



**Comments of the Digital Creators Working Group
United States-United Kingdom Trade Agreement Negotiations
83 Federal Register 57790, November 16, 2018
Regulations.gov Docket No. USTR-2018-0036**

January 15, 2019

Creativity is an engine for U.S. economic growth and copyright protection is its fuel, particularly in the digital age. American copyright-intensive industries power the United States' competitive advantage – leading by virtually every metric, whether economic input, job creation, salary, trade surplus, or cultural influence. We are united in our resolve that strong copyright protection for creative industries should be a top priority for the U.S. trade agenda, including with respect to digital trade.

We are individual creators, small and independent producers, and large businesses, and represent virtually every aspect of the American creative sector, including movies, music, television, publishing, news media, photography, and radio. We employ or represent millions of Americans, and contribute significantly to U.S. GDP and trade surplus.

We believe that U.S. trade agreements offer tremendous potential to catalyze our competitive advantage by ensuring strong protections for American creators as they open international markets to American goods and services. A trade policy that is pro-creator is vital to the economic livelihood of the United States, with the Office of the United States Trade Representative as its long-standing champion.

We therefore support the Administration's commitment to strengthening and deepening the U.S. trade relationship with the United Kingdom, and welcome this opportunity to present our priorities to the Trade Policy Staff Committee (TPSC) for consideration in the development of the U.S. objectives for the United States-United Kingdom Trade Agreement. In response to the request for public comments issued in 83 Federal Register 57790 on November 16, 2018, we submit the following comments pertaining to the U.S.-UK trade negotiations.

Powering American Creators Through U.S.-UK Trade

American creative industries are engines for economic growth and copyright protection is critical to fueling our industries' contributions to the U.S. economy. In 2017, the American creative sector, contributed \$1.3 trillion to the U.S. economy. In the same year, the creative sector supported 5.7 million U.S. jobs. Significantly, the compensation paid in the creative sector far exceeds that of U.S. workers overall, amounting to a compensation premium of 39 percent over the average U.S. annual wage.¹

Regarding trade competitiveness, in 2017, the sale of U.S. copyright products around the world amounted to over \$191 billion. Importantly, in the same year, these foreign sales exceeded those of other major U.S. sectors, including electronic equipment, appliances and components, with sales of \$174 billion; agricultural products, with sales of \$138 billion; chemicals (excluding pharmaceuticals & medicines), with sales of \$137 billion; aerospace products and parts, with sales of \$134 billion; and pharmaceuticals and medicines, with sales of \$55.8 billion.² In terms of U.S. services trade, intellectual property rights licensing, including copyright licensing, is the second largest services export category among all U.S. services trade categories, valued at \$128 billion in 2017, which accounted for 16 percent of total U.S. exports of services, and which amounted to a \$77 billion trade surplus that year.³

The importance of copyright-enabled trade with the United Kingdom is critical to continuing to power the American creative community's contributions to the U.S. economy. In 2017, the United Kingdom was the largest services export market globally for U.S. services at \$69.6 billion, amounting to a \$2.8 billion increase over 2016. The U.S. services trade surplus with the United Kingdom amounted to \$12.7 billion in 2017. With respect to U.S. IPR licensing, including copyright licensing, the United Kingdom was the third largest services market globally for U.S. IPR licensing exports at \$9.8 billion in 2017. The U.S. IPR licensing surplus with the United Kingdom reached \$5 billion in 2017.⁴

¹ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

² Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

³ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; "U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016"; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

⁴ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; "U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016"; *Survey of Current Business, The Journal of the U.S. Bureau of*

In terms of digital trade, in 2017, the United Kingdom ranked second globally for U.S. digital services exports, which totaled \$45.5 billion. Likewise, the United States had a digital services trade surplus with the United Kingdom of approximately \$12 billion in 2017.⁵ Of particular importance, the United Kingdom consistently has been among the leading *digital* services trade markets for U.S. IPR licensing exports, including for copyrighted works. For example, in 2014, the United Kingdom was the third largest market for U.S. IPR licensing exports at \$9.7 billion, which accounted for the fifth largest U.S. IPR licensing surplus globally at \$5.6 billion.⁶

With this solid commercial background and strong foundation for copyright protection already provided in each country's national laws, these negotiations provide the United States with a unique opportunity to reach a high-standard agreement on issues pertaining to copyright and digital trade, with the prospect of setting a model for future U.S. trade agreements.

Creative Industry Priorities for U.S.-UK Trade Negotiations

As the TPSC develops its negotiating objectives for the U.S.-UK trade negotiations, we wanted to convey the following illustrative list of priorities of the American creative sector for the negotiations. Likewise, we wanted to express our strong interest in working closely with and supporting the U.S. delegation throughout the negotiating process on these priorities.

- **Copyright Term:** Appropriately meaningful and standardized term of protection for works and sound recordings;
- **Copyright Protections:** Strong protections for making available, communications to the public, broadcasting, and reproduction rights; reciprocal performance rights for sound recordings; protections for technological protection measures; protections for rights management information;

Economic Analysis; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>.

⁵ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; "U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016"; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

⁶ Grimm, Alexis; "Trends in U.S. Trade in Information and Communications Technology (ICT) Services and in ICT-Enabled Services"; Bureau of Economic Analysis, Economics and Statistics Administration, U.S. Department of Commerce; May 24, 2016; p.11, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.

- **Copyright Exceptions:** Confining exceptions and limitations to copyright by the internationally-recognized and time-tested three-step test, omitting “balance” and fair use language.
- **Copyright Enforcement:** Explicit obligations with respect to liability, including primary and secondary liability; comprehensive commitments on civil, administrative, provisional, border, and criminal measures, including criminalization of unauthorized camcording of movies in theaters; civil remedies and criminal penalties, including to reflect the relevant aspects of the UK Proceeds of the Crime Act of 2002, as amended; commitments regarding online infringement, including deterrent civil and criminal remedies; to reflect website blocking, including “dynamic” blocking as provided in UK law.
- **No Overbroad Copyright Safe Harbors:** The U.S.-UK Trade Agreement should not include overbroad provisions on copyright safe harbors that facilitate the misapplication of such safe harbors and impose trade obligations that lend themselves to poor implementation. In some jurisdictions, safe harbors have been misapplied and expanded in a manner that negatively impacts the ability of creators to license their works online. Trade agreements should not permit or promote such expansions of safe harbors beyond their original intent. Further, trade agreements should not prevent clarifications of, or amendments to, domestic law in order to ensure that the law remains effective and can adapt to the ever-evolving Internet ecosystem. Moreover, trade obligations on ISP safe harbors lend themselves to poor implementation.
- **Accountable Digital Trade:** Platform accountability should be a priority for U.S. digital trade policy. While we share strong support for digital trade chapters that promote economic growth online – as we both benefit from and contribute significantly to such growth – our industry also faces fundamental systemic challenges, with significant negative economic impact, posed by certain digital services, including infringing websites and other platforms that do not fairly compensate for the use of creative works. If digital trade chapters are to establish the rules of the road for digital trade, those chapters also must provide critical guard rails to help the creative sector address these challenges, particularly given the highly-dynamic nature of the digital environment and the U.S. law that is constantly evolving to it.
- **National Treatment:** Obligations that the parties provide full national treatment for all categories of intellectual property covered in the agreement, including copyrights and related rights.

- **Contractual Freedom**: Commitments ensuring the freedom of contract for right holders within a clear legal framework with respect to copyright and related rights and the licensing of creative content.

Conclusion

The American creative sector reiterates its support for the U.S.-UK trade negotiations and looks forward to continuing to work with the TPSC as the negotiations proceed. We stand ready to provide any additional information with respect to our priorities for the negotiations.

Sincerely,

American Association of Independent Music
American Federation of Musicians
AFM SAG-AFTRA Intellectual Property Rights Distribution Fund
American Society of Composers, Authors, and Publishers
American Society of Media Photographers
Association of American Publishers
Content Creators Coalition
CreativeFuture
Directors Guild of America
Independent Film and Television Alliance
International Alliance of Theatrical Stage Employees
International AntiCounterfeiting Coalition
Motion Picture Association of America
National Music Publishers Association
News Media Alliance
The Recording Academy
Recording Industry Association of America
Screen Actors Guild-American Federation of Television and Radio Artists
SoundExchange