

Trade with South Korea, the Andean countries and Vietnam: Call for input from the Department for International Trade

General Questions

Q1. Please indicate how actual or potential Intellectual Property issues affect your organisation, business or members (for example, it is difficult to export or invest abroad if a potential partner does not enforce trademark protections).

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 31 member organisations that span the creative industries from creators of literature, music, television 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. In 2019, the value of goods exported by sector was: £20.1bn for the Creative Industries (49.9% higher than 2018; 33.0% higher than 2015) and £17.4bn for the Cultural Sector (63.2% higher than 2018; 41.4% higher than 2015).¹ These numbers are driven by music, performing and visual arts, publishing, film, tv, radio, museums, galleries and libraries.
3. Intellectual Property (IP) is also 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 are 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

Q2. Please provide, to the extent that you are able, an overview of your organisation's Intellectual Property interests in these countries.

Specifically in relation to South Korea:

1. The Republic of Korea is a signatory to many international copyright treaties including the Berne Convention, the TRIPS agreement, 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The terms of protection for copyright works is also in line with the international standard of 70 years after the death of the author or after publication.

¹ <https://www.gov.uk/government/statistics/dcms-economic-estimates-2019-trade-report/dcms-sectors-economic-estimates-2019-trade>

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)

2. The Korean copyright framework had previously closely followed the UK's framework until recent years, it also has had very few copyright cases to this point. However, following the 2011 United States–Korea Free Trade Agreement, copyright law in South Korea is predicated under the concept of “fair use.” Yet as we know, the terms ‘fair use’ and ‘fair dealing’ are not interchangeable and it would be worth taking the opportunity offered by upcoming discussions to review instances and gaps in existing understanding. The advantages of a ‘fair dealing approach’ should be promoted, and the internationally recognised three-step-test governing exceptions & limitations which should be protected in FTAs and by WIPO.
3. Additionally, practitioners and international legal scholars note that the civil law system does not have many procedures characteristic of litigation practice in common law jurisdiction, such as discovery and the right to compel documents.³ This can result in higher costs of litigation and delays in securing remedies against fair use assessments by the courts which poses significant time and resources challenges to rights holders seeking to enforce their rights.
4. Whilst expanded a few years ago, it remains the case that the scope of copyright owners’ rights in respect of public performance of music in South Korea are limited. Not all types of premises are covered, and even those which are in scope may be exempt depending on their size. This limited public performance protection is inconsistent with South Korea’s international copyright treaty obligations and unfairly detrimental to copyright owners – which inevitably impacts UK rightsholders given the export popularity of UK music.
5. Lastly, due to the absence of a Artist’s Resale Right in South Korea, many UK artists have experienced resales of their work in South Korea, but have not received any royalties for these sales. On the other hand, these artists would have received fair remuneration had these works instead had sold in the UK. Given that the Artist’s Resale Right creates fair remuneration for artists, the adoption of a robust law that allows reciprocity with the UK, thereby adhering to the Berne Convention, would address this issue.

Specifically in relation to the Andean Countries:

1. At this time all members had adopted the Berne Convention and the Universal Copyright Convention. However, we still lack a convergence on common copyright rules across all Andean countries which risks posing difficulties to UK based rightsholders. This is due to the need of not only having access to experts who have experience working in these different jurisdictions but also the inherent difficulties of navigating a legal case which may be affected by different national overlaps which risks leading to fragmented implementation processes national courts may not be fully equipped to address.
2. The BCC has expressed and continues to hold the view that the flexibility already accorded under the Three Step Test is sufficient for national laws to be developed and applied within the agreed parameters. Which is why we do have concerns regarding arguments in favour of the creation of a new international instrument that might conflict with or challenge the correct scope of copyright exceptions and limitations for uses in education and by libraries and archives.
3. Additionally, it is important that steps are taken to ensure that the existing Cartagena Agreement in place for the Andean Countries does not dictate IP Chapter precedents for any

³ <https://escholarship.org/content/qt8b9199zm/qt8b9199zm.pdf?t=n4owqs>

IP Chapter discussions for trade agreements with the UK that counter continued recognition of the UK framework or restrict future development of that within the digital world.

4. The importance of protecting systems for reciprocal recognition of rights and their application is of particular importance as national governments across the world begin to adopt and ratify The Beijing Treaty on Audiovisual Performances which was originally signed in 2013.

Specifically in relation to Vietnam:

1. It is worth noting that Vietnam is a priority market for the UK and Britain is currently one of the largest European investors in Vietnam.⁴ Vietnam is a signatory to the Berne Convention on copyright which sets the minimum protection at 50 years from publication for cinematographic works, photographic works, dramatic works, works of applied art and anonymous works, and at 50 years after the death of the author for other works.
2. The term of protection for copyright works is 20 years shorter in Vietnam than the international standard of 70 years after the death of the author or after publication. There is therefore an opportunity here to discuss increasing this term of protection to the international standard of 70 years- in line with international best practice.

Q3. Please provide a description of any problems you have had entering, operating in, or protecting your Intellectual Property these markets.

We refer to the responses from individual members of the BCC.

Q4. Please note any concerns and/or suggested solutions would you like to see raised with Vietnam, South Korea or the Andean countries in upcoming meetings. Please include those issues that are a priority to your organisation and that you believe are best addressed through our Free Trade Agreements

All countries noted above are presently signatories to several international copyright treaties which provide minimum standards of protection as well as national treatment. However, we note there are a few specific areas which could be reviewed to achieve the maximum benefit the UK's creative industries and rightsholders:

- a) Where it is not already the case, encourage increasing the term of protection to the international standard of 70 years after the death of the author (for literary, dramatic, artistic and musical works) or after publication (for sound recordings, with equivalent provisions for performers' rights).

4

- b) Similarly, when not already in action, international recognition, and adoption of the Artist Resale Right should be recognised within FTA provisions.
- c) IP Chapters in all FTAs should include provisions which promote transparency, good governance and support the effective operational status of collective management organisations within different national jurisdictions.
- d) The creation and consumption of online content continues to increase and is an important driver of creative and copyrighted content. However, there is a need to ensure that both domestic and international user upload platforms and digital services are clear on the requirement that they procure licenses for their use of music and many other copyrighted materials within services offered within the platforms.
- e) Piracy and unauthorised use of copyright works is rife and increasing in many countries. This is due to both the scale of criminal activities, the fragmentation of the digital landscape and the reality that many do not have enough resources to effectively enforce IP rights and current penalties are too low to act as a meaningful deterrent. Beyond taking the opportunity to encourage the enforcement of existing copyright laws by pursuing physical and digital infringements of users, where possible, the UK should also support discussions to develop enforcement recognition provisions within trade agreements that support international cooperation and recognition of the importance of Technical Protection Measures and Rights Information Systems in the legitimate application of copyright works.
- f) In respect of South Korea, as noted above, copyright owners' rights in respect of the public performance of music are unduly limited. Any FTA represents an opportunity to address this through further commitments to reforming the Korean legislation.

If you would like to discuss this response further contact director@copyright.org.uk.