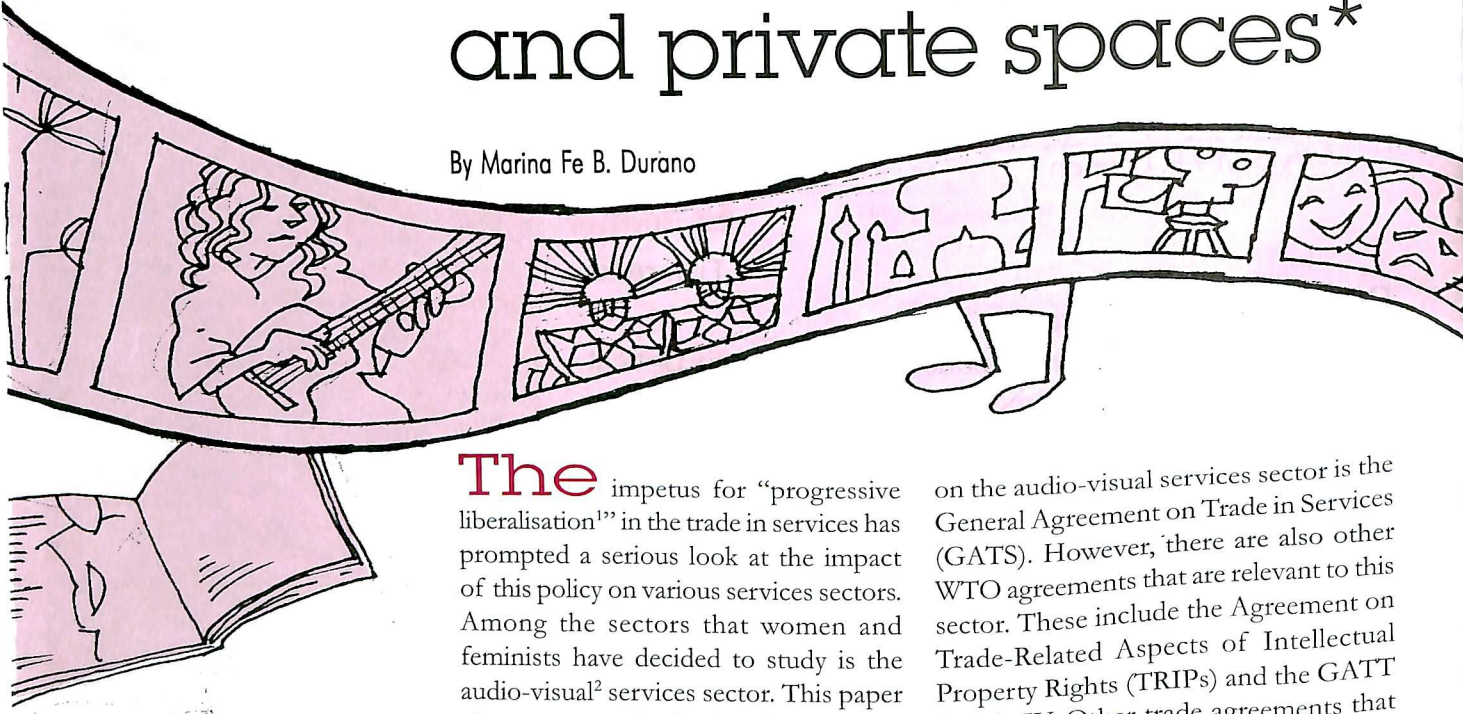


# Trade in Mass Media Services: Another case of contending public and private spaces\*

By Marina Fe B. Durano



**The** impetus for “progressive liberalisation” in the trade in services has prompted a serious look at the impact of this policy on various services sectors. Among the sectors that women and feminists have decided to study is the audio-visual<sup>2</sup> services sector. This paper aims to unpack the implications of various trade agreements under the World Trade Organisation (WTO) on women and, more importantly, on cultural transformation that promotes gender equality.

## **Market Access Versus Protection of Cultural Diversity**

The most important trade agreement under the WTO that will have an impact

on the audio-visual services sector is the General Agreement on Trade in Services (GATS). However, there are also other WTO agreements that are relevant to this sector. These include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the GATT Article IV. Other trade agreements that could have an impact are the Agreement on Subsidies and Countervailing Duties, the Agreement on the Implementation of Article VI of GATT 1994 (Anti-Dumping), the Agreement on Safeguards, and the Agreement on Trade-Related Investment Measures. Although the latter set of trade agreements apply generally to the trade in goods, there are audio-visual service products whose classification as a good or a service is controversial.



#### Coverage of the Audio-Visual Sector

This service sector covers both software and hardware segments. The software segment includes program production and distribution while the hardware segment includes the manufacture of equipment. Unfortunately, the dividing line between the two segments has proven to be controversial such that a WTO definition has yet to be clarified.

Under the Services Sectoral Classification List of the GATS, the audio-visual sector falls under the larger classification of Communication Services. The audio-visual sector has various sub-sectors that include the motion picture and video tape production and distribution services, the motion picture projection services, the radio and television transmission services, the sound recording services, and other services that are yet unspecified.

Despite the wide range of applicable agreements, perhaps the main debate defining the liberalisation of trade in audio-visual services is the debate over increasing market access of foreign audio-visual service providers and the extent of protection of cultural diversity. Market access is an essential objective of the liberalisation of audio-visual services that allows the unhindered entry into the domestic market of foreign service providers and products. In other words, laws, rules and regulations applied to the audio-visual services sector should not differentiate between foreign and domestic providers. Zampetti (2003) provides examples of the various laws, rules and regulations that could be affected by the two types of liberalisation commitments.

“The main types of cultural policies and instruments currently in place in different jurisdictions potentially fall within the meaning of market access or national treatment as defined in GATS. In the area of market access restrictions, there are widespread measures that control access to film markets, including screen quotas for cinemas (as in Mexico, South Korea and Spain); prohibitions of dubbing of foreign films (Mexico); dubbing licenses (e.g. in Spain, film distributors can only receive a dubbing license for foreign films when they contract to distribute a certain number of national films) and quantitative restrictions, as was the case in India, which used to restrict the import of film titles to 100 per year; as well as foreign investment and ownership restrictions, including divestiture policies, for example, in the broadcasting industry and news media in Australia, Canada, the United Kingdom and the United States.

In the area of national treatment many countries use domestic content requirements, especially measures regulating radio and television broadcasting content. For example, European Communities, Australia, Canada, and France use domestic broadcast content to control access to their television broadcast and film markets; as well as discriminatory regulatory/licensing restrictions, especially measures that control access to radio or television broadcasting through regulatory or licensing restrictions (Canada). Furthermore, many national and regional audiovisual policies rely on discriminatory subsidies, involving the provision of grants, loans

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and tax preferences for the production or co-production of cultural works, most notably audio-visual products. For example, Eurimages, an initiative by the Council of Europe, provides subsidies for the co-production of European audiovisual works. The Media II program of the European Communities, while excluding the support of production, focuses on training for professionals, the development of attractive projects and the transnational distribution of audiovisual programs and films. National programs providing subsidies to the domestic film industry exist in France, Germany, the United Kingdom, Canada, the United States and Switzerland.” (Zampetti, 2003, pp. 5-6)

On the other hand, the protection of cultural diversity, primarily through public subsidies granted to the audio-visual sector, is meant to promote and preserve local and national cultural products and expressions. The Australia Broadcasting Authority (ABA) (1999) in discussing trade liberalisation in the audiovisual sector pointed out that the “audiovisual services sector is an important and influential medium for cultural expression” (ABA, 1999, i). Hence, regulation of this sector focuses

on safeguarding and promoting cultural products. The ABA states that “cultural products are valued for the contribution they make to a sense of community identity and well-being” (ABA, 1999, i). Specific to public broadcasting, says Verhulst (1999), is the impetus for regulation based on the preservation of a public sphere for political and social debate. This motivation has led to calls for ensuring universal access and public provision of audio-visual services.

The Schedules of Commitments after the Uruguay Round of negotiations indicate the need for several countries to create exemptions for certain restrictions and limitations in order to preserve cultural identities or “promote regional identity, cultural values, and linguistic objectives” (Zampetti, 2003, p. 8). According to Zampetti, “no fewer than 27 States, including the EC and its Member States, Canada, many Latin American and Arabic countries, have asked to have cinema and television subsidized co-production and co-distribution agreements inscribed as MFN exemptions...” (Zampetti, 2003, p. 7). “MFN exemptions” refer to those policies that states can exempt from the most-favoured nation obligation that requires WTO-member countries to expand the most favourable treatment from one or a few trading partners to all the WTO members. In general, Zampetti points out that the GATS does not contain a cultural exception that could be applied to the audio-visual services sector unlike the North American Free Trade Agreement (NAFTA), which allows cultural industries to be exempted from the obligations under the NAFTA, subject to some limitations.

One of the most common forms of supporting the audio-visual sector for purposes of cultural preservation is the subsidy. A “subsidy” is any support that a government or public authority grants to the audio-visual service provider or industry<sup>3</sup>. As yet, there is no definition of a subsidy for the services sector. Article XV of the GATS specifies the creation of multilateral disciplines on subsidies and countervailing measures that are applicable to the trade in services, taking into account flexibilities for developing countries. The Working Party on GATS Rules has not yet arrived at an agreement on this definition and continues discussions in this area<sup>4</sup>. Despite this absence of a definition, Paragraph 1 obliges the exchange of information on subsidies among the member countries. Obviously, the basis of this exchange is unclear; as the

### **Intellectual Property Protection versus Knowledge as a Public Good**

Among the various forms of intellectual property protection, copyright and neighbouring rights are the most relevant for the audio-visual sector. Copyright refers to the protection accorded to authors to exclusively take advantage of their work, whether for commercial or non-commercial purposes, while neighbouring rights refer to the rights of performers, producers of sound recordings, and rights of broadcasting organisations. The objective of these rights is to provide incentives and rewards to the creators, which is believed to be important for the development of the industry. These rights are protected under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). The TRIPs consolidates the Convention for the Protection of Literary and Artistic Works (Berne Convention), the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (Geneva Convention), and the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (Rome Convention). It also adds some new and even higher standards of protection.

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definition is still under negotiations, any exchange of information might prejudice the negotiations in one way or another. Furthermore, Paragraph 2 allows for consultations to occur if a subsidy is found to adversely affect a member country on the stipulation that consultation “requests shall be accorded sympathetic consideration” (WTO, 1999, p. 298).

The new rules provided by TRIPs appear to be a restriction on policy options that could be available to developing countries. Chang (2004) discussed how historical evidence indicates that many of the developed countries themselves did not provide protection of intellectual

property during their development stage and only implemented a strong intellectual property rights regime at the point when they were already capable of producing their own original inventions, trademarks and copyright materials. Furthermore, Chang said that the pursuit of knowledge for its own sake or for the public good is enough of a strong incentive to generate new knowledge. There are, in addition, natural protective mechanisms that allow an inventor or creator to reap the benefits from a first mover advantage. Chang, for example, refers to an “imitation lag,” a “reputational advantage,” and a head start in the race down “learning curves”. Chang goes further by calling for a reform or elimination of the TRIPs agreement.

Trebilcock and Howse (1999) prefers to take a more matter-of-fact view of the debate surrounding TRIPs. He says that “once we have established that the issue is actually the level of compensation to which a creator is entitled, then it is clear that at least implicitly the creator’s claims are being balanced against other social interests” (Trebilcock & Howse, 1999, p. 308). Indeed, Trebilcock and Howse

recognise that creations and inventions do not happen in a social vacuum:

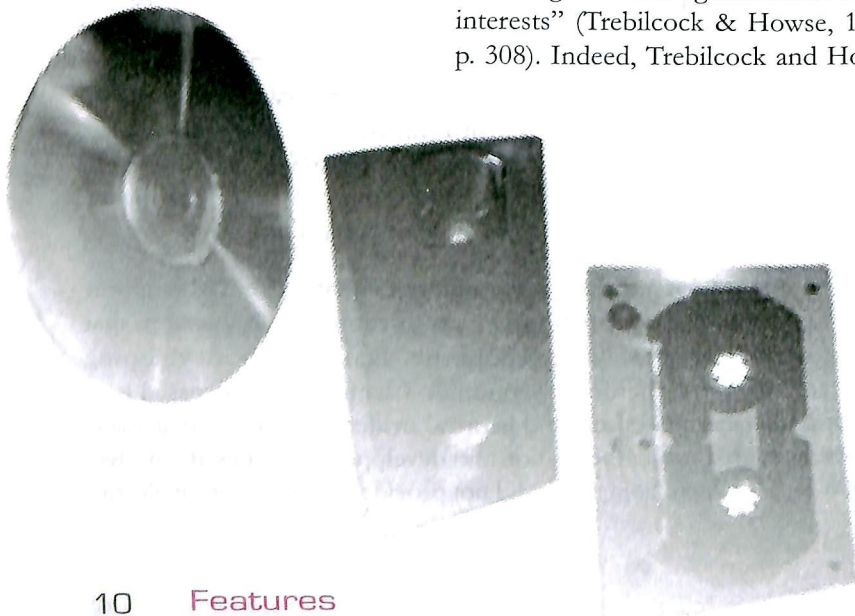
“Society provides the context in which creative activity takes place—few inventions or works of art or literature spring fully grown from the inventor’s head. They usually depend on education within society, and build on the work of many others. There is thus a limit to the extent that creators can declare the work totally their own, and exclude any claim by society on some of that value.” (Trebilcock & Howse, 1999, p. 308)

### **Domestic Regulation as Non-Tariff Barriers versus Sovereign Scope of Governance**

As indicated above, cultural exceptions cannot be claimed for the audio-visual services sector. Subsidies to the services sector have also been difficult to establish clearly as trade-distorting. The GATS, particularly Article VI covering domestic regulation, stipulates that regulations “not be more burdensome than necessary.” The measures covered include those applied by national and local governments and authorities, as well as non-governmental bodies exercising powers delegated by national and local governments and authorities. The audio-visual services sector is regulated for various reasons, including censorship and other forms of content regulation.

Trebilcock and Howse describe the situation thus: “It has become increasingly difficult to delineate the boundaries between a nation’s sovereign right to regulate and its obligation to the international trading community not to restrict trade gratuitously” (Trebilcock &

*LIBERALISING AUDIO-VISUAL SERVICES allows the unhindered entry of foreign audio-visual service providers and products into the domestic market.*



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*Top audio visual trade corporations*

Howse, 1999, p. 135). In particular, the difficulties attached to the contested boundaries of trade and domestic regulation have been analysed with respect to health and safety standards, especially with respect to jurisprudence produced in the WTO. This analysis will have to be extended to the specific forms of regulation applied to the audio-visual services sector.

A dispute panel facing the question of contested boundaries can use three “tests,” each with their own challenges. The first is the “sham” test where the dispute panel tries to find out if “the country with the offending standard has intended to adopt a policy in bad faith” (Trebilcock & Howse, 1999, p. 163). This test implies that panels need to be able to assess the intention of policy, which is clearly difficult to establish since it would require an understanding of a country’s policy-making processes.

A second test is based on scientific risk assessment, which implies some objectivity to the test. However, experience has shown that normative judgements are always present, especially in the choice of methodology. The panel

is thus faced with conflicting scientific evidence, which may be beyond the expertise of the panel that is usually made up of lawyers and diplomats.

The third test is the proportionality test where the panel must decide on whether the choice of regulatory measure is proportional to the stated objective of the measure. This last test is most relevant to the GATS Article VI provision quoted above.

“As the legal test for evaluating whether a measure is ‘necessary’ is based on whether a least trade-restrictive measure has been employed, a panel will be required to engage in what may be a very complex policy inquiry into the various policy alternatives and their viability in achieving the stated policy goal. In answering these questions, panellists are drawn into an uncomfortable area of second-guessing expert domestic regulators.... The question of proportionality can easily extend into an inquiry about the validity of the stated goal itself.” (Trebilcock & Howse, 1999, p. 164)

The GATS also says that the manner of implementation can be raised as a case for a non-tariff barrier. The administrative implementation of laws, rules and regulations that could fall under the GATS purview can also be subject to negotiation and dispute settlement.

“Article VI requires members to ensure that measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. To bring this about, the agreement reaches beyond the

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layer of the law to be found in the statute books and deeper into the disparate legal cultures of the member countries.” (Arup, 2000, p. 132)

This final feature of the GATS is quite compelling in that the “quality of governance” can now become a subject of trade disputes. In effect, international trade agreements, especially those under the WTO, have become judge and jury on broad matters of internal governance.

Market access, national treatment and most-favoured-nation obligations of trade agreements will normally deal with regulations concerning competition that deals not only with market shares and ownership but also with standardisation and interconnection. Other regulatory objectives that could fall under the ambit of GATS Article VI would be content regulation and regulation for media diversity and pluralism. The motivations behind these regulations are not likely to be debated. However, under an environment of “progressive liberalisation” these regulations can be subjected to any of the tests described above.

## **Social Purpose and Public Goods**

What are the implications for women of these various agreements on the audio-visual services sector? Cultural transformation leading to gender equality often involves content regulation and access regulation needed to direct audio-visual services towards social goals and objectives. Yet, we find that the trade agreements are defining the bounds and limits of acceptable policies and regulations. Hence, the contestation between public and private divide is expressed in the media services sector as well. The private side refers more to the unlimited expansion of markets and private provision while the public side is expressed through regulation and through public services. International trade agreements enter into the contestation by creating a policy and regulatory bias for unfettered private provision.

The justification for expansion of markets is the familiar promise of employment, income-generation, and increasing variety of consumption products. However, these pecuniary returns are not necessarily the superior or the only rationale. Audio-visual services as carriers of culture add to the quality of life in many other different ways. Regulation helps to encourage the development of these carriers in order to contribute to human development.

Amartya Sen’s comments on the role of music in Africa’s development probably illustrates the non-monetary value of cultural products that can be carried by the audio-visual services sector, while

acknowledging that the protection of rights and entitlements to music secures economic returns to the music industry and its practitioners. Sen (2004) highlights the fact that music is a source of joy and fulfilment and should be valued in and of itself. Furthermore, Sen argues:

“A third contribution that must be noted is the part that music plays in the sustaining of old identities and the creation of new ones. People see themselves as belonging to various different groups, related to their nationality, their community, their work, their profession, their language and literature, their political affiliations, their religions. Music not only helps to strengthen the solidarity that group identities can generate, but can also help to overcome narrowly divisive groupings that tend to split up a culture into battling groups along the lines of artificially sustained ‘separations.’ Music is not only a great harmonious influence in general,

it can also assist in sustaining broad cultural solidarity and to some extent even help to resist the inter-group rivalries that cause so much bloodshed in Africa (and elsewhere). Music has played a uniting role in the lives of African Americans, both in the north and in the south of America (including the Caribbeans), and the integrative contribution of culture in general and music in particular must not be neglected for Africa itself.

Fourth, music is not just entertainment, but also dialogue. It is not surprising that music has often been at the vanguard of protest movements and in general has tended to give some voice to the voiceless. The destitute and the marginalised can use music as a vehicle of communication and expression, and a well-developed music industry, with firm channels of transmission, can give eloquence to voices that are otherwise muted and muffled.” (Sen, 2004, pp. 1-2)

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Certainly, among the “artificially sustained separations” that music and other cultural products could bridge is that between women and men. Thus, policies that promote the development of cultural products and the carriers of cultural products contribute to the promotion of peace and democracy as well as gender equality. This view of cultural products and potential role of audio-visual services sector as carriers of cultural products highlights the importance of seeing this sector as providing public goods. And the provision of public goods is in itself a public service.

The expansion of the audio-visual services markets does not in itself guarantee the universal access of cultural products. However, publicly-provided audio-visual services are under attack

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from budget cuts or poor public support. There are some non-government organisations that see community broadcasting as a bridge between privately-provided services and publicly-provided services. Unfortunately, government support for these community-based approaches has not been as strong. Furthermore, these “private” (but not-for-profit) activities are also highly contingent on the funding<sup>5</sup> they can generate, which are seldom stable or adequate.

This view of public service and public goods allows us to draw attention to the social purpose of audio-visual services sector. The contribution of music to democracy that Sen (2004) articulates is also expressed by Raboy (1999) as the social purpose of broadcasting. In particular, Raboy (1999) raises the concept of citizenship.

“The notion of citizenship has severe implications for broadcasting. Citizenship cannot be passive. Citizenship is political. When public service broadcasting is linked to the idea of citizenship, it must logically be decoupled from the authoritarian power of the state. At the same time, it cannot be commodified. This is not a question of principle but of purpose. The main point of distinction between public service and private sector broadcasting is that the latter is only commercially-driven, while the former, despite the various shapes and forms it assumes from time to time and place to place, is necessarily propelled by a different logic.” (Raboy, 1999, p. 9)

International trade agreements fail to appreciate this “different logic.” International trade agreements ignore the social purposes of various modes of expression, seeing these modes of expression and their carrier services simply as commodities that exist outside their social context. Rather than promote an “enabling environment,” international trade agreements only serve to shackle the potential of cultural transformation for achieving gender equality and democracy through mass media services. ■

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#### Endnotes

- 1 See preamble of the General Agreement on Trade in Services, especially paragraphs 2 and 3.
- 2 This classification follows the Services Sectoral Classification List (MTN.GNS/W/120) used during the Uruguay Round of negotiations on trade in services. This sector comes closest to mass media services, which has a very broad coverage.
- 3 The subsidy is more specifically defined under Article I of the Agreement on Subsidies and Countervailing Measures.
- 4 No progress has also been made with respect to emergency safeguard measures that are to be applied when increased imports due to liberalization results in serious injury to a domestic industry.
- 5 According to Raboy (1999), "[c]ommunity broadcasting generally has little access to conventional funding sources, being of limited interest to advertisers where regulation does not exclude it from the advertising market, and coming far behind conventional public service broadcasting as a priority for public funding" (Raboy, 1999: 16).

#### References

- Arup, C. (2000). *The New World Trade Organisation Agreements: Globalising Law Through Services and Intellectual Property*. Cambridge, UK: Cambridge University Press.
- Australian Broadcasting Authority (1999). "Trade Liberalisation in the Audiovisual Services Sector and Safeguarding Cultural Diversity," *A discussion paper commissioned by the Asia-Pacific Broadcasting Union*.
- Chang, H. (2004). "Trade and Industrial Policy Issues." In Chang (ed.), *Rethinking Development Economics*. London: Anthem Press.
- Raboy, M. (1999). "The World Situation of Public Service Broadcasting." In *Asian Media Information and Communication Centre* (ed.), *Public Service Broadcasting in Asia: Surviving in the New Information Age*. Singapore: Asian Media Information and Communication Centre.
- Sen, A. (2004). "What's the Use of Music? The Role of the Music Industry in Africa," *Remarks given during the Workshop On the Development of the Music Industry in Africa, Sponsored by the World Bank and the Policy Sciences Center, Inc., Washington, D.C. June 20-21, 2001*.
- Trebilcock, M. & Howse, R. (1999). *The Regulation of International Trade*, 2<sup>nd</sup> ed. London: Routledge.
- Verbulst, S. (1999). "Coping with the New Communications Environment: Are Regulations Still Relevant?" In Venkat (ed.), *Media Regulations for the New Times*. Singapore: Asian Media Information and Communication Centre.
- World Trade Organisation (1999). *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge: Cambridge University Press.
- Zanpetti, A. B. (2003). "WTO Rules in the Audio-Visual Sector." *Hamburg Institute of International Economics Report*, 229.