

interchangeability. Once content is accepted as relevant, it seems obvious that magazines created for different markets – not to mention those on different topics – are not interchangeable. They are not substitutes, and certainly not direct substitutes. They serve different end-uses. Ultimately, of course, there may be some degree of competition for disposable income between all cultural products and all luxury products – for everything beyond the necessities of life – but this is far too remote. It is not direct competition and it does not therefore fall within the rule. There would not be 1440 different magazine titles produced in Canada alone if the products were directly substitutable, or directly competitive, in the sense contemplated by the Ad Article to Article III:2.

(b) The *Excise Tax Act* is not protectionist

33. Protection is afforded to domestic production for the purpose of Article III:2, second sentence, if there is a "discriminatory or protective effect against imported products". "Imported products" means products physically transported into the territory of a Member. The United States conceded at the first substantive meeting of the Panel with the parties that the *Sports Illustrated* innovation that led to the legislation involved a domestic product, where the only thing "imported" was the electronically-transmitted foreign content. The United States has thus conceded, in the case of *Sports Illustrated Canada*, that there was no discrimination or protective effect against imported products. It follows that "foreign based" split-runs are not imported products if they are printed and published in Canada.

34. The *Excise Tax Act* thus applies to domestic and imported products without distinction, and it is primarily aimed at a form of domestic product. While the tax secures advertising revenues for Canadian publishers, protection in the sense of Article III:1 as read into III:2 means protection against *imported products*. As the preceding paragraph has shown, split-runs are not intrinsically imported products. Even if there were no import prohibition, given the economies of local production and distribution and the ease of electronic transmission, it is likely that most split-runs would be locally produced. It is highly significant, moreover, that, as the U.S. delegation noted in response to a question at the hearing, the effect of the tax was to induce *Sports Illustrated* to cease its Canadian production and to resume direct imports from the United States. The substitution of imports for domestic products, as the result of a public policy measure, is the direct opposite of what almost everyone understands by protectionism. It suffices by itself to refute the contention that the *Excise Tax Act* operates to "afford protection to domestic production".

35. The excise tax measure is designed to prevent the diversion of advertising to low-cost publications reproducing recycled editorial content, at the expense of publications created for Canadians. It does not guarantee the survival of Canadian magazines that the public does not want. It does not stimulate or create an artificial demand. It ensures fair competition, a "level playing field", no more and no less.