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Re: Request for Comments on Negotiating Objectives for a U.S.-United Kingdom Trade Agreement, 83 Fed. Reg. 57790 (November 16, 2018)

I. INTRODUCTION

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the copyright and related issues that are critically important to our members as a part of the U.S. Government's negotiations with the United Kingdom (UK) for a U.S.-UK Trade Agreement (UK Agreement). This filing is made in response to the above-captioned Federal Register Notice (FRN) which requested comments "with regard to objectives identified in section 102 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4201)." The FRN specifically invites comments on a non-exhaustive list of issues, including "[r]elevant barriers to trade in goods and services between the United States and the UK" and "[o]ther measures or practices that undermine fair opportunity for U.S. business, workers, farmers, and ranchers." Although the negotiating objectives of the U.S. Government in the UK Agreement are broad, the IIPA's comments focus primarily on intellectual property rights and digital trade objectives.

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpaa.org), and Recording Industry Association of America (www.riaa.com).

Collectively, IIPA's five-member association represents over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by these IIPA-member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs and audiocassettes; and fiction and

non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. For all of the IIPA member-companies, strong copyright laws and enforcement regimes, in all markets around the world, are essential to their success in order to make these materials accessible to consumers.

In December 2018, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2018 Report*, prepared by Stephen E. Siwek of Economists Inc. (2018 Report). According to the 2018 Report, the "core" copyright industries in the United States generated over $1.3 trillion of economic output in 2017, accounting for 6.85% of the entire economy, and, employed approximately 5.7 million workers in 2017, accounting for 3.85% of the entire U.S. workforce and 4.54% of total private employment in the U.S. The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 39% higher wages than other U.S. workers. In addition, according to the 2018 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 5.23% between 2014 and 2017, while the U.S. economy as a whole grew by 2.21%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2018 Report calls the "total" copyright industries), the numbers are even more compelling, as detailed in the 2018 Report.

Additionally, the 2018 Report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. In 2017, these sectors contributed $191.2 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, aerospace products and parts, agricultural products, and pharmaceuticals and medicines.[1]

Studies such as the 2018 Report amply demonstrate the contribution of creators, producers, and the copyright-based industries that support them, to the American economy. They also highlight what is at stake if those creators, producers and industries have to face the additional hurdles and costs associated with obstacles such as copyright piracy and discriminatory market barriers. This is why trade agreements that obligate American trading

[1]*See* Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018) available at https://iipa.org/reports/copyright-industries-us-economy/. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials. The link between copyright protection and economic growth is well documented by the World Intellectual Property Organization (WIPO) in its report, *2014 WIPO Studies on the Economic Contribution of the Copyright Industries: Overview*, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf, and the WIPO website now provides links to 49 country studies employing virtually the same agreed-upon methodology, see http://www.wipo.int/copyright/en/performance/. These national studies provide the economic underpinnings for efforts to reform copyright law, improve enforcement, and lower market access barriers. The Motion Picture Association Asia Pacific has issued a series of "Economic Contribution of the Film and Television Industry" studies. The most recent editions of these studies include: China (2015), Australia (2015), Hong Kong (2015), Japan (2015), Malaysia (2014), India (2013), Taiwan (2013), Shanghai (2012), New Zealand (2012), Indonesia (2012), Thailand (2012), and South Korea (2012). See Motion Picture Association Asia-Pacific, *Research and Statistics*, available at http://mpa-i.org/research-and-statistics/. See also UK Music's *The Economic Contribution of the Core UK Music Industry (2013) available at* http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry___WEB_Version.pdf, and PWC's *Economic contribution of the New Zealand music industry, 2012 and 2013* (2014), available at http://www.wecreate.org.nz/wp-content/uploads/2014/07/PWC-Music.pdf. See also Economists Inc.'s *Video Games in the 21st Century: The 2014 Report* (2014), available at http://www.theesa.com/wp-content/uploads/2014/11/VideoGames21stCentury_2014.pdf.

partners with high levels of copyright protection and enforcement, and which work to defeat market access barriers, are essential to the further successes of the copyright industries.

II. NEGOTIATING OBJECTIVES, RELEVANT BARRIERS, OTHER PRACTICES

Both the U.S. and the UK already provide strong copyright protections in their national laws, and devout significant resources to proper and effective enforcement. In some aspects, UK law is arguably stronger than U.S. law. Moreover, like the United States, the UK features a thriving creative industry, and has a well-developed marketplace for creative works. Thus, the negotiations with the UK will provide the U.S. Government with an opportunity to reach a very high-standard agreement on issues pertaining to intellectual property rights and digital trade. If these aspirations are realized, this agreement should become a model for future U.S. trade agreements. However, if some recent problematic U.S. trade agreement proposals are instead cut and pasted into the UK Agreement, or, if current positive aspects of the UK protection and enforcement system are weakened as part of these negotiations, this will not only harm the UK market for the U.S. copyright industries, but will set the wrong template for other agreements as well.

IIPA is hopeful that the U.S.-UK negotiations will build on the positive achievements of the recently concluded U.S. Mexico Canada Agreement (USMCA), while departing from certain provisions that are problematic, as discussed below. If this is accomplished, the UK Agreement can set the bar for a high-level agreement that is truly built for the digital age, including much-needed copyright protections and enforcement provisions. This would both serve as a model for future U.S. agreements, while also improving the market in the UK for the continued growth of the American and UK copyright industries.

A. Intellectual Property Objectives

For the continued success of the copyright industries, it is critical that any future UK Agreement includes obligations reflecting high standards of copyright protection and enforcement. It is also important that any agreement include enough flexibility to contemplate not only current IP business models, but also provisions that can account for future technological changes. At a minimum, any trade agreement should reflect the current global consensus on minimum standards of protection in the digital era. Such provisions include: (i) a **proper duration of protection** for works and sound recordings; (ii) effective legal **protections for technological measures** that are used by copyright owners to control access to and copying of their works; (iii) comprehensive obligations for copyright enforcement, including a panoply of **criminal penalties and civil remedies**, plus **liability for aiding and abetting** infringing activities; and (iv) **enforcement measures specifically addressing online infringement** mandating deterrent civil and criminal remedies, and providing **incentives for online service providers to cooperate** with right holders. Improved protections will provide American and other creators and producers with stronger incentives to invest in the UK's creative industries, spurring economic growth and tax revenues, and enabling creators and producers to continue offering content to UK's consumers in the latest formats.

Like the USMCA, the UK Agreement should include obligations to **fully implement the WIPO Internet Treaties**, including the rights of distribution and communication to the public

and explicit coverage of exclusive rights pertaining to electronic copies. The UK Agreement should also incorporate strong requirements regarding: (i) **camcording enforcement**—criminalizing the unauthorized camcording of movies in theaters; (ii) the **presumptions of ownership**; (iii) **protections of Rights Management Information (RMI)**; and (iv) **criminal, civil, and border enforcement measures**. The USMCA sets very high standards in these areas and IIPA is hopeful that the UK Agreement will meet or exceed these standards.

The UK Agreement should also require **pre-established (statutory) damages** in civil cases as an alternative for rights holders in lieu of proving actual damages or lost profits. This is a critical enforcement tool because in many instances of copyright infringement, especially online, the harm to a rights holder is substantial, but quantifying the value of such harm is difficult and expensive (requiring experts). The UK Agreement should improve upon the USMCA provision by requiring such pre-established damages, where the USMCA provided that such a remedy was merely permissive, not mandatory.

The UK Agreement should require proper protections relating to **technological protection measures (TPMs)**, which are critical protections for enabling business models that have fostered many of the innovative products and services available online. A major reason why so much legitimate creative content is now available to consumers, and in so many formats and platforms, is because of the widespread use of TPMs by content producers and (licensed) services. These TPMs ensure that only authorized users and consumers have access to copyrighted content. To protect these business models, the UK Agreement should include TPM protections, confine exceptions to those provided in U.S. law, and provide an explicit requirement for regular review of additional exceptions. The USMCA provision on TPMs is very strong, but unfortunately does not include the review requirement. This review requirement was included in the Korea-U.S. FTA and is a key aspect of U.S. law needed to ensure that additional exceptions remain appropriate for changing technologies, and an evolving marketplace and business models.

The UK Agreement should incorporate the global consensus on the **term of protection** for works and sound recordings, which is consistent with current U.S. law. For works, this is a term of life-plus-70 years, or 95 years from date of publication for works not measured by the life of a natural person. For sound recordings, this should include a minimum term of 70 years from fixation. The UK Agreement should provide at least a standard of protection commensurate with the USMCA, which requires a minimum term of protection of life of the author plus 70 years, or 75 years from publication for works and sound recordings. Since both the United States and UK already provide this minimum term for works, adopting the USMCA term into the UK Agreement would only require the UK to extend its current term for sound recordings from its current 70 years from publication (or communication to the public) to 75 years. Adopting this term will help to ensure full reciprocity of protection.

The UK Agreement must enshrine the concept that **limitations and exceptions** to copyright protection are confined to those that are consistent with the longstanding "3-step test." This touchstone of global copyright norms—which is found in the Berne Convention for the Protection of Literary and Artistic Works, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the WIPO Internet Treaties, and numerous

other international agreements that include copyright obligations—is the gold standard against which copyright exceptions and limitations should be measured. Like every trade agreement into which the U.S. has ever entered, the USMCA provides a clean repetition of the 3-step test to confine the scope of exceptions and limitations to copyright protection. IIPA members strongly support the USMCA text on copyright exceptions and limitations, and the omission of language on "balance" and fair use, which is unnecessary because of the 3-step test language. This is critical to ensure that our FTA partners do not undermine important protections, and the UK Agreement should likewise include only a clean repetition of the 3-step test to confine exceptions and limitations.

Regarding **safe harbors for online service providers**, negotiators should not use the USMCA as a model. It is unfortunate that the USMCA included detailed prescriptive provisions on safe harbors for online service providers that unnecessarily incorporate highly contentious issues into that agreement. Effective safe harbors are necessary for a legitimate online ecosystem, but the proper interpretation and application of those safe harbors is very complex with many different and strongly held views on all sides. The operation of the system for safe harbors in the United States is constantly changing due to rapid changes in technology, judicial evolution, and shifting business conditions. At the same time, increasing questions are being raised whether such detailed provisions, enacted over two decades ago, reflect current commercial realities and are "state of the art" in this complicated area. The U.S. Copyright Office is currently preparing a report for Congress on the state of U.S. safe harbor law.

The UK Agreement should reflect important aspects of U.S. law that are necessary for adequate and effective protection and enforcement. For example, an important feature of U.S. law is the set of **secondary liability doctrines** under which service providers can be held responsible for infringements carried out by third parties using their services or networks. Secondary liability provides the legal incentives for cooperation in the U.S. system. Because UK law also includes principles of secondary liability, these negotiations provide a golden opportunity to ensure U.S. trade agreements explicitly provide this key legal basis for cooperation between rights holders and online service providers. Not only is an explicit secondary liability standard missing in the text, the USMCA actually includes a number of new provisions that could undercut USTR's efforts to ensure U.S. trading partners provide adequate "legal incentives" through secondary liability principles.[2] Furthermore, the USMCA text on safe harbors includes several new provisions that do not appear to be consistent with U.S. law, and omits certain important conditions for safe harbor eligibility that are part of U.S. law.[3]

[2]For example, unlike in prior FTAs, the text includes an option to "take other action to deter the unauthorized storage and transmission of copyrighted materials." While the intent of this language is not clear, one interpretation is that it provides broad flexibility in additional measures Parties may choose to take to address online piracy and frame limitations on liability, undercutting the "legal incentives" obligation. The text also states that "the failure of an Internet Service Provider to qualify for the limitations in paragraph 1(b) does not itself result in liability," highlighting the absence of an explicit secondary liability obligation – many ISPs face no threat of liability without secondary liability concepts, meaning in that context that the conditions imposed on the safe harbors are essentially voluntary.

[3]For example, USMCA for the first time authorizes parties to "prescribe in its law conditions for ISPs to qualify" for safe harbors, or, "alternatively, shall provide for circumstances under which ISPs do not qualify" for safe harbors. This language could be interpreted, contrary to U.S. law, to allow parties to shift the burden such that, rather than

The UK's system for online legal remedies, including safe harbors is, in some features, more advanced than the U.S. system and provides enforcement that is even more effective. One of the more troubling aspects of the USMCA was its exemption of Canada's inadequate notice-and-notice from even the weak requirements of core safe harbor rules. This problem should not resurface in the UK Agreement. The USMCA approach, and the concession to Canada, resulted in an inflexible, detailed and prescriptive approach on safe harbors, which, as noted, fails to reflect the standards found in U.S. law. The UK Agreement offers an important opportunity to draft high-level principles that cover the U.S. system as well as the advanced system in the UK.

A granular approach to language on legal remedies and safe harbors is fraught and will make it impossible for negotiators to reflect the standards found in U.S. law. On this highly technical issue, therefore, these negotiations should take a general, high-level approach that articulates key principles, while providing flexibility. The Internet and online business models have changed dramatically even in the past few years, and will continue to change. The UK Agreement should reflect this reality, rather than attempting to export in detail what is now widely agreed to be an outdated model for safe harbors.

The U.S. Government should instead seize the opportunity presented by these negotiations to elevate the standards in U.S. trade agreements for online enforcement. In some respects, the UK has online enforcement remedies that are stronger and more effective than those in US law. For example, the UK is among a growing list of countries that have taken more effective action to address the serious problem of illegal marketplaces hosted in one country that target consumers in another (including, for example, a regimented system of **site blocking**). This is necessary because of the failure of the host country for services based there to take effective action against their own "homegrown" notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed back against this "offshoring" of enforcement responsibility, by developing means and processes for blocking access to these foreign pirate sites from within their borders. Government agencies and courts in an increasing number of countries around the world are employing a wide spectrum of judicial and administrative means to impose such restrictions under defined circumstances when other domestic remedies are insufficient.

The UK Agreement should, therefore, consistent with U.S. law, require additional remedies that are effective in combatting online infringement and promote stronger standards of online enforcement than the USMCA. For example, the UK Agreement should require parties to make available **injunctive relief orders** against parties or persons who are in active concert or

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requiring ISPs to affirmatively meet certain conditions to qualify for the safe harbor, parties may provide ISPs a blanket entitlement to a safe harbor, and the rights holder would have the burden of proving the ISP did not qualify. In addition, while prior FTAs required that safe harbors "shall be confined" to the four functions listed, USMCA does not explicitly include this limit. This raises the potential for parties to provide additional safe harbors for additional functions, which again would not be consistent with U.S. law. Footnote 118 regarding the "appropriate role for the government" also raises questions regarding consistency with the U.S. framework. Lastly, unlike prior FTAs, the USMCA does not include certain conditions for safe harbors that are part of U.S. law, including the requirement to publicly designate a representative to receive notifications, and, for eligibility for the caching safe harbor, the requirements to comply with industry standard technology or refreshing rules and to expeditiously remove or disable access to cached material upon notice that the original source of the material has been taken down.

participation with infringers in order to prevent or restrain the infringement.[4] Such injunctive relief orders should be available, *inter alia*, to prevent unauthorized storage, transmission, and access to copyrighted materials. Moreover, nothing in the UK Agreement should restrain the UK from taking actions against online infringement; to the contrary, the UK Agreement should include language recognizing the efficacy of the UK's legal and enforcement framework, and should call for additional measures to address the destructive problem of online infringement effectively. This could include, as noted above, providing obligations that address the UK's very effective system for online legal remedies and safe harbors.

B. Digital Trade Objectives

As evidenced by the growth of and now reliance on revenues from digital distribution, the copyright industries have embraced all means of digital technologies to produce and distribute their works and recordings, including launching new businesses, services, and apps to meet evolving consumer demand. More legitimate copyrighted material is now available to consumers, and in more diversified ways and with more flexible pricing than at any time in history.[5] This consumer appetite for copyrighted materials does not stop at our borders. To meet worldwide demand, the copyright sector, more than any other in the U.S. economy, has moved aggressively to digitally deliver its products and services across borders, inextricably linking "digital trade" with trade in copyright-protected material.[6]

As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. The UK Agreement should therefore ensure the American creative industries can compete on a level playing field in the UK's digital marketplace. In particular, the UK Agreement must address the single-most damaging barrier to digital trade faced by the creative industries: digital piracy. Content industries are forced to face unfair competition, including from those who engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyrighted content are facing increased threats, as they must compete with the massive proliferation of illegal services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them (as well as other services that avoid fair licensing and claim no legal responsibility for the copyrighted works distributed on their sites). As noted, the UK has strong enforcement and the UK Agreement should reflect this in language that can serve as a model for future agreements.

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[4]See Federal Rule of Civil Procedure 65.

[5]For example, there are now over 40 million tracks and hundreds of digital music services now available according a 2017 study: IFPI, *Music Consumer Insight Report 2017*, available at http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf. For more information on the proliferation of services, see, e.g., https://www.mpaa.org/watch-it-legally/ (movies and TV content); http://www.whymusicmatters.com and http://www.pro-music.org/ (music); and http://www.theesa.com/purchasing-legitimate-digital-copies-games/ (video games).

[6]A January 2018 Department of Commerce study, using the latest available year (2016) data, found that charges for the use of intellectual property, which includes copyrighted content, accounted for $124.5 billion of a total of $403.5 billion of potentially ICT (information and communications technology)-enabled services exports, or 31%. It also found that charges for the use of intellectual property accounted for $80 billion out of a total trade surplus of $159.5 billion of potentially ICT-enabled services, or over 50%. See, Department of Commerce "Digital Trade in North America" at 4, available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf.

The current size and scope of digital piracy worldwide, and its impact on the digital marketplace, is substantial, although the full costs of copyright piracy are difficult to quantify. RIAA estimated that in 2016 there were over 137.3 billion visits globally to websites dedicated to copyright infringements. A 2017 study "estimate[d] that the commercial value of digital piracy in film in 2015 was $160 billion," while the corresponding estimate for the music industry was $29 billion. The study also spells out methodological reasons why "it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount."[7] This study does not include a comparable estimate for video games but discusses briefly how such an estimate might be prepared. The study also attempts to quantify the broader social and economic costs of piracy. A 2016 study by Carnegie Mellon focusing on movie piracy, determined that if piracy was eliminated in the theatrical window, box-office revenues would increase by 15% or $1.3 billion per year.[8]

Rampant piracy not only impedes the evolution of legitimate channels for distribution, but also threatens to permanently damage or displace existing and authorized distribution channels, which are unable to compete with infringing business models that make pirated content available for free to consumers. Moreover, by undermining the U.S. copyright industries, piracy significantly impairs one of the key drivers of U.S. trade surplus. This is also true of the other market distortions that prevent the commercial licensing of copyrighted materials or which hamper investment in the production and distribution of content (which often maximizes revenue through exclusive distribution deals). The U.S.-UK negotiations must therefore address the problem of digital piracy, along with other impediments to the digital marketplace, including such market distortions arising from unfair competition, to enable the production and distribution of legitimate creative content in the UK.

There are other concerning aspects of the USMCA that should be addressed properly in the UK Agreement. While the USMCA otherwise includes a strong Digital Trade Chapter, IIPA is concerned that two new articles, which have not appeared in prior FTAs could undermine the effective protection and enforcement of copyright. First, Article 19.17 on **Interactive Computer Services** is a novel provision that attempts to export the principles of Section 230 of the Communications Decency Act. While this provision does include an IP carve-out, IIPA is concerned that the article's untested language may complicate online copyright enforcement.

Likewise, IIPA is concerned that Article 19.18 on **Open Government Data** could diminish adequate and effective protection and enforcement of copyrights if implemented in an overly broad manner that sweeps copyrighted content into its directive for expanded access. If either of these USMCA issues and any such language is going to be replicated in whole or in part in the UK Agreement, the copyright industries should be consulted to avoid the concerns that resulted from the USMCA provisions.

[7]Frontier Economics, The Economic Impacts of Counterfeiting and Piracy (February 2017), at pp. 23-39, *available at* http://www.inta.org/Communications/Pages/Impact-Studies.aspx.
[8]Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

C. No Exception for the "Cultural Industries"

A major concern with the USMCA that should not be replicated in the UK Agreement is the **"carve out" exception for obligations regarding the "cultural industries."** Such a provision would completely undermine many, if not all of the benefits of the agreement for the copyright sector, a sector that contributes over $1.3 trillion to U.S. GDP and approximately 5.7 million American jobs, and is a key driver of U.S. trade surpluses. It is extremely disappointing that this anachronistic provision, a vestige of the original NAFTA (and the precedent U.S.-Canada trade agreement), is part of the USMCA. At best, such an exception denies the copyright industries the certainty that is a core benefit of a trade agreement. At worst, it permits U.S. trading partners to discriminate against these critical industries by denying them access to their marketplace and/or denying them intellectual property rights and other protections that would otherwise be guaranteed by the agreement. There should be no exception for cultural industries in the UK Agreement (or, in any other future U.S. trade agreement).

III. CONCLUSION

For the reasons set forth above, IIPA welcomes negotiations with the UK, which offer the potential to produce a high standard trade agreement with one of the U.S.'s most important trading partners. The UK is at the forefront in efforts to combat the scourge of digital piracy, which threatens the viability of licensed platforms and erodes the capacity of American authors, artists, musicians, filmmakers, publishers, videogame developers, performers and songwriters to earn a living.

The U.S. Government should embrace the unique opportunity to build on the USMCA, and correct its shortcomings, in order to achieve a high standard agreement that will serve as a model for future U.S. trade agreements and to improve copyright enforcement around the world. This will undoubtedly result in increased U.S. jobs and trade competitiveness, and strengthen a critical driver of the U.S. trade surplus. It will also serve to provide consumers of copyrighted materials in the UK, with an even wider array of legally accessible copyrighted materials and services than is already available.

Respectfully submitted,
/s/
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