



October 2018

Department for International Trade

Free Trade Consultation – UK-CPTPP

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. A full list of UK Music members can be found in annex.

2. Intellectual Property, and copyright specifically, are key elements of international trade in creativity; this is in particular the case for the successful UK music industry, one of three global net exporters. The key international agreements underpinning the modern music business globally are the WIPO Internet Treaties (WCT/WPPT); the main international trade agreement containing the provisions on copyright and its enforcement, the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, is referred to as a core provision of any free trade agreement in the accompanying papers to the consultation at hand. We comment on the recent text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (Chapter 18: intellectual property).
3. The music industry contributes £4.5 billion Gross Value Added of which £2.6 billion are revenues derived from export (UK Music Measuring Music 2018 report).
4. At this stage our main concerns relates to the prominence of the interests of the music industry as part of the creative industries; i.e. that copyright remains a key consideration during the negotiations of a free trade agreement. In the context of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) our main objective is to improve the recognition of the contribution of copyright to innovation and efficient functioning of markets and to recognise existing obligations under international copyright treaties and ensure their full and correct implementation by the signatories of the CPTPP, including in particular the TPM provisions (which are amongst those suspended in the CPTPP).

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We welcome the express reference in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership to the Berne Convention 1886 and the two WIPO Internet treaties of 1996. The basic rights provided (reproduction, broadcast, communication to the public and distribution) in these international agreements are further expressly reflected in the text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. However, we note that, regrettably, the parties are allowed to opt out of some of these obligations and continue not to recognise protection for the use of recorded music in broadcasting and public performance (see Art.18.62(3)(b)) and some key provisions, such as full national treatment (Art.18.8, footnote 4, last two sentences).

5. Furthermore, the CPTPP, like its predecessor the TPP, contains a problematic provision on exceptions and limitations (Art.18.66) titled “Balance in Copyright and Related Rights Systems” which urges the parties to “find an appropriate balance” in copyright systems “among other things by means of exceptions and limitations”, which represents encouragement to introduce more exceptions despite the fact that the very existence of a copyright-restricted act implies that the legislature has struck the balance between the competing societal interests and decided to grant copyright protection for relevant uses.

In this regard it is important to recognise that the text reflects the three-step test for exceptions and limitations to copyright (Article 18.65). This test defines the scope of exceptions internationally and provides much needed certainty especially given that it appears next to Art.18.66 which calls for further exceptions, including some exceptions which are worded in an open-ended way (“and other similar purposes”) and thus the reference to the three-step test was essential to minimise the impact of this provision on copyright holders.

We also note with concern the CPTPP’s policy endorsement for efforts to promote the public domain (Art.18.15) and the suspension of provisions relating to term extension for copyright and related rights which were part of the original TPP agreement.

We welcome the express reference to enforcement procedures in section I, in particular the general obligation (Article 18.71) which will be of practical relevance for the enforcement of copyright. We would like to put forward several considerations from a UK perspective:

Communication to the public/broadcasting

We note that the definitions in 18.57 provide a different approach to communication to the public/broadcasting than the one chosen in the United Kingdom when implementing the Directive Copyright in the Information Society in 2003. At this time, the United Kingdom introduced a communication to the public right consisting of a broadcasting and a making available to the public right as subcategories. The text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership offers a different categorisation between broadcasting and communication to the public respectively. In order to avoid any misunderstanding we suggest that the section on definitions reflects the various established approaches to communication to the public, making available to the public, and broadcasting.

Term

We note that the term extension provisions of the CPTPP are currently suspended. However, we expressly welcome Article 18.63: Term of Protection for Copyright and Related Rights providing a term of 70 years after the death of the author. This reflects the term of protection in the European Union and the United States. Equally, the term extension provision includes a guarantee of a minimum of 70 years' protection (after publication) for sound recordings (Art.18.63).

No hierarchy of rights

The CPTPP (and US trade agreements in general) contain a useful reminder that there is no hierarchy of rights where authorisation is needed from both the author/publisher and the performer/producer (Art.18.61). This reminder is particularly pertinent to sectors such as music where multiple rightholders have rights which need to be cleared before lawful exploitation can take place.

The suspended ISP safe harbour limitation should not be revived

At present, the CPTPP provisions concerning ISP safe harbours (Art.18.81-82) are suspended. As explained further below, these provisions represent an outdated regulatory model and should not be revived in their current form.

6. Free Trade Agreements can assist UK artists by removing such barriers to trade and investment. We note that a Free Trade Agreement (FTA) is defined as an international agreement which removes or reduces tariff and nontariff barriers to trade and investment between partner countries. It should be very simple for UK musicians to tour throughout the countries which signed up to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

Education.

7. The lack of knowledge on copyright for right holders and users alike became apparent during recent political discussions on copyright. In order to appreciate the importance of copyright for individuals, companies as well as users, we suggest a high level reference to copyright education in the trade agreement along the lines of the recently signed Economic Partnership [Agreement](#) between Japan and the European Union expressly recognising the value of promotion of public awareness concerning protection of intellectual property.

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.

No detailed “safe harbours” provisions in free trade agreements.

8. Currently, legal initiatives at UK and European level address the role of content online platforms within the value chain. The “safe harbour” provisions under US law or the limitations of liability provisions in the UK e-Commerce provisions will be updated to take into account technical developments in the last 20 or 18 years respectively. The extent of such changes will only become apparent once these initiatives are adopted (in the European Union - the proposed Directive Copyright in the Digital Single Market and in the UK - the Digital Charter). We note that the withdrawal from the European Union provides a good opportunity for UK government to unilaterally improve the situation for British composers, performers and right holders, most of them micro business or small and medium enterprises. This should not be jeopardised by a too detailed reference in free trade agreements.

We urge the UK Government not to introduce such complex provisions in free trade agreement (contrary to what was done in the United States - South Korea trade agreement and most recently, in the US-Mexico-Canada provisional agreement).

Exhaustion.

9. Existing approaches to exhaustion are fundamentally different; in the absence of any obvious compromise on an international approach to exhaustion during the discussions of the TRIPS agreement, Article 6 of the TRIPS agreement expressly refers to national solutions to exhaustion. We suggest to continue such approach. We welcome the current wording of Article 18.11 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership:

Exhaustion of Intellectual Property Right:

Nothing in this Agreement prevents a Party from determining whether or under what conditions the exhaustion of intellectual property rights applies under its legal system.

Collective management.

10. In our view each free trade agreement the United Kingdom concludes should contain a statement on collective management organisations given their importance for the income of composers, performers and rightholders. Such statement should not only acknowledged the importance of collective management organisations but also refer to general standards of accountability, good governance and transparency as is the case in the United Kingdom. Most importantly, it should include a statement confirming the right holders’ freedom to decide on whether and whom to mandate and the right of right holders to exercise effective control over the CMO which they have entrusted with the management of certain rights. This issue is particularly relevant in the Pacific region where some countries do not offer the standards of good collective management service

to which right holders in the UK are used. Thus, we expressly welcome current Article 18.70 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, however, we suggest that further provisions be included to reflect more closely the key principles of freedom of choice and right holders' control over their CMOs:

Collective Management

The Parties recognise the important role of collective management societies for copyright and related rights in collecting and distributing royalties¹⁰⁰ based on practices that are fair, efficient, transparent and accountable, which may include appropriate record keeping and reporting mechanisms.

11. We note specifically the reference to cooperation on collective management of rights in some of the European Union Free Trade Agreements (for instance Korea (Article 10.8), Singapore (Article 11.8); Japan (Article 16). We would welcome similar provisions in any Free Trade Agreements the United Kingdom were to conclude stressing the importance of high standards of accountability, good governance and transparency. E.g.

Singapore: Article 11.8 Cooperation on Collective Management of Rights

The Parties shall endeavour to promote dialogue and cooperation among their respective collective management societies with the purpose of ensuring easier access and delivery of content between the territories of the Parties, and the transfer of royalties arising from the use of works or other copyright-protected subject matter.

Japan: Article 16 Collective Management

The Parties:

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

Annex

UK Music's membership comprises of:-

- AIM – The Association of Independent Music – the trade body for the independent music community, representing over 850 small and medium sized independent record labels and associated music businesses.
- BASCA exists to celebrate, support and protect the professional interests of all writers of music.

- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition represents and promotes the interests of featured recording artists in the music industry.
- MMF – Music Managers Forum - representing over 500 UK managers of artists, songwriters and producers across the music industry with global businesses.
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, remixer, programmers and mastering engineers.
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.
- Musicians' Union representing 30,000 musicians.
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 114,000 composers, songwriters and publishers and an international repertoire of 10 million songs.
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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