

**Subject: Trade considerations concerning UK withdrawal from the EU**

**To: UK Department for International Trade**

**Date: June 2018**

The British Copyright Council (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.

### **Introduction**

The BCC agrees that the creative industries “will be absolutely central to our post-Brexit future”<sup>1</sup>. The copyright-based sectors we represent already contribute significantly to the UK economy and many, such as music, are net exporters of cultural goods. According to data from the Department for Digital, Culture, Media and Sport (DCMS), creative industries as a whole export more than £36bn a year in goods and services<sup>2</sup>. In 2016, for example, 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<sup>3</sup>.

The BCC therefore submits the following recommendations to ensure this vital, export-intensive sector is fully supported, protected and stimulated in all trade agreements that follow withdrawal from the European Union. In view of ongoing developments in this area, we expect to add further considerations in due course.

### **Summary**

I. The UK’s current copyright system, based on the high level of protection provided by European copyright acquis, needs to be maintained. As far as withdrawal from the EU/ European Economic Area necessitates modifications, detailed consultations are required to ensure that our creative industries do not suffer from unhelpful changes specifically concerning exhaustion and reciprocity.

Additionally, existing initiatives such as the Digital Charter provide a good opportunity for government to create a level playing field between the UK creative sector, mainly individual creators and performers, and online content-sharing service providers and other tech companies.

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<sup>1</sup> Rt Hon Matt Hancock, MP, Secretary of State for Culture, Media and Sport (9 September, 2016)

<sup>2</sup> Figures (2015) for creative sector from “DCMS Sectors Economic Estimates 2017: employment and trade”

<sup>3</sup> Ibid

II. Concerning relations with the EU/EEA, we envisage that private international law conventions will continue to provide certainty as regards jurisdiction, applicable law and recognition of judgments.

In addition to the legal framework, no barriers of any type (tariff or non-tariff) should be introduced inhibiting the mutual exchange of culture and creativity in Europe.

III. With regard to trade arrangements with other countries, it is paramount that any agreements expressly refer to the international copyright treaties, in particular the Berne Convention, the Rome Convention, TRIPS and the WIPO Internet treaties to ensure their application in practice, which is not always the case in all countries. This should encourage trading partners to bring their copyright rules and their application up to the UK standard. Weaknesses in copyright regimes, including lack of enforcement, result in missed revenue opportunities.

In addition to the mandatory provisions of international copyright treaties, the BCC recommends specific reference to the Artist's Resale Right, which has been operating successfully since 2006 for the benefit of creators whose work is resold through an auction house or art market professional in the UK.

Furthermore, we have identified specific concerns in some countries that could be addressed in trade agreements.

### **Key markets**

Our members agree that the key territories for exports are the European Union, the United States and China. Other important markets are Japan, Canada, and Australia, with emerging markets in Southeast Asia, Africa and South America also of increasing significance.

## **Detailed considerations**

### **I. United Kingdom**

1. Withdrawal from the EU does not force UK Government to substantially change the Copyright, Designs and Patents Act 1988 ('CDPA'). However, some amendments to the Act will be required where it refers to the EU/EEA — the nature of such amendments depending on our future relationship with the EU and the EEA. We note the European Commission [notice](#) on the withdrawal of the UK, which identified where EU copyright rules would cease to apply unless without an agreement between the UK and the EU.

The European copyright acquis deals with rights and mutual recognition often on the basis of reciprocity, whereby member state recognise compliance with, and application of, each other's provisions as part of EU (or sometimes EEA) membership. This potentially leads to a "reciprocity gap" following the withdrawal from the EU.

Without changes to the legislation, the UK would legally have to recognise the provisions of EU/ EEA member states, while EU/ EEA member states would not be required to do the same in return when the UK becomes a third country in relation to these blocs.

Areas in which the reciprocity gap will be relevant include:

- Audio-visual Media Services Directive 2010, acknowledging broadcast licences obtained in the country of origin throughout the EU, as well as accepting compliance with the provisions of that Directive in one member state being valid for the EU.
- Cable and Satellite Directive 1993, providing mutual recognition of licensing systems based on mandatory collective management (cable) or country of origin (satellite).
- Orphan Works Directive 2012, mutually recognising the status of orphan works throughout the EU.
- Portability Regulation 2018, providing cross-border portability of online content services based on a legal fiction of licensing “where a service is deemed to have been provided, accessed and used in the subscriber’s home Member State”.
- Online (re-)transmission Regulation (yet to be adopted, expected 2018) generally stating that copyright-relevant activities regarding ancillary online service of broadcasting organisations are deemed “to occur solely in the Member State where the broadcasting organisation is established” with implications on the place licensing, including mandatory collective licensing of retransmissions from other Member States.
- Collective Rights Management Directive 2014, possibly allowing an EU collecting society to mandate another to represent its repertoire in relation to online multi-territorial licensing.

The BCC anticipates further detailed consultation on eventual changes to these European initiatives before any changes are carried out.

2. A further area in which changes will be required relates to the exhaustion of rights in physical goods<sup>4</sup>. Section 18 CDPA currently provides for exhaustion in the EEA for copies put into circulation in the EEA for the first time by or with the consent of the copyright owner.

This section needs to be redrafted to implement the UK’s chosen type of exhaustion: national, regional or international. The BCC supports national exhaustion, noting that regional exhaustion will lead to an asymmetry between the UK and EU/ EEA if member

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<sup>4</sup> Under EU copyright law there is no digital exhaustion (other than in specific cases such as software programs), Art 3 (3) Information Society Directive.

states do not take the same approach towards the UK.<sup>3</sup> The BCC cautions against any substantial changes to UK copyright law that are not [required](#) by withdrawal from the European Union. In particular, copyright must not be used as a bargaining chip in future trade agreements, for instance if online content sharing service providers and other tech companies, many of which are based in the US, were to seek as part of a trade agreement the introduction of a US-style fair use exception, or the abandonment of measures that seek to address the “value gap” in the context of safe harbours for internet intermediaries. Both the introduction of a US-style fair use exception and a private copying exception without fair remuneration have been previously considered in the UK following numerous copyright reviews and both propositions have ultimately failed. Such exceptions conflict with the internationally recognised Berne Three-Step Test. Moreover, fair use is uncertain in scope, costly and complex, to the detriment of all business 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.

4. The BCC specifically recommends upholding the European Union approach towards Public Lending Right under the Lending and Related Rights Directive, applying it on a reciprocal basis.

5. Of broader relevance than only copyright, withdrawal from the EU might provide an opportunity to consider a wider ranging approach to the liability of information society services. In the context of the Digital Charter, UK government could provide a more robust approach to the liability of information society services.

## **Trade agreement with the European Union**

### **1. Copyright and enforcement**

The high level of protection established in the European Copyright Acquis (Recital 9 Information Society Directive) must be maintained. We note the importance of website blocking orders in the UK under Section 97A CDPA, based on Article 8 (3) Information Society Directive and Article 11 Enforcement respectively, which provide a well-established efficient remedy for right holders. Most EU/ EEA countries have not meaningfully implemented the relevant Articles and we hope this can be addressed in trade negotiations. With regard to private [international](#) law, we note certainty provided by European legislation, supported by cases from the Court of Justice of the European Union. In particular as regards:

- Jurisdiction (Brussels I Regulation and the international Lugano Convention)
- Applicable law (Rome II [Regulation](#) and Art 5 (2) Berne Convention)
- Enforcement Recognition (Brussels I Regulation and the international Lugano Convention)

Clarity on the relevant private international law provisions is an urgent area to be addressed following the withdrawal from the EU.

## 1. Tariff barriers

No tariffs apply to the import and export of physical copies or to the cross-border licensing of copyright, and none should be introduced; the absence of tariffs is already part of the relevant WTO rules.

## 2. Non-tariff barriers

Custom checks of UK imports and exports must not lead to any delays in the movement of physical goods, such as CDs, DVDs or books. Any such customs delay would undermine speed of service, and hence the competitiveness of UK companies operating across Europe.

Touring and freelance performers (eg musicians or actors) need to be able to move throughout the European Union without requiring a visa for every member state — as do other creators, such as photographers who may be sent on assignment to multiple EU countries on a tight schedule. This could be achieved via specific visas (similar to the blue card for high-skilled [workers](#)). Any solution also needs to deal with the movement of musical instruments and to crews and their equipment.

Non-UK European citizen account for around 10% of the workforce in the creative sector and it is important that their skills and expertise are retained. The BCC suggests applying a simple process to ensure their right to remain in the UK.

## 3. Taxation

The UK should work with the EU to improve the alignment of tax regimes, eg reduce the incidence of withholding tax.

# III. Trade agreements with other countries

## 1. Copyright and enforcement

Compliance with international obligations under Berne Convention (membership of individual European Union countries as well as the EU itself via Article 9 TRIPS), the Rome Convention, TRIPS, WIPO Internet Treaties 1996, 2012 and 2013, must be ensured.

Notably, reference to international obligations on copyright are already part of all “new generation” free-trade agreements concluded by the EU with other countries. Again, we note the importance of website blocking orders in the UK under Section 97A CDPA; reference to such orders in trade negotiations with other countries would be helpful.

In private [international](#) law, as above we note the certainty provided by European legislation, supported by cases from the Court of Justice of the European Union. In particular as regards:

- Jurisdiction (Brussels I Regulation and the international Lugano Convention)
- Applicable law (Rome II [Regulation](#) and Art 5 (2) Berne Convention)
- Enforcement Recognition (Brussels I Regulation and the international Lugano Convention)

BCC members representing the artistic sector highlight specific problems concerning enforcement in practice, with infringing websites using images without permission. 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.

## **2. Tariff barriers**

Under existing WTO rules there are no tariffs for import and export of physical copies or cross-border licensing of copyright.

## **3. Non-tariff barriers**

Non-tariff barriers with third countries are not affected by withdrawal from the EU. However, new free-trade agreements provide the opportunity to address some of the issues that UK rightholders face with specific third countries. In particular, the UK could ensure negotiations are used to:

### **US**

- Highlight the non-compliance with the WTO panel decision of 2000 on section 110 (5b) US Copyright Act, "bars and grills"
- Promote change regarding the use of sound recordings in broadcasts
- Demand the streamlining of the withholding tax procedure

### **Canada**

- Oppose copyright exceptions introduced in 2012, in particular regarding user-generated content and educational institutions
- Seek an extension of term from 50 to 70 years

### **China**

- Suggest practical changes to address the limited licensing revenues from broadcasters using UK repertoire`

### **Australia**

- Express concerns about proposed changes to the system of exceptions under Australian copyright law as have been suggested in the 2018 consultation by the Department of Communications and the Arts.

## **4. Taxation**

The UK should work with third countries to improve the alignment of tax regimes, eg reduce the incidence of withholding tax.

## **5. Collective management**

Given the importance for the international exploitation of creative works, the BCC strongly recommends that any trade agreement specifically promotes further cooperation between the UK and the partner country concerning collective management organisations.

At EU level, the directive on collective rights management provides a high level of transparency, accountability and good governance. Collective management organisations in the UK already apply high standards in administering the rights of their members. Together with UK Government they should offer their practical expertise to international collective management organisations; this is in addition to any developments at international level (eg WIPO CMO toolkit).

## **6. Artist's Resale Right**

The Artist's Resale Right ensures that UK artists receive the royalties they deserve from the further exportation of the works, in particular in the growth art markets. Since 2006, when the UK implemented the European Union Artist's Resale Right directive, more than £75m has been distributed to artists via collective management organisations<sup>5</sup>. Such a right already exists in around 80 countries and it is expected that the WIPO will further assess the possibility of an international approach.

Currently, the introduction of Artist's Resale Right is not mandatory under the Berne Convention; the creation of an international level playing field would benefit UK artists as well as those from other nations. Notably, the leading art markets — the US, Switzerland and China — as yet have no Artist's Resale Right.

The BCC submits that the introduction of an Artist's Resale Right should be mandatory under every trade agreement the third countries. Based on research commissioned by WIPO, the Artist's Resale Right neither causes harm to the art market nor does it divert sales to countries in which the right does not apply<sup>6</sup>.

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<sup>5</sup> Source: DACS/Artists' Collecting Society

<sup>6</sup> The Economic Implications of The Artist's Resale Right, WIPO SCCR/35/7

## **Annex**

### **Headlines: FTA with third countries**

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 Berne Three-Step Test (in addition to Article 1)
- Article 4 recognition of technological protection measures as well as rights management information
- Term 70 (pma or after performance)
- Artist's Resale Right mandatory
- Express recognition of, and solution to, non-tariff barriers for cross border movement of performers
- Cooperation between collective management organisations