



United States-United Kingdom Trade Agreement Negotiations
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Comments of the Recording Industry Association of America (RIAA)
January 15, 2019

The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. Our membership includes several hundred companies, many of which are small-to-medium-sized enterprises (SMEs).

The RIAA welcomes this opportunity to provide information to the Trade Policy Staff Committee (TPSC) in order to assist the Office of the United States Trade Representative (USTR) as it develops its negotiating positions for the United States-United Kingdom Trade Agreement. In response to this *Request for Comments on a Proposed U.S.-UK Trade Agreement including U.S. Interests and Priorities, in order to Develop U.S. Negotiating Positions* (Federal Register Volume 83, Number 57790 (Friday, November 16, 2018)), RIAA provides the following comments regarding matters relevant to the negotiation of a U.S.-UK Trade Agreement.

These comments address matters enumerated in the Federal Register Notice, including “(a) [g]eneral and product-specific negotiating objectives for the proposed agreement”, “(b) [r]elevant barriers to trade in goods and services between the U.S. and UK that should be addressed in the negotiations”, “(c) [e]conomic costs and benefits to U.S. producers and consumers of remove or reduction of tariffs and removal or reduction of non-tariff barriers on articles traded with the UK”, “(d)(i) [p]roduct-specific import and export interests or barriers”, “(d)(ii) [e]xperience with particular measures that should be addressed in the negotiations”, “(d)(iii) [w]ays to address export priorities and import sensitivities in the context of the proposed agreement”, and (g) “[o]ther measures or practices that undermine fair market opportunities for U.S. businesses, workers, farmers, and ranchers that should be addressed in the negotiations”.

Given our significant SME membership, RIAA urges the TPSC to consider the following comments as also representing the interests and priorities of U.S. recording industry small-to-medium sized enterprises (SMEs).

Trade Fuels the U.S. Recording Industry's Contributions to the U.S. Economy

Trade agreement negotiations are a high priority for the U.S. sound recording industry. Our industry is highly trade intensive and relies heavily on international commerce supported by strong trade disciplines that promote creativity and that ensure fair and legitimate trade in creative goods and services. Supported by such disciplines, including through trade agreement negotiations, our industry makes considerable contributions to U.S. economic growth, high-quality American jobs, and U.S. trade competitiveness.

For example, the industry contributed \$143 billion annually in value to the U.S. economy in 2016 and created, directly or indirectly, 1.9 million U.S. jobs across a very wide variety of fields.¹ Likewise, copyright-intensive industries, including the music industry, contributed \$1.3 trillion to the U.S. economy in 2017, and grew at an aggregate annual rate of 5.23 percent from 2014 to 2017, compared with average annual growth rate of 2.10 percent for the U.S. economy generally.² These industries supplied 5.7 million U.S. jobs in 2017,³ and the compensation paid in the copyright-intensive industries far exceeds that of U.S. workers overall – amounting to a compensation premium of 39 percent over the average U.S. annual wage.⁴

Strong trade disciplines achieved through U.S. trade negotiations likewise help drive U.S. sound recording industry exports and surplus of goods and services, which in turn support American jobs and U.S. economic growth. For instance, the sale of U.S. copyright products in third countries around the world amounted to \$191.2 billion in 2017. Notably, these foreign sales surpass the sales of other major U.S. industries, including electronic equipment, appliances and components (\$174.2 billion), agricultural products (\$138.2 billion), chemicals (excluding pharmaceuticals & medicines) (\$137.0 billion), aerospace products and parts (134.4 billion), and pharmaceuticals and medicines (\$55.8 billion).⁵

¹ Siwek, Stephen; *The U.S. Music Industry: Jobs & Benefits*; April 2018; pp. 5, 7,

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

³ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2018; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf><https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

⁴ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2018; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

⁵ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2018 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 3; available at: <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>

In turn, the American recording industry helps fuel the substantial surplus in U.S. *services* trade globally. For example, charges for the use of IPR (i.e., IPR licensing, including of sound recordings) has been among the top three contributors to the U.S. *services surplus* since 2006, and accounted for the second largest service trade surplus of all services trade categories in 2017, following closely behind financial services. Likewise, in 2017, IPR licensing was the third largest category of U.S. *services exports* (accounting for 16 percent of total services exports). Last year, IPR licensing, travel, financial services and “other business services” accounted for three-fourths of total U.S. *services exports*.⁶

Moreover, the U.S. sound recording industry is *digital* trade intensive, with digital accounting for 90 percent of our revenues in the United States, with streaming accounting for 75 percent of revenues. The licensing of copyright that protects sound recordings is a digital service that fuels trade in sound recordings, which are digital products that can be streamed or downloaded.

The profound importance of the provision of such services to the U.S. economy is exemplified by the considerable contributions of IPR to the U.S. *digital services* trade surplus. IP licensing continued to be a key driver of the U.S. *digital services exports* and surplus. For example, in 2017, IPR licensing accounted for \$128 billion in digital services trade *exports* and generated an \$77 billion digital services trade *surplus*, which was second only to financial services by a narrow margin (i.e., \$80 billion).⁷

To realize the full potential of the sound recording industry’s contributions to U.S. economic growth, employment, and trade surplus, it is vital that the U.S. government take active steps to ensure that its policies reflect these priorities, including in the negotiations of a U.S.-UK Trade Agreement. An agenda for promoting these contributions of our industry consists of high-quality consumer-oriented digital products and services in an ecosystem that advances creativity and innovation through strong copyright protection and enforcement, powers digital trade through licensing music, secures market access for digital products and services, promotes fair competition between content delivery services, and that ensures digital platform accountability.

⁶ 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>.

⁷ 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>

U.S.-UK Trade Fuels the Recording Industry's Contributions to the U.S. Economy

The United Kingdom is the fourth largest music market in the world and the second largest *digital* music market. In fact, the United Kingdom accounted for eight percent of global music *streaming* revenues, ranking second behind the United States in terms of its share of total music streaming revenues. The United Kingdom also has significant growth potential with respect to streaming, which further underscores the importance of strong copyright protection and enforcement to ensure a good licensing environment in that market. In 2017, the United Kingdom ranked 11th globally in terms of the contributions of streaming to the total UK recorded music market, i.e., 38.2 percent. For example, total streaming revenues in that market increased by 41 percent in 2017, ranking 10th globally in terms of increases in streaming revenues in European countries.⁸

The United Kingdom is also a leader in other critical music consumption categories, including physical (e.g., CDs and vinyl records) and performance rights (i.e., the revenue generated from the use of recorded music by broadcasters and public venues). For example, the United Kingdom ranks fourth globally for physical music sales, with such sales representing 30 percent of total music sales in that market and eight percent of global physical music sales. Likewise, the UK market is the fourth largest performance rights market in the world, accounting for 10 percent of total global performance rights revenues. Finally, the United Kingdom has among the highest revenue per capita for recorded music at \$19.98, which is comparable to that of the United States at \$18.11.⁹

In turn, the American recording industry helps fuel the substantial U.S. *services* trade with the United Kingdom. At \$69.6 billion in services exports from the United States, the United Kingdom is the largest export market globally for U.S. services in 2017, with U.S. services *exports* to the United Kingdom having increased by 42.8 billion (i.e., four percent) that year. The U.S. services trade *surplus* with the United Kingdom reached \$12.7 billion in 2017. Likewise, U.S. IPR licensing, including sound recordings, in the United Kingdom followed global trends as a leader in U.S. services export and surplus categories. For instance, the United Kingdom was the third largest services market globally for U.S. IPR licensing *exports* at \$9.8 billion in 2017. In the same year, the United States also had a \$5 billion IPR licensing *surplus*

⁸ IFPI; *Global Music Report (2018): Music Consumption Exploding Worldwide*; pp. 49-51, 56, 63, 66-67, and 127; available at: <http://www.ifpi.org/downloads/GMR2018.pdf>.

⁹ IFPI; *Global Music Report (2018): Music Consumption Exploding Worldwide*; pp. 49-50, 56, 59, 63; available at: <http://www.ifpi.org/downloads/GMR2018.pdf>.

with the United Kingdom.¹⁰

Regarding *digital* services trade, the United Kingdom ranked second globally for *exports* in 2017, with U.S. digital services *exports* totaling \$45.5 billion, and a U.S. digital services trade *surplus* of approximately \$12 billion.¹¹ Similarly, the United Kingdom was among the top *digital* services trade markets for IPR licensing exports, including for sound recordings. According to U.S. Bureau of Economic Analysis data from 2014 (most recent available), 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.¹²

U.S. Recording Industry Priorities for a U.S.-UK Trade Agreement

Trade agreement negotiations between the United States and the United Kingdom offer both opportunity and challenge. In particular, U.S.-UK trade in music and other digital products relies on a strong foundation of copyright protection and enforcement, while loopholes and overbroad immunities for copyright infringement create tremendous barriers to trade in music, including with respect to goods, services and digital products, that threaten current and future bilateral trade. Ensuring such protection and enforcement, while combatting such barriers, are critical for the continued growth and viability of the U.S.-UK digital music market. The following include both systemic as well as specific priorities (where noted) of the U.S. recording industry with respect to trade negotiations with the United Kingdom.

Copyright Protection

- Making Available Right. The exclusive making available right is the essential right underpinning all online commerce in content.

¹⁰ 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>.

¹¹ 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>

¹² 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>.

- Broadcast and Public Performance Rights. Music producers and performers should be granted full exclusive communication to the public and broadcasting rights, instead of the remuneration rights.
- Technological Protection Measures. Technological protections measures (TPM), which are used to protect access to copyright-protected sound recordings, are critical for Internet services, including those that are cloud based, which offer licensed content.

With respect to the systemic priorities for copyright protection enumerated in the three bullets above, we note that the United Kingdom provides for these rights/levels of protection.

Copyright Enforcement

Strong copyright protection in isolation, however, is of limited value without robust enforcement, particularly in the digital environment. Likewise, the absence of adequate and effective IPR enforcement tools constitutes an important impediment to digital music trade.

- Primary and Secondary Liability. A strong copyright enforcement framework is predicated upon clear legal basis for liability, including both primary and secondary civil liability, such as contributory and vicarious infringement as well as inducing infringement, and for aiding and abetting criminal infringement.
- Website Blocking. Website blocking is a highly-effective form of copyright enforcement in the UK, and in numerous other jurisdictions around the world to combat infringing websites, and is a critical tool in ensuring legitimate trade in digital products and services.
 - Under Section 97(a) of the Copyright Designs and Patents Act 1988, UK law provides copyright holders with the ability bring enforcement actions to block access to copyright infringing websites. Under this law, the United Kingdom also provides for website blocking of copyright infringing websites through third part civil injunctions. Website blocking has been successful in the United Kingdom with 63 music sites being ordered to be blocked following music right holders' initiatives. On average this produces a reduction in the use of those sites by UK users by approximately 75 percent.
 - Notably, in March 2017, the UK High Court granted the first "live" or "dynamic" blocking orders in relation to a case brought by the Football Association Premier League. The order requires six OSPs to block access not to a particular website, but rather to a streaming server that provides unauthorized access to copyright content. The order is

“live” in that it only has effect at the time when live Premier League match footage is being broadcast, and only for the duration of the season.

- Damages. Damages are also particularly critical in promoting a legitimate and sustainable digital music trade. The music industry places particular importance on the availability of statutory damages given the difficulties in proving numbers of infringements or obtaining financial records from infringers. In the alternative, damages should be based on the harm caused to right holders and/or profits obtained by the infringer. Damage calculations should take into account deterrence for future infringers and should adequately compensate right holders.
 - The UK Digital Economy Act 2017 includes several measures supported by the recording industry. These include an increase in criminal penalty for online copyright infringement. The Act increases the maximum sentence for online copyright infringement from two years to ten years to harmonize penalties for online and offline (physical) copyright infringement. The Act requires that a person must either intend to make monetary gain, or know or have reason to believe that their actions will cause loss to the owner of the right.
 - The U.S. recording industry supports penalties to deter copyright infringement, particularly online. The UK Proceeds of the Crime Act of 2002 offers such deterrence by providing for confiscation or civil recovery of the proceeds from crimes, including copyright infringement. This statute has provided a critical enforcement tool to UK authorities working to combat piracy in the UK.

Barriers to Copyright Protection and Enforcement

Copyright protection and enforcement, and contributions described above that flow from them, face critical barriers that significantly impede legitimate and sustainable digital trade in music and other digital products from the creative sector. Such trade barriers include:

- 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. Safe harbors in both jurisdictions have been misapplied and expanded by certain music services that actively make infringing music available to avoid commercially-licensing the music uploaded by users to that service. Trade agreements should not permit or promote such vast expansions of safe harbors beyond their original intent. Nor should such

agreements prevent clarifications of, or amendments to, domestic law in order to ensure that it remains effective and can adapt to the ever-evolving Internet ecosystem. Moreover, trade obligations on ISP safe harbors lend themselves to poor implementation.

- Overbroad Application of Copyright Exceptions and Limitations. Copyright exceptions and limitations are subject to international norms, including the three-step test. This fundamental norm is woven tightly into the fabric of international copyright law. Efforts to include U.S.-style fair use in trade agreements are particularly troubling. Fundamentally, fair use creates profound uncertainty out of the U.S. legal system context. It also contrasts with the closed-list approach under the fair dealing exception in the United Kingdom -- these two distinct legal concepts should not be conflated.
- Lack of Platform Accountability. As we have stated in previous filings, platform accountability should be a central feature of U.S. digital trade policy. While the Internet presents opportunity for legitimate commerce, there are also significant and copious challenges to such commerce. Such challenges include illicit content, whether copyright infringing or other illegal content. Many other threats to economic and national security as well as individual security and democratic institutions also proliferate in the digital ecosystem.

Internet platforms must be accountable with respect to addressing illegal material on their platforms and do a better job in ensuring that they are not used for infringing or other illegal activity. The argument that someone else initiated the illegal activity should not absolve platforms from the reality that, but for their services, the third party may not have been able to engage in the illegal act in the first place. Digital trade policy should not automatically promote safe harbors and platform immunities as the *sine qua non* for Internet growth.

This is particularly true of trade agreement provisions, which often are simply incapable of fully reflecting the complexity, extent and nuance of U.S. law, including its jurisprudence, and where the drafting of such provisions present a significant risk that they will not be adequately transposed and will be implemented or interpreted in a manner inconsistent with U.S. law. Moreover, in view of the fact that the United States is currently reviewing several aspects of U.S. law, and either has made or is actively considering several future changes to law, with respect to platform accountability, including such provisions in trade agreements presents considerable risk of exporting outdated law and significantly circumscribing congressional legislative prerogative regarding changes to that law.

Conclusion

RIAA welcomes this opportunity to provide these comments to the TPSC regarding the U.S. sound recording industry's priorities with respect to promoting U.S. trade competitiveness in the United Kingdom and globally, where market access, strong IPR protection and enforcement, and platform accountability are mutually reinforcing and contribute to the overall welfare of the U.S. economy, and its businesses, workers and consumers. RIAA looks forward to continuing to engage intensively with the TPSC on negotiations of a U.S.-UK Trade Agreement.