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

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I. Introduction

Hollywood has a dirty little secret: a great many of America’s cultural and entertainment products are not even “Made in the USA” anymore, and Hollywood itself appears to be for sale to the highest bidder. Today, experts estimate that approximately 25% of U.S.-developed feature films are filmed outside of the U.S., and the percentage of U.S.-developed television programs and movies of the week (MOWs) filmed abroad is significantly higher. Some studies report, for example, that the percentage of U.S.-developed MOWs made outside of the U.S. is an astounding 75%. In light of the exceedingly generous incentives provided to U.S. film makers by other countries which generally are conditioned on the use of local (foreign) labor, there reportedly is even a sign posted in the window of a Screen Actors’ Guild (SAG) hiring office in Los Angeles that reads: “Americans need not apply.”

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1 Assistant Professor, Thomas Jefferson School of Law. I was aided by helpful comments from Professor Robert Lutz of Southwestern University School of Law, Professor Alan O Sykes of the University of Chicago, The Law School, and Professor Paul Weiler of Harvard Law School.

2 Note that a movie shot in another country possesses the country of origin of that other country. See Section 304 of the Tariff Act of 1930, as amended (19 U.S. C. § 1304 (2005), as implemented in Part 134, Customs Regulations (19 C.F.R. Part 134) (2005) (The country of origin of an imported product is the country of manufacture.)

3 Author’s interview with members of the Film and Television Action Committee (FTAC), a grassroots organization dedicated to maintaining film and television filming in the U.S., Burbank, California, July 8, 2005.
The overwhelming majority of films shot outside of the U.S. are shot in Canada, which has the most established film incentive program. The list of U.S.-developed movies filmed in Canada is long and impressive. So many U.S.-developed movies are filmed in Canada these days that it is referred to in the industry as “Hollywood North,” and Canada’s actors’ union, ACTRA, even offers a workshop to teach Canadian actors how to use American accents, so that fewer American actors need be hired on any film shot in Canada.4

A sample of the big budget, well-known feature films shot there within recent years includes Good Will Hunting, Cat Woman, My Big Fat Greek Wedding, The Day After Tomorrow, I, Robot, Cinderella Man, Electra, and Armageddon. Even many quintessentially “American films” have all been shot outside of the U.S., primarily in Canada. Examples include Rudy, which portrays the life of Rudy Giuliani, the former mayor of New York City, Chicago, which depicts the true-crime story involving Velma Kelly and Roxie Hart in Chicago in the 1920s, The Miracle, showing the U.S. hockey team triumph over the Soviet team at the 1980 Olympics, Independence Day, which was released on July 4, 1996, and portrays a fictitious attempted takeover of the world by aliens, and Cold Mountain, which concerns the Civil War period of U.S. history. All of these films have been shot in Canada, except for Cold Mountain, which was shot in Romania. The outsourcing of the U.S. feature film industry for economic reasons, which began in the early 1990s and picked up steam in the late 1990s, is continuing unabated.

As this article is being written, Jennifer Garner is in Vancouver filming Catch and

In fact, the outsourcing of the U.S. film industry is so well-entrenched and accepted by film industry management that there are reports that U.S. film industry workers who have organized activities promoting the retention of film production in the U.S. have been “blacklisted” in Hollywood.\(^5\) Just as in the McCarthy era in the 1950s, these film industry workers say that they are being accused of being Communists and of engaging in potentially dangerous “un-American activities.”\(^6\) As a result, they claim that they are finding it difficult, if not impossible, to be hired to work in the film industry in the U.S.\(^7\) If these reports are true, the meaning of “un-American activities” clearly has been turned on its head. What could be more American than arguing that America’s premier industry should remain in America? Or, more specifically, that Americans should actually portray Americans in stories that reflect and promote American culture and values?

This article addresses whether the film incentives offered by other countries to the U.S. film industry as well as to their own indigenous film industries are legal under U.S. domestic and international law. In particular, the article discusses in some detail whether the foreign film subsidies are legal under the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

\(^5\) Supra n. 3.
\(^6\) Id.; see also interview with Brent Snowcroft, former President of FTAC, www.ftac.org (accessed August 29, 2005).
\(^7\) Supra n. 3.
To be sure, it is not illegal for a U.S. film company to film a movie in a foreign location for artistic reasons. In addition, at least to date, it is not illegal to produce a film project in a foreign location in order to take advantage of the lower wage rates and/or a favorable currency exchange rate there. Furthermore, some countries argue that there is a “cultural exemption” to the international trade rules, such that incentives provided by a government to domestic companies in order to promote local culture are legal. That argument is not at issue here, however, because there is no requirement that the film maker include any minimum amount of local content in order to obtain the incentives that are the subject of this article.8

The question addressed in this article is whether, under U.S. and WTO law, a foreign government can artificially lower the costs of production in an industry to such an extent that non-local companies choose to relocate their production activities to the foreign locale and forego production in their own countries, thereby destroying the relevant domestic industry in their own countries. Specifically, as a case study, this article focuses on the Production Services Tax Credit (PSTC) film incentives that Canada offers to domestic and foreign film companies alike to produce films that need not possess any Canadian content. These incentives are based on the percentage of Canadian labor utilized, they are very generous, and they have been the most successful in attracting U.S. film companies to film their movies outside of the U.S. Of course, if the WTO Dispute

8 Some commentators argue that governments should at least be permitted to subsidize their own cultural industries, including their film industries, when those industries are in their embryonic stage. The rationale for this argument is that all countries benefit from having strong indigenous cultural industries. See, e.g., Paul C. Weiler, Speaking for Fun and Profit, chapter entitled Leveling the Entertainment World West (forthcoming 2005) (The unique feature of film production costs provides a legitimate rationale for governments to subsidize their film industries when in their infant phase). However, this argument is not relevant to the subsidies that Canada is currently providing to its film industry, as that industry is fully developed in Canada.
Settlement Body were to find that the PSTC Programs in Canada are illegal under the SCM Agreement, similar incentives provided by other WTO members (and indeed the film incentives provided by the U.S. federal government and several of the U.S. states) may also have to be abolished if challenged. The legality of each such incentive program would depend on the magnitude of the harm caused by the program to the film industry in one or more other WTO member(s).

In any case, though, many of the film incentive programs offered around the world have been enacted specifically in order to counteract those provided by Canada. In order to compete with Canada’s successful film incentive program, for example, in the late 1990s and early 2000s, both Australia and New Zealand created similar film incentive programs.9 These programs were quite successful in luring U.S. film producers to film their movies in Australia and New Zealand. In response, the Canadian federal government then increased its film subsidy amount from 11% to 16% of qualifying Canadian labor costs in February of 2003. Next, in November of 2004, the U.S. federal government responded by enacting Section 181 of the Internal Revenue Code as part of the Jobs Creation Act of 2004,10 which allows producers of smaller budget films to deduct 100% of film production costs in the first year following filming. Then, the three Canadian provinces where the majority of U.S. films are shot, British Columbia, Ontario, and Quebec, all raised their subsidy percentages in January of 2005. While approximately 30 out of the 50 states have had some local film incentive programs in place for some time, several states, including California, New Mexico, Louisiana, and

9 See Appendix C for a description of some of the major film subsidy programs in other countries.
New York, very recently have increased their subsidies or are considering doing so. This round-robin effect is the predictable outcome of the U.S. failure to challenge Canada’s film incentives in the first place. Thus, even if all of these incentive schemes ultimately are found to be illegal by the WTO Dispute Settlement Body, the overall effect of such a WTO ruling essentially would be a return to the status quo ante Canada’s rich film incentive scheme.

The article concludes that the foreign film incentives, and the PSTC tax rebate programs in Canada in particular, are illegal under both U.S. and WTO law, as they adversely affect the U.S. feature film industry. After providing an analysis supporting this conclusion, this article discusses the various remedies that could be pursued, considers the obstacles to a legal challenge to these programs, and provides recommendations for how interested parties in the U.S. might proceed.
II. Economic Theories Arguing Government Subsidies are Harmful

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

Specifically in the global trade arena, goods that have been subsidized by their home countries do not compete fairly with unsubsidized goods in the international marketplace.

11 In the case of government subsidies to the film industry, there is also a significant non-economic disadvantage inherent in such subsidies. This is the danger that governments, through their economic support of the film industry, will pressure film producers not to produce movies critical of those governments. This danger is particularly problematic in a democratic government such as the U.S., where freedom of speech is protected and promoted in the U.S. Constitution.

12 See Paul C. Weiler, Radically Moderate Law Reform, chapter entitled Insulating Taxpayers from Both Teams and Studios (West forthcoming 2005).
Companies producing a “like product” in a country into which the subsidized goods are imported may find that they cannot compete with the subsidized imports and as a result both domestic production and exports of the domestic product may be hampered. As indicated above, this unfair trade advantage often leads an importing country to establish its own competing subsides, which, in turn, leads to the establishment of even more generous foreign subsidy programs.

In summary, domestic subsidies tend to distort international trading patterns through encouragement of the production and the importation into other countries of the subsidized product, and discouragement of the production and exportation of products manufactured in non-subsidizing countries. This imbalance in the global economy leads affected nations to respond with their own subsidy programs, and the ensuing subsidy war has the same trade-distorting effect in the global economy as do undisciplined tariffs and quota increases. From an economic perspective, then, domestic subsidies tend to decrease the economic welfare of competing industries and workers in non-subsidizing nations, taxpayers in the subsidizing nations, and the global economy as a whole.13

In the instant case, for example, if the government subsides to the film industry remain in existence, a number of nations could end up with empty sound stages and recording studios and yet their taxpayers could be left paying the debt incurred by their

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governments to build these stages and studios for many years to come. From an overall
economic standpoint, it would seem preferable for all of the World Trade Organization
(WTO) trading partners to refrain from providing subsidies to their domestic film
production companies, as they are required to do under the SCM Agreement, and simply
allow the best film production companies in the world to survive.

III. **Significance of Film Industry to U.S. Economy and Culture**

The entertainment industry is arguably the most important industry in the U.S. It
contributes approximately $125 billion annually to the U.S. gross national product. In
addition, at least until recently, it has generated the U.S.'s largest trade surplus as a
country of around $25 billion annually, in light of an overall U.S. trade deficit of $500 billion. In Los Angeles alone, the entire film industry (encompassing both feature
films and television programs) in 2003 was estimated to provide upwards of 220,000
jobs and generate $31.8 billion in local business and tax revenues for the city, county,
and State of California. The film industry, at least until recently, has also
contributed significantly to the economies of several other states, including most
importantly New York and Illinois.

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15 *Id.*
Without question, U.S. entertainment products are enjoyed by people all over the world, and one could say that, as a nation, the U.S. is known most for its entertainment industry. U.S. travelers, for example, cannot help but marvel at the reach of the U.S. film industry into even the remotest corners of the globe. For example, one can travel almost twenty-four hours to some non-English-speaking country such as China, where very little English is spoken and communication with the taxi driver at the airport is a very trying experience. And yet, almost inevitably, the local theatre marquees will reveal that U.S.-developed feature films are pervasive.

Of all U.S. entertainment products, audiovisual or film products, such as feature films, television (TV) movies-of-the-week (MOWs), TV series, commercials, and documentaries – garner the lion’s share of U.S. entertainment revenues. While moviemaking was first created in France in the late 1800’s, Thomas Edison brought this technology back to the U.S., and the U.S. has been the predominant player in the industry worldwide since World War I.

The U.S. entertainment industry, and especially the U.S. feature film industry, unquestionably is the envy of many other countries around the world. Consequently, many other countries have attempted to emulate the U.S.’ success. In particular, they have offered their own film industry as well as the U.S. film industry very generous incentives to produce films in their countries and compete directly with the U.S. film industry in the U.S. Again, Canada has the most established film incentive program, and this article focuses on the PSTC film incentive programs in Canada.

17 Supra n. 11, at 18-19.
IV.  U.S. Film Industry and Canadian Film Incentive Programs

A.  U.S. Film Industry

As a case study, this article focuses not only on the PSTC film incentives in Canada, but it also focuses on the harm that these incentives are causing to a subset of the entire U.S. film industry – the feature film industry. The entire film industry in the U.S. generally refers to the production of all of the following:

1. full-length feature films;
2. movies of the week (otherwise known as MOWs or made-for-television movies);
3. series television shows;
4. television commercials; and
5. music videos.18

These various types of films are produced by either one of the seven “major” film studios or one of the numerous smaller production companies called “independents.” The “majors” are members of the Motion Picture Association of American (MPAA), while many of the independent film companies are members of the American Film Marketing Association (AFMA).19

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

Once the above tasks have been completed, the “film” can be produced or shot in the U.S. or elsewhere. The actual shooting of the film is a very labor-intensive process. Originally, all films were shot on hand-held film cameras and then the film was transferred to large reels of film stored in film canisters or “cans” – hence, the phrase “the film is in the can.” Today, many films are still shot with film cameras, although many of them are no longer hand-held but rather are controlled by computers. Some films are shot entirely with digital cameras instead, but this is rare. Especially on the bigger-budget productions such as feature films, scenes still tend to be recorded on film cameras, but this type of filming often is supplemented by filming with the use of a digital camera. Filming with a digital camera allows for various people around the globe to much more easily review the scenes that are shot daily (the dailies) and permits the on-going editing of the film throughout the entire shoot, whereas film editing in the past was done almost entirely at the conclusion of filming.

Once the “principal photography” on a film has been shot, a production company typically stores the completed film shot on location (in the U.S. or elsewhere) in a secure,
tangible format, for example, on film reels, DVDs, CDs, or computer hard drives and floppy diskettes. In both the U.S. and elsewhere, the film company then tends to store these tangible products in a secure “film vault,” so as to ensure against their damage, loss and piracy.

Post-production activities include editing, color imaging, and the addition of soundtracks, special effects, musical scoring, titles and credits, and dubbing. Typically, today, U.S. film companies perform these post-production activities in the U.S., whether the film is shot in the U.S. or outside of the U.S. As in the case of pre-production activities, relatively few people are required to perform the post-production tasks. When films are shot outside of the U.S., a company has to import the film into the U.S. in order to perform these post-production activities. Again, today, this usually means the importation into the U.S. of a tangible good, such as a film reel, a DVD, a CD, or a computer diskette. In rare cases, a film shot abroad might be imported into the U.S. solely via an internet transmission.
B. **Canadian PSTC Film Incentives**

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

In the past, most of the film incentives offered by Canada were conditioned on inclusion of a minimum percentage of Canadian content. There are still some incentive programs that require Canadian content, and U.S. film producers not infrequently take advantage of these incentives. The Canadian content tax incentives are the most generous of all of the incentives offered by Canada, generally equivalent to 25% of qualifying labor expenses, which are the sages and salaries paid to Canadian residents or taxable Canadian residents.

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20 For example, the capital cost allowance is a tax shelter given to foreign producers if they co-produce with a Canadian company. This attracts private financing by allowing Canadian financiers to offer film-financing incentives of three to four percent of non-Canadian labor costs. Some tax shelters can net four to eight percent of a film’s budget, but require a complicated financing scheme that only the major studios can take advantage of. See U.S. Department of Commerce, *The Migration of U.S. Film and Television Production*, January 18, 2001, at 73, which can be found at [http://www.ftac.org/html/2a.dgasag.html](http://www.ftac.org/html/2a.dgasag.html) (accessed July 17, 2005).

21 Id. at 71-72.

corporations (for amounts paid to employees who are Canadian residents the total costs of production of a film). However, several of the film incentive programs in Canada no longer require Canadian content.

The most generous subsidy not conditioned on inclusion of Canadian content offered by the Canadian federal government is the Federal Film and Video Production Services Tax Credit (the PSTC). This program was established in 1997, and it first became available for films shot in Canada on or after January 1, 1998. In order to qualify for this “tax credit,” the production costs for the proposed project must be at least $1 million (CAN). Under the PSTC Program, a film company is awarded a “rebate” of sixteen percent (16%) of “qualifying labor costs,” defined above.

The PSTC Program is actually structured as a transfer of funds rather than as either a rebate of taxes paid or a credit against taxes owed, even though the funds ostensibly are to be used to help the company pay future employment taxes owed to the Canadian federal government. Hence, the PSTC Program acts as a direct reduction of the employment costs associated with shooting a film in Canada, and, today, film companies often receive a check equal to 16% of the qualifying labor costs within a few weeks of

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25 Id.
filing their PSTC application, sometimes even prior to their commencement of filming in Canada.26

Applicants for the PSTC tax rebate must be either a taxable Canadian corporation or a foreign-owned corporation with a permanent establishment in Canada. Accordingly, many U.S. film studios have formed a Canadian branch of their corporations, such as Sony Pictures Home Entertainment-Canada and SKG Studios Canada, Inc. Others have partnered with Canadian production companies, such Alliance (Universal), TVA International (20th Century Fox), Remstar (Universal), and Cineplex Odeon (Universal). U.S. producers can also simply contract for productions services directly with Canadian companies.27

The PSTC Program is co-administered by the Canadian Audio-Visual Certification Office (CAVCO) and the Canadian Revenue Agency (CRA). CAVCO determines the eligibility of the production and issues an accreditation certificate on behalf of the Minister of Canadian Heritage.28 Then, the CRA distributes the funds to the film company.29

26 Id.


29 Id.
Most of the productions that receive PSTC funds are fiction or dramatic programs, and the total costs of production for projects that have qualified for PSTC funding since commencement of the program is $16.1 billion (CAN). The portion of these budgets that had been spent in Canada by the end of March 2004 was $8.1 billion (CAN), or 50.1% of the total.\(^{30}\) For the fiscal year commencing April 1, 2003 and ending March 31, 2004 (the most recent year for which data is available), the cost of production for films receiving PSTC funds was $2.3 billion (CAN) and the amount spent in Canada on PSTC productions that same year was $1.2 billion (CAN). For the last several years, the overwhelming majority (95%) of originating copyright holders of CAVCO-certified PSTC productions have been from the United States.\(^{31}\)

Similarly, each of the provinces in Canada provides a “rebate” of an additional percentage of the qualifying labor expenses incurred in the province. This percentage (with occasional maximum amounts based on the aggregate dollar amount of the rebate or a percentage of total production expenses) ranges from 16% to 40%. The federal and provincial PSTC funds are cumulative, so that the PSTC funds received by a film company can be quite substantial, amounting to a significant percentage of total production costs.\(^{32}\)

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\(^{31}\) Id.

\(^{32}\) A summary of all of the various Canadian federal and provincial film subsidy programs is provided in Appendix A.
At least partly in response to new generous film incentives in other countries, the Canadian federal government raised the PSTC rebate percentage from 11% to 16% in February of 2003. Then, in January of 2005, the Canadian provinces of British Columbia, Quebec, and Ontario, where the overwhelming majority of foreign films are shot in Canada, all amended their own PSTC programs to make them more generous. British Columbia raised its PSTC rebate percentage from 11% to 16%, and both Ontario and Quebec raised their PSTC rebate percentages from 11% to 20%. Apparently, the provinces raised their rates at least in part to counter the U.S. federal government’s new federal tax incentive for producers of smaller-budget films. Again, in the Jobs Creation Act of 2004, the U.S. Congress enacted Section 181 of the Internal Revenue Code. This

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33 For example, the U.K., Ireland, Australia, South Africa, and a number of other countries provide similar subsidies to their domestic and foreign film companies in order to entice them to shoot feature films in those countries. Some of these other film subsidy programs are even more generous than the subsidy programs in Canada. These incentives include, by way of example, low interest loans, loan guarantees, income tax breaks, free training, free use of film stages and sound studios, and outright cash grants. These foreign governments, like the Canadian governments, are providing these subsidies in order to provide jobs for their people and develop their own indigenous film industries over time. A number of the film subsidy programs in other countries are described in Appendix C. At the time that the Canadian federal government raised its PSTC subsidy rate, however, the Canadian dollar was also gaining in strength, so that the costs of producing a film in Canada were also increasing. This is another reason why the Canadian federal government increased its PSTC rebate percentage. See Canadian Film and Television Production Association (CFTPA), Profile 2004 –The Razor’s Edge: Canadian Producers in the Global Economy, http://www.cfpa.ca/newsroom/pdf_profile/profile2004-english.pdf (January 2004) (accessed August 16, 2005).


allows producers of feature films with budgets of $15 million or smaller to deduct within the first year following filming 100% of the production costs of the film, so long as 75% or more of the production costs of the film is incurred in the U.S. The maximum budget of the film is $20 million if the film is shot in an economically depressed area. This federal incentive is in addition to various stated incentives that exist in approximately 30 of the 50 U.S. states. These incentives generally are minor compared to the types of incentives offered by foreign countries.

From the point of view of the Canadian governments, the purpose of allowing the U.S. film companies to participate in these incentive programs is two-fold: First, any major film production by itself creates many local, if temporary, jobs that benefit the local populace. It is estimated, for example, that approximately 85% of the production costs of a film are spent in the local community, so it makes financial sense for Canada to pay only a portion of the production budget to a U.S. film company to get 85% of the film’s budget spent in the country. Second, the Canadian governments are using the U.S. film industry to help develop their own local film industry over time. In the short term, they are using U.S.-developed stories, major U.S. stars, and some U.S. writers and directors to teach them the trade. That is, they are using Hollywood to put Hollywood out of business. The Canadian governments readily admit both of these goals, at least when defending the incentives to their own taxpayers.

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38 Id. The enactment of this provision effectively ended any argument the Motion Picture Association of America or another entity might make regarding whether a film is a “product,” as only product costs can be deducted under Generally Accepted Accounting Principles and Internal Revenue Service rules in the U.S.

39 A summary of all of the various U.S. state film incentives is provided in Appendix B.

40 Supra n. 33.
VI. The Legality of Canada’s Film Incentives

The members of the WTO, including the U.S. and Canada, signed the SCM Agreement in order to make two types of government subsidies illegal because of the distortions such subsidies cause in the international trade of goods. The two types of subsidies made illegal by the SCM Agreement are “prohibited subsidies” and “actionable subsidies.”

Prohibited subsidies are considered to be illegal per se, meaning that they are considered to be so trade-distorting by definition that an explicit demonstration of injury or “adverse effects” caused by these subsidies to the domestic industry of a complaining WTO member is not required. It is unlikely that Canada’s PSTC film incentives are prohibited subsidies, and hence prohibited subsidies are not further discussed in this article.

Actionable subsidies, on the other hand, are subsidies that are provided to a specific enterprise or industry and are causing “adverse effects” to the industry producing a “like product” in another WTO member. Adverse effects to the domestic industry in the complaining WTO member include (1) material injury or a threat thereof; (2) nullification or impairment of a WTO benefit; or (3) serious prejudice or a threat thereof to that industry. The SCM Agreement further provides that a presumption of serious prejudice is established by a complaining WTO Member if the government subsidies in
question constitute five percent (5%) or more of the recipient firms’ sales of the product in question.

The SCM Agreement to date applies to WTO members’ trade in goods but not to their trade in services. Canada’s main argument in support of its contention that the PSTC film incentives are legal under the SCM Agreement is that films are services, not goods. While a more comprehensive response to Canada’s argument could be developed, this article proceeds on the basis that a film is a good rather than a service. Historically, GATT/WTO law has treated films as goods. For example, there are specific Harmonized Tariff Schedule (HTS) classifications for such items. In addition, Article IV of the GATT 1994, a WTO Agreement which covers only the trade in goods, specifically provides that WTO members may maintain import restrictions on foreign feature films, including the obligation of domestic movie houses to devote a minimum percentage of projection time to showing feature films portraying local culture. Article IV, of course, provides an exception to the general National Treatment obligation of

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41 U.S. domestic law has also consistently treated films as “products.” For example, the U.S. Supreme Court has ruled that films are products under the antitrust laws of the U.S. See United States v. Loew’s, Inc., 371 U.S. 38 (1962). In addition, the U.S. Internal Revenue Code has consistently treated films as products, most often in connection with the depreciation and deduction of film production costs. See, e.g., 26 U.S.C. § 181 (2005). The copyright laws provide protection to films, because they are physical manifestations of ideas. See 17 U.S.C. §102(a) (2005). Similarly, in the international trade law arena, the Department of Commerce has ruled that computer software is a product, not a service. See CASE Software of Singapore decision, 54 Fed. Reg. 37013 (1989). As software and films are both intellectual property that is protected by the copyright laws and can be copied and transmitted via various media, including the internet, a film should likewise be considered a product rather than a service.

42 See HTS heading 3704 (covering exposed and undeveloped film), HTS heading 3706 (covering exposed and developed film); HTS chapter 85 (covering recorded digital video discs (DVDs), compact disc (CD)s, and hard and floppy computer diskettes); see also the WTO Panel in Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (April 22, 1998) (photographic film is a “product” within the meaning of the General Agreement on Tariffs and Trade 1994 (as well as the SCM Agreement by virtue of Article XVI of the GATT 1994).
WTO members, set forth in Article III of the GATT 1994, not to discriminate in favor of domestic products over foreign products.

Furthermore, while the WTO has not ruled on this specific issue, the WTO Panel in *Canada – Certain Measures Concerning Periodicals*\(^{43}\) provided indirect support that a product such as a film that can be transmitted via the internet is a product encompassed within the SCM Agreement disciplines.\(^{44}\) In that case, the Panel ruled that Canada had violated the SCM Agreement when it subsidized the postal rates of Canadian-origin magazines but did not subsidize the postal rates of non-Canadian magazines such as the split-run edition of the U.S. magazine *Sport Illustrated*.\(^{45}\) Ironically, on account of Canada’s prohibition against the importation of magazines into Canada, Sports Illustrated had transmitted the content of the magazine to Canada via the internet and then had printed the magazine there. The Panel in that case also ruled that Canada’s import ban on foreign-origin magazines violated Article XI of the GATT 1994 (without addressing whether the publisher of *Sports Illustrated*, through its internet transmission, had, in fact, circumvented the import ban in any case), and treated the *Sports Illustrated* magazine as a U.S.-origin product protected under the SCM Agreement.\(^{46}\)

It is true that a U.S. importer need not declare to the U.S. Customs Service the importation of a film when it is transmitted to the U.S. via the internet, but this is no

\(^{43}\) WT/DS31/AB (July 30, 1997).
\(^{44}\) The recent U.S. Supreme Court case of *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, Docket 04-480 (U.S. June 27, 2005) also provides indirect support for this conclusion. The copyright laws, of course, protect against the unauthorized use of a copyrighted item, and only items that are capable of manifestation in a tangible form, as opposed to services, are entitled to copyright protection.\(^{45}\) *Supra* n. 42.
\(^{46}\) *Id.*
reason to treat a film as a service. The U.S., like other WTO Members, has agreed that, for the time being, it will not tax electronic transmissions, and the rationale for this agreement is two-fold. First, these countries believe that agreeing not to burden electronic transmissions with tariff assessments will facilitate the development of electronic commerce. Second, they do not currently possess an accurate method of monitoring cross-border electronic transmissions, so they did not want to attempt to assess tariffs on something that they could not audit. This agreement not to tax electronic transmissions simply reflects the WTO members’ initial reaction to a new technology, not a change in their philosophy as to whether a film should be protected by the WTO laws, in particular the SCM Agreement. Moreover, it would be nonsensical to hold that a change in technology can eviscerate the WTO protections that were specifically negotiated for the film industry by the U.S. and other WTO Members.  

A graphical depiction of the legal analysis required to demonstrate that the Canadian PSTC film incentives are illegal under the SCM Agreement because they are actionable subsidies follows, and the remainder of this section of the article proceeds accordingly:

47 Canada has sometimes argued that the U.S. must agree that a film is a service, because the U.S. Office of Management and Budget treats film workers as service workers, rather than manufacturing workers, for statistical purposes, and the U.S. has participating in negotiations held under the auspices of the General Agreement on Trade in Services (GATS) in which audio-visual workers have been treated as service workers. While it is true that the OMB and the U.S. Government in various GATS negotiations have treated audio-visual workers as service providers, there is no reason why this should mandate that a film itself is a service rather than a product. There are many situations in which a group of independent contractors contribute a variety of services in the creation of a product, such as a book, a computer program, a song, a house, or an international space station. There is no reason why a group of people cannot similarly provide various services in the creation of a product known as a movie or a film. In other words, both the OMB statistics and the U.S. Government in the GATS negotiations have been concerned with the treatment of audio-visual workers as people, not the trade treatment of the audio-visual product ultimately created by such people.
SCM Agreement Analysis

Good? Service?

SCM Agreement Applies

Prohibited Subsidies?

Export Subsidies?

Import Substitution Subsidies?

Actionable Subsidies?

Subsidy?

Specific?

Cause Adverse Effects?

Cause Injury?

Cause Nullification of WTO Benefit?

Cause Serious Prejudice?

Presumption of Serious Prejudice established if subsidies constitute 5% of sales revenues of recipient firms
A. The Canadian PSTC Film Incentives Are Actionable Subsidies

In order to qualify as actionable subsidies under the SCM Agreement, Canada’s PSTC film incentives must meet the definition of a “subsidy,” be provided to a “specific enterprise or industry” in Canada, and cause “adverse effects” to the domestic industry that produces a “like product” in another WTO member. All of these criteria are met in this case.

1. Canada’s PSTC Film Incentives are “Subsidies”

Under the SCM Agreement, a “subsidy” must constitute both a benefit to the recipient firm(s) and a cost to the granting government, such as:

a government practice involving a direct transfer of funds;

. . . [or]

government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits . . .

48 General Agreement on Tariffs and Trade 1994, Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), Articles 1, 2, 5, 6, and 15 (1994).

49 SCM Agreement, Articles 1.1 (a)(i) and (ii) (1994).
Without question, the PSTC film incentives in Canada constitute costs to the Canadian federal and provincial governments, and they certainly also provide a benefit to the recipient firms, namely a significant reduction in the production costs of those films created in Canada with benefit of the incentives. Also, the PSTC film incentives generally are either a “government practice involving a direct transfer of funds” or “government revenue that is otherwise due that is foregone or not collected.” In fact, tax credits are even mentioned by name in the above-quoted definition of a “subsidy” contained in the SCM Agreement. The PSTC film incentives clearly meet the definition of a “subsidy” provided in the SCM Agreement.

2. **The PSTC Film Incentives are Provided to a Specific Industry**

Furthermore, the Canadian federal and provincial governments provide the PSTC incentives to a specific industry in Canada: the film industry.\(^{50}\) As discussed above, this industry produces features films, television series, commercials, MOWs, and music videos. At the same time, as is explained further below, this industry appears to be composed of at least two sub-industries: the feature film industry and the television film

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\(^{50}\) In order to avail itself of these subsidies, a non-Canadian film company must contract with a Canadian film company to provide the services or establish a permanent establishment in Canada through a joint venture or other business arrangement. Canadian Audio-Visual Certification Office (CAVCO), *Film or Video Production Services Tax Credit (PSTC)*, [http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/progs/cisp-pstc/index_e.cfm) (August 02, 2004) (accessed August 13, 2005).
industry. Again, this article focuses on the harm that Canada’s PSTC film subsidies are causing to the feature film sub-industry of the U.S. film industry.

3. **Adverse Effects to a Domestic Industry in the U.S.**

A. **Definition of the Domestic Industry**

Again, the SCM Agreement provides that domestic subsidies are illegal if they are causing adverse effects to the domestic industry producing a “like product” in the complaining WTO member. In the instant case, Canada is the subsidizing country, and the products that the Canadian governments are subsidizing through their PSTC Programs are all types of films - feature films, television series, commercials, MOWs, and music videos. This article, however, focuses solely on the PSTC subsidies provided to the feature film industry in Canada, so that the product being analyzed is a feature film shot in Canada and subsidized by the applicable Canadian governments and then imported into the U.S. In some cases, a feature film shot in Canada needs various post-production tasks to be performed in the U.S. before it is finished and can be marketed and released to the public. Even the latter product would still be considered a feature film upon its importation into the U.S., however, as the semi-finished film would nonetheless have the essential character of the finished film. Hence, the next step in the injury

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51 SCM Agreement, Articles 5, 6, and 15.
52 General Rule of Interpretation 2(a) to the Harmonized Tariff Schedule of the United States, (HTSUS) (An incomplete imported product is treated as the complete product, so long as the incomplete product has the essential character of the complete product.)
analysis is a determination of what product in the U.S. is “like” the feature films being subsidized by the Canadian governments.

**B. U.S. Feature Films and Canadian Feature Films are Like Products**

Footnote 46 of the SCM Agreement provides that the term “like product” “shall be interpreted to mean a product which is identical, *i.e.*, like in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” Furthermore, with respect to ascertaining whether a foreign and a domestic product are “like products,” almost all GATT and WTO panel reports have followed the approach set forth in the Report of the Working Party on *Border Tax Adjustments*, which was then adopted by the GATT Contracting Parties in 1970. The relevant section of *Border Tax Adjustments* provides:

. . . the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumer’s tastes and habits, which change from country to country; the product’s properties, nature and quality.\(^{53}\)

Additional criteria considered by other WTO panels on the issue of “like products” include whether the two products possess the same tariff classification, and how producers of the two products have “. . . analyzed market segmentation.”

Application of the above criteria leads to the conclusion that Canadian feature films are not “like” U.S. television programs and vice versa. That is, while a Canadian feature film and a U.S. television program, which are both contained on the same medium such as a DVD, for example, may possess the same physical characteristics, general purpose of entertainment, and the same tariff classification, a subsidy provided with respect to the former wouldn’t seem to have any effect on those companies selling the latter in the U.S. A feature film is a one-shot deal that must be of higher quality than the average television show in order to grab viewers’ attention, and consumers generally do not consider the two products to be interchangeable. In other words, a person desiring to view a feature film won’t necessarily view a television show instead or vice versa. In addition, companies producing films have accurately analyzed this market segmentation and organized themselves accordingly. While the large film companies produce both feature films and televisions shows, these companies tend to be organized into two distinct divisions, one dedicated to the production of feature films and the other dedicated to the production of television projects.

On the other hand, application of all of the above “like product” factors leads to the conclusion that U.S. and Canadian feature films are “like products.” Whether a Canadian

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feature film is contained on a CD, DVD, floppy diskette, or film reel, its physical characteristics, chemical composition, and HTS classification would all be the same in Canada and in the U.S. The end use of a feature film, whether it is of U.S. or Canadian origin, is to provide a high-quality film entertainment product lasting a couple of hours. The increasing production of Canadian-origin feature films and importation of these films into the U.S. provides strong evidence that the ultimate consumers of the products, the movie-watching public, in no way prefer U.S.-origin feature films over Canadian-origin films. For all of these reasons, Canadian-origin feature films and U.S.-origin feature films would be considered to be “like products,” and hence the relevant U.S. industry to analyze with respect to the injury caused by Canada’s PSTC film subsidies is the U.S feature film industry.

4. **Adverse Effects to the U.S. Feature Film Industry**

Again, the SCM Agreement provides that “adverse effects” may be demonstrated by a showing of:

(a) injury to the domestic industry of another Member[ ];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[ ]; or

(c) serious prejudice to the interests of another Member.[ ]

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55 SCM Agreement, Article 5.
It is possible that paragraph (b), above, is not relevant in this case. Thus, that issue isn’t
developed further in this article. Still, the PSTC film incentives in Canada are causing
both “injury” and “serious prejudice” to the U.S. feature film industry. Each of these
two “adverse effects” prongs will be addressed in turn.

A. INJURY

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

More specifically, Part V of the SCM Agreement states that:

With regard to the volume of the subsidized imports, the investigating
authorities shall consider whether there has been a significant increase in
subsidized imports, either in absolute terms or relative to production or
consumption in the importing Member. With regard to the effect of the

56 Note that earlier film subsidy programs in effect in Canada during 1990-1998 also caused harm
to the U.S. film industry. This harm is documented in a report prepared by a private company
called The Monitor Company and entitled The Economic Impact of U.S. Film and Television
Runway Film Production. This report was published in June 1999, and it can be found at
57 See SCM Agreement, footnote 11 (The term “injury” is used in Article 5 in the same sense that
it is used in Part V of the SCM Agreement.).
58 SCM Agreement, footnote 45.
59 SCM Agreement, Article 15.1.
subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.60

The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.61

In a subsidies case, there is no requirement that the different causes of “injury” to a domestic industry be identified and compared in order to ascertain whether the subsidies in question are the most important, or even one of the important, causes of the injury. So long as the subsidized imports are one of the causes of the injury or threat of injury to the domestic industry of another WTO member, or one of the causes of the retardation of the establishment of such the domestic industry in another WTO member, a violation of the SCM Agreement is established.62

60 SCM Agreement, Article 15.2.
61 SCM Agreement, Article 15.4.
62 Supra n. 12, at 728.
Again, this article focuses on the harm that Canada’s PSTC film subsidies are causing to the U.S. feature film industry. Therefore, each of the various indicators of harm discussed below focuses on the harm occurring in that industry.63

1. Significant Increase in Subsidized Imports

As the U.S. has a well-established feature film industry, the Canadian PSTC film incentives have not retarded the establishment of such an industry. However, there is substantial evidence that the PSTC film incentives have materially injured or, at the very least, have posed a threat of material injury, to the U.S. feature film industry.

The outsourcing of the U.S. film industry commenced with the outsourcing of television (TV) commercials. At that time, U.S. film company executives assured film workers and the public that the high value, creative television and feature film work would remain in the U.S. Within a few years, however, MOWs began being filmed outside of the U.S. as well, and again, approximately 75% of all U.S.-developed MOWs are filmed outside of the U.S. today, primarily in Canada.64

Next, the filming of TV pilots and then TV series started moving off-shore, and at that time U.S. movie executives once promised that feature film work would of course remain

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63 While this article focuses solely on the U.S. feature film industry, it should be noted that there are also statistics, studies, and anecdotal evidence documenting that Canada’s various film incentives have caused significant harm to the entire U.S. film industry.

64 U.S. Dept. of Commerce (DOC), Petition for the Imposition of Countervailing Duties Pursuant to § 701 of the Tariff Act of 1930 (2001), As Amended, at 11.
in the U.S. In recent years, however, the U.S. feature film industry has been moving north across the Canadian border and overseas, and as a result, approximately 25% of U.S.-developed feature films are shot outside of the U.S. today.\textsuperscript{65} There is no reason to believe that the outsourcing of the U.S. film industry will end there, and, in fact, Canada recently has even enacted new tax subsidies specifically designed to lure the high tech, post-production feature film work to Canada.

Again, this article focuses on the outsourcing of the U.S. feature film industry, especially to Canada as a result of the PSTC Programs. Hence, the remainder of this section discusses the magnitude of this phenomenon.

\textit{A. CFTPA Reports}

The most comprehensive figures published since enactment of the PFTC Programs in Canada are those found in the annual \textit{Profile} reports published by the Canadian Film and Television Production Association (CFTPA) (hereinafter referred to as the CFTPA Reports). The figures stated in the CFTPA Reports, as summarized below in Exhibit 1, reveal that total feature film production in Canada grew from $420 million in 1997, just prior to enactment of the federal PSTC program, to $1.04 billion dollars in 2003 (the last year for which final annual figures are publicly available in Canada). This represents a growth rate of 148\% in the Canadian feature film industry between 1997 and 2003.

The Canadian Government quite proudly advertises that most of the tremendous growth in its feature film industry is attributable to the growth in “foreign location shooting,” which is defined as the shooting in Canada of feature films that were developed elsewhere.\footnote{See Canadian Audio-Visual Certification Office (CAVCO), 2001-2002 Activity Report, 2002-2003 Activity Report, and 2003-2004 Activity Report.} For example, in 1998, foreign location shooting constituted only 51% of total feature film production in Canada. Following implementation of the PSTC Program in 1998, however, this percentage rose to 80% by 2004. Furthermore, the Canadian Government reports that it is its generous tax incentives, in particular its PSTC Programs, that are responsible for this significant growth in foreign location shooting.\footnote{Id.}

Exhibit 1 also demonstrates that the production of U.S.-developed feature films in Canada has been growing steadily since commencement of the Canadian federal PSTC Program in 1998. In 1997, U.S. film companies spent approximately $202 million on the production of feature films in Canada. Then, with the exception of a slight decrease in production expenditures attributable to the 9/11 terrorist attacks and U.S. companies’ subsequent fears of doing business abroad as well as a writers’ strike in Hollywood, the production expenditures of U.S. film companies in Canada have increased steadily since 1998, when the PSTC Program was enacted. As a result, by 2003, U.S. film companies had spent approximately $790 million shooting feature films in Canada. This represents a 291% increase in the filming of U.S.-developed feature films in Canada between 1997 and 2003.
EXHIBIT 1

Production of Feature Films in Canada (U.S. Dollars, Millions)\textsuperscript{68}

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</thead>
<tbody>
<tr>
<td>All Canadian Films</td>
<td>420</td>
<td>530</td>
<td>760</td>
<td>714</td>
<td>632</td>
<td>824</td>
<td>1041</td>
<td>4921</td>
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<tr>
<td>% Growth 1997 - 2003</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>148%</td>
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<tr>
<td>Total Foreign Location Shooting</td>
<td>213</td>
<td>382</td>
<td>561</td>
<td>549</td>
<td>476</td>
<td>629</td>
<td>830</td>
<td>3640</td>
</tr>
<tr>
<td>% Foreign Location of All Canadian Films</td>
<td>51%</td>
<td>72%</td>
<td>74%</td>
<td>77%</td>
<td>75%</td>
<td>76%</td>
<td>80%</td>
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<tr>
<td>U.S. Foreign Location Shooting</td>
<td>202*</td>
<td>363*</td>
<td>533*</td>
<td>522*</td>
<td>452*</td>
<td>598*</td>
<td>789*</td>
<td></td>
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<tr>
<td>% Growth 1997- 2003</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>291%</td>
</tr>
</tbody>
</table>

Source: Annual Profile reports published by Canadian Film and Television Production Association (CFTPA), 1999-2005.
* Note that 2001-2002, 2002-2003 and 2004-2004 CAVCO Activity Reports state that the overwhelming majority (95%) of foreign location shooting projects are developed in the U.S. Thus, all of the figures highlighted with an asterisk are simply 95% of the applicable foreign location shooting figure.

B. CAVCO Reports

Figures published by the Canadian Audio-Visual Certification Office (CAVCO), as set forth in Exhibit 2 below, confirm that approximately $840 million in total foreign location shooting expenses were incurred in Canada to produce feature films in 2002. Of

this figure, approximately 95%, or approximately $800 million, was attributable to U.S.-
developed feature films produced in Canada. Assuming, according to figures published
in the CFTPA Reports discussed above, that production expenditures incurred by U.S.
film companies in producing feature films in Canada in 1997 were approximately $200
million, then the CAVCO Reports substantiate that approximately $600 million in feature
film expenditures migrated to Canada from the U.S. since 1997.

EXHIBIT 2

<table>
<thead>
<tr>
<th>Feature Film Production in Canada (U.S. Dollars, Millions)</th>
<th>2001</th>
<th>2002</th>
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<tbody>
<tr>
<td>Total Foreign Location Shooting</td>
<td>813</td>
<td>841</td>
</tr>
<tr>
<td>U.S. Foreign Location Shooting</td>
<td>772</td>
<td>799</td>
</tr>
</tbody>
</table>


C. **CEIDR Reports**

The tremendous growth in the production of U.S.-developed feature films in Canada
following Canada’s enactment of the PSTC Program in 1998 is also demonstrated by a
U.S. source, the Center for the Entertainment Industry Data and Reports (the CEIDR), in
three reports that the CEIDR published in 2000, 2001, and 2002. These reports, hereinafter referred to as the CEIDR Reports, cover feature film production in the U.S. and Canada (including all feature-length films that grossed at least $500,000 at the box office) during the production years 1998 - 2001. The figures compiled in the CEIDR Reports, which are reproduced in Exhibit 3, below, and, are considered to be highly reliable.69

These figures demonstrate that total feature film production expenditures incurred in Canada grew from $430 million in 1998 to $1.047 billion in 2001, resulting in an overall 154% increase in the production of feature films in Canada during that four-year period.70 Furthermore, the CEIDR Reports document that this approximate $617 million growth in feature film production in Canada was accompanied by an approximate $684 million loss in feature film production in the U.S. during those four years. This $684 million loss in the U.S. represented a loss of 17% of the U.S. feature film industry during those years alone.

EXHIBIT 3

| Feature Film Production in the U.S. and Canada (U.S. Dollars, Millions) |
|-----------------------------|-----------------|-----------------|-----------------|-----------------|------------------|------------------|
|                             | 1998            | 1999            | 2000            | 2001            | Absolute Growth | Percentage Growth |
| Budgets of Features Produced in U.S. | 3928            | 3554            | 3365            | 3244            |                   |                   |
| 1998-2001                   | -684            |                 |                 |                 |                  |                   |

*69 Supra n. 17.*

*70 The CFTPA, CAVCO, and CEIDR Report figures are also substantiated at least in part by a U.S. Department of Commerce estimate that $355 million was paid just to Canadians working on the production of U.S-developed feature films in the year 2000. See Supra n. 17, at 19.*
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<tr>
<td></td>
<td></td>
<td>+617</td>
<td>+144%</td>
</tr>
</tbody>
</table>

Source: Reports published by the Center for Entertainment Industry Data and Research (CEIDR) in 2000, 2001, and 2002 and covering feature film production in the U.S. and Canada

**D. ANECDOTAL EVIDENCE**

Overwhelming anecdotal evidence confirms the above statistics. For example, citing off-shore production of film projects, the Directors Guild of America (DGA) removed the five cities of Atlanta, Boston, Dallas, Miami and Orlando from its list of “production centers” in mid-2002. A DGA spokesman said that there simply was not sufficient work “... to merit continuing the production center designation.” 71 Similarly, for several years, North Carolina was third in the nation behind California and New York in terms of total film production revenue from all sources (feature films, television, commercials, and industrial films). In 1999, total direct spending on film-making there came to approximately $300 million. By 2002, it was down 23% to $230.8 million. 72

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The DGA maintains figures regarding the U.S. share of feature films produced under DGA contracts, and this data reveals that, in 2003, of 154 feature films released under DGA contracts, 20 were filmed in Canada, 8 in Europe, 3 in Australia or New Zealand and 6 in the U.K./Ireland. The DGA’s figures also illustrate that the U.S. share of total feature productions declined each year from 2001 to 2003.73

At the other end of the spectrum from big-budget films shot under DGA contracts are small-budget independent films. Evidence regarding the outsourcing of this type of film is even more alarming. At a meeting of independent film producers, held in Beverly Hills on June 17, 2004,74 Tom Berry, president of Reel One Entertainment, explained that he intended to make 8 movies in 2004, all in Canada. Crystal Sky president-CEO Steven Paul said that five years ago, he made all of his movies in the U.S., but now he produces most of his 8-10 projects a year out of the country. Andrew Stevens, president-CEO of Andrew Stevens Entertainment, reported that he was planning to shoot 12 pictures that year, but only 2 to 4 of them were to be made in the U.S. Nu Image reported that it was planning to produce 12 features in 2004, but only two of them would be shot in the U.S. As Nu Image company co-chairman Avi Lerner said, “It’s all about


74 Representatives of FTAC attended this meeting and these FTAC representatives recorded the comments attributed to the various independent film producers at this meeting. These comments were subsequently reported in Film and Television Action Committee, Letter to Ronald Lorentzen regarding Comments on Unfair Trade Practices Task Force, 69 Fed. Reg. 30, 285 (June 28, 2004) at 12.
money[,]” and U.S. filmmakers can make more money by producing their films outside of the U.S. where their costs of production are significantly lower.

Again, by 2004, a number of other countries had copied Canada’s successful film subsidy programs and the outsourcing of Hollywood picked up even more steam. A review of the June 10, 2004 issue of the magazine Production Weekly, for example, listed a total of 73 feature films and TV series or TV movies with scheduled start dates. . . . Of these 73 projects, 52 were feature films, and of these 52 features, 28 were scheduled to be shot in the United States, 20 were scheduled to be shot in foreign countries (including 5 in Canada) and 4 were to be shot in unknown locations.”

In 1999, the authors of a report prepared by a private consulting company, the Monitor Company, reported that, in the year 1998 alone, a total of $10.3 billion was lost to the U.S. economy in direct production expenditures, plus indirect production expenditures, and tax revenues on account of the outsourcing of all types of film projects. By 2001, that figure was closer to $14 billion, according to the CEIDR Reports. Industry experts today estimate that at least $25 billion in direct production expenditures plus the multiplied effect of indirect jobs and tax revenues, is lost to the U.S. economy annually,


76 Supra n. 21, at 21.
77 The Center for Entertainment Industry Data and Research (CEIDR), The Migration Of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report, (2002) at 10.
as a result of outsourced film production,\textsuperscript{78} and approximately one-third of each of these figures is attributable to the outsourcing of feature film production.\textsuperscript{79} These aggregate figures indicate the magnitude of the harm suffered by the U.S., and, ironically, this $25 billion figure is almost exactly what the film industry previously contributed as a surplus to the U.S. balance of trade. Figures discussed below detailing lost jobs, reductions in wage rates paid, and bankrupt companies catering to the film industry, reveal the extent of the suffering experienced by scores of film industry workers and companies associated with the film industry as a result of outsourced film production.

In any case, as more and more U.S.-developed feature films are shot in Canada and are then imported into the U.S. for marketing and release, it is necessarily the case that importations into the U.S. of Canadian-origin feature films have also increased significantly. Accordingly, the first prong of the material injury test – increasing imports of the subsidized product – is met.

\textbf{2. Effect of Subsidized Imports on U.S. Prices}

Typically, one part of a film company in the U.S. does not shoot a movie and then sell it to another part of that same company for finishing and release. Thus, prices for feature films that have been produced but not yet finished in the U.S. are not available, in order to make a direct comparison to the price of U.S.-developed films


\textsuperscript{79} Canadian Film and Television Production Association (CFTPA) Annual Reports for 1999-2003.
produced in Canada and then imported into the U.S. for finishing. In any event, though, an arm’s length price for a feature film produced in Canada and then imported into the U.S. and an arm’s length price in the U.S. for a feature film produced in the U.S. and then sold to another film company in the U.S. would cover the costs of film production plus a reasonable profit figure. Furthermore, as the profit figure included in both such prices would be derived rather than actual in any case, the proper analysis for determining the effect of the increasing imports of subsidized feature films produced in Canada on U.S. prices would involve a review of the effect of those subsidies on the costs of shooting a feature film in the U.S.

When viewed in this manner, there is no question that the costs of producing feature films in the U.S. have been suppressed so that they can compete with the heavily subsidized U.S.-developed films produced in Canada. For example, the average budget for a feature film produced in the U.S. declined by $3.9 million (13%) from $31.2 million in 2000 to $27.3 million in 2001.80

Anecdotal evidence suggests that this downward pressure on the costs of production in the U.S. has continued, and every cost component has been affected. For example, wages and salaries, as well as various fringe benefits, of feature film production workers in the U.S. have decreased. Businesses such as restaurants, hotels, and

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80 The Center for Entertainment Industry Data and Research (CEIDR), The Migration of Feature Film Production From the U.S. to Canada and Beyond: Year 2001 Production Report, (2002) at 1. In Canada, for the same period, there was a slight decline of $0.8 million (-3%) from $27.6 million in 1998 to $26.8 million in 2001, as Canada started to struggle with the U.S. movie industry starting to move to other foreign locales where the government subsidies are even more generous. Id.
costume shops catering to the feature film industry in the U.S. have reduced their costs to local film production companies in order to retain business in the local area. Finally, as discussed above, state and local governments have provided all kinds of incentives and subsidies, such as reduced fees for film permits and land rentals, grants, loan guarantees, and tax incentives to the U.S. movie houses in order to entice them to retain film production in the U.S. Again, even the federal government, in the Jobs Creation Act of 2004, provided a tax incentive for U.S. movie companies to film at least low budget films in the U.S. Of course, U.S. taxpayers, including, in particular, the film industry workers living in the areas most affected by the outsourcing of the U.S. film industry, ultimately pay the cost of these government subsidies, and in this manner film workers’ wages and salaries have been decreased even further.

a. **Reduced Wages, Salaries and Fringe Benefits of Film Production Workers**

Numerous employees in the feature film industry have lost their jobs in the industry in recent years. Those workers, of course, no longer receive any type of wage, salary or fringe benefit from the film industry. In fact, many former film production workers in the U.S. are no longer even eligible for unemployment insurance payments as they have been out of work so long. These direct financial consequences of lost

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82 Author’s interview with FTAC members, Burbank, California, July 8, 2005.
jobs in the U.S. film industry are discussed below in the section entitled “Actual and Potential Negative Effects on Employment.”

In addition, many of those individuals who have been able to obtain work in the U.S. industry have had to make significant wage, salary, and benefit concessions in order to obtain this work. The Screen Actors Guild (the SAG), for example, reports that its members have agreed to maintain or reduce their wage rates and overall benefits for several years in order to decrease the U.S. production costs for feature film makers. Some cities, such as New York City, have even boasted on their websites that film industry employees have agreed to take wage cuts in order to retain feature film production locally.83

The SAG reported in 2004 that its members were losing not only current wages, but also future residual payments and contributions to their health and pension funds, to outsourced film production.84 In 2001, the SAG announced that it was even raising the eligibility requirements for its health plan. Among the reasons cited for this action were not just the expected skyrocketing costs of prescriptions and medical treatment but runaway production and its resulting decline in contributions to the plan’s funding from current members’ earnings.85

85 Id. at 18, citing Dave McNary, SAG forced to cut back health plan, Daily Variety, July 31, 2001.
Of course, the major stars typically do not sacrifice their salaries or benefit packages in order to retain feature film production in the U.S. They simply relocate to the applicable foreign country for the duration of the film shoot. Recently, though, even some of these people have been affected by the increasing imports of subsidized feature films from Canada. For example, Arnold Swartzenagger, when he was running for Governor of California in 2003, agreed to take a $3 million reduction to his $20 million salary for starring in *Terminator Three*, so that Warner Brothers would agree to shoot the movie in California rather than Canada.86

b. *Reduction of Other Direct Costs of Film Production*

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

86 Since becoming Governor of California, Swartzenagger has also formed a commission, together with Governor Pataki of New York, to investigate methods of retaining film production in the U.S., including granting additional state and local tax incentives to film companies that shoot their films in those states.
c. **Reduction of Film Production Costs through Government Subsidies in U.S.**

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

Warner Brothers, for example, received from North Carolina, New Hanover County, and Wilmington an outright grant of $750,000 to maintain the production of the television series “One Tree Hill” in Wilmington instead of move it to Canada. Obviously, such subsidies reduce the costs of producing films in the U.S. as the reduction of U.S costs is the rationale for provision of the subsidies in the first place. Again, though, U.S. taxpayers, in particular in those in locations especially affected by runaway production, ultimately have to pay for these government services and subsidies. While the welfare of the U.S. move houses is increased as a result of the subsidies, the economic welfare of the U.S. taxpayers is reduced. By way of example, “[a]lthough steadily employed on the
[One Tree Hill] show, one local taxpayer [in the Wilmington area even] referred to . . . [the $750,000 payment to Warner Brothers] as “extortion.”87

Similarly, the State of Wyoming attempted to raise $900,000, at the request of a line producer at Focus Films, in order to entice it to film Brokeback Mountain (Annie Prolyx’s novel about Wyoming) in that state. However, Wyoming was able to raise only $100,000, and Focus Films concluded this was an insufficient amount and filmed this movie in Calgary, Canada, instead, where it received significantly more generous subsidies.88 As stated above, by late 2004, even the U.S. Government had established a tax incentive for film producers who shoot smaller budget films in the U.S.

The above-discussed sacrifices made by film production workers, owners and workers in film support companies, and U.S. taxpayers to retain feature film production in the U.S. have been quite substantial. Also, without question, these sacrifices have lowered the costs of producing feature films in the U.S. Unfortunately, all of these sacrifices together have been insufficient to overcome the exceedingly generous subsidies that Canada (primarily through the PSTC Programs) (and other countries) is providing to the U.S. feature film industry.


88 Id.
3. **Impact of the Subsidized Imports on the Domestic Industry**

The great majority of economic factors and indices having a bearing on the state of the industry, referred to in the SCM Agreement, indicate that the subsidized imports have seriously detrimentally affected the U.S. feature film production industry. These factors and indices will be discussed in turn, below.

**a. Actual and Potential Decline in Output**

As discussed above, the production of U.S.-developed feature films in Canada (and other countries) has grown significantly. It is reasonable to assume that all of this production otherwise would have occurred in the U.S. Accordingly, output of the feature film production industry in the U.S. has been negatively affected and this trend can be expected to continue if countermeasures are not taken to halt this trend. Also, as demonstrated above, the U.S. feature film industry has actually suffered an absolute decline in recent years. This measure of the impact of the subsidized imports on the domestic film industry demonstrates significant injury to the U.S. feature film industry.

**b. Market Share**

Given Canada’s tremendous growth in the production of U.S.-developed feature films, the U.S.’s share of the world market for feature film production has declined. The U.S.’s
decline in world market share is demonstrated in Exhibits 5 and 6. In particular, these Exhibits illustrate that the U.S. feature film industry has declined from a 70% share of the world market in 1998 to a 58% share of the world market in 2001. Hence, this second measure of the impact of the subsidized imports on the domestic industry also illustrates that the feature film industry in the U.S. has been adversely affected by Canada’s PSTC subsidies.

EXHIBIT 5
Estimated Budgets of Domestic Theatrical Releases ($Millions) 1998

- U.S., $3,930.00, 70%
- Other, $1,200.00, 22%
- Canada, $430.00, 8%

EXHIBIT 6
Estimated Budgets of Domestic Theatrical Releases ($Millions) 2001

- U.S., $3,240.00, 58%
- Other, $1,309.00, 23%
- Canada, $1,050.00, 19%


c. *Factors Affecting Domestic Prices*

As demonstrated above, “domestic prices” or, in other words, the costs of producing feature films in the U.S., have declined or been suppressed, so as to make feature films produced in the U.S. at least somewhat competitive with the subsidized feature films from Canada. Accordingly, this factor also demonstrates that the subsidized imports from Canada are detrimentally affecting the U.S. feature film industry.
d. **Actual and Potential Negative Effects on Employment**

“We are creating the jobs your children want.” This is the rallying cry that the Canadian Government has used over the last few years to develop taxpayer support for the PSTC incentive programs established for the film industry.\(^89\) This strategy involves moving jobs from the U.S. to Canada, and it clearly has been exceedingly successful. Both government agencies and private groups in Canada and the U.S. evidence this fact.

The Canadian Film and Television Production Association (CFTPA), in its annual *Profile* studies, reports that the number of direct jobs producing U.S.-developed feature films in Canada has grown from 2,656 employees in 1997 to 11,629 employees in 2003. The CFTPA also estimates that for every direct job in the industry, 1.6 indirect jobs in Canada are also created. Indirect jobs include, for example, jobs in the hotel, restaurant, and retail sale business catering to the film industry. Thus, the CFTPA reports that the number of such indirect jobs associated with the production of U.S.-developed feature films in Canada has grown from 4,250 in 1997 to 18,606 in 2003. The total number of direct and indirect jobs associated with the feature film industry that were outsourced from the U.S. to the Canadian feature film industry, then, grew from 6,906 in 1997 to a whopping 30,235 in 2003. This represents a 338% growth in U.S.-developed feature film jobs in Canada over the course of this six-year period. This transfer of direct and indirect jobs in the feature film industry from the U.S. to Canada is illustrated in Exhibit 7.

\(^89\) *Supra* n. 86, at 8.
EXHIBIT 7

<table>
<thead>
<tr>
<th>Year</th>
<th>Jobs Created in Canada and Lost in U.S. in Feature Film Industry ($U.S. Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>Direct Jobs</td>
<td>2,656</td>
</tr>
<tr>
<td>Indirect Jobs</td>
<td>4,250</td>
</tr>
<tr>
<td>Total Jobs</td>
<td>6,906</td>
</tr>
</tbody>
</table>

Source: Annual Profile reports published by Canadian Film and Television Production Association (CFTPA), 1999-2005.

The highly-respected CEIDR Report for 2001 reports that 27,313 jobs were lost in the U.S. feature film industry in that year alone.\(^{90}\) CEIDR, in fact, contends that, in each of the four years covered by its studies, 1998-2001, an average of 25,000 jobs per year were lost in the U.S. feature film industry.\(^{91}\)

Statistics for the entire film industry are even more alarming. The Monitor Report, for example, states that, in 1990, there were 345,000 permanent jobs in the U.S. audiovisual

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\(^{90}\) Supra n.79, at 3.

\(^{91}\) Id.
industry. By 1998, however, 75,000 of those jobs had been lost, and 20,000 of those jobs had been lost in 1998 alone.

Los Angeles and the surrounding areas have been particularly hard hit by the outsourcing of the feature film industry. Jack Kyser, chief economist for the Los Angeles Economic Development Corporation, found a loss of 32,400 show business jobs in the Los Angeles area between 1999’s peak employment figure of 146,000 and the final 2003 figure of 113,600, which was lower than his original prediction for the year of 116,100. Film industry employment in Los Angeles has been declining steadily every year in between. In 2000, it fell to 138,900, in 2001 to 126,100, and in 2002 to 121,000, according to Kyser. He expected it to decline to 111,100 for 2004 and then to a low 109,600 in 2005. “The problem with the film industry, [according to Kyser,] is that everyone sees it in the light of ‘Entertainment Tonight’ and ‘Access Hollywood’ – all the glitz and glamour – and they don’t see that the bulk of the industry is below the line and that’s what’s hurting.”

UCLA Anderson Forecast senior economist Christopher Thornberg confirms Kyser’s figures and predictions regarding the precipitous decline of the Hollywood film industry. In September of 2003, he stated that “I don’t think the industry will leave Los Angeles,

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92 Supra n. 21, at 18.
93 Id.
95 Id.
but it looks as if local production jobs are slowly declining and moving elsewhere. Los Angeles and New York remain the centers for the industry’s dealmaking, financing and advertising.” 96 Of course, as FTAC spokespeople have noted:

The physical production of a feature film or television project is incredibly labor intensive, requiring large numbers of specialized, highly skilled workers and artists in positions which far outnumber Thornberg’s “management jobs” with a studio or production company. A shift in these numerous middle class jobs from cities in the United States to foreign locations has severe adverse economic impact, and is a serious problem. 97

When U.S. film workers lose their jobs, they obviously are harmed by the loss of the direct wages and salaries that they otherwise would have derived from those jobs. In addition, however, as the Hollywood Entertainment Labor Council noted in June of 2004, “SAG members have lost residual payments, important safety protections, and significant contributions to their health and pension funds . . . because of work done out of the country . . . .” 98 And, again, some industry workers have been out of work so long that they no longer qualify for unemployment insurance. 99

That film production workers have been suffering greatly in the U.S. is further illustrated by the fact that requests by such employees to the Directors’ Guild Foundation for short-term, no interest loans have been increasing. 100 Similarly, a number of film workers have

98 Id.
99 Supra n. 81.
100 Supra n. 96, at 18, citing Letter to Directors Guild members from Delbert Mann, Directors Guild Foundation Chairman of the Board, October 2002.
applied for financial aid to the Motion Picture Fund in the past several years. Many Hollywood film industry veterans report that they have been able to survive only because they have been able to sell or refinance their mortgages in Southern California where real estate values have been escalating.

It certainly appears that the outsourcing of the U.S. feature film industry, to Canada and elsewhere, has effectively destroyed the livelihoods of many people who formerly were employed in the industry. Even more ominously, it appears that the future dominance of the U.S. in the feature film industry is jeopardized, as our children’s jobs in this industry are outsourced to workers in other countries through the use of exceedingly generous foreign subsidies. This factor of “Actual and Potential Negative Effects on Employment” illustrates, perhaps more dramatically than any other factor, that the subsidized feature film imports from Canada are causing material injury to the U.S. feature film industry.

101 Supra n. 96, at 18.

102 Id. Interestingly, very recently, even Canadian film industry employees have started to feel the sting of outsourced production, now that other countries around the world have copied Canada’s successful film subsidy programs. In some cities, Canadian film workers have been out of work for several weeks or a few months, and some Canadian film employees have made concessions on salary rates and benefit levels in order to retain work in Canada. This boom-bust cycle is not surprising, of course, as “foreign subsides do not create new jobs, they merely relocate existing jobs from one country to another[.]” (Film and Television Action Committee, Letter to Ronald Lorentzen regarding Comments on Unfair Trade Practices Task Force, 69 Fed. Reg. 30, 285 (June 28, 2004) at 20), and, as Telefilm Canada executive director Wayne Clarkson put it succinctly recently, “[b]uilding [the Canadian film] . . . industry based on foreign production [was] . . . like building [a] house on quicksand . . . .” Canadian Film and Television Production Association (CFTPA), Profile 2004 – The Razor’s Edge: Canadian Producers in the Global Economy, http://www.cftpa.ca/newsroom/pdf_profile/profile2004-english.pdf (January 2004) at 6.
**E. Actual and Potential Negative Effects on Wages**

As discussed above, wages in the feature film production industry have declined in recent years. This is not surprising, given the large number of industry workers who have lost their jobs completely or are only occasionally employed in the industry. That is, those still actively seeking employment in the industry have very little bargaining power in the marketplace, and this weak bargaining power manifests itself in the form of lower wages and salaries received by a worker when employed, as SAG and other employee representatives have made clear. Examples of SAG members and other industry employees agreeing to wage decreases or at least wage freezes in order to retain feature film production in the U.S. were discussed above. Hence, this factor, like all of those discussed above, demonstrates that the increasing subsidized feature film imports from Canada are materially injuring the U.S. feature film industry.

**F. Utilization of Capacity**

Given the great decline of the feature film industry in the U.S., capacity in the industry is underutilized. This is demonstrated by the great numbers of unemployed feature film workers (discussed above), little-used stages and sound studios in several cities around the U.S., and the number of companies that have stopped catering to the film industry or have gone out of business entirely. The underutilization of capacity in the industry is also demonstrated by the fact that the major movie studios have removed five cities from their
list of “production centers,” a large number of state and regional film offices have closed completely, and almost every state has cut funding for its film office.\textsuperscript{103}

There are a great many anecdotal examples of companies dedicated to the film industry suffering financially or closing their doors. For example, in June of 2004, the Oregon Film Office reported that “[o]ur film lab just closed, smaller grip and lighting companies have closed, and one of the two remaining is on the ropes. Our crew depth has gone from three crews deep to one and a half because crew have left for other areas or left the business altogether.”\textsuperscript{104} Similarly, the Washington Film Office reported in June of 2004 that “[w]e have several vendors who are holding on by a thread, including equipment suppliers and talent agencies. Half of our crew base has either moved to LA or gotten out of the business entirely.”\textsuperscript{105}

The Film and Television Action Committee (FTAC), which is a grassroots organization dedicated to retaining feature film production in the U.S., reported during the same time period that “[i]n Hollywood, long-established businesses which service the motion picture industry with rentals of various items have gone out of business or, if surviving, report huge losses. Some typical examples: Alpha Medical, which rents medical

\textsuperscript{103} Supra n. 79, at 11.


\textsuperscript{105} Id., \textit{quoting} June 18, 2004 e-mail from Suzy Kellett, Washington State Film Office, in response to a request for information on state losses from outsourced production.
equipment solely for film industry use as props and set dressing, says it has downsized its staff from 25 to 15 employees. Independent Studio Services, a well-known prop rental and fabrication company, reports its sales are down $1.5 million and that 2003 was the first year it has ever lost money. It has downsized from 90 to 25 regular employees and has had to reduce the size of its physical plant. Nights of Neon, a neon fabrication and rental company which also does some business outside the film industry, has lost 50% of its studio business, and has contracted in size from 10 to 5 employees.” 106

FTAC also has noted that opportunities for young actors in the U.S. are disappearing. As indicated above, Canada’s actors’ union, ACTRA, offers a workshop to teach Canadian actors how to use American accents, so that fewer American actors need be hired on any film production in Canada. As a result, young actors in the U.S. who normally would have received training in minor roles in U.S. feature films now are not receiving that training, and the pool of talented young U.S. actors is shrinking.107 The evaporation of jobs for promising new U.S. actors was demonstrated quite clearly during the filming of the U.S.-developed movie Cold Mountain in Romania. Reportedly, American tourists were grabbed off the streets and offered parts in the movie because there were not enough American actors in Romania to fill the spots.108

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1. 107 Id.
108 Id.
All of these examples of the underutilized capacity in the U.S. feature film industry also lead to the conclusion that the subsidized feature film imports from Canada are causing material injury to the U.S. feature film industry.

G. Producer Profits

The U.S. film companies argue that the PSTC film incentives actually increase their profits by lowering their production costs, and thus the incentives are not illegal under the SCM Agreement. If company profits were the only criterion for a showing of actual injury listed in the SCM Agreement, the producers may have a point. The growth or decline in company profits, however, is only one criterion among many other criteria listed in the SCM Agreement for determining whether a U.S. industry is being materially injured by foreign subsidies, and the WTO Members quite clearly would not have included all of these other criteria if they considered such criteria irrelevant to a finding of material injury. Furthermore, the WTO Panel in Indonesia – Certain Measures Affecting the Automobile Industry,109 considered whether the United States could claim it was suffering “serious prejudice” in the context of the SCM Agreement solely on the basis that certain U.S. companies were producing automobiles outside of the U.S. for sale in Indonesia. The WTO Panel in that case ruled emphatically in the negative on that question, on the ground that the WTO rules protect national products and industries, not national companies.110 Hence, based on this reasoning, U.S. film companies should not

110 Id.
be able to claim that Canada’s PSTC film incentives do not violate the SCM Agreement simply because the shareholders of U.S. companies are not harmed by those subsidies.

As made clear above, the PSTC film incentives that Canada is providing are quite substantial, and all of the above indicators show significant contractions in the U.S. feature film industry, especially since commencement of the PSTC Program in 1998. As stated above, in order for a violation of the SCM Agreement to be found, subsidization of a domestic industry by a WTO member need be only one cause of the “material injury” being suffered by the relevant domestic industry in another WTO member.\textsuperscript{111} In light of all of the above, the conclusion is inescapable that the PSTC film incentives in Canada are causing or, at the very least, are threatening to cause “material injury” to the U.S. feature film industry. Accordingly, Canada’s PSTC film subsidies are causing “adverse effects” to the U.S. feature film industry and are illegal under the SCM Agreement.

\textbf{B. SERIOUS PREJUDICE}

Moreover, Canada’s PSTC film incentives are causing “serious prejudice” to the U.S. feature film production industry. “‘Serious prejudice to the interests of another Member’ is used in . . . [the SCM] Agreement in] the same sense as it is used in paragraph 1 of \textsuperscript{111} \textit{Supra} n 61.
Article XVI of GATT 1994, and includes threat of serious prejudice.”112 In addition, as stated above, the SCM Agreement provides that “. . . the total ad valorem subsidization [ ] of a product exceeding 5 per cent[ ] . . . establishes a presumption of serious prejudice . . . .”113

The 5% ad valorem subsidization figure is to be calculated “. . . in accordance with Annex IV of the Agreement[,]114 which provides, inter alia, that:

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.115

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period

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112 SCM Agreement, footnote 13.
113 SCM Agreement, Article 6.1 (Emphasis added.)
114 SCM Agreement, footnote 14.
115 Annex IV, paragraph 2 and footnote 64 of the SCM Agreement provide that, in the case of tax-related subsidies, the value of the product is to be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned. Given the reference to a “fiscal year,” this particular provision appears to refer to an income tax-related subsidy. As stated, in the case of the Canadian PSTC film subsidies, the tax rebates are technically earned by Canadian film companies when the companies produce the films in question and utilize Canadian labor in the films, even though some or all of the funds may be provided to the film companies at the commencement of filming. Hence, this benefit might be earned over the course of more than one calendar or fiscal year, and thus, whether this provision or paragraph 3 of Annex IV of the SCM Agreement is applicable, the result is the same: the 5% subsidization rate is to be calculated in accordance with each recipient firm’s “sales” of feature films produced in Canada and then exported to U.S. companies.
period, for which sales data is available, preceding the period in which the subsidy is granted.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

As discussed above, the Canadian PSTC film subsidies are based on a percentage of “qualifying labor costs” incurred in Canada during the production of a film. Hence, as the subsidies are tied to the production of a given product - a film – Annex IV of the SCM Agreement makes clear that the “value of the product” for each subsidized company should be calculated, as set forth in paragraph 3, above, as the total value of that company’s “sales of films” in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted. Reference to the preceding 12-month period of sales in paragraph is an acknowledgment of the fact that subsidies based on the production or sale of a particular product would in most cases be granted to recipient firms following the production or sale of that product. In other words, it takes into account the time gap between the production/sale of the product and the payment of the corresponding subsidy.

Given that the Canada’s PSTC film subsidies are directly tied to the production costs of the films produced by each recipient firm, the 5% subsidization figure arguably should be calculated with reference to those production costs, rather than with reference to the “sales” of those films to the companies importing the films into the U.S. This is

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116 SCM Agreement, Annex IV.
particularly the case, as it is possible that the phrase “production costs” simply was inadvertently omitted from paragraph 3, above, when both “production” and “sales” were referred to at the beginning of the paragraph.

In any case, though, a transfer price can be determined for each film imported into the U.S. from Canada, and then the 5% subsidization figure could be calculated with reference to sales at those transfer prices. Again, a valid transfer price of each film would be equivalent to the production costs plus a representative profit figure for that industry in that country (Canada). In essence, the transfer price would be equivalent to a “computed value” for the film declared to U.S Customs at the time of entry into the U.S. and a “comparable uncontrolled price” (CUP) derived for U.S. tax purposes.

Neither the Canadian Government nor the U.S. movie houses publish comprehensive data on the actual subsidies each company has received from the various Canadian governments under the PSTC Programs. In any event, though, it should not be difficult for the U.S. to establish that the total subsidization of each film imported into the U.S. from Canada totals 5% or more, whether production costs or sales of each film are used in the calculation. Of course, each recipient firm’s total production costs/sales are the sum of such costs/sales revenues received for all feature films shot in Canada. Therefore, throughout the following discussion, a single film will be referred to for ease of reference.


a. *Five Percent Figure Based on Production Costs*

To begin with, it is clear from the face of both the federal and provincial PSTC laws that each such government is prepared to provide subsidies amounting to substantially more than 5% of the production costs of each film. Again, at the present time, the federal government provides a tax rebate equal to 16% of the qualifying labor costs incurred in Canada and it does not impose any upper limit on the percentage of production costs that it will reimburse. The provincial governments provide additional subsidies of between 16% and 40% of qualifying labor costs, and while some of the provincial governments do have an upper limit on the percentage of production costs that can be reimbursed, the lowest such maximum is 22.5% of production costs enforced by the Province of Alberta. Therefore, it is certainly possible for the subsidies provided with respect to any film to total significantly more than 5% of the production costs incurred in Canada.

Furthermore, as discussed above, both the federal and provincial governments in Canada advertise that their combined PSTC subsidies will cover a significantly higher percentage of the production costs of a film, and numerous articles and studies have reported that the PSTC subsidies constitute between 7% and 20% of the production costs of a film shot

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in Canada. CAVCO, for example, indicates that qualifying labor costs are approximately 50% of a typical budget associated with a PSTC film presented for CAVCO approval, and thus, according to CAVCO, the federal PSTC subsidy prior to 2003 would have been equal to 11% of 50%, or 5.55%, and the federal PSTC subsidy after 2003 would have been equal to 16% of 50%, or 8% of total production costs.

Also, movie house executives at both the major and the independent studios have justified their outsourcing of film production to Canada by pointing to the substantial percentage of production costs covered by the PSTC subsidies. In particular, they pointed to such subsidies when they argued to the U.S. Congress in late 2004 that the U.S. Government needed to likewise provide some type of film incentive program in order to retain feature film production in the U.S.

Moreover, application of a simple mathematical formula makes clear that the 5% subsidization figure is almost certainly met with respect to any U.S.-developed feature film produced in Canada. This calculation is based on the fact that labor costs – funds spent on the wages and salaries of those working to produce the film

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122 Supra n. 66.
- constitute approximately 50% of the production costs of a film.\textsuperscript{125} Also, below-the-line labor costs – those labor costs that tend to move to another country – typically constitute 60% of the total labor costs on a film.\textsuperscript{126} Consequently, it is reasonable to assume that approximately 30% of the budget of a feature film is comprised of below-the-line or “qualifying labor costs” (60% multiplied by 50%).

Finally, today, as discussed above, the lowest combined federal and provincial subsidy rate is 32% (16% on the federal level plus 16% on the provincial level for British Columbia) of “qualifying labor expenses” (those labor expenses incurred in Canada).

Hence, without even investigating individual film costs, one would expect to find that approximately 9.6% (32% of 30%) of the production costs of a U.S. film produced in Canada today is subsidized by the applicable Canadian governments. Note that between 1997, when the federal PSTC program was established in Canada and February 2003, when the federal Canadian Government raised the subsidy percentage from 11% to 16% and the subsidy percentage in some provinces likewise was 11%, the subsidy received on an average film would have equaled at least 6.6% of the production costs of a film (22% of 30%). For all of the above reasons, it appears very likely that the 5% subsidization figure

\textsuperscript{125} U.S. Department of Commerce, The Migration of U.S. Film and Television Production, January 18, 2001, at 28, which can be found at http://www.ftac.org/html/2a_dgasag.html (accessed July 17, 2005) (Approximately 50% of film costs are labor costs.); Department of Information Technology and the Arts (DCITA), Final Destination: A Comparison of Film Tax Incentives in Australia and Canada (June 2003), at 2 (Approximately 50% of a film budget is attributable to labor costs and 60% of that 50% is attributable to below-the-line labor costs.); CAVCO Activity Reports for 2001, 2002, and 2003 (Approximately 50% of budgets presented for CAVCO approval consist of qualifying labor costs.)

\textsuperscript{126} \textit{Id.}
establishing a presumption of serious prejudice is met, if production costs rather than sale prices are used in the calculation of the 5% subsidization figure.

b. *Five Percent Figure Based on Sales Prices*

As indicated above, films shot in Canada typically are imported into the U.S. by a company related to the Canadian exporter. Whether the Canadian exporter actually charges and receives a price from the U.S. importer, a proper arm’s length price for the film would be equivalent to the total costs of production plus a representative profit for that (film production) industry in that foreign country (Canada). The appropriate profit figure to add, of course, would be the profit figure that an unrelated Canadian film company would charge a U.S. movie company in order to shoot the film in Canada. Once again, this would be consistent with the derivation of a “computed value” for an imported product under the U.S. Customs laws and a “comparable uncontrolled price (CUP) for a product under the U.S. tax laws.\(^\text{127}\)

Reviewing relevant film industry data, an appropriate profit figure to add to the production costs of a film shot in Canada and then sold to a U.S. company would be approximately 5%. This is in line with the typical profit rate for a Canadian manufacturing operation utilized by the IRS and the U.S. Customs Service in

When this profit figure is added to the production costs of a film, the 5% subsidization rate is still exceeded, whether the combined Canadian subsidies are 22% (pre-2003) or 32% (post-2003).

Hence, the U.S. should be able to establish a presumption that the combined Canadian PSTC subsidies are causing serious prejudice to the U.S. feature film industry. This means that the U.S. should prevail in establishing that the Canadian PSTC subsidies are causing adverse effects and hence are illegal under the SCM Agreement, unless Canada were able to rebut this presumption by demonstrating that none of the following is true with respect to the PSTC subsidies:


129 SCM Agreement, Article 6.3 (a)–(d).
To reiterate, Canada must illustrate that none of the “adverse effects” (a) – (d) has occurred as a result of its combined PSTC film subsidies in order to overcome the presumption of serious prejudice established by the U.S. To the contrary, however, each of these factors indicates that Canada’s PSTC film subsidies have indeed caused serious prejudice to the U.S. feature film industry.

As has been demonstrated above, the PSTC film subsidies have, in fact, caused significant suppression of the production costs (prices) of feature films produced in the U.S. so that they can compete with the U.S.-developed feature films that are produced in Canada with benefit of the PSTC subsidies. Thus, Canada should lose on the issue of serious prejudice solely on the basis of the adverse effect set out in paragraph (c), above.

In addition, the significant growth in the number of Canadian-origin feature films produced during each of the last several years has increased Canada’s market share of the feature films shown in Canada and numerous third countries such as France. Exhibits 5 and 6 show the growth in the percentage of Canada-origin feature films being produced and the decrease in the percentage of U.S.-origin feature films being produced. Accordingly, the clear effect of the Canadian PSTC film subsidies has been the displacement or impedance of imports of U.S.-origin feature films into Canada and numerous third countries (and replacement with Canadian-origin films). Thus, Canada

130 The “imports” referred to in Articles 6.3(a) and (b) of the SCM Agreement must refer to products produced in the complaining WTO Member, rather than simply products of any origin exported from that country. The WTO Appellate Body in Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS 54/R, WT/DS 55/R, WT/DS 59, WT/DS 64/R (July 2, 1998), made clear that the SCM Agreement protects products made in the complaining WTO Member, not companies based in the complaining WTO Member that choose to produce their products outside of that country.
should also lose on the issue of serious prejudice on the basis of the adverse effects set out in paragraphs (a) and (b), above.

As a feature film is not a “primary product,” the “adverse effect” set forth in paragraph (d), above, arguably is irrelevant. Still, it is noteworthy that Canada’s share of the worldwide market for feature films has increased during the 1998-2001 period, while the U.S.’s share of the worldwide market for feature films has decreased during this period. Accordingly, if paragraph (d) is relevant, Canada should also lose on the issue of serious prejudice based on paragraph (d).

Hence, it is very unlikely that Canada could overcome a presumption of “serious prejudice” first established by the U.S. through a demonstration that the 5% subsidization figure has been met. Thus, the U.S. should prevail on a claim that the Canadian PSTC film incentives are causing, or at the very least, are threatening to cause, serious prejudice to the U.S. feature film industry.

In conclusion, then, the U.S. should be able to establish that Canada’s PSTC film subsidies are causing material injury or a threat of material industry to the U.S. feature film industry, as well as serious prejudice or a threat thereof to the U.S. feature film production. This is the case, because these subsidies are actionable subsidies causing “adverse effects” to the U.S. feature film industry and hence are illegal under the SCM Agreement.
VII. Remedies, Obstacles, and Recommendations

As is discussed above in Section VI, the evidence demonstrates that the Canadian PSTC film incentives violate the SCM Agreement. If these subsidies violate the SCM Agreement, they would also violate Section 701 of the Tariff Act of 1930, as amended,\textsuperscript{131} which provides for the imposition of countervailing tariffs if a foreign government provides an illegal subsidy with respect to any product exported to the U.S. Hereinafter, such a petition is referred to as a “Section 701 petition,” and this section of the Tariff Act of 1930, as amended, is referred to as “Section 701.” Hence, U.S. interested parties could both request the Office of the U.S. Trade Representative (the USTR) to have the U.S. initiate a dispute resolution proceeding in the WTO as well as file a countervailing duty petition with the U.S. Department of Commerce on the ground that the subsidies are illegal. Furthermore, a domestic interested party could file a petition under Section 301 of the Trade Act of 1974\textsuperscript{132} with the USTR as a method of prompting the U.S. Government to initiate a WTO dispute resolution proceeding against Canada. Such a petition hereinafter is referred to as a “Section 301 petition,” and this section of the Trade Act of 1974 is referred to simply as “Section 301.” Each of these three remedies will be discussed in turn, below. Then, various obstacles facing interested parties in successfully pursuing these remedies are discussed. Finally, recommendations on how domestic interested parties may best proceed to challenge these subsidies are provided.

\textsuperscript{132} 19 U.S.C. §§ 2411(a), (b) (2005).
A. Remedies

1. Initiate a WTO Proceeding

Interested parties in the U.S., in particular those feature film workers who have been harmed by the Canadian PSTC film subsidies, could request that the USTR initiate a proceeding against Canada under the dispute settlement mechanism of the WTO. Such a request need not follow any particular format, but the U.S. Government, in response to such a request, has complete discretion as to whether to pursue a dispute proceeding against another country in the WTO. The USTR is not even obligated to respond in any fashion to such a request. In fact, it is not unusual for such a request filed by domestic interested parties to languish at the USTR indefinitely. The USTR might also be especially tempted in this case to ignore such a request, as the powerful MPAA opposes any challenge to the subsidies.

2. File a Section 301 Petition

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

Section 301(A) provides a method for the USTR to identify unfair trade practices harming U.S. producers and request reform of those practices by the responsible foreign governments, backed up by the threat of sanctions. Under Section 301(A), the USTR would determine whether an act, policy, or practice of a foreign country:

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the U.S. under any trade agreement, or

(ii) is unjustifiable and burdens or restricts U.S. commerce.

In the instant case, the petitioners would allege that Canada, with its PSTC film subsidies, is violating the rights of the U.S. under the SCM Agreement because the subsidies adversely affect the U.S. feature film industry.

After a Section 301 petition is filed, the USTR is required to decide within 45 days whether to “initiate an investigation.” Hence, the main advantage of a Section 301(A) action is that it would force the USTR to take some action regarding Canada’s PSTC film subsidies. However, it is important to point out that the USTR still could decide not to initiate an investigation of Canada’s PSTC film subsidies.
Technically, reasonably tight time limits apply for the completion of Section 301 investigations. Today, however, the USTR must extend the deadlines for every Section 301 investigation, because the U.S. has agreed to suspend any investigation initiated under Section 301 until the completion of a WTO dispute proceeding on the same issue. Specifically, in the WTO Panel on *U.S. – Sections 301-310 of the Trade Act of 1974*, the U.S. asserted that its Statement of Administrative Action (the SAA) accompanying passage of the Uruguay Agreement Act had clarified that the U.S. would not conduct a Section 301 investigation in such a manner as to unilaterally determine whether another country is violating a WTO Agreement such as the SCM Agreement. Based on this assertion, the WTO Panel in this case approved Section 301 actions as being consistent with the WTO dispute resolution scheme.

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

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133 WT/DS/152/R, (December 22, 1999).

134 *Id.*
(b) **Section 301(B)**

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

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

3. **File a Section 701 Countervailing Duty Petition**

Lastly, interested parties in the U.S., in particular the feature film workers who have been harmed by Canada’s PSTC film subsidies, could file a petition with the International

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136 *Id.*
Trade Administration of the U.S. Department of Commerce (the DOC) requesting that it initiate an investigation into whether the subsidies are illegal under domestic countervailing law. Again, such actions are brought under Section 701 of the Tariff Act of 1930, as amended. In such a case, the International Trade Commission (the ITC) would first conduct a preliminary injury investigation into whether the PSTC film subsidies are materially injuring the domestic feature film industry. If the ITC’s preliminary injury investigation results in a positive determination, then the DOC would conduct a preliminary subsidy investigation to determine if the subsidies are illegal. Next, assuming that the DOC’s investigation results in a positive determination, the DOC would proceed to conduct the final subsidy investigation, and then finally the ITC would conduct the final injury investigation.

As the Canadian PSTC film subsidies are adversely affecting the U.S. feature film industry, then the subsidies should also be found to be illegal under U.S. countervailing law as well as under the SCM Agreement. However, the U.S. has no power to order Canada to abolish the subsidies at the conclusion of a Section 701 countervailing proceeding. Rather, if the subsidies were found to be illegal in a countervailing duty investigation, the U.S. would calculate and impose a proper tariff rate to counter the subsidies received by each Canadian film maker exporting films to the U.S.

In a petition requesting a countervailing investigation, the domestic interested parties would have to demonstrate to the DOC that at least 25% of the employees in the industry support the filing of the petition. This issue of standing arose in 2001, when FTAC and

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several film industry unions filed a Section 701 petition with the DOC. Predictably, the MPAA opposed FTAC’s petition, based in part on this issue of standing, arguing that the petitioners had shown that only 23.5% of film workers in the U.S. supported the filing of such a petition at that time. The petitioners then withdrew their countervailing duty petition and they have not refilled it since. Still, workers in the film industry clearly seem to support the imposition of some type of trade sanction against Canada.

It appears that the issue of standing could be overcome and a countervailing petition successfully filed. In addition to the issue of standing in Section 701 cases, however, countervailing investigations often take several years to conclude. Furthermore, even assuming that the Canadian PSTC film subsidies were found to be illegal in such a proceeding, the imposition of countervailing tariffs on the import of Canadian-origin feature films into the U.S. may be counterproductive in the long run. This is the case, because once an additional countervailing tariff is imposed, the Canadian governments could simply respond by granting even more generous subsidies, which Canadian Government spokespeople appear willing to consider. While yet another countervailing investigation could then be initiated and further countervailing tariffs imposed, this could simply result in yet another escalation in the PSTC subsidy rates. In other words, there is the strong possibility that this remedy would accomplish nothing more than another subsidy spiral. At the same time, the imposition of countervailing

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138 MPAA’s Motion to Dismiss Petition for the Imposition of Countervailing Duties Pursuant to § 701 of the Tariff Act of 1930 (2001), As Amended.
139 Author’s interview with FTAC members, July 8, 2005, Burbank, California; see also FTAC’s website at www.ftac.org, which lists the various entertainment trade unions that support trade sanctions against Canada with respect to its film subsidies.
duties on feature film exports to the U.S. may cause Canada to abolish the PSTC film incentives or at least make them less generous.

Finally, assuming that the film subsidies were found to be illegal in a Section 701 action, from a practical point of view, it would be difficult to assess the countervailing duties on the importation of feature films from Canada. The countervailing duty rate for each film would be extremely high, and there would be a great outcry from the MPAA, with the MPAA most likely claiming it would have to raise movie ticket prices as a result of the imposition of such a high tariff. Also, such a high tariff would lead to significant attempts by U.S. importers to circumvent the tariff, for example by sending more and more movies to the U.S. via internet transmissions that are difficult to trace. All in all, the practical hurdles to establishing and collecting a countervailing tariff are formidable.

\section*{B. Obstacles}

\subsection*{1. MPAA Opposition}

The MPAA argues that the PSTC film subsidies are legal and that, in any case, it would be counterproductive for the U.S. to challenge the subsidies as illegal. The MPAA’s most commonly voiced argument that the subsidies are illegal is that movie producers
constitute the “movie industry,” and the shareholders of the producers are not adversely affected by the subsidies.141

Surely, though, corporate shareholders are only one component of any particular industry in a country, especially as the economic well-being of the shareholders is not necessarily consistent with the economic well-being of other components of a national industry, such as the workers in the industry. In fact, the WTO Panel in Indonesia – Certain Measures Affecting the Automobile Industry,142 ruled that the WTO laws protect national products rather than national companies, and thus the SCM Agreement did not protect the U.S. in that case because there were no producers of U.S.-origin automobiles. This holding provides strong support for the conclusion that, under the SCM Agreement, the shareholders in an industry are, at the most, should be treated as only one component of a domestic industry. That the SCM Agreement is intended to protect much more than just industry shareholders is also demonstrated by the long list of factors which the SCM Agreement states should be considered on the issue of whether the domestic industry in a complaining WTO Member is being materially injured by foreign subsidies. These factors include economic indicators such as the utilization of capacity, product prices, wages, employment, and investment in the industry in the complaining member. Again, if company profits were the only relevant factor, the WTO Members need not have included any of these other factors in Article 15.4 of the SCM Agreement.

141 See, e.g., MPAA’s Motion to Dismiss Petition for the Imposition of Countervailing Duties Pursuant to § 701 of the Tariff Act of 1930 (2001), As Amended; MPAA’s opposition to City of Burbank’s resolution recommending the filing of a Section 301(a) action regarding Canada’s film subsidies, which can be found at www.ftac.org/html/rebut-3-11-5.html.

Furthermore, the MPAA has occasionally agreed with Canada that a film is a “service” rather than a “good” and thus neither the SCM Agreement nor U.S. countervailing law would apply to Canada’s PSTC film subsidies. At the same time, however, the MPAA has argued to Congress that a film is a “good” and its members should be able to depreciate a film on their tax returns.\footnote{143} As explained above, the U.S. Congress even agreed with this analysis and enacted Section 181 of the Jobs Creation Act in late 2004 in order to allow producers of low budget films to immediately deduct 100% of their feature film production costs.\footnote{144} The MPAA has also succeeded in getting the USTR to initiate a Section 301(C) action known as a “Special 301 action” against foreign countries that allow their nationals to download digital copies of the MPAA’s movies via the internet, thereby allegedly infringing their copyrighted movies.\footnote{145} Of course, a movie can be copyrighted in the first place only if it capable of being manifested in some physical form.\footnote{146} Obviously, the MPAA cannot claim that a feature film is a “product” for tax and copyright purposes but it is a “service” for international trade purposes.

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

\footnote{143} Supra n. 123; see also www.afc.gov.au/downloads/policies/usftasub03.pdf (Motion Picture Association of America (MPAA) President Jack Valenti, on the U.S. trade agreement with Chile, saying that studios’ investment in films should be written off against their taxes.) 
\footnote{144} Supra n. 33. 
\footnote{145} Similarly, the studios’ recent triumph in the U.S. Supreme Court case of Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., Docket 04-480 (U.S. June 27, 2005), is based on the premise that one’s downloading of a song via the internet constitutes copyright infringement. 
\footnote{146} 17 U.S.C. § 102(a) (2005).
2. Lack of IATSE Leadership Support

The leadership of one of the entertainment industry labor unions, the International Alliance of Theatrical Stage Employees (IATSE), currently does not support a legal challenge to Canada’s PSTC film subsidies. This is the case, even though it appears that IATSE’s members themselves support a challenge to the legality of the subsidies. The leadership of the IATSE maintains that IATSE is an international union, and, for this reason, the leadership supports IATSE members in Canada who are benefiting from the new film industry jobs in Canada. Therefore, the IATSE leadership explains, it doesn’t oppose Canada’s PSTC film subsidies.

While most large unions have international alliances with their fellow members in other countries, it is extremely unusual for the leadership of a union in the U.S. to actually support the outsourcing of a U.S. industry which is putting its own U.S. members out of work. In fact, as a union is supposed to be a democratic institution and thus is supposed to represent the interests of its members, one could argue that the failure of the IATSE leadership to represent its members’ desires can be ignored and what matters is the fact that individual IATSE members support a challenge to Canada’s PSTC film subsidies. Given that the U.S. Government is not required to pursue a legal challenge to the PSTC film subsidies, however, the failure of the IATSE leadership to support such a challenge is a significant obstacle to any such challenge.
3. **Recent Data on the U.S. Feature Film Industry**

The most recent figures on the economic harm being suffered by the U.S. feature film industry have been published by various Canadian entities, and these figures have been presented in this article. Interested parties in the U.S. should not rely solely on this data to support their legal challenge to Canada’s PSTC film subsidies.

**C. Recommendations**

1. **Obtain Recent Data on Adverse Effects to U.S. Industry**

As the U.S. Government has the discretion not to pursue a legal challenge to Canada’s PSTC film subsidies, it is very important that interested parties in the U.S. present a very compelling case demonstrating the adverse effects that the subsidies are causing to the U.S. feature film industry. The data presented in this article, most of which was published by Canadian private and government agencies, document such adverse effects. However, the most up-to-date data available in both Canada and the U.S. on these adverse effects to the U.S. feature film industry should be gathered and summarized in order to prepare the strongest possible legal challenge to the PSTC film subsidies.
2. Document IATSE Members’ Support for a Legal Challenge

As stated above, the leadership of IATSE, one of the main entertainment labor unions, does not support a legal challenge to the PSTC film subsidies. While the U.S. Government might initiate a legal challenge to the subsidies without the MPAA’s support, there is a significant chance that it would not do so if IATSE also opposes a legal challenge to the subsidies.

Therefore, if rank and file IATSE members do indeed support a legal challenge to the subsidies (as appears to be the case), it is recommended interested parties in the U.S. first compile proof of the IATSE members’ support. Once that evidence is compiled, those interested parties should request the IATSE leadership to support a legal challenge to the subsidies, as labor unions are supposed to represent their members’ interests. If the IATSE leadership still refuses to support a legal challenge to the subsidies, then interested parties should document rank and file IATSE members’ support and provide that documentation in their legal challenge to the subsidies.

3. Prepare Response to MPAA’s Opposition

The MPAA most likely will strongly oppose any legal challenge to the PSTC film subsidies. The MPAA’s main arguments are discussed above. Thus, interested parties in the U.S. should be prepared to counter the MPAA’s opposition, and in particular they
should be prepared to provide counterarguments to the MPAA’s main arguments. This article has discussed some of the possible counterarguments.

4. Interested Parties Should File a Section 301 Petition

It is recommended that interested parties in the U.S. file a Section 301 petition with the USTR as a method of requesting the initiation of a WTO dispute resolution proceeding challenging the legality of Canada’s PSTC film subsides. This recommendation is based on the fact that the USTR must respond to a Section 301 petition and need not respond to a request for the commencement of a WTO dispute resolution proceeding per se. At the present time, FTAC and a group of entertainment unions are planning to file a Section 301(A) petition with the USTR on the issue of Canada’s film subsidies. They have even been successful in getting the City Council of Burbank to pass a resolution in favor of such a filing, and the City Council of West Hollywood is considering the adoption of a similar resolution within the near future.

Unless the USTR declines to initiate an investigation of the PSTC film subsides under Section 301, it is recommended that interested parties not file a Section 701 countervailing duty petition with the DOC. While a Section 701 petition ultimately

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147 See FTAC’s website at www.ftac.org; author’s interview with FTAC members, Burbank, California, July 7, 2005.
148 See Mark R. Madler, City backs production probe, Burbank Leader, April 30, 2005, which can be found at http://www.ftac.org.
149 See http://www.weho.org/download/index.cfm?fuseaction=download&cid=3624 (City of West Hollywood City Council meeting agendas, including original agenda for July 18, 2005 meeting); www.ftac.org (discussing request for resolution passed by West Hollywood City Council in support of FTAC’s Section 301(a) filing).
might prompt Canada to abolish the PSTC film incentives or at least make them less generous, there are many disadvantages to a Section 701 petition.

**VIII. Conclusion**

It is strongly recommended that the U.S. Government challenge the legality of the foreign film subsidies, and in particular the Canadian PSTC film incentives, before the U.S. feature film industry disappears completely. This action is warranted on account of the extreme harm that the U.S. feature film industry is suffering and the fact that these subsidies are illegal under the SCM Agreement as well as U.S. law. In addition, it is counterproductive for the U.S. Government to provide its own domestic subsidies to the film industry, as this simply leads other governments to raise their own subsidy rates.

In particular, it is recommended that interested parties in the U.S. file a Section 301(A) petition with the USTR as a method of prompting the U.S. to initiate a WTO dispute resolution proceeding against Canada. First, though, interested parties in the U.S should compile up-to-date evidence of the adverse effects that the U.S. feature film industry is suffering, secure proof of IATSE members’ support for a WTO dispute proceeding, and prepare counterarguments to the MPAA’s likely opposition to such a proceeding.

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

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

In summary, Canada and other WTO Members providing illegal subsidies to the U.S. feature film industry should not be permitted to circumvent the SCM Agreement simply because the shareholders of U.S. movie houses benefit from these countries’ unfair trade practices as well. A decision to forego a challenge to the foreign film subsidies in order to satisfy the MPAA would go a long way toward confirming the conviction of the
WTO’s critics that the WTO rules exist solely to protect the interests of wealthy and powerful corporate shareholders. In contrast, a decision on the part of the U.S. Government to challenge the foreign film subsidies would be consistent with the mission of the WTO, which to enforce the rules of fair and free trade among the WTO nations so as to promote and protect the economic well-being of the industries and citizens of those nations.
# Appendix A

**FILM, TELEVISION, AND VIDEO SUBSIDY PROGRAMS**  
Canadian Federal and Provincial

<table>
<thead>
<tr>
<th>Level</th>
<th>Program</th>
<th>Benefit</th>
<th>Qualification</th>
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</table>
| Federal  | Canadian Film or Video Production Tax Credit (FTC) | 25% of qualified labour expenditures* incurred by a qualified corporation* incurred after 1994, net of any assistance*, for the production of a Canadian film or video production* | Relevant Statute: § 125.4 of the Income Tax Act  

Who can apply:  
Qualified corporation*

Must be:  
(1) qualified corporation – a corporation that is throughout the year a prescribed taxable Canadian corporation the activities of which in the year are primarily the carrying on through a permanent establishment in Canada of a business that is a Canadian film or video production business*  

(2) Canadian film or Video Production – A film or video production, other than an excluded production, of a prescribed taxable Canadian corporation that is:  
(a) a treaty co-production; or  
(b) a film or video production at all times during the production of which the producer is a Canadian, and meets all the requirements of section 1106 of the Regulations* (see Regulations attached)  

(3) qualified labour expenditures – the total of the three categories: (i)salary or wages; (ii) portion of the remuneration, other than salary or wages; (iii) reimbursement by a wholly-owned corporation to its parents

(4) Certified by CAVCO as a Canadian film or Video Production* (Part A)  

(5) Completed within 2 years after the end of the taxation year, and a “Certification of Completion” (Part B) must be issued by the Minister of Canadian Heritage w/in 30 months after the end of the corporation’s taxation year in which the production’s principal photography began

Limitations:
(1) *Qualified labour expenditures* may not exceed 48% of the cost of the production net of *assistance*

(2) Tax Credit cannot exceed 12% of the cost of production net of *assistance*

(3) Total cost of *qualified labour expenditure* will be reduced by any *assistance* received as defined in paragraph 12(1)(x) of the Income Tax Act, such as other provincial tax credits

(4) Production Costs and Labour Expenditures are limited to those amounts which have been incurred in respect of the property owned by the corporation (ownership may be shared, *e.g.*, a *Canadian co-production* or *treaty co-production*)

(5) Co-productions between Canada and another country are eligible for the tax credit program only when co-produced under an official treaty (Telefilm Canada responsible for certification)

| Federal Film or Video Production Services Tax Credit (PSTC) (refundable tax credit) | 16% of *qualified Canadian labour expenditures* incurred after October 1997, net of any *assistance*, by an *eligible production corporation* for services provided in Canada by *Canadian* |

**Relevant Statute:**
§ 125.5 of the Income Tax Act

**Who can apply:**
The copyright owner(s) must apply to CAVCO

**Note:** an *eligible production corporation* may sell the rights to the production after the time at which production in Canada is completed
<table>
<thead>
<tr>
<th><a href="http://www.ccra-adrc.gc.ca/taxcredit/pstc/pstcsu.html">http://www.ccra-adrc.gc.ca/taxcredit/pstc/pstcsu.html</a></th>
<th>residents OR taxable Canadian corporations for the production of an accredited production*</th>
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<tr>
<td>[see also “Film or Video Production Services Tax Credit: Administration and Legislation,” Canada Customs and Revenue Agency (April 2002)]</td>
<td>Assistance = any financial assistance from public or private Canadian sources or from foreign sources, such as grants, subsidies, provincial tax credits, forgivable loans, contributions, services or certain advances and any other similar forms of assistance</td>
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<tr>
<td></td>
<td>without affecting eligibility for the PSTC</td>
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<tr>
<td>Must be:</td>
<td></td>
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<tr>
<td>(1) Eligible Production Corporation (§ 125.5(1)) –</td>
<td>A corporation (either Canadian or foreign-owned), the activities of which in the year are primarily the carrying on through a permanent establishment (as defined by regulation) in Canada of a film or video production business or a film or video production services business AND that (a) owns the copyright in the accredited production OR (b) has contracted directly with the owner of the copyright in the accredited production to provide production services in respect of the production, where the owner of the copyright is not an eligible production corporation in respect of the production</td>
</tr>
<tr>
<td>(2) Accredited productions (§ 9300 Regs) – There is a two-fold requirement process: (i) a production cost must meet a cost minimum; and, (ii) must be an eligible genre (see guidelines)</td>
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<tr>
<td>(3) Qualified Canadian Labor Expenditures (§ 125.5(1)) –</td>
<td>An amount must be paid to persons who were residents of Canada at the time payments were made. Total Canadian labour expenditure equals the total of the following three: (i) salary or wages paid to employees of the corporation; (ii) remuneration, other than salary or wages, paid to a person or partnership that carries on business in Canada; and (iii) reimbursement by a wholly-owned corporation to its parent for an expenditure that would otherwise be a Canadian labour expenditure if it were made by the wholly owned corporation</td>
</tr>
<tr>
<td>(4) Certified by CAVCCO as an Accredited film or video production</td>
<td></td>
</tr>
<tr>
<td>(5) Approved by CCRA after attach approved</td>
<td></td>
</tr>
</tbody>
</table>
accredited certificate and the requisite form (T1177) to the front of a T2 Corporation Income Tax Return

Limitations:
(1) Total cost of *qualified labour expenditure* will be reduced by any *assistance* received as defined in paragraph 12(1)(x) of the Income Tax Act, such as other provincial tax credits

(2) No cap on limit

Cost Minimum:
- 24-mo. production → $1,000,000 (Cdn)
- Series (2 or more episodes) or series pilot of up to 30 min → $100,000 (Cdn) per episode
- Series (2 or more episodes) or series pilot of over 30 min → $200,000 (Cdn) per episode
<table>
<thead>
<tr>
<th><strong>Canadian Television Film (CTF) Fund</strong></th>
<th><strong>Administered via:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>License Fee Program (LFP)</strong> – subsidy for broadcaster cash licence fees</td>
<td><strong>Who can apply:</strong></td>
</tr>
<tr>
<td><strong>Equity Investment Program (EIP)</strong> – direct cash equity investment</td>
<td></td>
</tr>
<tr>
<td><strong>See type of production:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Aboriginal languages</strong></td>
<td></td>
</tr>
<tr>
<td>- $2.5 million available</td>
<td></td>
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<tr>
<td>- Covers up to 70% total production costs, to a maximum of $200,000 per project</td>
<td></td>
</tr>
<tr>
<td><strong>Children’s and youth Documentary Drama</strong></td>
<td></td>
</tr>
<tr>
<td>- LFP: up to 13% total production budget</td>
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</tr>
<tr>
<td>- EIP: $185,000 per hour, up to $2.405 million per series</td>
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<tr>
<td><strong>Theatrical feature film</strong></td>
<td></td>
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<tr>
<td>- $15 million available</td>
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<tr>
<td>- Lesser of (i) 4 times the license fee (English language films) or 8 times the licence fee (French-language films), (ii) 20% the budget, and (iii) $500,000 per film</td>
<td></td>
</tr>
<tr>
<td><strong>Variety / performing arts</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Up to $250,000 in loans per 12 month period, to a maximum of $1 million over time</strong></td>
<td><strong>Who can apply:</strong></td>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Culture Industries Development Fund (CIDF)</strong></td>
<td></td>
</tr>
<tr>
<td>**<a href="http://www.bdc.ca/scripts/site/display-products.asp?&amp;chk=1&amp;banner=&amp;node_ID=2419&amp;parent_ID=74&amp;tthread_ID=15&amp;module_ID=50&amp;n">http://www.bdc.ca/scripts/site/display-products.asp?&amp;chk=1&amp;banner=&amp;node_ID=2419&amp;parent_ID=74&amp;tthread_ID=15&amp;module_ID=50&amp;n</a></td>
<td></td>
</tr>
<tr>
<td><strong>Who can apply:</strong></td>
<td></td>
</tr>
<tr>
<td>- Canadian-controlled corporation with head office and activities in Canada, with financial stability, and operating principally as a television or film production entity</td>
<td></td>
</tr>
<tr>
<td>- Broadcaster-affiliated production companies</td>
<td></td>
</tr>
<tr>
<td>Production must meet the following requirements:</td>
<td></td>
</tr>
<tr>
<td>(1) Reflect Canadian themes and subject matter</td>
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<tr>
<td>(2) Have 10/10 points (or maximum number of points appropriate to project) on CAVCO scale</td>
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</tr>
<tr>
<td>(3) Underlying rights are owned or significantly developed by Canadians</td>
<td></td>
</tr>
<tr>
<td>(4) Primarily shot and set in Canada</td>
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</tr>
<tr>
<td>Feature Film Fund</td>
<td>Equity investments of up to 49% of production costs, to a maximum of $2.5 million</td>
</tr>
<tr>
<td>-------------------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Administered via:</td>
<td>- Canadian-controlled corporation, situated and operating in Canada, with financial stability, and operating principally as a feature film production or distribution entity</td>
</tr>
<tr>
<td>- Performance-based approach</td>
<td>- Broadcaster-Affiliated Production Companies (only for production financing, not selective component)</td>
</tr>
<tr>
<td>- Selective approach</td>
<td>Must:</td>
</tr>
<tr>
<td></td>
<td>- Possess significant Canadian creative elements, including stories, themes, talent and technicians, reflecting Canadian society and cultural diversity</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>New Media Fund</th>
<th>$9 million annually for minimum of three years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administered via:</td>
<td>- Canadian private companies actively involved in new media content development, production and distribution</td>
</tr>
<tr>
<td>- Product Assistance</td>
<td>Must be:</td>
</tr>
<tr>
<td>- Distribution Assistance</td>
<td>- Canadian-owned and controlled company, with financial stability and experience to successfully complete the product</td>
</tr>
<tr>
<td>- Sectoral Assistance</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Distribution assistance: Up to 50% of final costs of distribution in conditionally repayable advances; otherwise, no cap except as available</td>
</tr>
<tr>
<td></td>
<td>Sectoral assistance: Nonrepayable advance</td>
</tr>
<tr>
<td></td>
<td>not to exceed 50% of final initiative costs; otherwise, no cap, except as available</td>
</tr>
</tbody>
</table>
| Alberta                  | Alberta Film Development Program (AFDP) (formula grant) | 20% of production costs spent in Alberta $750,000 maximum for projects $1.5 million for full dramatic series | Who may apply: (1) Alberta-based and controlled companies  
(2) Operated by resident Albertans, incorporated in Canada and principally produces films  
(3) 75% of all salaries and wages are paid in Alberta for film production  
Must be: For production expenses expended in Alberta. |
|-------------------------|--------------------------------------------------------|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| British Columbia        | British Columbia Production Services Tax Credit (PSTC) (refundable tax credit) | 11% of the accredited qualified BC labour expenditure of the corporation for the taxation year in respect of the accredited production* incurred by the accredited production corporation* after May 31, 1998  
Assistance = includes any grant, forgivable loan, credit, subsidy, from government, municipality or other public authority except for FTC, PSTC, and BC FTC and PSTC | Relevant Statute: § 82.1 of the BC Income Tax Act  
http://www.qp.gov.bc.ca/statreg/stat/I/96215_01.htm#part5  
Who can apply: Accredited production corporation*  
Must be: (1) Accredited BC labour expenditure – The amount that would be the corporation’s BC labour expenditure for the taxation year in relation to the production incurred after May 31, 1998, to the extent that the amounts referred to in the definition of BC labour expenditure did not and do not form part of the accredited BC labour expenditure of any other corporation  
(2) Accredited Production – A film or video production, other than an excluded production, for which the total expenditures include the cost of producing the production, incurred in the 24 month period beginning when principal photography begins, other than any amounts determined by reference to profits or revenues, are (a) greater than $100,00 in the case of a production that is an episode of less than 30 minutes, (b) greater than $200,000 in the case of a production that is an |
episode lasting more than 30 minutes, or (c) greater than $1 million in any other case

(3) Accredited Production Corporation – A corporation that is a BC-based corporation during the taxation year, the activities of which throughout the taxation year are primarily the carrying on of a film or video production business or a film or video production services business, and that owns the copyright in the production throughout the period during which the production is produced in British Columbia; OR it has contracted directly with the owner of the copyright in the production to render production services in respect of the production

(4) Accredited qualified BC labour expenditure –

The amount by which the total of the corporation’s accredited BC labour expenditure* for the current and proceeding taxation years exceeds the total of the following amounts: (a) assistance that can reasonably be considered to be in respect of the corporation’s accredited BC labour expenditure* that the claimant has received or is entitled to received, has not been repaid under a legal obligation to do so, (b) all amounts of accredited qualified BC labour expenditure* claimed in a previous year, and (iii) all amounts included above for which the corporation has received or will receive a reimbursement

(4) Certified by Minister of Competition, Science and Enterprise

(5) submitted to CCRA with T2 Corporate Income Tax Return
<table>
<thead>
<tr>
<th>Film Incentive BC – Film and Television Tax Credit (FTTC) (refundable tax credit)</th>
<th>See specific tax credit below.</th>
<th>See specific tax credit below.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limitations:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Eligible labour costs during a taxation year are capped at 48% of total cost of production</td>
<td></td>
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<tr>
<td>(2) No minimum size of production</td>
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<tr>
<td>(3) No project cap limiting tax credits that can be claimed with respect to a particular production and no corporate cap limited FIBC tax credits that production company or groups of companies may claim.</td>
<td></td>
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</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Basic Tax Credit (refundable tax credit)</th>
<th>20% of the corporation’s qualified BC labour expenditure* for that year incurred by an eligible production corporation*, incurred after March 1998 and before April 2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assistance = includes any grant, forgivable loan, credit, subsidy, from government, municipality or other public authority except for FTC, PSTC, and BC FTC and PSTC</td>
<td></td>
</tr>
<tr>
<td>Relevant Statute: § 80 of the BC Income Tax Act</td>
<td></td>
</tr>
<tr>
<td>Who can apply: Eligible production corporation*</td>
<td></td>
</tr>
<tr>
<td>Must be:</td>
<td></td>
</tr>
<tr>
<td>(1) Eligible production corporation – must (a) begin principal photography production after March 31, 1998 and before April 1, 2003, (b) complete production w/in 24 months, (c) continue to be an eligible production corporation throughout the taxation year that is BC-controlled, (d) the producer of the production, or, in the case of an interprovincial co-production or a treaty co-production, the producer of the BC portion of the production is at all times during the production of the production, a BC based individual who is Canadian, (e) no distribution of the production is made in Canada w/in 24 months by a person who is not a Canadian, (f) for production that is neither an interprovincial co-production nor a treaty co-production, the producer of the BC portion of the production is at all times during the production of the production, a BC based individual who is Canadian, (e) no distribution of the production is made in Canada w/in 24 months by a person who is not a Canadian, (f) for production that is neither an interprovincial co-production nor a treaty co-production, more than 50% of the copyright in the production is owned by the corporation OR by the corporation and one or both (i) a BC-controlled eligible production corporation related to the corporation, and (ii) a prescribed person, AND the balance if any, of the copyright is owned by one or more of the following: (i) an eligible</td>
<td></td>
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</tbody>
</table>

production corporation; (ii) a corporation that would be an eligible production corporation if it had a permanent establishment in BC; (iii) a recognized person, (g) not exempt from taxes, (h) primarily engaged in the carrying on of a film or video production business through a permanent establishment in Canada

(2) BC labour expenditure – the total of the following amounts incurred by the corporation after March 1998: (i) salary or wages, if paid by the corporation to BC-based individuals, (ii) remuneration for service rendered for the production for individuals and proprietorships which were BC-based (a person subject to tax in BC or corporation that has permanent establishment in BC) partnerships

(3) Eligible production – A film or video production that meets all of the following criteria:
(a) the production must obtain a minimum of 6 out of 10 Canadian content points, or in the case of a documentary, all creative positions applicable to the production must be occupied by Canadians (doesn’t apply to treaty co-productions);
(b) if the production is a TV broadcast, it must have minimum length of ½ hour
(c) principal photography must occur in BC on at least 75% of principal photography days
(d) At least 75% of the total cost of the production must be for goods or services provided in BC by BC-based individuals or proprietorships that carry on business through permanent establishments in BC
(e) at least 75% of the cost of post-production must be for work carried out in BC
(f) there must be written agreement to have the production shown in Canada w/in two years after completion for FMV consideration
(g) if the production is interprovincial co-production, at least 20% of the total cost of the production must be in respect for the BC portion of the production, and at least 50% of the cost of post production work must be
for work carried out in BC

(h) if the production is a treaty co-production, the BC portion of the production must account for at least 20% of the total cost of production

(3) Qualified BC labour expenditure -

The lesser of the following amounts: (a) the total of the corporation’s \( BC \) labour expenditure to the extent not previously included in qualified \( BC \) labour expenditure; and (b) the amount by which 48% of the total production costs incurred by the corporation, less assistance, exceeds the total of the corporation’s qualified \( BC \) labour expenditures* for preceding years

Note: all excess in (b) above, may be carried forward and included in the determination of the corporations qualified BC labour for a subsequent year

| Regional Tax Credit (refundable tax credit) | 12.5% of the corporation’s qualified \( BC \) labour expenditure* incurred by an eligible production corporation* in the production of an eligible production* for the taxation year in respect to the production | Relevant Statute: § 81 of the BC Income Tax Act |
| Who can apply: Eligible production corporation* |
| Must be: |

(1) Eligible production corporation –

Same as BCFTC above

(2) Eligible production –

In addition to general qualifications: (i) principal photography of the production must occur in BC outside the designated Vancouver area during at least 85% of the production’s principal photography days, and if the production is a television series of three or more episodes, at least three of the episodes in the production must meet this requirement; and (ii) throughout the period during which principal photography occurs in BC outside the designated Vancouver area, the applicant must have a production office located in BC and outside the designated Vancouver area |
<table>
<thead>
<tr>
<th>Training Tax Credit (refundable tax credit)</th>
<th>Lesser of 30% <em>trainee salaries</em> or 3% <em>eligible labour costs expenditure</em> incurred by an <em>eligible production corporation</em> in the production of an <em>eligible production</em> for the taxation year in respect to the production</th>
<th>Relevant Statute: § 82 of the BC Income Tax Act.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Who can apply:</strong></td>
<td></td>
<td><strong>Must be:</strong></td>
</tr>
<tr>
<td>Eligible production corporation*</td>
<td></td>
<td>(1) Eligible production corporation – Same as BCFTC above</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2) Eligible production – In addition to general qualifications, credit must be assessed in conjunction with Basic or Regional Tax Credit</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(3) Qualified BC labour expenditure – Same as BCFTC above</td>
</tr>
</tbody>
</table>

### Manitoba Film and Video Production Tax Credit

35% of *eligible salaries* paid to Manitoba residents and qualifying non-resident employees (“deemed residents”) for work on eligible film or video produced in Manitoba or 10% of production costs incurred in Manitoba.

**Note:** Over the past 3-yr. period, tax credits totally $7.6 million were paid toward 61 productions in Manitoba.


**Must be:**

1. Eligible salaries – Total amount, reasonable under the circumstances, of the following: (i) salary or wages of eligible individual incurred after 1996 by the corporation from final script stage to end of post-production stage and paid by corporation in the year or within 60 days after the end of the year (ii) remuneration, other than salary or wages

2. Eligible film or video – Film or video registered (i) by application, (ii) as intended for television, cinema, video tape, digital, CD-ROM, multimedia, or nontheatrical production and for drama, variety, animation, children’s programming, music programming, informational series, or documentary and (iii) according to any other criteria prescribed in regulations.
| New Media Equity Investment Fund | $900,000 for three years (beginning May 2002) for production of high quality new media* interactive or Internet projects | Eligible products: New media
New Media – Interactive digital products that contain at least three of the following: text, sound, graphics, images, live action video or animation |
<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>Manitoba Film and Sound</td>
<td>$1.1 million in provincial funding to Manitoba Film and Sound</td>
<td></td>
</tr>
<tr>
<td>Province/Sector</td>
<td>Program</td>
<td>Eligibility</td>
</tr>
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<tr>
<td>New Brunswick</td>
<td>Film (Labour Incentive) Tax Credit</td>
<td>40% of eligible salaries paid to <em>New Brunswick residents,</em> earned between June 30, 1996 and December 31, 2006 &lt;br&gt; <em>New Brunswick resident</em> – individual who has lived in New Brunswick for 12 consecutive months and has filed income tax in New Brunswick during that period of time</td>
</tr>
<tr>
<td></td>
<td>Development Loan Program</td>
<td>40% of development budget Up to $35,000 for feature films, made-for-TV movies or TV series Up to $20,000 for other projects Maximum of $100,000 for any one production company at any one time.</td>
</tr>
<tr>
<td></td>
<td>Equity Investments</td>
<td>Up to 25% of total production budget, to maximum $400,000. &lt;br&gt; Investment maximums: &lt;br&gt; - TV Dramatic Series, Children’s programming - $400,000 &lt;br&gt; - Feature film - $400,000 &lt;br&gt; - TV Mini-series or MOW - $350,000 &lt;br&gt; - Documentary features or series - $200,000 &lt;br&gt; - Documentary (60 min. or less) - $125,000 &lt;br&gt; - Animation - $100,000 &lt;br&gt; - Short film - $75,000</td>
</tr>
</tbody>
</table>

**Newfoundland & Labrador Film and Video Tax Credit**<br>40% of eligible local labour costs, up to 25% of production<br>**Requirements:** Corporation must pay at least 25% of its salaries and wages to residents of the province and must
<table>
<thead>
<tr>
<th>(refundable tax credit)</th>
<th><a href="http://www.gov.nf.ca/fin/filmvideo.html">http://www.gov.nf.ca/fin/filmvideo.html</a></th>
<th>costs $1 million per eligible project or $2 million per corporation</th>
<th>have less than $25 million in assets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Film Development Corporation</td>
<td><a href="http://www.newfilm.nf.net/">http://www.newfilm.nf.net/</a></td>
<td>See below for specific programs.</td>
<td>Eligible Applicants: Incorporated Newfoundland and Labrador film and video production companies</td>
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<td>Requirements:</td>
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<td></td>
<td>(1) Must show primary focus is on development, production and distribution of film and video products</td>
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<td>(2) At least 51% owned by resident or residents of Newfoundland and Labrador</td>
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<tr>
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<td></td>
<td></td>
<td>Eligible products: Feature films, TV Series, TV mini-series, TV specials, non-theatrical</td>
</tr>
<tr>
<td>▪ Equity Investment Program</td>
<td><a href="http://www.newfilm.nf.net/programs/prog_fund_flash.htm">http://www.newfilm.nf.net/programs/prog_fund_flash.htm</a></td>
<td>20% of overall costs</td>
<td>See above criteria for eligibility.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Investment maximums: Dramatic series - $250,000</td>
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<td></td>
<td>Theatrical feature film - $250,000</td>
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<td></td>
<td></td>
<td>Documentary - $150,000</td>
<td></td>
</tr>
<tr>
<td>▪ Development Program</td>
<td><a href="http://www.newfilm.nf.net/programs/prog_fund_flash.htm">http://www.newfilm.nf.net/programs/prog_fund_flash.htm</a></td>
<td>Phase I: $15,000 advance, not to exceed 33% of budget</td>
<td>See above for criteria for eligibility.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Phase II: $20,000 advance, not to exceed 33% of budget</td>
<td></td>
</tr>
<tr>
<td>Nova Scotia (refundable tax credit)</td>
<td><a href="http://www.film.ns.ca/">http://www.film.ns.ca/</a></td>
<td>Amount is lesser of: Halifax regions: 30% of eligible Nova Scotia labour or</td>
<td>Requirements: Applicant must be incorporated under laws of Nova Scotia or another province of Canada, or federally</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Applicant corporation has permanent</td>
</tr>
</tbody>
</table>
| **Prince Edward Island** | **Film and Labour Rebate Program** | Lesser of 30% of eligible Prince Edward Island labour expenditures or 15% of eligible total production costs | **Eligible labour expenses:**  
(1) Reasonable under the circumstances – conforms to industry standards and are recognized as essential to production of the film or television project  
(2) Directly attributable to production  
(3) Expenditures incurred within 60 days of the end of the production  
(4) Expenses incurred from final script stage to end of post production |
| --- | --- | --- | --- |
| **Equity Investment Program** | **Up to 20% of approved eligible budget costs, to maximum of $200,000** | **Eligible Applicants**  
*Eligible Production Companies* – Prince Edward Island businesses that have as their primary purpose, the (domestic or collaborative) production of film or video productions  
**Eligible Production Companies**  
Private Corporations:  
- Incorporated federally or in Prince Edward Island  
- Head office and principal place of business in Prince Edward Island  
- Majority of the voting shares must be beneficially owned by Prince Edward Island residents.  
Partnerships and Sole Proprietorships:  
- Must be registered in Prince Edward Island  
- Head office and principal place of business |
in Prince Edward Island
- Majority of those exercising voting control must be Prince Edward Island residents.

Eligible Productions
- **Features**: dramatic, documentary and animated programs intended for distribution to and exhibition on television (including pay and pay-per-view), cinema, or video.
- **TV Series**: drama, variety, performing arts, animated or informational series, including pilot productions.
- **TV Mini-Series**: short, dramatic series of two to ten episodes with continuing plot and characters.
- **TV Specials**: single television programs of drama, documentary or performing arts. Non-theatrical: individual programs or series whose primary exhibition will be in a non-theatrical, non-commercial broad setting such as schools, universities, libraries, etc.

Productions must have: full marketing plan as well as firm exhibition commitments such as:
- Television: a broadcast or pre-licence for telecast on broadcast, specialty, pay or pay-per-view television, specifying the amount and timing of licence fees and other payments;
- Cinema/Video: a commitment from a distributor for release in Canada, and/or a distribution advance, equity investment or distribution guarantee from such distributors;
- Non-theatrical Release: supporting documentation showing sales potential. (Preference will be given to projects with firm distribution arrangements).

<table>
<thead>
<tr>
<th>Development Loan Program</th>
<th>One-third of proposed development budget, to maximum of $25,000</th>
<th>See above criteria for eligibility.</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="http://www.techpei.com/index.php">http://www.techpei.com/index.php</a></td>
<td>Phase I – 50% of approved costs up to $5,000</td>
<td></td>
</tr>
<tr>
<td><strong>Short Film Program (grant)</strong></td>
<td><strong>Phase II – First draft script up to 50% of approved costs to maximum of $10,000</strong></td>
<td><strong>Phase III – Final draft script up to 50% of approved costs dependant upon amount accessed in other phases</strong></td>
</tr>
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<td>-------------------------------</td>
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<td>------------------------------------------------------------------------------------------------</td>
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</tbody>
</table>
| **http://www.techpei.com/index.php?number=48751&lang=E** | **25% of total cost of production, to maximum of $10,000** | **Eligible Applicants:**
- Prince Edward Island residents
- Companies registered to operate in Prince Edward Island |
<table>
<thead>
<tr>
<th><strong>Ontario Media Development Corporation</strong></th>
<th><strong>See benefits listed below.</strong></th>
<th><strong>See qualifications listed below.</strong></th>
</tr>
</thead>
</table>
| **Ontario Production Services Tax Credit (PSTC)**<br>(refundable tax credit)<br>[http://www.ofdc.on.ca/pdf/guide_and_app/opstc_guide.pdf](http://www.ofdc.on.ca/pdf/guide_and_app/opstc_guide.pdf) | 11% of the *eligible Ontario labour expenditures* incurred by a *qualifying production company* with respect to an *eligible production* minus *assistance* relating to such expenditures incurred after October 31, 1997 | **Relevant Statute:**<br>§ 43.5 of the Ontario Income tax Act<br><br>**Who can apply:**<br>*Qualifying Corporation*<br><br>**Must be:**<br>1) *Qualifying corporation* – A Canadian or foreign owned corporation which (i) primarily carries on a film or video production or production services business (ii) at a *permanent establishment* in Ontario, (iii) files an Ontario corporate tax return and *owns the copyright* in the eligible production OR contracts directly with the copyright owner to provide production services to an eligible production, and (iv) is not exempt from tax<br><br>2) *Eligible production* – (i) its principal photography begins during the taxation year for which the OPSTC is claims; (ii) its total production expenditure during the 24 months after principal photography exceed certain levels (see guidelines, p. 5); (iii) it is not in one of the excluded genres (see guidelines, p. 6); (iv) it is not a production for which public financial support would be contrary to public policy<br><br>3) *Ontario Labour Expenditure* – The total of the following three types of amounts: (i) salary or wages paid to employees of the qualifying corporation, (ii) remuneration, other than salary or wages paid by the qualifying corporation to persons or partnerships that carry on business through a permanent establishment in Ontario, and (iii) reimbursements by a wholly-owned subsidiary corporation to its parent corporation for an expenditure made by the parent which would be an Ontario labour expenditure of the subsidiary corporation if it had been made by the them for
Production tax credit in respect of the production (CPSTC); OR (2) a federal Film or Video Production Services Tax Credit (CFTC) in respect of the production

**Note:** OPSTC, OCASE, and Federal Film tax credit programs are excluded from the definition of assistance for the purposes of Ontario tax credit program

| Limitations: | (1) No cap |

### Ontario Film and Television Tax Credit (OFTTC)

(refundable tax credit)


- 20% of the **eligible Ontario labour expenditure**\* incurred by a **qualifying production company**\* with respect to an **eligible Ontario production**\* which commenced principal photography after May 7, 1996 (15% for eligible labour expenditures incurred prior to May 7, 1997), net of **assistance**\*.

- An enhance credit rate of 30% is available for first time productions.

- A bonus of 10% is available for regional Ontario productions.

- **Assistance** = includes any grant, forgivable loan, credit, subsidy, from government.

**Relevant Statute:** § 43.10 of the Ontario Income Tax Act

**Who can apply:** 
Qualifying production company*

**Must be:**
1. **Qualifying production company** – A Canadian corporation which is (i) **qualified corporation** under section 125.4 of the Federal Act, (ii) maintains a permanent establishment in Ontario, (iii) is not exempt from tax;

2. **Eligible Ontario production** – must satisfy the following requirements: (i) production is not an excluded production; (ii) the certificate has not been revoked; (iii) did not commence principal photography before May 8, 1996; (iv) produced for television broadcast and is not directed primarily for children; (v) if the production is not an interprovincial co-production or treaty co-production, the following additional conditions are satisfied: (a) certain number of points; (b) not less than 75 per cent of all amounts in respect of the cost of producing the production are payable to Ontario-based individuals or corporations in respect of goods or services.
<table>
<thead>
<tr>
<th>Municipality or other public authority except for FTC, PSTC</th>
<th>provided by the Ontario based individuals corporations in the course of carrying on business at a permanent establishment in Ontario; (See Regs for further detail);</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) Eligible Ontario labour expenditure – The total of wages, salaries, and remuneration paid for services of individuals who were resident in Ontario at the end of the calendar year prior to commencement of principal photography. (See § 125.4 of the Federal Income Tax Act)</td>
<td></td>
</tr>
<tr>
<td>(4) Certified by Ontario Media Development Corporation (OMDC)</td>
<td></td>
</tr>
<tr>
<td>(5) submitted to Ministry of Finance for Ontario with corporate tax return</td>
<td></td>
</tr>
</tbody>
</table>

**Limitations:**

1. Eligible labour expenditures are subject to a maximum of 48% of the net production costs

2. For production that commenced principal photography before November 1, 1997, the OFTTC has per-project caps of $1.5 million per cycle for television series and $500,000 for other productions. There is also an annual corporate cap which applies to the production company and any associated companies of $2.667 million for productions commenced in 1997 and $2 million for productions which commenced in 1996. Per-project and annual caps do not apply to productions which commenced on or after November 1, 1997
<table>
<thead>
<tr>
<th>Ontario Computer Animation and Special Effect Tax Credit (OCASE) (refundable tax credit)</th>
<th>20% of the eligible Ontario labour expenditures* incurred by a qualifying corporation* with respect to eligible computer animation and special effects activities* in the corporation’s taxation year, subject to a maximum of 48% of the cost of such activities net of government assistance*. Assistance = includes any grant, forgivable loan, credit, subsidy, from government, municipality or other public authority except for FTC, PSTC, OCASE, OPSTC, and OFTTC</th>
</tr>
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<tbody>
<tr>
<td>Relevant Statute: § 43.8 of the Ontario Income Tax Act</td>
<td>Who can apply: Qualifying Corporation Must be: (1) qualifying corporation - Canadian corporation that (a) performs, at a permanent establishment in Ontario operated by it, eligible computer animation and special effects activities, for: (i) an eligible production that it undertakes, or (ii) an eligible production under contract with the producer of the production, (b) is not controlled directly or indirectly in any manner by a tax exempt corporation, and (c) is not a corporation that is a prescribed labour sponsored venture capital corporation (2) Eligible production – (a) the production is produced for commercial exploitation, (b) not contrary to public policy, (c) if production commences before Nov. 1, 1997, it is not a variety production, educational or instructional production or programming in magazine format. principal, (d) if production is a television production and all Ontario labour expenditure is incurred before May 6, 1998, the production is directed at children or is suitable for broadcast in a standard television time slot of at least 30 minutes (3) Eligible Animation or Visual Effects – animation or visual effects which are created primarily with digital technologies but does not include: (a) audio effects, (b) in-camera effects, (c) credit rolls, (d) subtitles or visual effects created all or substantially all by editing activities, or (e) animation or visual effects for use in promotional material for the eligible production (4) Eligible Computer Animation and Special Effects Activities –</td>
</tr>
</tbody>
</table>
activities carried out in Ontario directly in support of the production of eligible film and television production*, excluding activities that are scientific research and experimental development

(5) Ontario labour expenditures – Sum of the (a) the qualifying wage amount (salaries or wages directly attributable to eligible computer animation services) and (b) 50% of the qualifying remuneration;

(6) Certified by OMCC

Limitations:
(1) The credit will not exceed 9.6% of the prescribed cost of the eligible computer animation and special effects* activities net of government assistance*

(2) There are no per project limits on the amount of credit which may be claimed

(3) The OCASE Tax credit which may be claimed by a qualifying corporation and associated corporation is limited to $333,000 on labour expenditures in 1997 and $500,000 on labour expenditures from January 1, 1998 to May 5, 1998
| Quebec Film or Television Production Services Tax Credit (QPSTC) (refundable tax credit) | One-third of eligible labour expenditures*, to a maximum of 16 2/3% of production expenses, incurred after February 12, 1998 by an eligible corporation* or services provided in Quebec by Quebec residents or taxable Quebec corporations for the making of an eligible production*, net of assistance*  
Bonus to 22.5% of production expenses for French-language feature films  
Bonus to 27.75% of production expenses for regional production  
Maximum of $2.5 million per film | Who can apply: Eligible corporation*  
Must be: (1) Eligible Corporation – A corporation with an establishment in Quebec whose activities consist primarily in operating a film or television production business or a film or television production services business and which: (i) either owns the copyright for the eligible production throughout the period during which the production is carried out in Quebec; (ii) or, in the case where the owner of the copyright is not an eligible corporation regarding such production, has concluded, directly with the owner of the copyright for the eligible production, a contract to supply production services in relation to such production; (iii) AND cannot be tax exempt  
(2) Eligible productions - Must be of an eligible genre and meet a cost minimum (Similar to Federal CFTC)  
(3) Eligible Labour Expenditures - the total amount of the following payments, if person or corporation is Quebec resident or taxable as Quebec corporation: (i) wages or salary, (ii) portion of remuneration, other than wages or salaries  
Limitations Labour expenses may not exceed 50% of production costs  
Certified by SODEC |
| Improved Tax Assistance for Computer Animation and Special Effects | Adds a supplementary rate of 20% for eligible labour expenditures* on top of the QPSTC, OR 20% for eligible small budget productions*, if the eligible labour | Who can apply: Eligible corporation  
Must be: (1) Eligible production – Same as QPSTC above |
| (refundable tax credit) | expenditures* are related to the making of computer animation and special effects* for use in an eligible production* | (2) Eligible small production – Productions that do not satisfy the minimum cost rules to qualify for the base rate of the tax credit for production services (See QPSTC minimum cost rules)  
(3) Eligible labour expenditures - the total of the following amounts: (i) wages paid to the employees of a corporation with an establishment in Quebec which are directly attributable to eligible activities relating to computer animation or special effects which these employees carrying out as part of an eligible production, (ii) wages paid after March 31, 1998  
(4) Computer animation and special effects - Includes motion capture, correction of animation curves, rendering, image, retouching, graphics, filming, computerized and automated animation benches, use of motion control  
(5) Certified by SODEC - Must include with QPSTC form a written documentation establishing amount of wages paid to employees who carried out eligible activities relating to computer animation and special effects |

| Improved Tax Assistance for Giant Screen Films (refundable tax credit) | 45% of eligible labour expenditures, incurred after December 21, 2001, to a maximum of 22.5% of production expenses | Who can apply: Eligible corporation  
Must be:  
(1) Eligible production – Same as QPSTC above  
(2) Eligible labour expenditures – See QPSTC above  
Limitations  
Labour expenses may not exceed 50% of production costs |

<p>| Tax Credit for | One-third of eligible labour expenditures, to | Who can apply: Eligible corporation |</p>
<table>
<thead>
<tr>
<th>Saskatchewan</th>
<th>Film Employment Tax Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><a href="http://www.cyrgov.sk.ca/programs_sask_films.shtml">http://www.cyrgov.sk.ca/programs_sask_films.shtml</a></td>
</tr>
</tbody>
</table>

**Production of Shows**

- Maximum of 15% of production expenses or $300,000

**Must be:**

1. *Eligible production* – Same as QPSTC above
2. *Eligible labour expenditures* – See QPSTC above

**Limitations**

Labour expenses may not exceed 45% of production costs

35% total wages of all Saskatchewan labour and deemed labour for Saskatchewan productions and co-productions.

Bonus of 5% of total production expenditures

**Relevant statute:**

F-13.11 of *Statutes of Saskatchewan*

**Eligible applicants:**

- Incorporated under Saskatchewan or Canadian law
- Primary business of film, video or multimedia production

**Eligible salaries:**

- No more than 50% of production’s total eligible production costs

**Eligible productions:**

- Television, cinema, videotape, digital, CD-ROM, multimedia, nontheatrical production, with subjects drama, variety, animation, children’s, music, educational, documentary
## Appendix B

### US TAX INCENTIVES FOR FILM PRODUCTION – BY STATE

<table>
<thead>
<tr>
<th>STATE</th>
<th>TAX INCENTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Sales tax exemption for hotel accommodations after 30 days. Some local option tax exemptions exist on hotel rooms after 60 days.</td>
</tr>
<tr>
<td>Alaska</td>
<td>No state sales tax. No state individual income tax.</td>
</tr>
<tr>
<td>Arizona</td>
<td>A 50% sales (transaction privilege) and use tax rebate on the purchase or lease of tangible personal property if producers spend over $1 million in Arizona filming movies for theaters, television, video, industrial, or education films commercial advertising. A second threshold of expenditures of $250,000 applies to television commercial or advertising in commercials aired in two minutes or less. No withholding tax from wages of nonresidents engaged in any phase of motion picture production. A 1996 law provided for an exemption of retail sales tax on the purchase of machinery and equipment used primarily at sound stages constructed between 1 July 1996 and 1 January 2002. No state tax on lodging after 30 days.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Full gross receipts and use tax refund on the purchase of</td>
</tr>
</tbody>
</table>
property and services including in connection with production costs. To qualify, a production company must spend at least $500,000 within six months or $1 million within 12 months in connection with the production.

California

No sales or use tax on production or postproduction services on a motion picture or TV film. No sales and use tax on services generally. Such industry specific services include writing, acting, directing, casting, and storyboarding. Five percent sales tax exemption on the purchase or lease of postproduction equipment by qualified persons. No sales and use tax on 45% of the charges for sets, including labour to design, construct, and strike and no sales tax on the full charge for the rental of personal property. No state hotel tax on occupancy, however cities or countries that impose a local tax have a tax exemption for occupancies in excess of 30 days.

Colorado

No sales and use tax on film company services if, in fact, the company is providing a service and not tangible personal property.

Connecticut

Sales and use tax exemption for the purchase, lease, use, storage, or other consumption of motion picture, video production, or sound recording equipment for use in the state for production activities that become an ingredient of any motion picture, audio tape, or recording produced for commercial entertainment. No hotel occupancy tax for
Delaware  No state sales tax.

Florida  Sales and use tax refund for the purchase or lease of motion picture, video, or other equipment (depreciable equipment with a useful life of at least three years) if used exclusively as an integral part of production activities in the preparation of motion pictures, tapes, TV, or productions produced for commercial use or sale. If equipment and personnel used belong to the producer of a qualified motion picture, there is no tax on fabrication labour. Repair of motion picture equipment is used exclusively by the producer as an integral part of production activities. No state individual income tax.

Hawaii  Income tax credit up to four percent, which is deductible from net income tax liability of the costs incurred in the state in the production of motion picture and television films; and up to six percent for costs incurred in the state for actual expenditures for transient accommodations. Must spend at least $2 million in Hawaii for motion pictures or at least $750,000 to produce a television episode, pilot, or movie of the week. If the tax credit exceeds the income tax liability, the excess will be refunded to the taxpayer.

Idaho  No hotel occupancy tax on hotel stays of 30 days or longer.

Illinois  Sales and use tax exemption for products of photoprocessing
produced for use in motion pictures for public commercial exhibition.
The 14.9% hotel tax is reimbursed for stays in excess of 30 days.

Kansas  Sales tax refund for certain film, television, commercial, or video production expenditures. Must spend at least $200,000 per project in Kansas. Expires 30 June 2000.

Kentucky  Sales and use tax refund for purchases made by a motion picture production company in connection with filming in Kentucky if the company films or produces one or more motion pictures in the state during any 12-month period.

Louisiana  State sales and use tax refund on purchases made in connection with filming or production if purchases exceed $1 million or more in a 12-month period. After 30 consecutive days, the 14.9% hotel tax is reimbursed and no further taxes and charged.

Maine  Hotel occupancy taxes are rebated after 28 consecutive days.

Maryland  No state sales tax for hotel stays in excess of 30 days.

Mississippi  A 1998 attorney general opinion declared film production a manufacturing process. This would provide a sales and use tax cap of one and one-half percent on the purchase of machinery, equipment, and tangible personal property used in the production of motion pictures, television programs, commercials, and documentaries. This opinion requires
Minneapolis Provides for an annual appropriation of $500,000 per year for payments to producers for a portion of services and wages paid for in-state production jobs up to a maximum of $100,000 per film.
No sales tax on hotel stays of 30 days or more.

Missouri Provides an income tax credit up to 25% of expenditures in the state to a maximum of $250,000 in tax credits per project. Productions must spend a minimum of $300,000 in the state.
No sales tax on hotel stays after 31 days.

Montana No sales tax.
No property tax on out-of-state equipment used exclusively in motion picture or commercial production.
No accommodation tax for hotel stays in excess of 30 days.

Nebraska No hotel occupancy for stays in excess of 30 days.

Nevada No corporate or individual income tax. Low hotel room tax.

New Hampshire No state sales tax. Individual income tax on interest and dividends only.

New Jersey Sales tax exemption for all film and video related machinery and equipment as well as services of installing or repairing equipment used directly in production and post-production of motion pictures, television, or commercials.
New Mexico  State sales tax exemption on all production costs including set construction, wardrobe, facility and equipment rental, all production and post-production services. After 30 days, the four percent ledgers tax is waived for hotel guests.

New York  Comprehensive state and New York City sales and use tax exemption for machinery, equipment, and services used in production and post-production activities in the production of feature length films, television programs, music videos, and commercials. Film, television, and commercial production are considered a manufacturing process.

North Carolina  Reduced sales and use tax (one percent rate) on the purchase and rentals for motion picture production films of cameras, films, set construction materials; as well as chemicals and equipment used to develop and edit film that is used to produce release prints. Full exemption for the purchase of film that becomes a component part of release prints sold or leased. Chemicals used to develop prints for sale or lease are also exempt. A 1997 law included a sales tax exemption for audiovisual master tapes made or used in production.

Ohio  No state sales tax on hotel stays in excess of 30 days.

Oklahoma  Sales tax exemption on sales of tangible, personal property, or services to a motion picture or television production company to be used or consumed in connection with an "eligible production." An eligible production is defined as all television productions (not including commercials), television pilot, or on-going series televised on a network.
or a feature-length motion picture intended for theatrical release.
State sales tax rebate on hotels after 30 days.

Oregon No state sales tax.

Pennsylvania A 1997 law granted a six percent sales and use tax for the purchase or rental of any tangible personal property in Pennsylvania used directly in the production of a feature length commercial motion picture distributed to a national audience. The exemption covers props, sets, supplies, tools, production and post-production services including processing, editing, etc.

South Carolina Sales and use tax exemption for all suppliers, technical equipment, machinery, and electricity sold to motion picture companies for use in the filming or producing of motion pictures. For tax years after 1998, corporate and personal income tax credits for investments in South Carolina production projects or facilities.

South Dakota No state individual income tax.

Tennessee Sales and use tax refund for out-of-state motion picture companies for use in filming or producing motion pictures. For tax years after 1998, corporate and personal income tax credits for investments in South Carolina production projects or facilities.

Texas Comprehensive sales and use tax exemption for purchased or rented equipment or services used in the production of a motion picture or video recording for ultimate sale, license,
or broadcast (including cable broadcast).
No sales tax on hotel rooms for stays in excess of 30 days.

Utah
Transient occupancy tax rebate after 30 days.

Vermont
Credit for non-resident income tax for commercial film production if Vermont income tax exceeds income tax rate in state of residence.
No tax on hotel stays in excess of 30 days.

Virginia
Sales and use tax exemption for production services or fabrication in connection with the production of any portion of exempt audio/visual work, feature or made-for-television films, programs, documentaries, commercials, etc. Tangible personal property including scripts, artwork, supplies, equipment, and accessories are also exempt.

Washington
Sales and use tax exemption for the purchase or rental of production equipment and services used in motion picture or video production or post-production. No sales and use tax on vehicles used in production.
No tax on hotel stays in excess of 30 days.
No state individual income tax.

Wyoming
No tax on hotel stays in excess of 30 days.
No state corporate or individual income tax.
Appendix C

Summary of Major Film Subsidy Programs in Other Countries

The United Kingdom offers tax assistance and investment and financing arrangements. There is a one hundred percent tax write-off for feature film production if there is a majority of U.K. or European Union residents used for production purposes, U.K. studios are used for production, and half of all technical production equipment is supplied by U.K. companies. If the foreign production company does not meet all of these requirements, it can participate in a “leaseback” scheme, where it sells its film rights to a U.K. leasing company which leases back the film rights to the production company. This allows the leasing company to have the tax break and the benefits are then divided between the production company and the leasing company. Other incentive programs, such as development grants, special loans, and regional funds are also available.

Ireland offers a subsidy of up to twelve percent (12%) of film production costs. In addition, as it is a member of the European Union, films produced in Ireland also gain access to the twenty European countries which have additional support measures for film production.

Similarly, Australia provides a tax offset of 12.5% of the total production expenses (rather than just labor expenses) that are actually incurred in Australia. A study conducted by the Australian Department of Information Technology and the Arts (the DCITA) in June 2003 determined that a film company shooting a film in Australia enjoyed a 7.5% cost advantage over shooting a film in Canada. The Australian incentives have been very successful in attracting the filming of U.S.-developed feature films there in recent years. It seems clear, for example, that Australia’s tax incentives are the major factor responsible for U.S. film companies’ production in Australia of films such as The Matrix trilogy, the Star Wars prologue trilogy, Mission Impossible 2, and Moulin Rouge.

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South Africa is another country that supports its film industry through the provision of subsidies. It gives grants for film development and production. It also gives low interest loans to individuals, companies and organizations for film-related expenses, such as education, training, development funding, marketing, and distribution.\textsuperscript{156} Foreign producers can receive this funding if they can show that it will benefit the South African film industry.\textsuperscript{157}

\begin{footnotesize}
\begin{enumerate}
\item South Africa Film Board, \url{http://www.nfvc.sa} (accessed August 13, 2005).
\item Id.
\end{enumerate}
\end{footnotesize}