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Post-Brexit Free Trade Agreement between the UK and the United States

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.

According to our latest research (published in our Music by Numbers 2019 report, available via www.ukmusic.org) the music industry added £5.2 billion value (income for UK music business) to the UK economy in 2018; £2.7 billion of this GVA were derived from exports. The United States is the world's largest music market in terms of value; the free-trade agreement is therefore of utmost importance to the future of the UK music industry after the withdrawal of the UK from the European Union.

We have set out below some key considerations for the UK Government in order to support this economically and culturally valuable sector in the course of its negotiations with the United States for a post-Brexit free trade agreement (referred to below as the "UK/US FTA").

Summary

While the US is the world's most valuable music market, estimated to be worth some \$20 billion in 2017, there are a number of market barriers for the UK's music industry. These barriers are exacerbated by the absence of a level playing field between the UK and US, where US companies and artists benefit from the protections and freedoms provided in the UK without reciprocal provisions in the US.

To rebalance the trading relationship for music between the UK and US we are seeking the following:

- **Improved visas systems for UK composer and touring artists entering the US**
- **Non-discrimination in rights**
- **Minimum standards in the management and protection of rights**

I. Visas for touring artists/ composers.

The current process whereby UK musicians have to apply for a US work visa is long, complex and prohibitively expensive. This also applies to songwriters, composers, performers and producers who often travel for work related purposes (e.g. co-writing opportunities or song writing camps).

The American visa application process requires face-to-face meetings in either Belfast or London which may trigger considerable costs (e.g. for travel and accommodation). Delays in the US visa application process can lead to flights, shows and, in some cases, full tours being cancelled.

By association access to the UK market for US performers and composers is significantly simpler for short term (under 1 month) via the Permitted Paid Engagement (PPE) visa or for a longer period via a Tier 5 visa.

Recommendations

- **The application process for US Visas needs to be simplified and clarified (including equipment to avoid unnecessary bureaucracy such as the imposition of carnets for musical instruments). Alternatively, the UK/US FTA could provide a simple waiver for visas and permits for touring musicians and composers, including for equipment (“tools of the trade”) to avoid unnecessary bureaucracy such as the re-introduction of carnets for musical instruments.**

II. Non-discrimination of rights

The UK has a balanced rights regime, comprising exclusive and remuneration rights, which supports the whole UK music ecosystem. This current framework must be upheld and protected by the UK government in its trade negotiations with the US.

The application of copyright exceptions in the US has a detrimental impact on the value of the UK's music industries work.

“Bars and Grills” exception non TRIPS compliant. Under Section 110 (5B) of the US Copyright Act some 70 percent of US bars and restaurants and more than 45 percent of shops and boutiques are exempted from having to pay copyright royalties for the transmission of music via TV or radio broadcast in their premises. This has become commonly known as the “Bars and Grills” exception. The “Bars and Grills” exception benefits many business in the US by not having to pay for the use of music at the expense of European (including UK) and US composers and songwriters. According to our latest research this illegal exception causes revenue losses of about \$44 million for European right holders and \$109 million for US right holders per annum.

This exception is still in place despite a 2000 decision of the World Trade Organisation Dispute Resolution Panel that Section 110 (5) of US Copyright law infringes the internationally binding Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

No imposition of fair use. The US copyright framework operate on a “fair use” based exceptions system. The fair use exception which has developed over almost 180 years of US cases, provides an undefined exception for “transformative” uses whilst the United Kingdom applies a “fair dealing” approach for clearly defined and specific uses. This plain definition in the UK prevents costly court cases compared to the abundance of cases in the United States. Indeed the fair use exception was called by the US Supreme Court in 1939 ‘the most troublesome doctrine in the US copyright law’. As a result the UK should resist any attempt to extend ‘fair use’ exceptions into the UK.

Royalties for terrestrial broadcasts. Finally, under US copyright law, there is no right for the producers of sound recordings (nor for featured or non-featured 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). The UK provides such a right, as do all European countries, and consequentially, US recording producers and artists benefit from royalties accrued for such use in the United Kingdom whilst UK recording producers and artists do not so benefit in the US.

Recommendations

- **“Bars and Grills” exception is not TRIPS compliant. The United States remains legally required to remove S110 (5B) from their Copyright Act. The UK/US FTA must remedy the harm caused to the UK’s music industry from the infringement of internationally agreed copyright provisions.**
- **No fair use. The UK should reject calls to include the US fair use system into UK copyright law.**
- **The UK/US FTA needs to refer to the introduction of a domestic US right for recording producers and artists regarding the use of sound recordings in terrestrial broadcast/public performance venues to address the existing discrimination for UK right holders.**

III. Minimum standards in the management and protection of rights

Website blocking. 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. Essential to this is access to website blocking orders, which enable internet access providers to lawfully prevent their customers from accessing copyright infringing services. Such orders are routinely issued in the UK pursuant to Section 97A of the CPDA 1988 and they contribute to the health of the UK online music market and the lower prevalence of piracy. It has already been tested in 30 countries. Globally, more than 2,600 URLs have been blocked with low implementation costs. Such mechanism is not available in the US.

Safe harbours. Digital technologies and the online market have changed dramatically the way in which music is used and consumed over the last two decades. And the change continues. Safe harbour provisions which limit the liability of online content services under the United States Digital Millennium Copyright Act were devised in the late 1990s to help the development of the then nascent digital communications market. The digital world has developed since then.

In 2020, the digital communications market is well established. In fact online content services established a considerable time after the coming into force of the Digital Millennium Copyright Act, are the main source of music consumption benefiting from enormous increases in broadband availability and speed. Such services often rely on limitations of liability to reduce the licensing fee for the use of music in negotiations with rightholders or even avoid obtaining a licence altogether. The “safe harbour” provisions under US law need to be updated to take into account technical developments in the last 20 years. These provisions are in urgent need for reform to incentivise online platforms to conclude licenses for the music available on their platforms (in particular in the US). It would be contrary to further development to set in stone existing and outdated safe harbours in the UK/US FTA. It would preclude both the UK and US from acting flexibly to new technological developments.

Collective management. Finally, the UK Copyright framework contains important legislation regulating collective management organisations (CMOs) based on the principles of transparency, accountability, and good governance. As part of those principles, CMOs have (for example) obligations around royalty distribution efficiency, and setting tariffs that reflect the economic value of the use of the rights in trade.

UK composers, performers and those who invest in their creativity (such as music publishers and sound recording copyright owners) should continue to benefit from the same minimum protections in their dealings with, and receipt of monies from, US-based CMOs.

Recommendations:

- **The UK/US FTA should expressly refer to website blocking orders as a means to protect legitimate business from unfair competition through unlicensed music services.**
- **We urge the UK Government not to introduce detailed provisions in the UK/US FTA based on the DMCA 1998. This will ensure that the UK can act in a sovereign and flexible way to any technological developments. The UK/US FTA should be limited to providing minimum standards to incentivise licensing.**
- **The UK government should seek in its FTA strong principles of transparency and accountability in the operation of collective management.**