

Trade with Canada and Mexico: Call for input

1. The British Copyright Council (BCC) is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues within the creative industries. We have 30 member organisations that span the creative industries from creators of literature, music, tv and film, photography, illustrations and other visual art - to publishers and producers. Our members represent over 500,000 individual creators and those who manage their rights.
2. The UK's creative industries contributed £115.9billion to the economy in 2019, according to the Department of Digital, Culture, Media & Sport.¹ This is a 43.6% increase since 2010 and means the sector makes up just under 6% of the economy - more than the automotive, aerospace, life sciences and oil and gas industries combined. Intellectual Property (IP) is in the top five UK service exports, valued at £17.5bn in 2020, 6.5% of UK exports, therefore the IP Chapters in any trade agreements will be of paramount importance to the UK's future as an exporter, but also its reputation as a hub for innovation and culture that draws many people to the UK to do business.²
3. The UK's negotiations with Canada and Mexico must be conducted with a full understanding of the recent US-Mexico-Canada Agreement (USMCA) and the UK's ascension to the Comprehensive and Progressive Transpacific Partnership. Any agreements the UK reaches with either Canada or Mexico could have implications for its negotiations with other countries.

CANADA

Which areas of the current UK-Canada trading relationship do you think the UK government should aim to keep the same and why?

4. Both the UK and Canada's interpretation of the Berne three-step test clause, that is included in several international treaties for intellectual property is, to adopt a fair dealing approach to limitations and exceptions. However, Canada's approach to exceptions and its interpretation of fair dealing raises real concerns about the scope accorded for the use of exceptions and limitations in fields such as education and academic research. Canada's approach is unbalanced in favour of users against rightsholders, and therefore we urge the UK Government to redress this imbalance which undermines of the interests of rightsholders.
5. The UK—Canada approach to resistance of US style safe harbour provisions should be maintained to ensure a flexible approach to new initiatives to address Platform liabilities. It is helpful that Canada did not concede in the USMCA negotiations on the issue of safe harbours to the extent currently provided under US law and the language was tightened to limit when Internet Service Providers (ISPs) can benefit from safe harbours in Article 20.88. However, it remains to be seen whether the Canadian's view about the flexibility, which they believe is built into the final wording, can and/or will be retained when Canadian law is updated to reflect all the USMCA provisions. It requires ISPs to adopt and reasonably implement certain policies and standard technical measures including a "notice-and-takedown" system and ISPs cannot receive a direct financial benefit from infringing activities.

¹ <https://www.gov.uk/government/statistics/dcms-economic-estimates-2019-gross-value-added/dcms-economic-estimates-2019-provisional-gross-value-added>

² Department for International Trade (2021) *Trade and Investment Core Statistics Book, April 2021* [Core Statistics Book for trade, investment and the economy \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/94444/core-statistics-book-for-trade-investment-and-the-economy)

Which areas of the current trading relationship between the UK and Canada do you think the UK government should consider changing or improving during future trade negotiations with Canada and why?

6. Whilst both the UK and Canada operate a 'fair dealing' approach in the application of copyright exceptions, in 2012, Canada broadened the exceptions for situations within the education sector under which copyrighted materials can be used without paying rights holders. According to figures provided by Access Copyright, which administered collective licensing agreement, the drop-off in licensing renewals in 2013 resulted in a C\$4.9 million decline in Access Copyright's payments to publishers and creators. It lost a further C\$13.5 million in 2013 because provincial education ministries also stopped paying licensing fees for the K–12 sector in public schools. Those losses had a direct impact on the livelihoods of creators and the operations of publishers. Oxford University Press Canada closed the K–12 division of its Canadian publishing program, stating that changes to copyright law and resulting loss of revenue were significant factors in the decision.³
7. This loss in income has persisted. Royalties collected by Access Copyright from the education sector have declined by 86% since 2012, resulting in an approximate 75% decrease in royalties distributed to creators and publishers. This is exacerbated by the education sector owing over \$150 million in arrears under tariffs certified by the Copyright Board. This impacts rightsholders. In October 2018, the Writers' Union of Canada income survey outlined the average income writers' make from writing was \$9,380 in 2017 – a 78% decline from 1998. Jobs in the book industry declined by 31% between 2012-2019. This represents a loss of over 4400 jobs. This must be avoided in the UK.
8. To ensure this does not happen specific reference to the Berne three-step test in the FTA should be retained. However, wider discussions should encourage Canada to re-adopt a more balanced regime towards educational exceptions, recognising areas that fall on the boundaries of the three-step test, and promoting licensing solutions that are well established in the UK under provisions such as s35 and s36 CDPA.
9. In 2019, both the Standing Committee on Canadian Heritage and the Standing Committee on Industry Science and Technology recognised the issue and recommended action. To date, the Canadian Government has not progressed these recommendations.
 - *Shifting Paradigms Report* by the Standing Committee on Canadian Heritage: <https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf>. Recommendations 18-21 specifically address the issues faced by publishers and creators in the education sector.
 - Report by The Standing Committee on Industry, Science and Technology: <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> (recommendations 16 & 17) specifically address the issues face by publishers and creators in the education sector.
10. The UK Government must ensure that these recommendations are acted on by the Canadian Government to ensure a strong framework for licensing in education. A straightforward change to the Copyright Act in Canada will ensure that rightsholders, including UK rightsholders, are fairly remunerated for the use of their work by Canadian educational institutions. Specifically, the Canadian government could adopt the UK's s.36 exception with a licence override (s.36(6)) for educational use. This would ensure that authors and publishers are fairly rewarded when their works are copied in the classroom. This accords with the recommendations of the Heritage Report.

³ <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/63630-copyright-changes-hit-canadian-publishers-hard.html>

11. Beyond this, a new comprehensive trade agreement provides the UK with an opportunity to go beyond the current provisions on intellectual property within the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). While CETA refers to the TRIPS obligations between the parties, given its importance to international trade in and protection for copyright works, we suggest that the IP chapter of the new UK-Canada FTA should specifically refer to the principle of National Treatment.
12. A further issue of particular importance, beyond the current terms of CETA, concerns the role of online intermediaries. The Canadian government is currently consulting on the modernisation of its copyright framework, which could lead to changes to its approach to the liability of online intermediaries. Notably, this call for input recognises the shortcomings of the Canadian approach compared to the approach in other countries, such as the UK. This modernisation reflects an international movement to address the role of online intermediaries, such as the 2019 review of Section 512 by the US Copyright Office and the 2019 EU Directive on Copyright in the Digital Single Market (in particular Article 17). This is an opportunity for UK policymakers to set the standards online intermediaries. The Canadian approach is deficient. Specific deficiencies include:
 - a. Notice and notice: Canada operate a 'notice and notice' system which is ineffective. The UK operates a 'notice and takedown' system, which also has limits, but means that online intermediaries must take down infringing material once notified.
 - b. Knowledge requirement: Safe harbours limit the liability of online intermediaries. In Canada intermediaries benefit from safe harbour protections, even for unlicensed content, because the bar of proof for presumed knowledge of copyright infringement is set inappropriately high - "know of a decision of a court of competent jurisdiction."
13. The UK Government must not accept these lower standards. Our view is that the best approach would be for the UK-Canada FTA not to contain detailed provisions on legal remedies and safe harbours. Individual countries should be free to decide which approach benefits their individual requirements and the UK should remain free to set further rules on the liability of online intermediaries (for instance in the context of the discussions on the Online Safety Bill). Therefore, we recommend that there is only a high-level reference to the responsibility of online intermediaries in the IP Chapters of this Agreement.
14. Whilst this call for input is not about the CPTPP it is important that the UK government remains mindful that this partnership suspended Section J (Article 18.82), which contains rules on legal remedies and safe harbours as these rules are constantly changing. It is paramount that this remains suspended given the UK's ascension to the CPTPP.
15. There are several other areas where the UK and Canada's IP regime differ in a manner which disadvantages the UK's creative sector.
 - a. Term of protection: Following the signing of the USMCA, the term of protection for authors in Canada needs to reflect the international standard of 70+ years after the death of the author. We welcome Canada's commitment to extend the term of protection from 50 years under the USMCA. The provisions in this FTA must not undermine the necessity for Canada to extend the term of protection for authors.
 - b. Beijing Treaty: The UK government has just conducted a call for views on the UK's ratification of the Beijing Treaty. Therefore, we recommend that this international

treaty is given express reference in the IP Chapters of the UK-Canada trade agreement.

- c. Website blocking orders: Website blocking is an effective way for internet access service providers to lawfully prevent their customers from accessing copyright infringing services. In the UK, website blocking orders fall within Section 97A of the CPDA 1988. This means that they can be routinely issued, lowering the prevalence of piracy. The Canadian Copyright Act does not expressly authorise Canadian courts to grant injunctive website blocking orders. However, Canadian courts have recently acknowledged that there is a legal basis for website blocking orders.⁴ Therefore, express permission for website blocking should be included in the FTA text.
- d. Collective management organisations (CMOs): This a crucial element of the value chain for music, publishing, audiovisual and other key sectors of the creative industries. CMOs have a considerable responsibility to authors, performers, publishers and producers in managing rights and collecting and distributing revenues. It is, therefore, of utmost importance that CMOs operate under the core principles of transparency, accountability, and good governance. The UK-Canada FTA should include express reference that CMOs should adhere to these core principles.

Our members in the music industry have also highlighted the following:

- e. Limitation of broadcast royalties: The Canadian Copyright Act provides a radio royalty exemption in Section 68.1 (1)(a); this means except for a nominal fee of Canadian \$100 “radio stations [are] exempted from paying royalties on their first \$1.25 million in advertising revenue”. This exception was introduced in the 1990’s on a temporary basis to help the then struggling commercial broadcasting sector. The conditions have changed drastically since the 1990’s making this exception unjustifiable. It benefits often large broadcasting organisations at the expense of record companies and individual artists – including UK artists. This exception also infringes the Berne three-step test clause. The UK government should push to remove this exception.
- f. The copyright regime in Canada (Section 69(2) of the Canadian Copyright Act) includes an exemption for venues using the radio for public performance purposes. Many public performance venues use the radio to improve their customer or staff experience, they derive a commercial benefit from the use of music and do not currently have to pay for the benefit that music provides. This exemption does not exist for other rightsholders in Canada, such as the controllers of authors rights, and should be repealed. The UK government should push for a commitment regarding the repeal of this exemption in the text of the free trade agreement.
- g. Definition of sound recordings: Section 2 of the Canadian Copyright Act defines sound recordings as excluding “any soundtrack of a cinematographic work where it accompanies the cinematographic work.” According to evidence provided to the Canadian Industry, Science and Heritage Committee in 2019 this limited definition of sound recordings causes \$45 million in losses for artists every year. Therefore, this definition must be amended to ensure that sound recordings used in television and film are eligible for public performance remuneration.

⁴ Teksavvy Solutions Inc. v. Bell Media Inc.

MEXICO

Which areas of the current trading relationship between the UK and Mexico do you think the UK government should consider changing or improving during future trade negotiations with Mexico and why?

16. The UK should not under any circumstances adopt the 'fair use' approach operating in Mexico to limitations and exceptions. The advantages of the UK's 'fair dealing approach' should be promoted, and the internationally recognised three-step-test governing exceptions & limitations should be protected in FTAs and by WIPO. Any requirement to adopt the fair use doctrine, instead of maintaining the UK's principle of fair dealing, would not be in the public interest and would ultimately have a negative economic impact.
17. The UK's interpretation of this clause is a fundamental strength of our framework. 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.
18. Mexico has adopted a more general approach to exceptions - 'fair use'. Fair use is more subjective than fair dealing, therefore claims of copyright infringement in Mexico are open to interpretation more so than in the UK. This makes decisions about whether someone's copyrights have been infringed, or not, more complex.⁵ This complexity means 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 rightsholders, many of whom operate as sole traders and SMEs.
19. Adopting a similar 'fair use' doctrine to Mexico 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 UK's regime is world-leading because it balances the rights of creators alongside society's access to information and content.
20. Collective management of rights is a crucial element of the creative industries value chain and it is of utmost importance that collective management organisations operate under the principles of transparency, accountability, and good governance. We note that the continuity agreement, which has been in force since 1 June 2021, contains an article on Cooperation on

⁵ §107 · Limitations on exclusive rights: Fair use⁴¹

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.

Collective Management of Rights. We welcome reference to the promotion of “*transparency and non-discrimination among entitled members of collective management organisations, in particular as regards the rights revenue they collect, deductions they apply to such revenue, the use of the rights revenue collected, the distribution policy and their repertoire.*” It is also important for collective management organisations to have robust enforcement powers, together with operating a fair independent market valuation of rights, to ensure that users pay appropriately for using these rights.

Are there any obstacles other than tariffs that the businesses you represent experience when trading with Mexico that the UK government could address in future negotiations? If so, please describe these obstacles.

21. Piracy is rife and increasing in Mexico. The reality is that they do not have enough resources to effectively enforce IP rights and the penalties are too low to act as a meaningful deterrent. It is important that the wording of enforcement provisions within the IP Chapter of any new FTA must support the raising of standards and engagement with systems for international co-operation of criminal enforcement proceedings.

For further information about this response please contact Rebecca Deegan, Director of Policy & Public Affairs (director@britishcopyright.org).