Submission to UK Government consultations on future free trade agreements with the US, Australia and New Zealand, and potential accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

26 October 2018

The British Copyright Council (BCC) welcomes the opportunity to present its position concerning chapters on intellectual property rights and cross-related issues in future trade arrangements with the United States, Australia, New Zealand, as well as prospective accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

This paper has been prepared in response to all four of the UK Government's 2018 trade consultations, noting that many key issues run across trade agreements. However, we would also draw attention to sections detailing concerns specific to each country and to the CPTPP.

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 also include collecting societies that represent right holders providing licensed access to works of creativity at national and international level.

The creative industries will be absolutely 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 Right (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.

Introduction

The copyright-based sectors 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 services 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 exports[1].

The creative sector consists largely of individual creators and performers, as well as small and medium enterprises. They entirely 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.

The BCC therefore submits the following recommendations to ensure this vital, export intensive sector is fully supported, protected and stimulated in all trade agreements following withdrawal from the European Union. In view of constantly changing political parameters and the associated uncertainty, we expect to add further considerations in due course.

[1] Figures (2015) for creative sector from "DCMS Sectors Economic Estimates 2017: employment and trade"

2 Pancras Square
London
N1C 4AG
+44(0)20 3290 1444
info@britishcopyright.org
britishcopyright.org

General observations

International copyright treaties. The UK has ratified most of the treaties in the framework of international copyright (leading to dual membership as an individual country and a member of the European Union), as have the United States[2], Australia, New Zealand and all the CPTPP countries. The basic tenets of copyright, such as minimum standards of protection and national treatment, are thus agreed and internationally binding. Nevertheless, many of our trading partners – including the US, Australia, NZ, and some CPTPP members – maintain opt-outs and/or overbroad exceptions to the basic copyright rights set out in the treaties. It is crucial that any free trade agreements expressly close these gaps in protection as well as recognise the international copyright treaties which the UK has already, or will expect to, ratify following exit from the EU. This includes UK ratification of the Marrakesh Treaty and addressing the Beijing Treaty to follow ratification of WPPT and others already forming a basis for current UK law.

The importance of provisions from the Berne Convention 1886, the Rome Convention 1961, TRIPS 1994 and the WIPO Internet Treaties 1996 providing a bedrock for effective application of provisions within IP chapters of future trade agreements is fundamental. 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.

As such, members of the British Copyright Council have concerns about the UK Government moving quickly to enter into the CPTPP because of damaging limitation within Chapter 18 on intellectual property and copyright in particular (see section CPTPP below, p7).

We now address topics that must be treated with particular importance in bilateral trade talks. Our position is based on the principle that the UK has a gold standard copyright framework, carefully developed over many years, and that it is essential these achievements be neither rolled back nor traded in FTAs — on the contrary, that IP is seen as central to trade deals and that the UK uses its negotiations to improve the effective recognition and enforcement of copyright at an international level.

Term of protection. It is essential that the 70-year term of protection on which UK creativity depends is retained, defended and promoted. This means going beyond the “minimum” levels established within TRIPS to promote a term of protection for copyright works, performances and recordings of not less than the life of the author, plus 70 years after death — or at least 70 years after publication in the case of sound recordings.

For term calculated on a basis other than the life of a natural person, provision should be made for a term of not less than 70 years from the end of the calendar year of the first authorised publication of the work (including phonograms) or of a performance. Failing publication within 25 years from the creation of a work or performance to which such provision is relevant, a term of not less than 70 years from the end of the calendar year of creation should be applied.

In 1886 it was suggested that following the death of the author, two generations of heirs should benefit from their creativity (balancing the interests of the creator and society); at the time, 50 years was seen as sufficient to cover two generations but, given significant increases in longevity, the term should be updated to 70 years.

[2] Noting the US has not signed the Rome Convention 1961 but has implemented the WPPT, with similar obligations

Similarly, a 70-year term for performers and producers should be advocated rather than the 50-year period from publication, which can result in some producers and performers losing economic rights in their recordings during their lifetime. The inequity of this situation has already been recognised by more than 60 countries (accounting for 91% of global music revenues) that have switched to a minimum term of protection of 70 years or longer for recorded music.

Collective Management Organisations. Future UK trade agreements should include provisions that export the UK's high standards of transparency, good governance and accountability of collective management organisations. Provisions in line with such best practice should be sought in any trade arrangements to ensure a high standard internationally for the benefit in particular of individual creators and performers who rely for their income on the efficient administration operated through the framework of collective management organisations. The proposals for collective management of rights in the draft EU/Mercosur agreement may be considered a good guide.[3]

The UK also provides a high level of freedom for right holders to choose the rights they might wish to mandate – or not – for collective management by a CMO. This freedom of choice, however, is not respected by many of the UK's trading partners, including several CPTPP members. Therefore, it is essential that the UK asserts and promotes the right holders' discretion to decide whether and on what terms to use the services of a CMO. Such obligations would provide a remedy to UK right holders in situations where a foreign government seeks to intervene in the right holders' licensing decisions or decisions relating to which rights should be collectively managed or by whom.

Technical Protection Measures. Much careful consideration has been applied to the development of TPM provisions within the Copyright, Designs and Patents Act 1988, which support future trade agreements in recognising the importance for rights holders of being able to use TPMs both to administer authorised uses and to protect against unauthorised use of copyright works and related rights.

Qualification to this important principle to address any exceptions or limitations that enable only legitimate use or permitted exceptions must avoid terminology or "clarifying notes" that render or support practical access beyond the scope of permitted exceptions. This is particularly important to preserve recognition of suitable provisions along the lines of those established in Article 6 of the EC Copyright Directive 2001 (EC 2001/29/EC).

These provisions permit the application of exception provisions alongside conditions for right holders to receive fair compensation in areas of non-commercial use, which also take account of the application or non-application of TPMs (as recognised in Article 5.2 of the EC Copyright Directive 2001.

Artist's Resale Right. In addition to the mandatory provisions of international copyright treaties, the BCC urges specific reference to the Artist's Resale Right (ARR) in future trade agreements.

Since 2006, when the UK implemented the EU Artist's Resale Right directive, more than £75m has been distributed by UK collecting societies to British and overseas artists via collective management organisations. The right already exists in around 80 other counties, but notably not in leading art

[3] See Article 4.9 of the EU proposal on intellectual property rights in the trade part of the EU-Mercosur Association Agreement: http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155070.pdf

markets such as the US[4], China and Switzerland, nor in key trading partner countries including Canada, Japan and New Zealand.

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. Furthermore, there is a booming online art market but sales of works online can lead to jurisdictional issues that also impact the receipt of ARR royalties.

Ensuring ARR is in force internationally, and especially in the US, would level the playing field to the benefit of UK artists — and those from other participating nations — as well as our wider economy. While delivering these gains, research commissioned by WIPO found the ARR neither causes harm to the art market nor diverts sales to countries in which the right does not apply[5].

In calling for Government to include the ARR in its new trade agreements, 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.

Copyright Education and Awareness. BCC members have first-hand experience of the value of copyright education and awareness for creators and performers as well as users. The BCC suggests this could be strengthened at international level by reference to the promotion of public awareness concerning protection of intellectual property in any trade agreement.

"Safe Harbours". With regard to limitations of liability for internet service providers ("safe harbours" to use the US terminology), we note with concern the approach recently adopted in the USMCA and would urge Government to resist such language as to safe harbours in trade agreements that it negotiates with the US, or with Canada or Mexico.

Our concerns reflect those expressed in the course of the USMCA negotiations by the Recording Industry Association of America (RIAA) and other groups representing virtually the entire United States music community, whose members' contributions are "jeopardized by the erosion of copyright perpetuated by those exploiting creators' work for their own profit," a sentiment we share on behalf of UK creators.

The RIAA expressed its deep concern at "the efforts of some to use the agreement to lock in flawed interpretations of pre-Internet 'safe harbors' perpetuating the theft of American music, creating safe havens preventing successful enforcement efforts within our trading partner nations, and severely harming our country's creators and their contributions to U.S. growth, jobs and surplus" and went on to urge that "a modernized NAFTA must provide clear and strong copyright protections, and not reward those seeking to profit unjustly from American creators, the lifeblood of our culture and economy."

However, as the RIAA and these other groups have observed: "Unfortunately, the agreement's proposed text does not advance adequate modern copyright protections for American creators. Instead, the proposal enshrines regulatory twenty-year-old 'safe harbor' provisions that do not comport with today's digital reality. These provisions enrich platforms that abuse outdated liability protections at

[4] As of September 2018, a bipartisan group of US senators has introduced a new bill, the American Royalties Too (ART) Act, seeking to amend copyright law to secure the rights of visual artists to copyright, to provide for resale royalties, and for other purposes".

[5] The Economic Implications of the Artist's Resale Right, WIPO SCCR/35/7: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=389676

the expense of American creators and the U.S. music community, which provides real jobs and is one of our nation's biggest cultural assets."

We urge the UK not to go down the same path, especially when it risks threatening the model now provided in the UK by the Digital Charter and the text as agreed by the European Parliament of Article 13 of the proposed European Union Directive on Copyright in the Digital Single Market, both of which go some way towards shifting the balance in favour of creators. We call on Government to support these measures in trade negotiations.

The BCC further notes the US DMCA[6] includes a safe harbour for search engines, thereby providing four dedicated safe harbours, compared with three in (current) UK/EU law. That would put at risk initiatives such as the Code of Practice with search engines.

No "fair use". The BCC believes that the unequivocal recognition of the Berne/TRIPS/WIPO Internet treaties Three-Step Test as the benchmark for recognition of any exceptions or limitations to copyright and related rights is vital for future application and development of copyright law.

The UK must avoid any express reference to the US approach to exceptions, which involves an open-ended list of exceptions and leaves the gaps to be filled through litigation, based on the fair use provisions in Section 107 US Copyright Act in Free Trade Agreements. The BCC submits that there is also no evidence that a fair use system provides greater benefits than a tailored system of fair dealing. Meanwhile, interpreting "fair use" is more complex, resulting in greater uncertainty and higher costs for all parties concerned. Consequently, fair use is detrimental to everyone in the creative value chain, from the original creator to the publisher or record company, to the platform provider and ultimately to the end user.

More than 170 years of case law on fair use in the US has failed to bring clarity on the scope of this exception. Recent examples include:

- Cambridge University Press, Oxford University Press and Sage Publications v Georgia State University, U.S Court of Appeals, 11th Cir., 19 Oct 2018
- Brammer v Violent Hues Productions U.S. District Court, ED Va, 11 June 2018
- Dr. Seuss Enterprises v. ComicMix U.S. District Court, SD Cal., 9 June 2017
- Disney Enterprises v VidAngel U.S. Court of Appeals, 9th Cir., 8 June 2017
- Paramount Pictures v. Axanar Productions U.S. District Court, C.D. Cal., 3 Jan 2017
- Penguin Random House v. Colting U.S. District Court, SDNY, 7 Sept 2017
- Graham v Prince U.S. District Court, SDNY, 18 July 2017
- TCA Television v. McCollum U.S. Court of Appeals, 2d Cir., 11 Oct 2016
- VMG Salsoul, LLC v. Ciccone U.S. Court of Appeals, 9th Cir., 2 June 2016

We are concerned that Australia, as a net importer of creative goods, is also considering introducing a US-style fair use exception[7].

[6] Digital Millennium Copyright Act

[7] See: http://www.britishcopyright.org/policy/documents/2018/australian-copyright-modernisation-consultation/

Exhaustion of Rights. It will remain important that nothing in future bilateral trade agreements be allowed to prevent a party from determining whether and under what conditions the exhaustion of intellectual property rights applies under its legal system.

The BCC is particularly concerned to preserve national exhaustion rules as the base for copyright protection as the UK looks to establish new bilateral trade agreements outside the EU.

The current EU regional exhaustion rules, limited in application to the restricted right of “distribution” within the EU, must not become confused or applied to any right of communication to the public or making available in the context of any future bilateral trade agreements (particularly in view of the US approach to defining communication to the public rules).

Enforcement of rights

Recognition of rights must be supported by effective provisions for enforcement. This means future trade agreements must recognise comprehensive obligations regarding copyright enforcement under both criminal penalties and civil remedies (including the availability of no-fault, third-party injunctions against online intermediaries whose services are being used by the infringer, liability for aiding and abetting, criminal remedies for illegal camcording, and remedies addressing online piracy and signal theft).

Such measures must address online infringement in ways that mandate deterrent civil and criminal remedies and provide incentives for online service providers to cooperate with right holders and ensure staydown of notified pirated content.

In this respect, the possibility for civil injunctive relief corresponding to the provisions of Sec. 97A of the Copyright, Designs and Patents Act 1988, in order to address the serious trade disruptions arising from illegal marketplaces hosted in third countries that target UK and US consumers, is a recent development that should be advocated as an example of good practice.

We are particularly concerned that there should be streamlined and inexpensive enforcement options for low-value infringements. We commend the UK’s own Intellectual Property Enterprise Court and the Small Claims Track within it and note with concern that neither the US, Australia nor New Zealand has such systems.

BCC members representing the artistic sector highlight specific problems concerning enforcement in practice, with infringing websites using images without permission[8]. When billions of images are uploaded to the web every day, this is particularly difficult for a sector in which a high percentage of businesses are sole traders and SMEs. Any trade agreement should ensure that regulations are enforced that support the image industry’s global commercial licensing abilities.

Movement of creators and performers. In addition to the legal framework, the BCC urges recognition of the importance of removing barriers of any type (tariff or non-tariff) inhibiting the mutual exchange of culture and creativity internationally (eg movement of creators and performers in exercising their creativity; creativity is borderless). We note that under existing WTO rules there are no tariffs for import and export of physical copies or cross-border licensing of copyright. This needs to be guaranteed.

[8] A survey conducted by BAPLA in 2015 found 94% of members had experienced copyright infringement online, while a 2018 survey showed 81% of members now use paid-for services to pursue infringements online. One such service found that of the 55 million images it identified, only 1 in 6 images from photo agency websites was an authorised use.

Country-specific concerns

United States
In 2000, following a complaint brought by the EU, the WTO found the United States was infringing the TRIPS agreement by granting an exception that allows small businesses (such as bars and shops) to play music from radio and TV broadcasts without paying the composers (producers and performers do not have the right to be paid at all)[9]. The US is still not complying with the ruling of the WTO panel to bring its law into line with TRIPS and to our knowledge has not paid European composers and publishers for the non-compliance since 2004. More generally, recording artists and producers are not being paid when their music is played by any public performance venues, so irrespective of the WTO ruling in the composers' case, there is also the gap in protection of two groups of music right holders.

It is worth pointing out that the United States is in an ambivalent position regarding international IP treaties and is not a signatory to the Rome Convention. Equally, under US federal copyright law there is very limited protection of moral rights other than for visual artists in VARA[10]. Free trade negotiations provide an opportunity to remind the US to introduce adequate protection for moral rights to comply with obligations under the international treaties.

With regard to non-tariff barriers, our members wish to see the streamlining of the withholding tax procedure which is complex and onerous, particularly for individual creators.

Australia
As mentioned in the fair use section above, the BCC is very concerned about proposed changes to the system of exceptions under Australian copyright law as suggested in the 2018 consultation by the Department of Communications and the Arts. Moreover, Australia maintains a 1% cap on the fees payable in respect of broadcasting of recorded music and lacks the full scope of protection for indirect uses of recordings (compared to the UK or Art.15(1) WPPT)

New Zealand
Term of copyright protection in New Zealand is 50 years; for the reasons already given above, the UK can ensure negotiations are used to seek an extension to 70 years, improvement to the TPMs, introduction or confirmation of availability of no-fault, third-party injunctions and the recognition of protection for indirect uses of recorded music in public performance.

There is a concern common to all three countries in respect of the Public Lending Right. The US does not have a PLR scheme, and the UK currently has no reciprocal PLR arrangements with New Zealand or Australia — this means UK authors do not receive payment when their work is borrowed from libraries in these countries. Given that new trade deals could increase the number of books exported to these countries, it is important that PLR arrangements are considered in any new trade deals.

CPTPP
We note with concern the suspension of certain copyright provisions previously found in Chapter 18 of the original TPP, including those relating to term of protection, technical protection measures, rights management information and certain aspects of national treatment. The suspension approach is not helpful and fails to recognise the economic importance of intellectual property for the creative

---

[9] Exception S 110 (5b) US Copyright Act was held to infringe the Three-Step Test, Article 13 TRIPS: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm
[10] The Visual Artists Rights Act of 1990

industries and all aspects of business where intellectual property underpins manufacture, licensing and use of goods and services.

Since the agreement is already in place, the UK would need to ask to renegotiate these and other provisions, or to introduce any other articles that would benefit UK creativity, for example as already described on ARR or for the promotion of public awareness concerning intellectual property. Equally, the UK could be disadvantaged if the US were to re-join the CPTPP — mooted as a possibility — and the damaging provisions on safe harbours for internet service providers (18.82), which are currently suspended, were to be restored.

We emphasised on page 2 the importance of driving the highest standards through international treaties and therefore have concerns about provisions within the CPTPP that allow other parties to take advantage of exceptions to the fullest extent permitted under existing treaties, rather than recognising the opportunity to strengthen protections in line with UK/EUs levels. By way of example:

Article 18.8 (2) – National Treatment provides

> 2. With respect to secondary uses of phonograms by means of analog communications and free over-the-air broadcasting, however, a Party may limit the rights of the performers and producers of another Party to the rights its persons are accorded within the jurisdiction of that other Party.

Article 18.66 – Balance in Copyright and Related Rights Systems provides

> Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled. [78] [79]
>
> 78 As recognised by the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, done at Marrakesh, June 27, 2013 (Marrakesh Treaty). The Parties recognise that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.
>
> 79 For greater certainty, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article 18.65 (Limitations and Exceptions).

Such provisions could inhibit the ability of the UK to be in the driving seat for the promotion of effective application of copyright rules in the digital world within the negotiation of bilateral trade agreements (including key trading partners such as Australia and Japan).

At country level, in addition to our comments on CPTPP signatories Australia and New Zealand we also have concerns about Canada. The Canadian Copyright Act was changed considerably in 2012, introducing exceptions for user-generated content and educational institutions, among others, which have had a directly deleterious impact on the creative industry — including on UK companies such as publishers. Meanwhile, with regard to term of protection, the UK should be supporting efforts to extend the term of copyright protection in Canada from 50 to 70 years (noting such a length of term is contained in the final negotiated text of the USMCA). A bilateral FTA with Canada would be an opportunity to address these issues. However, if the UK signs up to the CPTPP, the lower standards of protection may be enshrined in our trading relationship.

The UK Government must therefore avoid moving quickly to adopt the provisions of CPTPP, particularly where difficult IP issues have been side-stepped and suspended and would require careful renegotiation with the partnership and attention in future bilateral agreements.

Summary

In any new trade agreements, and in transitioning existing FTAs between the EU and other countries, the following should be included/retained:

- Express reference to international agreements outlining the scope of the protection granted (Berne Convention, TRIPS agreement, WIPO Internet treaties)
- Express reference to the Berne Three-Step Test
- Recognition of technological protection measures as well as rights management information
- Term of protection to be a minimum of 70 years (after the death of the author or following the publication for “related” rights) or linked 70-year provisions
- Obligation to make available injunctive relief against third-party intermediaries, including online intermediaries – modelled after s.97A of the CPDA 1988
- Closing gaps in substantive protection of recorded music (full broadcast and public performance rights)
- Artist’s Resale Right mandatory
- Promotion of public awareness concerning protection of IP in any trade agreement
- Provisions for cooperation between CMOs based on good governance, transparency and accountability, and clear principles that lead to separate development and application of model clauses on the relationship between right holders and CMOs
- No binding agreement on limitations of liability of internet service providers, especially in view of differences between secondary liability for copyright infringement in the UK and the US
- No express limitations on rules of exhaustion
- Express recognition of, and solution to, non-tariff barriers for cross border movement of creators and performers

For further information, please contact:
Elisabeth Ribbans, Director of Policy & Public Affairs, British Copyright Council

elisabeth@britishcopyright.org
Tel: (0)20 3290 1444
Mob: 07791 677827