

Response to: Call for input on a free trade agreement between the UK and Japan

Date: 4 November 2019

Introduction

The British Copyright Council (BCC) supports a free trade agreement between the United Kingdom and Japan which, for copyright, takes the currently applicable provisions of the Economic Partnership Agreement (EPA) between the European Union and Japan as its starting point¹. The BCC has previously made a comprehensive submission on trade priorities concerning copyright in the context of the 2018 consultations conducted by the Department for International Trade²; all general observations made in those submissions remain applicable here. With regard to arrangements specifically with Japan, we call for the UK to conclude a trade deal that builds on the objectives of the EU agreement, recognising this opportunity to take forward the wider strategic partnership between the UK and Japan, “underpinned by mutual interests, common values and a commitment to upholding the rules based international system”³. On this basis we are pleased to submit the recommendations set out below.

Background

The BCC represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights. Our members include professional associations, industry bodies and trade unions that together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs, as well as larger corporations within the creative and cultural industries. Our members (a full list of which can be found on our website [here](#)⁴) also include collecting societies that provide licensed access to works of creativity at national and international level.

The creative industries will be central to the UK’s post-Brexit future, as has been acknowledged in the papers accompanying the current consultations. While copyright and other intellectual property is governed at international level by important international agreements, these remain benchmarks for supporting development of good practice under bilateral and other trade agreements. The 1994 agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has been significant in setting core provisions for policy cooperation in free trade agreements and economic partnership agreements; but this is the starting point for protecting modern copyright industries, not the finishing line.

¹ https://europa.eu/rapid/press-release_IP-19-785_en.htm

² <https://www.britishcopyright.org/policy/policy-doc-response-to-department-for-international-trade-consultations-on-uk-future-trade-agreements-october-26-2018/>

³ UK-Japan [Joint Statement](#), 10 January 2019.

⁴ <https://www.britishcopyright.org/members/>

Economic context

The copyright-based sectors that we represent contribute significantly to the UK economy, with many, such as music, being net exporters of cultural goods. According to data from the Department for Digital, Culture, Media and Sport (DCMS), creative industries export more than £36bn a year in goods and services⁵. In 2016, our publishing and music sectors contributed £2.92bn and £4.4bn in export revenue respectively, while in the previous year TV, film, radio and photography accounted for £5.8bn in exports⁶.

The creative sector consists largely of individual creators and performers, as well as small and medium enterprises. They depend on copyright for their livelihoods and it is therefore paramount that any trade deal provides a strong basis for the rights in their creative output to be protected and enforced, recognising that their ability to create is fundamental to the success of this key UK economic sector.

International copyright treaties

We welcome reference in the EPA between the European Union and Japan to the international agreements on copyright⁷. This is a condition *sine qua non* for all trade agreements that the UK will conclude post-Brexit. The UK has ratified most international copyright treaties (leading to dual membership as an individual country and as a member of the European Union) and our future ratification of the Beijing Treaty will be important in this context. The basic tenets of copyright, such as minimum standards of protection and national treatment, are thus agreed and internationally binding. Their express acknowledgement in any free trade agreement is key.

The provisions of the Berne Convention 1886, the Rome Convention 1961, TRIPS 1994 and the WIPO Internet Treaties 1996 are fundamental as the bedrock for effective application of provisions within IP chapters of FTAs (c.f. subsection 1 of Chapter 14 of the EPA between the European Union and Japan, see Annex below). This should encourage trading partners to bring their copyright rules and application up to the UK standard and close any remaining gaps in protection. Weaknesses in copyright regimes, including carve-outs from substantive rights protection, overbroad exceptions or lack of enforcement, result in significant missed revenue opportunities.

We strongly endorse subsection 1 of Chapter 14 of the EPA between the European Union and Japan on copyright which recognises that to facilitate the production and commercialisation of innovative and creative products, the provision of services and to increase the benefits from trade and investment, there is a need to ensure adequate, effective and non-discriminatory protection of IP and provide for measures for the enforcement of rights against infringement, including counterfeiting and piracy.

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695097/creative-industries-sector-deal-print.pdf

⁶ Figures (2015) for creative sector from “DCMS Sectors Economic Estimates 2017: employment and trade”

⁷ Article 14

Collective management

The effective collective management of rights provides an invaluable service for creators and performers, as well as for those wishing to use copyright works. The wording found in Article 14.16 of the EPA between the EU and Japan (see Annex below), is generally supportive of collective management, if limited. At EU level, legislation is in place to ensure that Collective Management Organisations (CMOs) work for the benefit of creators and performers whose work they administer. A central feature of the [Collective Rights Management Directive](#)⁸, adopted in 2014 and implemented in the UK in 2016, is that it gives rights holders the freedom to choose how their rights are administered, while enshrining the basic principles of accountability, accuracy, transparency and good governance etc. We urge that such principles be referenced in all FTAs concluded by the UK, including with Japan.

Education

We welcome Article 14.7 of the EPA between the European Union and Japan on “*promoting public awareness concerning protection of intellectual property*” (see Annex below) as vital for increasing understanding and promoting respect for copyright and other forms of IP. The UK Intellectual Property Office undertakes a variety of initiatives aimed at informing UK business and consumers, which we hope can be used as best practice for other countries.

Protection and enforcement

The BCC is concerned that despite the baseline strength of the EU-Japan EPA, it does not secure the expected level of copyright protection and enforcement against acts of infringement taking place in Japan. Some individual BCC members will make their own detailed submissions on how a new FTA can address these problems. However, key among our requests is that a trade deal should be taken as an opportunity to ensure rights holders can enforce their rights in Japan through website-blocking actions; the ability to bring third-party actions against online intermediaries should be confirmed and not merely optional.

Further in the online space, we are concerned that the UK should defend rights holders against any import of the Japanese regime on safe harbours for internet service providers. The EU-Japan EPA does not include safe harbours but we note how this out-dated and damaging protection was included in the original CPTPP⁹, to which Japan was a signatory, provisions for which were suspended only when the US left the trade partnership. Any attempt to include such relief from liability in an FTA would cause great difficulty for the enforcement of rights online in Japan.

⁸<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026>

⁹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Public Performance Rights

The playing or performing of music in public is a significant form of exploitation and – where appropriately protected under copyright law – therefore an important revenue stream for music rightsholders worldwide, and one for which there are many examples around the world of effective collective licensing models. In a market the size of Japan, this is therefore a significant matter.

We note that, whilst Article 14.12 EPA states, *“The Parties agree to continue discussion on adequate protection for the use of phonograms for all communication to the public, giving due consideration to the importance of international standards regarding protection for the use of phonograms”*, there is no express commitment in the EPA to the introduction of Japanese public performance rights for performers and phonogram producers (in contrast to certain other rights covered by the EPA). We understand this is nevertheless under consideration and would encourage the UK to press for the introduction of these rights as part of any free trade discussions. This should cover not only musical works (as is the case now) but also phonograms, and with appropriate remuneration for the performers on those phonograms.

In this context, it is noted that Japan acceded to the Beijing Treaty on audio-visual performances on 10 June 2014. It is hoped that the declarations made on accession will enable the important development of systems for payment of equitable remuneration to audio-visual performers in the context of wider ratification of the Beijing Treaty in due course.

Artist’s Resale Right

We note that the EPA between the EU and Japan makes welcome reference to an agreement to continue discussing the Artist’s Resale Right (ARR)¹⁰. The BCC urges the inclusion of specific reference to the ARR in a future trade agreement with Japan.

Since 2006, when the UK implemented the EU Artist’s Resale Right directive, more than £80m has been distributed by UK collecting societies to British and overseas artists via collective management organisations. The right already exists in around 80 other countries, but notably not in Japan. Until the ARR is implemented more widely, artists will continue to be deprived of payments when their works sell in countries with no resale right.

In calling for Government to include the ARR, the BCC observes how FTAs elsewhere have been influential in establishing the resale right in other markets – for example, the EU-South Korea FTA contains a clause on resale rights and Seoul has since announced it will bring ARR into law in 2022. Similarly, Ukraine adopted ARR after the EU-Ukraine agreement.

Contact for further information on this submission:

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¹⁰ Articles 14.8-14.17, EPA

Annex: key provisions of the Economic Partnership Agreement between the European Union and Japan in addition to pure copyright

ARTICLE 14.3 - International agreements

1. The provisions of this Chapter shall complement the rights and obligations of the Parties under other international agreements in the field of intellectual property to which both Parties are party.

2. The Parties affirm their commitment to comply with the obligations set out in the international agreements relating to intellectual property to which both Parties are party at the date of entry into force of this Agreement, including the following:

(a) the TRIPS Agreement; ...

(c) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 (hereinafter referred to as "the Rome Convention");

(d) the Berne Convention for the Protection of Literary and Artistic Works, done at Berne on 9 September 1886 (hereinafter referred to as "the Berne Convention")¹;

(e) the WIPO Copyright Treaty, adopted at Geneva on 20 December 1996;

(f) the WIPO Performances and Phonograms Treaty, adopted at Geneva on 20 December 1996;

...

ARTICLE 14.7 - Promotion of public awareness concerning protection of intellectual property

Each Party shall take necessary measures to continue promoting public awareness of protection of intellectual property including educational and dissemination projects on the use of intellectual property as well as on the enforcement of intellectual property rights.

ARTICLE 14.16 - Collective Management

The Parties:

- recognise the importance of promoting cooperation between their respective collective management organisations;*
- agree to promote the transparency of collective management organisations; and*
- endeavor to facilitate non-discriminating treatment by collective management organisations of right-holders they represent either directly or via another collective management organisation.*