October 2018

Department for International Trade

Free Trade Consultation – UK-US

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 particular for the successful UK music industry. We welcome the recognition of the importance of Intellectual Property in the briefing note accompanying the consultation on the content of a future United States and United Kingdom trade agreement. 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 a free trade agreement. In addition to copyright related concerns in the trade with the United States we also highlight non-tariff and non-legislative concerns such as the difficulties facing British musicians applying for visa to perform in the United States and problems with the administration of withholding tax.

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). United States is a key export market for British music which we expect to be further increased in the future. UK collective management organisation PRS for Music collect substantial amounts from the public performance and communication to the public of musical works of British composers and music publishers from United States. This is in addition to other income streams such as Synchronisation to films or advertising. British performers and record companies receive considerable income from licensing sound recordings into United States – whether directly through license deals with digital services, or indirectly, through licensing certain uses of recordings through PPL.

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Furthermore, United States represents a strong market for physical products such as CDs and Vinyl.

4. As we explain in this paper this should increase if gaps in legal protection and enforcement are addressed in the US. We note that per capita income for UK artists from the use of their music is currently significantly lower in the US than in EU. This is the result of shortcomings in the US legal framework:

    1. User-uploaded-content (UUC) services (such as YouTube) claim the protection of the Digital Millennium Copyright Act 1998 “safe harbours” and therefore claim not to be liable for the content they make available.
    Such services either refuse to enter into licence agreements, or only offer licence terms that significantly undervalue the music they are making available. The legal framework therefore causes a serious market distortion, which has a knock-on effects across the digital music market, and risks the future sustainability of the digital music market.

    2. Outside of the digital market, low royalty rates for live performances and copyright exceptions which limit public performance licensing, and the outright denial of protection to recorded music used in broadcasting and public performance also contribute significantly to the below-par performance of the US market on a music revenue per capita basis.

    3. Finally, the US online music market remains open to online piracy, a situation which could be substantially improved by providing for website blocking orders in respect of copyright content, in line with UK and international best practice.

    Free Trade Agreements can assist UK artists, producers and publishers by removing such barriers to trade and investment. Discussions on a Free Trade Agreement provide the ideal opportunity to address such shortcomings at a bilateral level.

5. We expressly welcome the Music Modernization Act 2018 which we hope will amend the law to more closely approximate a level playing field between music publishers and composers on the one side and digital service providers on the other (Section 115 US Copyright Act).

6. 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. In addition to the legal aspects referred to above and below we also stress the concerns of other nontariff barriers in particular for British musicians performing in the United States and there are problems in obtaining a visa both practical and economical.

Fundamental principle.

7. The condition sine qua non for any trade agreement is a strong copyright and enforcement framework and we suggest that these issues are centre stage in any future

free trade negotiations with the United States or any other country. In most existing free trade agreements this is done by listing the respective international binding Copyright Treaties, in particular the Berne Convention of 1886, the Rome Convention of 1961 which the US has not yet signed, and the WIPO Internet Treaties from 1996. Whilst the United States has ratified some international Treaties and in particular the TRIPS agreement, it has not complied with a WTO ruling against it in respect of Section 110 (5B) of the US Copyright Act which was found not to be TRIPS compliant.

8. Moreover, the fact that recorded music is denied protection when played on the radio or TV or in venues open to the public represents a worldwide anomaly in the treatment of music right holders. It also means that US businesses, whether in the broadcasting sector or across the services economy, are getting a legal subsidy at the expense of the recording industry, including UK artists and labels, to whom they do not need to pay any licensing fees at all (or, in the case of composers and publishers, pay low fees as mentioned above).

Details.

S 110 (5B) US Copyright Act is not TRIPS compliant.

9. The “bars and grills” exception benefits many business in the US from not having to pay for the use of music at the expense of UK composers and songwriters (as mentioned above, these businesses do not have to pay to producers and performers at all). This exception is still in place despite a 2000 decision of the WTO panel that the relevant Section 110 (5B) of US Copyright law infringes the internationally binding Three Step Test (Art 13 TRIPS stating that exceptions need to be restricted to certain special cases which neither conflict with a normal exploitation of the subject matter nor unreasonably prejudice the legitimate interests of the right holders). Express reference to the three-step test in the trade agreement would be a good reminder that the United States must not ignore WTO decisions thus undermining free trade agreements.

Use of sound recordings in terrestrial broadcast/ public performance venues.

10. Under existing US copyright law, there is no right for the producers of sound recordings or recording artists to receive a royalty when their recordings are included in terrestrial broadcasts (e.g. through FM radio or TV) or are played in venues open to the public (public performance uses).

Compulsory licensing.

11. UK Music members have been very concerned about the provisions in US copyright law de facto removing the possibility for publishers and songwriters to negotiate the value of the use of music with commercial digital service providers. We expressly welcome the Music Modernization Act 2018 which we hope will amend the law to allow a level playing field between music publishers and composers on the one side and digital service providers on the other (Section 114 US Copyright Act).

12. UK Music members on the recorded side are also subject to statutory licensing of their rights when used by certain types of online webcasting services. It is worth noting that this statutory intervention in the market for music rights and the negotiations between music right holders and various types of online music services represents a significant departure from the principles of market freedom and free trade.

Exceptions.

13. Whilst we do not expect change as to the established UK approach to exceptions to copyright in the trade agreement with the United States; it is important to mention the inappropriateness of the US "fair use " approach for the United Kingdom, or indeed any such "open-ended" (and therefore unclear) exceptions. This issue has been considered in various reviews of UK copyright throughout the years and always been rejected. We ask the negotiators to be wary of respective lobbying campaigns of US tech companies trying to undermine the rights of British composers, performers and rightholders. We are at the disposal of the Department of International Trade to provide comprehensive information should this be required.

No or no detailed "safe harbours" provisions in free trade agreements.

14. Limitations of liability for Internet service providers, acting as mere conduit, caching or merely hosting ("safe harbours") as well as for search engines have been introduced in the Digital Millennium Copyright Act 1998. These complex provisions have been in operation for some 20 years and have not kept pace with the development of new types of internet services, such as user uploaded content services, which use copyright protected content to attract users to their services and thereby generate revenues from advertising and data analytics. Some 20 years later, the shortcomings of the DMCA system, and in particular the limitation of responsibility of 'hosting' services and search engines are well known, for instance as regards notice and stay down and the general complexity of § 512 US Copyright Act.

    Currently, legal initiatives at UK and European level are focused on clarifying the liability of user-uploaded content services to make clear that these active services are not eligible for the "safe harbour" privileges designed to protect purely passive intermediaries (in the European Union the proposed Directive Copyright in the Digital Single Market and in the UK the Digital Charter; the UK Code of Conduct for search engines). 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, many of them micro business or small and medium enterprises and to promote global adoption of UK best practices in the area of copyright enforcement, such as the UK Code of Conduct for Search Engines. This should not be put in danger by the inclusion in free trade agreements of "safe harbour" privileges that are inadequately scoped so as to be open to the same abuses that have caused the existing market distortions.
    We urge the UK Government to resist any attempt by the US to introduce into the bilateral trade agreement any DMCA-style provisions and more generally, not to introduce such complex provisions in the trade agreement between the United Kingdom

and the United States. Regrettably, such provisions have been introduced in the United States - South Korea trade agreement and more recently the US-Mexico-Canada provisional agreement.

Website blocking orders.

15. In order to maintain a healthy and fair online music market, music right holders and governments have an interest in protecting legitimate, licensed market players from unfair competition from unlicensed music services. To achieve this, it is essential to have access to website blocking orders so as to enable internet access providers to lawfully prevent their customers from accessing copyright infringing services. Such orders are routinely issued in the UK pursuant to s.97A of the CPDA 1998 and they contribute to the health of the UK online music market and the lower prevalence of piracy in the UK than in the US, and such orders should be made available in the US in line with UK and international best practice.

Exhaustion.

16. Existing approaches to exhaustion are fundamentally different between countries and 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. UK Music members generally prefer national exhaustion which will enable British composers, performers and rightholders to sell their works reflecting the specifics of individual markets. We are opposed to the de facto international exhaustion regime in the US based on § 109 of the US Copyright Act as interpreted by the US courts).

Collective management.

17. 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 acknowledge 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.

18. Moreover, while the UK and United States generally have good standards of governance and accountability of CMOs towards their members, the same cannot be said of certain third countries with which both the UK and the United States trade. Therefore, it might be useful for the UK and the United States to include in their trade agreement provisions which could subsequently become best practice for use vis a vis third countries. In this context we note 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.*

Education.

19. 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 and 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.

Withholding tax.

20. Withholding tax applies to income generated by performances and royalties overseas. The general rule is that any payment of “US Income” made to a non-resident of the US is subject to the 30% withholding tax payment. The tax can be claimed back but that incurs compliance costs and delays, as well as complex administrative procedures.

    Improvements to the system should be sought to make it easier to claim the tax back to ensure that those businesses that depend on intellectual property are not at risk.

Visa.

21. The process whereby UK musicians have to apply for a US work visa is long, complex and prohibitively expensive. Whilst most musicians understand the reasons for requiring visas, the administration of it acts as a significant barrier to a musicians' trade.

    The American visa application process requires face-to-face meetings in either Belfast or London which may require expensive overnight stays for musicians and bands that live outside these cities. Delays in the US visa application process can lead to flights, shows and, in some cases, full tours being cancelled. Homeland security is generally cited as the reason for delays.

    Despite meetings with US officials over the years, little has been done to alleviate the problems encountered by musicians.

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, re-mixers, 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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