

CreativeFuture

Creativity. Innovation. Tomorrow.

January 15, 2019

Members of the Trade Policy Staff Committee
Office of the United States Trade Representative
Washington, DC

RE: *U.S.-UK Trade Agreement*

Submitted Electronically through the Federal eRulemaking Portal, Docket No. USTR-2018-0036

Dear Members of the Committee,

CreativeFuture appreciates the opportunity to respond to the Office of the United States Trade Representative's *Request for Comments on Negotiating Objectives for a U.S.-United Kingdom Trade Agreement* as set forth in the Federal Register notice dated November 15, 2018.

CreativeFuture is a coalition of over 540 organizations and companies and over 220,000 individuals. Whether we work in film, television, publishing, music, or photography, our ability to engage in core expressive and culturally important activities in the digital environment is under siege from the rampant, illicit activity of digital piracy.

This problem disproportionately affects the American creative industries, and, in particular, the small businesses of which they are largely comprised. The film and television industry, for instance, is made up of over 93,000 businesses in total, located in every state in the country. 87% of all companies in the film and television industry have fewer than 10 employees.¹ Many members of these communities are self-employed or freelance workers who depend upon our copyright system to protect their livelihoods.

Although a collection of mostly small businesses, America's creative industries are an important economic driver, contributing more than \$1.3 trillion to our nation's Gross Domestic Product and employing 5.7 million Americans. U.S. core copyright industries are leading exporters, with total foreign sales eclipsing those of other major U.S. industries – including aerospace, agriculture, and pharmaceuticals.² When consumers in other countries enjoy American-made creative products through legitimate distributors, job creation and economic growth occur here at home. But rampant online piracy diminishes the value of the creative economy around the world, adversely affecting our favorable trade balance and American jobs.

In seeking a trade agreement with the United Kingdom (UK), the U.S. will enter into negotiations with a partner that likewise sees great economic benefit from the film and television industry. According to the Office of National Statistics, the film, television and music sectors economic value has grown by 72% in

¹ Motion Picture Association of America, *The Economic Contribution of the Motion Picture & Television Industry to the United States*, November 2017

² International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy*, 2018

the last five years and employs almost 2 million people in the UK. Any measure that the U.S. secures to help protect the livelihoods of creatives in the U.S. will also deliver benefit for creatives in the UK.

It is essential, therefore, that the United States always seeks to achieve a gold standard for copyright and intellectual property protections in all free trade agreements (FTAs). An agreement between the U.S. and the UK offers a unique opportunity to set a new gold standard for intellectual property protection. Both countries have significant creative and innovative industries and both countries' laws provide strong copyright protections and other forms of intellectual property rights.

UK law is stronger in some ways than the law in the U.S. A priority of any U.S.-UK trade negotiations should be to fully realize the potential global precedent that could be set in the IP chapter. Together, the U.S. and UK should see aligned incentives to create an alliance that drives creative industries in both countries in the decades to come, when frankly other countries, including some in Europe, should do more.

Strong copyright protections are precisely what give our creative communities the freedom to pursue their art as a career, not just as a hobby. Foreign markets are increasingly important to America's creative economy. For example, almost three fourths of all movie box office receipts come from overseas markets.

Foreign governments' protection of intellectual property is now more important to the American creative community than ever before. These protections ensure that the years of uncompensated work that creatives invest in the creation of songs, publications, films, or coding a program have a real opportunity of a meaningful return – a return that may then be used to pursue the next work, continuing to enrich our culture and economy.

Unfortunately, powerful corporate interests in Silicon Valley are threatening decades of U.S. leadership and progress in negotiating trade agreements with strong copyright protections. These corporate interests seek to protect their business model and legal immunities at the expense of every American who relies on copyright to make an honest living. Further, they have recently advocated for expanding their outdated and overbroad immunities into FTAs – immunities that were granted to them in the U.S. in the late '90s and are currently being scrutinized here at home.

Our creative economy is under siege from digital piracy, exacerbated by massively dominant platform companies like Facebook and Google, which enjoy liability protections that allow them to fall far short in taking the responsibility necessary to stop criminals from using their platforms to deprive creatives of fair compensation. In recent trade discussions, these companies have actively campaigned to weaken our protections via both the digital trade and intellectual property chapters, which are inextricably linked in this digital age.

Our free trade agreements should *only* support the most effective policies for the digital age, embracing the best of copyright principles and practices from the United States and other nations. In today's borderless digital and global marketplace, copyright works stolen in one country have a ripple effect, causing harm across the globe.

New Attacks on Copyright in Trade Agreements

Until the negotiation of the Trans Pacific Partnership (TPP) by the previous Administration, the United States had been working toward the goal of constantly improving the intellectual property chapters of its trade agreements. Over several decades, the U.S. had steadily and sensibly increased the level of copyright protection in these chapters.

Unfortunately, during the TPP negotiations, this positive trend changed. Big Tech made an aggressive push to weaken the IP chapter of the agreement. They and their constellation of lobbyists and aligned interest groups launched an all-out assault on the agreement's copyright protections, using the tired and disproven argument that copyright "stifles innovation." For the first time, the United States Trade Representative (USTR) considered weakening what had been a hallmark of American trade agreements for two decades – strong copyright and IP protections.

Due to the withdrawal of the U.S. from the TPP, these provisions were never considered or ratified by Congress. However, many of the efforts to weaken the IP chapter were repeated by Big Tech during the recent renegotiation of the North American Free Trade Agreement (NAFTA), resulting in the United States Mexico Canada Agreement (USMCA), which we will revisit below.

The U.S.- UK Trade Agreement

Copyright and Intellectual Property Protections

CreativeFuture urges the negotiators of the U.S.-UK agreement to prioritize the protection of legitimate, global digital trade that powers the American creative industries. This requires the simultaneous protection and export of existing copyright laws and statutes. Primary and secondary liability for infringement remains the *sine qua non* of any FTA negotiation by the U.S.

The U.S-UK agreement provides an opportunity to build upon important provisions from the recently-negotiated U.S. – Mexico – Canada Agreement (USMCA). To the extent that these protections are already part of UK law, this upcoming treaty should make clear that these are absolutely necessary pieces of any future agreement:

- The protection for the full range of rights covered by copyright, including internet age distribution and public performance rights, and the requirement of a term of protection consistent with the global norm.
- The implementation of the World Intellectual Property Organization (WIPO) Internet Treaties, which includes strong technological protection measures (TPMs). These protections against circumvention of "digital locks" are important because they allow U.S. copyright holders to distribute their works globally, while also protecting from infringement.

For example, without TPMs, content owners would not be able to offer a lower-priced digital "rental" for a fixed period of time alongside a digital purchase; nor would they have confidence in the security of their content on popular subscription video-on-demand (SVOD) services like Netflix.

- Strong criminal, civil, and customs remedies against copyright infringement – including liability language for aiding and abetting, and legal remedies for digital piracy, the same as for physical goods.
- The reiteration of legitimate, existing copyright exceptions without accepting the harmful “balance” Trojan horse language inserted in the TPP by Big Tech’s lobbyists. That language alone could have undercut all of the other copyright provisions. The USMCA did not include this “balance” language.
- A strong provision criminalizing the act of camcording in movie theaters, one of the most devastating methods of copyright infringement for U.S. creatives. Camcording is normally done within the first few days of release – a time of maximum consumer appetite, as well as an important stage in the profitability of the film. Studies have shown that camcording disrupts the theatrical window, which is key to production companies, distributors, and financiers recouping their initial investments and is crucial to the long-term prospects for any film.

At the same time, the forthcoming U.S.-UK agreement provides an opportunity to fix key omissions and flawed provisions of the USMCA that can be tied to Big Tech’s continued assault on copyright protections:

- A U.S.-UK agreement should fix the glaring omission of secondary liability for copyright infringement. As noted above, such liability is a core aspect of American copyright law and has proven essential for policing infringement in a digital world. Most, if not all, of the major enforcement actions involving large-scale digital piracy operations have relied upon secondary liability.
- A U.S.-UK agreement should not make the same mistake as USMCA’s copyright safe harbor language, which was based on the language in TPP and watered down at the behest of Big Tech. Simply put, any copyright safe harbor in the upcoming agreement should not be more permissive than current U.S. law – a law which we believe has proven to be inadequate in addressing the needs of copyright holders.

Creative Future has grave concerns over the impact of the current U.S. regime – the Digital Millennium Copyright Act’s (DMCA) “notice and takedown” regime – on small and medium-sized creative companies, without the resources for this endless game. It is untenable for individual creatives battling a worldwide, illegal distribution network facilitated by American companies.

Any state-of-the-art agreement should have both a strong secondary liability obligation *and* language that helps ensure an effective safe harbor regime that protects innocent ISPs without institutionalizing a lack of accountability-by-design.

Trade agreements are the vehicles through which we ensure proper protections internationally for individual Americans working here at home. These creatives are at an incredible disadvantage in the current system where the largest companies in the world are facilitating a massive piracy ecosystem – allowed to look the other way because of their legal immunities.

The burden of combatting infringement is placed squarely at the feet of individual copyright holders rather than with massive corporations that run the platforms that facilitate infringement.

And, while some may think that there are equally powerful corporations that are copyright holders in the music, book, film, and TV businesses, the reality is that individual creatives who stake their livelihood on the rights granted by copyright are hurt most by a system that shields the powerful from accountability.

In addition to the copyright provisions discussed above, we hope that this forthcoming agreement will be written to accommodate certain existing, unique protections in UK law that have proven invaluable to the creative industries and do not currently exist in the U.S.

- Specifically, in the UK, there is a system that allows courts to issue orders to internet service providers to ensure their services are not being used to facilitate infringement, including so-called “site blocking” orders. These orders may be readily modified to reflect proxy, mirror, etc. sites. Studies have shown that site blocking is very effective at reducing traffic to specific infringing sites.³ Any enforcement standards contained in the agreement should permit, if not encourage, the UK to continue using this remedy.
- Finally, both countries’ governments have taken leadership roles in helping to broker voluntary initiatives. Once again, and especially in recent years, the UK has in some ways done more than the U.S. The UK government has been putting pressure on the major search engines to implement a voluntary search demotion initiative, which may soon bear fruit. The London Police Intellectual Property Crimes Protection Unit (PIP CU) has also helped advertisers to remove their ads from piracy sites.

The U.S.-UK agreement should include provisions that promote these types of voluntary efforts as a supplement to solid legal mandates and ensure that governments continue to share information about best practices.

Immunities for Big Tech

At the same time, we urge the USTR to resist any and all attempts by Silicon Valley to insert overbroad exceptions, limitations, and safe harbors into any agreement. Today’s safe harbor and immunity policies were created 20 years ago, at the dawn of the consumer internet. The “infant industry” argument may have had some merit then, but those policies are now shielding some of the largest and wealthiest companies the world has ever seen from basic responsibility for activities they facilitate and, in many cases, profit from – and in all cases – mine valuable data in the process.

These immunities are receiving increased scrutiny today in the United States in light of numerous revelations about Big Tech’s business practices. Efforts by Big Tech’s mouthpieces in Washington to export these immunities through free trade agreements is an entirely transparent effort to make it even easier for certain market dominant internet platform companies to shirk any responsibility for the illegal activities they facilitate.

³ [*The Normalization of Website Blocking Around the World in the Fight Against Piracy Online, by Nigel Cory, June 12, 2018*](#)

Market Access

The USMCA also allowed Canada to continue its “cultural carve-out” that was created in the original NAFTA. As an organization representing the U.S. industries impacted by such a carve-out, we must point out that this outcome is an unfortunate flaw and must not be replicated elsewhere.

The UK has well-developed creative industries without significant trade barriers. However, this openness is not reflected in existing trade agreements. We urge USTR to work with the UK government to ensure ambitious market access commitments in the movie, TV, music, publishing, and software sectors, so the U.S.-UK FTA could set a positive example for future FTAs.

We very much appreciate the opportunity to share our comments and the perspective of our communities. America’s creative industries produce content that the world loves. All we ask is that our government ensure that we have the legal tools and market access to be compensated fairly for our work – wherever it is enjoyed. Every dollar spent abroad on our content supports an American industry that creates millions of jobs from coast to coast.

We respectfully ask the USTR to ensure that all future FTAs continue to build upon an American legacy of strong protections for intellectual property and copyright, while also updating the digital trade policies to promote innovation and commerce online. The survival and continued health of our creative industries rely upon strong copyright protections and enforcement tools here and abroad.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ruth Vitale". The signature is fluid and cursive, with the first name "Ruth" and last name "Vitale" clearly distinguishable.

Ruth Vitale
CEO, CreativeFuture