less trade-restrictive policies, but the decentralized policies it relies on are also far less likely to run afoul of WTO trade rules compared to traditional patronage mechanisms.³⁸¹

We should therefore ask: how can we best develop diversity-friendly export markets? Korea and other countries surveyed in this Article employ a fairly standard toolkit of audiovisual export promotion: film festivals, trade fairs, co-production agreements, and the like. The reality, however, is that countries have limited ability to unilaterally promote audiovisual sales beyond their borders. Moreover, WTO rules actively constrain export-oriented protectionism. For example, the Subsidies Code imposes a blanket prohibition on export subsidies.³⁸²

Is the digital technology the answer? Certainly, basic investments in digital infrastructure seem warranted—and could pay lasting dividends.³⁸³ In the long run, cultural protectionists will doubtless contemplate more ambitious efforts to nurture digital ecologies hospitable to diversity. Several governments have already taken tentative regulatory steps down this path.³⁸⁴ Europe’s characteristically *dirigiste* course is likely to have just as perverse outcomes online as it has off.³⁸⁵ However, even with the

³⁷⁹ Martin, *supra* note 79, at 15.

³⁸⁰ See Singh, *supra* note 349, at 49 (describing filmmaking flourishing in China, India, Korea, Argentina, Brazil, and South Africa as “not despite but because of global communications networks” operating on commercial lines).

³⁸¹ Complaining governments must prove a causal nexus between subsidies and claimed injury. Subsidies Agreement, Article 11-12. The decentralized targeting of Korea’s subsidies (tax incentives, infrastructure) would preclude such a showing because they bestow diffuse and hard-to-quantify benefits from which it would be all-but-impossible to trace adverse competitive effects. By contrast, patronage involves giving specific money to specific actors in ways that more overtly distort market competition. See Wright, *supra* note 46, at 745.

³⁸² WTO rules classify export subsidies as “red light” measures that are prohibited per se to the extent that government benefits are tied to export activities. MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 32-33 (3rd ed. 2005).

³⁸³ Korea has taken an early lead in this regard. See *Korea’s Digital Wave Travels Far*, FDI MAGAZINE, Oct 3, 2005.

³⁸⁴ The new EU Audiovisual Directive purports to regulate diversity in online platforms directly. See Hettich, *supra* note 3, at 1448; see also Joanna Smith, *Regulate Internet*, CRTC Told, TORONTO STAR, Feb. 17, 2009 (describing similar Canadian efforts). Plans to tax internet businesses to fund digital diversity initiatives are also underway in several countries. See *id.*; Gelles & Hall, *supra* note 53.

³⁸⁵ European state patronage has already expanded to such novel domains as video game production. Ian Mundell, *French Game Subsidy Cleared: EU Says Tax Break*

best policy intentions, aggressive action to regulate digital markets is likely to prove premature and possibly counterproductive.³⁸⁶

In the short run, a more promising policy lever can be found off-line. As noted, barriers to global distribution remain a key hurdle that producers of diverse content struggle to overcome. Perhaps the biggest challenge is getting noticed in a crowded marketplace.³⁸⁷ For this, old fashioned theatrical exhibition still offers the biggest splash. Successful theatrical releases can set in motion a cascading value chain of downstream revenues and generate stronger word-of-mouth than any other source.³⁸⁸ Yet, capacity constraints on theatrical distribution remain a crucial bottleneck that entrenches Hollywood's global advantage.³⁸⁹ Such barriers present a promising target for a trade-focused cultural protectionism to attack.

Korea's successful use of screen quotas has prompted renewed interest in such mechanisms to promote domestic exhibition. However, domestic quotas have serious drawbacks. Setting the quota at the right level can be challenging given the uncertain nature of creative markets: Set too low, the quota becomes redundant. Set too high, it may exceed domestic capacity, tempting producers to churn out low quality filler that tarnishes the reputation of domestic films. Moreover, privileged access to the domestic market can turn the focus of content inward, limiting its export potential.³⁹⁰ Realizing the potential of global markets to sustain diverse audiovisual content may therefore require international initiative.

Passes Cultural Test, VARIETY, Dec. 13, 2007. France and Germany have also poured millions into a quixotic attempt to develop internet search capabilities for avowedly cultural motives. See *Quaero's Challenge: I Search, Therefore I am. But Europe's Web Project is Unlikely to Reverse US Dominance*, FINANCIAL TIMES, Jan. 23, 2006, at 18. As noted, Europe has also undertaken a series of unilateral measures to clip the wings of American e-commerce competitors. See *supra* note 53. However, none of these measures can substitute for lack of a commercially thriving content industry.

³⁸⁶ Digital markets and technologies present an uncertain, moving target. You don't want to miss the target, but don't want to cripple it either. See generally Ben Deporter, *Technology and Uncertainty: The Shaping effect on Copyright Law*, 157 U. PENN. L. REV. 1831, 1832-36 (2009).

³⁸⁷ This problem applies online as well as off. See Hindman, *supra* note 360, at 14; Daniel Fleder and Kartik Hosangar, *Blockbuster Culture's Next Rise and Fall: The Impact of Recommender Systems on Sales Diversity* (November 2008) 23, available at <http://ssrn.com/abstract=955984> (discussing "cold start" problem whereby user-generated filters only recommend works that other users already know about).

³⁸⁸ See *supra* notes 112-13 and accompanying text.

³⁸⁹ While multiplexes offer more screens per cinema, the big budget blockbusters hog most of them. Messerlin & Cocq, *supra* note 70, at 8. Moreover, Hollywood's stranglehold on global distribution ensures that diverse competitors never even get the chance to audition.

³⁹⁰ See Kim, *supra* note 247, at 373.

B. International Solutions

1. An Export-Focused “Cultural Exception”?

One option would be to enact a “cultural exception” within world trade law that would enable measures specifically designed to promote cross-cultural exchange. An export-focused “cultural exception” could override Article IV’s limitation on screen quotas to domestic films and/or sanction export subsidies under specified conditions.³⁹¹ Whatever its intrinsic merits, from the standpoint of practical politics, a “cultural exception” approach has scant prospect of success. The politics of the “trade and culture” debate are frozen around the status quo, and none of the principal players has the heart to push for changes.³⁹² Instead, a better approach would be to craft a multilateral solution that is compatible with existing trade disciplines.

2. Establishing Global “Diversity Quota”

Perhaps the most effective way to promote diverse audiovisual exports would be to convert screen quotas into mechanisms for global distribution.³⁹³ The crucial change would be that screen quota eligibility would no longer be restricted to domestic producers. Policy-makers should take calls for global diversity literally and create a multilateral quota regime open to creative content originating from *any* diverse source. Doing so would greatly augment the effectiveness of screen quotas as a distribution tool and indirect subsidy while alleviating many of their drawbacks.³⁹⁴

³⁹¹ The WTO’s per se bar on export subsidies is premised on the idea that it is particularly objectionable (or provocative) to target subsidies to encroach upon neighboring markets. Yet, culture is not fungible. If we are serious about cultural diversity, *more* choices benefit consumers and subsidies may therefore be warranted. See JOEL WALDFOGEL, *THE TYRANNY OF THE MARKET* 33 (2007). At the very least, we should not automatically condemn such efforts without proof of significant market harms. For reasons why we might want to relax Article IV’s restriction, see *infra* subsection 2. As a matter of trade policy, there is no *a priori* reason to limit screen quota benefits solely to national films, a result that leads to less trade rather than more and cuts against the grain of other trade rules. Cf. GATT Article III (national treatment); Article XIII (non-discriminatory quotas); Article XX (chapeau).

³⁹² See *supra* notes 43-46 and accompanying text.

³⁹³ Theatrical distribution under the quota would jumpstart the value chain of follow-on revenues in derivative markets, including online platforms. See *supra* notes 112-13 and accompanying text.

³⁹⁴ Quotas would work better than a analogous scheme based on distribution subsidies because quotas are more transparent (encouraging reciprocity), more equitable (given participating states of unequal means), and more predictable (i.e. not subject to fiscal uncertainty). Countries could still choose to supplement the quota with targeted subsidies to ease the burden on local exhibitors/distributors. They could also adopt variable compliance standards that, e.g. set a lower quota for rural single-screen theaters

Converting domestic screen quotas into "diversity quotas" would instantly create a global market for diverse content. Expanding opportunities for filmmakers to export their work would facilitate economies of scale and avoid the introverting effect of existing screen quotas. In practice, such a proposal would still primarily benefit domestic producers in their home markets given an inherent audience bias toward locally produced content.³⁹⁵ However, it would prevent domestic producers from taking preferential market access for granted (avoiding the "quota quickie" phenomenon) and, conversely, encourage them to compete for a share of the global "diversity market."

A global diversity quota would greatly expand the pool of "diverse content" available to meet such quotas, reducing the vagaries of supply caused by restricting eligibility to producers in a single country. This would allow policy-makers to set the quota level at a higher threshold, acting as a pace-setter to stimulate local production without the risk of devaluing quality. It would also reduce the hardship on distributors and exhibitors, while encouraging them to explore alternative channels of supply.

At present, GATT Article IV restricts screen quota eligibility to national films.³⁹⁶ To make a "diversity quota" consistent with WTO rules it would therefore need to operate on a non-discriminatory basis. To do this, diversity should be defined in terms of production budgets in a manner that would exclude big budget films by Hollywood majors and their affiliates, while still allowing American indies to benefit.³⁹⁷ Operating on such a "nationality-blind" basis would keep the diversity quota regime on the safe side of world trade law.³⁹⁸ As a bonus, such a

compared to urban multiplexes as does Brazil. Randal Johnson, *Film Policy in Latin America*, in *FILM POLICY: INTERNATIONAL, NATIONAL, AND REGIONAL PERSPECTIVES* 128, 133 (Albert Moran ed., 1996).

³⁹⁵ Audiences prefer to watch films and TV shows made in their language that speaks directly to their own experiences and everyday realities. Baker, *supra note 1*, at 165-67. Accordingly, most films screen under the quota would likely remain of domestic origin. However, such preferences are only relative, not absolute. French-Canadian movies could play in Paris; Turkish films could travel to Kazakhstan. It would be left to individual distributor/exhibitors to weigh competing products in fulfilling the quota.

³⁹⁶ See GATT, Article IV.

³⁹⁷ A diversity cutoff of \$30 million, for example, would catch virtually all Hollywood movies (whose budgets today average upward of \$70 million), while excluding all but the biggest non-American blockbuster films. For example, over the last two years, France has averaged 12 movies with budgets over \$30 million out of more than 200 total; Korea has made four. CNC, KOFIC, and MPA statistics.

³⁹⁸ The quota could still be challenged as an indirect form of discrimination since Hollywood would bear the brunt of the losses. However, quota defenders would have a fairly strong case. First, it is arguable that in many countries, US blockbusters and indie/foreign "art films" occupy distinct market segments. If so, the two may not be considered "like products" for most-favored-nation purposes and the challenge would be

quota regime would avoid the frequent difficulties in determining national origin.³⁹⁹ Because production budgets represent a much less ambiguous criterion, this would allow the quota to operate in a decentralized fashion that avoids cumbersome bureaucracies.⁴⁰⁰

The beauty of the “diversity quota” regime proposed here is that it could be adopted by likeminded states immediately (with others joining later on a reciprocal basis) without any need for multilateral agreements based on WTO consensus. A diversity quota regime along these lines would be less trade restrictive than alternative measures. If successful, it could alleviate demands for a WTO cultural exception, thereby defusing much of the tension that infuses the trade vs. culture debate.

V. Conclusion

European cultural protectionism has failed not for lack of funding or effort. Its failures reflect basic design flaws: bureaucratic mechanisms that turn producers into paper-pushers; elitist values that scorn popular taste and disparage commercial success; pointless production of films no one watches; and an introverted focus on domestic markets that is commercially disabling. As a result, Europe’s once thriving film industry has been reduced to a shadow of its former self.

At its core, Europe’s failure springs from the false assumption that culture is incompatible with commerce and that trade is the enemy of diversity. The persistence of this misguided belief has not only caused lasting damage to Europe cinema, it has inflicted serious harm to the fabric of international trade law, blocking liberalization, and undermining efforts to advance e-commerce governance.

rejected. TREBILCOCK & HOWSE, *supra note* 382, at 137-39. (Note that lowering the quota threshold could strengthen the “unlike” distinction). Second, even if the “like products” defense fails, the quota defenders could still argue they have legitimate grounds to discriminate by budget as a way of addressing social concerns shown to be predominantly associated with blockbuster films (e.g. excessive violence, escapist narratives, objectification of women). To be sure, it would be possible to regulate such issues more directly—but only at an unacceptable risk of content discrimination. So long as the quota defenders can show a reasonably objective correlation between the budget criterion and the stated quota goal and so long as American indie films still benefit and the larger European or Korean blockbusters are excluded, a WTO panel would hesitate to second-guess a Member State’s sovereign right to regulate its cultural markets on this facially neutral basis. *Id.* at 141. More controversially, the quota defenders could also argue that the UNESCO Convention itself constitutes international recognition of cultural diversity as a legitimate objective of state policy. Although the US is not bound by the Convention, it could potentially still constitute relevant customary law under the logic of the US-Turtle case. *See id.* at 532; Azzi, *supra note* 2, at 768.

³⁹⁹ By contrast, “national origin” of film often hinges on various subjective factors that can get very messy in case of international co-productions. *See* Messerlin, *supra note* 190, at 308-09 (criticizing subjective nature of such inquiries).

⁴⁰⁰ One can even imagine a global certification process to determine quota eligibility operated by an independent, neutral organization (e.g. UNESCO or an NGO).

Korea's example offers a better way forward. Using decentralized subsidies combining infrastructural investments and tax incentives backed by the safety net of a reinvigorated screen quota, Korean policy-makers set in motion a remarkable cultural and commercial renaissance. Korea's success has established a new paradigm for cultural protection, combining decentralized subsidies with diversity through trade.

Culture protectionists are right about one thing: Culture is not a fungible commodity. More choices make everyone better off. We can watch a Hollywood blockbuster one day, a Japanese spaghetti western the next; Hong Kong kung fu followed by Nigerian *ju ju*. However, this is an argument for *more* trade, rather than less. Films are expensive to produce but cheap to distribute. You can show the same film around the world at little additional cost—so why not share the wealth? In clinging to their fragmented national markets, Europeans are playing a self-defeating game. Their despair at Hollywood's "unfair" economies of scale mistakes an opportunity for a threat. By contrast, Korea, India, Nigeria, and Hong Kong have shown that by tapping into global markets commercial success can drive cultural vitality.

Cultural protection should be reengineered accordingly. The European top-down approach should be replaced by decentralized policies that are both more effective and less trade restrictive. In the long run, the diversity potential of digital economies may provide a lasting solution. However, in order to jump-start a global market for diverse filmmaking, adoption of the "diversity quota" proposed in this Article would serve as a constructive interim step.