

British Copyright Council response to the House of Lords UK-US trade negotiations inquiry

1. The British Copyright Council (BCC) is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues. We have 30 member organisations spanning the creative industries. Our members represent over 500,000 individual creators and those who manage their rights. We provide an authoritative voice on copyright and related rights across literary and dramatic, musical, and artistic works, performers, publishers and owners of sound recordings, films and audiovisual works. Therefore, we have only answered those questions regarding digital trade and intellectual property (IP) provisions.
2. We are pleased to see specific questions pertaining to the IP provisions. Whilst there may be more headline grabbing issues the importance of IP and copyright to the UK's economy must not be undervalued. Copyright is crucial to the creative industries, which contributed more to the economy in 2018 than the automotive, aerospace, life sciences and oil and gas industries combined.¹
3. Our priorities:
 - i. The UK should NOT under any circumstances adopt the 'fair use' approach to limitations and exceptions.
 - ii. The UK should use the negotiations as an opportunity to encourage the US to review its approach to the Artist's Resale Right, website blocking and Public Lending Right.
 - iii. The UK should reject proposals which prescribe "safe harbour" provisions for online platforms by reference to the US Section 230 Communications and Decency Act or the specific provisions of the US's Digital Millennium Copyright Act (DMCA).
 - iv. The BCC supports establishing a UK-US intellectual property working group. It should ensure that the voices of creators are represented and a key focus should be the increasingly important role of intermediaries in the digital marketplace.

Q12. How do the two countries' copyright and IP rules compare? What provisions on copyright and IP should the UK seek to agree with the US to support the UK's creative industries in particular? How high a priority should other areas be, such as securing an Artist's Resale Right provision?

4. The most significant, and therefore the most important difference is the UK and US's approach to the Berne three-step test clause that is included in several international treaties for intellectual property. The UK's interpretation of this clause is a fundamental strength of our framework, namely the principle of 'fair dealing'. The list of fair dealing exceptions is set out in UK law and this provides a substantive framework for establishing whether use of copyright material is lawful or not. The UK's legislation already has exceptions for a range of circumstances including teaching, research and private study, quotation, critique and review, parody, caricature or pastiche, text and data mining and reporting of current news events.
5. The US has adopted a more general approach to exceptions - 'fair use'. Our view is that as fair use is more subjective than fair dealing, claims of copyright infringement in the US are open to interpretation more so than in the UK. This makes decisions about whether someone's copyrights have been infringed, or not, more complex². This complexity means

¹ Government press release, *UK's Creative Industries contributes almost £13 million to the UK economy every hour* <https://www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour>

² §107 · Limitations on exclusive rights: Fair use⁴¹

that claims are more likely to be considered on a case-by-case basis and through litigation. This is problematic because the cost of litigation reduces access to justice for individual right holders, many of whom are sole traders and SMEs. As fair dealing is more specific, litigation is more likely to be avoidable. Whilst it has been sometime since the Hargreaves Review the BCC conducted an analysis of the number of cases linked to fair dealing in the UK and the number of fair dealing cases in the US to inform this Review. The analysis found the number of cases in the US to be more than fourfold those in the UK (please note this is based on estimates using readily available data, so should be taken as an approximation / illustration).

6. The US Senate is already showing concern about the US approach - the US Senate Judiciary Committee's Intellectual Property Subcommittee is reviewing the DMCA. It recently asked creatives, academics and internet service providers 'How does the DMCA contemplate limitations and exceptions, like fair use, and how should a reform bill consider it?'. During the proceedings, Subcommittee Member, Senator Chris Coons, stated that fair use is "a contentious and challenging subject" because there needs to be a balance between safeguarding free speech and ensuring creators are fairly compensated, and importantly as part of this, be able to combat online piracy when their rights are infringed. If right holders are less able to pursue online infringement of their rights, then there is less of a deterrent. This not only means creators are less able to earn an income from their existing works, but it also reduces market demand for original works.
7. Adopting a similar 'fair use' doctrine to the US would inject uncertainty into UK legislation. This would undermine a key objective of the copyright system i.e. to provide clarity, as well as reducing incentives for licensing and thereby reducing investment confidence in the UK cultural and creative sectors. Ultimately, this means the UK would likely see a sizeable increase in (costly) litigation around copyright infringement claims, potentially leading to a 'chilling effect' on the commercialisation of creative content. **The BCC urges the Committee to recommend that the UK maintains its current approach to 'fair dealing' applying for limitations and exceptions to copyright and its accompanying licensing regime i.e. for educational use.** The UK's regime is world-leading because it balances the rights of creators alongside society's access to information and content.
8. There are also a number of 'sector-specific' concerns amongst our members:
 - i. Artist's Resale Right (ARR): In the UK, artists benefit from legislation that provides artists with a royalty when their copyright protected works resell through art market professionals, like galleries, auction houses and dealers. There is no ARR or equivalent law in the USA. This means that when British artists' works are bought in US auctions these sales do not result in a payment for the artist and no royalties flow back into the UK economy. ARR exists in 80 countries worldwide, therefore the absence of a US version not only affects American artists but artists of many nationalities whose works are sold on the US art market – which is the largest in the world. Again, this is an area where there have been successive attempts to update US legislation that would bring it in line with

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

globally recognised standards. **Therefore, we ask the Committee to strongly recommend that not only does the UK maintain the ARR, but pushes for the US to adopt legislation to recognise the ARR.**³

- ii. Website-blocking: In order to maintain a healthy and fair digital marketplace, rightholders and governments have an interest in protecting legitimate, licensed market players from unfair competition from unlicensed services (piracy). Injunctive relief in the form of orders for website blocking is essential to protecting legitimate market players as it allows rightholders to apply to the courts for an order that means intermediaries, such as Internet Service Providers, must disable access to websites that make infringing content available and the website must remain blocked. This has become a hugely valuable tool for rightholders and **we would like to see the UK Government use the trade negotiations as an opportunity to encourage the US to adopt this practice.** Website blocking orders are routinely issued in the UK in accordance with Section 97A of the Copyright, Designs and Patents Act (CPDA) 1988 and this approach has already been tested in thirty countries.
- iii. Public Lending Right: This right makes a small payment to authors of books, including photographers and illustrators, whenever their work is borrowed from a library - to compensate for the reduced sales expected. The recent extension of Public Lending Right in the UK to cover lending of e-books is extremely welcome. This will be vital to book authors retaining the possibility of professional independence in the digital age - though, to be truly effective in these times it needs to be applied worldwide. **The negotiations offer an opportunity to promote this right on a global stage.**
- iv. Exhaustion: The principle of exhaustion dictates that once a product is legitimately put on a market by the rightholder (or with their consent), such a product can circulate freely within that market without the need for any authorisation from the rightholder. Thus, the exclusive right of the rightholder to authorise the distribution of that product in that market is considered to be "exhausted". In a complex interplay between IP rights and free trade principles, the legal consequence of the exhaustion is essentially an exemption to infringement. It is therefore a crucial issue for rightholders, as well as for anyone dealing with the import/export of IP products. Whilst the basic concept of exhaustion is recognised in most jurisdictions, its application differs considerably. Notably, there are national, regional, and international forms of exhaustion. **The UK should resist any prescriptive provisions applicable to exhaustion being included in the wording of any Trade Agreement with the US. Instead the implications for different sectors and the economic impact of international exhaustion rules must be carefully examined and assessed before any "one size fits all" approach is imposed for the UK.**

Q13. Witnesses have also raised concerns about the US' "safe harbour" rules that protect platforms like Google and Facebook from liability for content posted by others. What is your view of those protections and their consequences for copyright rights holders? What provisions should the Government be seeking to support copyright holders enforcing their rights?

9. The BCC agrees with those who have raised concerns about the currency of US 'safe harbour' rules. Although it is not mentioned in the question, like Google and Facebook, we are also particularly concerned about YouTube. Digital technologies and the digital marketplace have changed dramatically since the US's Digital Millennium Copyright Act

³ <https://www.legislation.gov.uk/ukxi/2006/346/contents/made>

(DCMA) was devised in the late 1990's. The US Copyright Office has concluded itself that the operation of the section 512 'safe harbor' system today is unbalanced. A report it published earlier this year highlights areas where current implementation of section 512 is out of sync with Congress' original intent, including repeat infringer policies, specificity within takedown notices, and injunctions.⁴ The Office did not recommend wholesale changes to section 512, but did identify areas for fine-tuning to better balance the rights and responsibilities of online service providers and rightsholders in the creative industries. It would therefore seem counter-productive for the trade agreement to include provisions on safe harbours, given the US's work to review and fine-tune its system is ongoing - though there is precedent for doing so, the recently negotiated US-Mexico-Canada Agreement, or USMCA.⁵ Our view is that at this time efforts to harmonise this aspect of the UK and US's respective frameworks could impair any domestic legislative efforts to review and clarify the nature and scope of copyright safe harbours in each country. This is as true in the UK as the US, given the UK's consideration of introducing greater obligations on digital platforms within the context of discussions around online harms.

Q14. The Court of Justice of the European Union has recently issued its judgment in the Schrems II case, invalidating the EU's adequacy decision for the US' Privacy Shield, which had facilitated transatlantic data transfers. How might that judgment affect the possible provisions that the UK and US can agree? How might it affect the UK's parallel discussions with the EU?

10. The Schrems II Decision has highlighted for BCC members the importance of the UK and US reaching agreement over the data adequacy status of UK data protection laws as we approach 31 December 2020. The processing of data across borders is intricately linked to digital services and the reporting and collection of revenues for copyright uses around the world. Barriers to transfers of data within agreed standards remain a vital practical stand of business.

Q15. Would you support establishing a UK-US intellectual property working group? Who should be represented on that group, and what should its key focuses be?

11. Yes, the BCC would support such a working group. As the authoritative voice on copyright in the UK, the BCC would hope for a seat at the table; however, the priority is that the voices of all links in the creative value chain are given equal representation and voice. Individually creators versus platforms provides a modern day story of David and Goliath – we would strongly support government intervention to support the needs of creators – without them the UK stands to lose its rich cultural heritage and the soft power gained from its reputation as a hub for innovation and creativity. It is not clear from the question whether this working group would continue to operate after the agreement, but we believe it should. The USMCA established a joint committee on IP regulations; if the UK-US agreement includes a similar provision this working group could then inform future IP discussions by the Committee.
12. The development of digital and communication technologies mean that we are global citizens and consumers. Working across borders to create effective marketplaces and economies across the globe would stand to benefit all concerned. Given this a key focus should be digital marketplaces. This is growing in importance, growing even more rapidly since the Coronavirus Pandemic, making the role of intermediaries even more important. Striking a

⁴ US Copyright Office report, s.512 of Title 17, May 2020: <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>

⁵ US-Canada-Mexico free trade agreement, Chapter 20:58: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-IntellectualProperty-Rights.pdf>

balance of responsibility for the effective regulation and functioning of these markets needs to be addressed as a matter of urgency.

13. A 2019 report by the UK's Intellectual Property Office (IPO) and Intellectual Property Crime Group identified that "Intellectual Property Crime is a feature of organised crime and highly profitable, accounting for £4 billion in lost tax revenue and 60,000 UK jobs."⁶ A vital part of tackling organised crime is addressing the role which online platforms such as Google, YouTube and social media channels play in facilitating copyright infringement. Currently, the onus is on individual creators to identify when their rights have been infringed. This has created an imbalance of power which can be addressed with advances in technology supporting a shift in responsibilities for platforms to more actively prevent illegal content being uploaded and shared on their sites. Our view is that these platforms are best placed within the digital ecology to deal with illegal material efficiently, thereby preventing economic harm and creating a level playing field in the digital marketplace for legal content. When entering a recession, the need to support legitimate markets and boost tax revenue is of paramount importance.

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⁶ IPO & IP Crime Group (2019) *IP Crime and Enforcement*
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