

ALLIANCE

**FOR INTELLECTUAL
P R O P E R T Y**

Consultations on trade negotiations

UK preparation for an independent
trade policy once UK leaves the EU



The United Kingdom is a world leader in creating brands, designs, programmes and products which are not only commercially successful but also deliver a soft power element that is realised globally. According to the Soft Power 30, the UK is second only to the US in terms of cultural soft power¹.

The United Kingdom has one of the best developed and applied intellectual property regimes in the world. It enables innovative new products and services to be developed within recognised intellectual property rights. At the same time consumers are afforded high levels of information and protection when choosing their preferred goods and services. This current advantage must not be jeopardised as we seek to reposition our trading relationships in preparation for withdrawal from the European Union.

The Alliance for Intellectual Property is a unique association of 21 organisations representing businesses, small and large. Alliance members include representatives of the audio visual, branded, business software, design, games, image, music, publishing, retailing, sports rights and visual arts, sectors. They all share a collective interest in ensuring that IP rights are valued in the UK and that a legislative regime exists which enables the value and contribution of those rights to be fully realised in the UK and globally.

In addressing the detail of negotiations for boosting trading relationships with countries including the United States, Australia, New Zealand and considering potential accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) it is vital that the protection and promotion of intellectual property (IP) is at the heart of policy, ensuring that everything we create in the UK has the potential to achieve its maximum value, that creators are properly rewarded and that markets work well for consumers.

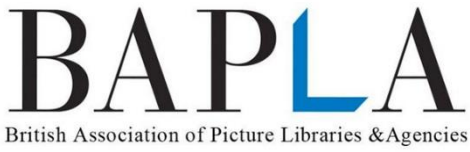
The Alliance has previously collated and published its “Trading Places”² report covering major export markets for our members’ industries, in addition to future priority markets and the specific issues and opportunities within IP that will come with this.

The trading priorities addressed in our report stress the importance which Alliance members attach to the highlighted provisions within IP Chapters of future trade agreements.

Eddy Leviten
Director General, Alliance for Intellectual Property

¹ The Soft Power 30 <http://softpower30.portland-communications.com/ranking/>

² Alliance for IP ‘Trading Places’ https://docs.wixstatic.com/ugd/e1dfe1_84e21db5fbc54000be3116e09508663a.pdf?index=true



Responses to Consultations

1. Yes – the Alliance consents to its response being used as part of the Government’s published consultation response.

2. Yes – the Alliance looks forward to continuing to work with the Department for International Trade as relevant negotiations progress.

3. This response is made for the Alliance for Intellectual Property in its capacity as a Business association. Contact Eddy Leviten – Director General – email eddy@allianceforip.co.uk

4. The name of the association is the Alliance for Intellectual Property.

5. The Alliance for Intellectual Property is a unique association of 21 organisations representing businesses, small and large. Alliance members include representatives of the audio visual, branded, business software, design, games, image, music, publishing, retailing, sports rights and visual arts, sectors. They all share a collective interest in ensuring that IP rights are valued in the UK and that a legislative regime exists which enables the value and contribution of those rights to be fully realised in the UK and globally.

Details of full membership are published <https://www.allianceforip.co.uk/about-the-alliance>

Within Broadcasting, creative and digital sectors, the members of the Alliance cover

Creative Industries – Film – Music – Publishing across books, journals, consumer and business magazines and periodicals, Art, Images, Design, Brands and Sport.

Broadcasting and digital and information technologies are central to the activities of members, alongside **Manufacturing and retail distribution** of physical goods including UK designs, branded products, music, audio-visual works, art and images across the whole group of industries generally referred to as the creative industries.

6. Members of the Alliance have significant presence operating within

The United States of America

Australia

New Zealand

and other territories within membership of CPTPP, notably Japan, Canada and Mexico.

As previously reported in the Alliance “Trading Places” report the countries that dominate export markets for some of the industries that the Alliance represents are as follows:

Games	USA	China	Japan		
Publishing	Europe	North America	East & South Asia	Middle East & North Africa	
Music	Europe	USA	Japan	Australia	Canada
Television	USA	Denmark	Sweden	Germany	Spain
Film	USA	Rest of Asia	France	Sweden	Netherlands
Magazines	USA	Australia	Canada	France	Spain
Art	USA	Switzerland	China	Intra-EU	
Images	Germany	USA	France	Japan	Australia
Premier League	Nordic Region	USA	Hong Kong	Sub-Saharan Africa	North Africa & Middle East

For others, including Brands and Designs, international outreach is diversified and wide ranging.

Within each of the significant territories, challenges exist over effectiveness in terms of the application of copyright, trade mark and design right laws at national level.

Working to increase international recognition of good practice and effective application of copyright, trade mark and design rights for enforcement must be addressed in setting the Chapters on Intellectual Property which will form an increasingly important part of any UK trade deals in the future.

It is this good practice which should support provisions within IP Chapters of future trade agreements that promote both ratification and adherence to the terms of the International Treaty provisions for recognition and enforcement of copyright, trade mark, design and other intellectual property rights, which provide the foundations for development of the businesses represented by members of the Alliance.

That means encouraging national reform in cases where current practice falls short of standards which UK legislation has already recognised are necessary for the effective development of intellectual property laws, including in the digital environment.

It also means:-

(a) **defending standards**, such as the Three Step Test for defining the scope of exceptions and limitations to copyright against efforts for “watered down” or overly vague descriptions that require litigation to interpret, alongside detrimental costs to businesses. Such defence also means taking into account the huge importance of the UK design sector and the central role that IP rights play in allowing designers to contribute to the UK both culturally and economically.

(b) **allowing flexibility** for higher levels of protection to be applied, whilst pushing for new standard levels of protection when international norms have already moved beyond minimum levels established under International Treaty provisions (for example on the terms of protection for copyright and building on recent UK changes to registered design rights, recognising the further steps needed to bring parity with the current European system).

(c) **promoting recognition** at international level of rights such as the Artists’ Resale Right, when International Treaty provisions have yet to be adopted at global level;

(d) **making provision for effective enforcement of rights, including in a digital environment** through concepts of civil liability for secondary infringement, application of systems of good practice developed between traditional and new platforms, particularly linked to updated provisions for injunctive relief while addressing outmoded aspects of systems for right owners serving notices on platforms covering notice and take down;

(e) **recognising the importance of cybersecurity**, which would be enhanced through such measures as the ability for non-residents to register country specific domain names, a broad approach to “bad faith” beyond “a bad faith intent to profit” and the use of any country name (not just the Party’s country name) that may mislead; and

(f) **sustaining the UK’s trade mark exhaustion regime**, ensuring that no trade agreement is inconsistent with or undermines UK’s regional exhaustion approach resulting from current EU status.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

The final text of Chapter 18 on Intellectual Property within the CPTPP must be assessed against these criteria. In this context it must be remembered:-

1. Creative Industries and reliance on IP and effective recognition and enforcement of IP rights are issues of increasing importance for the UK economy (whomever we trade with in the future).
2. It is a mistake to continue to treat IP issues as “also rans” in the context of wider trade negotiations. They should be seen as central to, and not an Annex to, the main trade terms.
3. Suspension of IP terms because “there are bigger fish to fry” to get a deal done is not helpful for the creative industries and weakens our world leading position in the longer term.
4. The UK Government must avoid moving quickly to adopt the provisions of CPTPP as a “quick fix” to crossing off trade negotiation issues, particularly as far as IP is concerned. In reality, many of the really difficult issues were sidestepped or agreed to through a “lowest common denominator” deal, and some were suspended and so would need to be “properly” addressed in future bi-laterals.
5. In addressing these points the “suspension” approach adopted for the final CPTPP text on many important provisions linked to recognition and enforcement of Intellectual Property Rights is not in the interests of UK creative industries.
6. In practice, it is vital that the UK leads bi-lateral negotiations to promote the legal standards and enforcement of IP rights that have moved significantly beyond the minimum levels of protection recognised in wider International Treaties.

Priorities for Copyright and Related Rights

Whilst our Trading Places report provides more detail of IP-related issues in key export markets for the various sectors of the UK creative industries, topics within the IP Chapters (with particular relevance to copyright) for which current UK and EU standards should be promoted in any new bilateral trade agreements include:-

1. Promotion of national treatment to highest standards.
2. Advocating a term of protection for copyright works, phonograms and performances based upon 70 years/70 years beyond the year in which an author dies.
3. Application of effective transparency and reporting obligations for collective management organisations.
4. Strong legal protections, including criminal penalties in appropriate cases, for Technical Protection Measures and Rights Management Information systems, which are critical for the effective licensing and use of copyright works and performances in the digital world. Trade Agreements must not ignore these roles and their importance across the creative industries.
5. Advocating recognition for the Artists’ Resale Right.
6. Avoiding use of outdated “safe-harbour” provisions which have perpetuated the theft of copyright works online and which create safe havens for prevention of successful enforcement efforts in trading partner nations.

7. Expressly recognising the Berne Three Step test as the benchmark for recognition of any exceptions of limitations to copyright and related rights. Watered down references to achieving “balance of interests” in this area provide invitations to litigation and not effective trade.
8. Avoiding prescriptive terms which prevent trading partners from determining whether, and under what conditions, exhaustion of intellectual property rights applies under its legal system.
9. Recognition of comprehensive obligations regarding copyright enforcement under criminal penalties and civil remedies (including concepts of secondary infringement statutory damages, liability for aiding and abetting, criminal remedies for illegal camcording and strong remedies to address online piracy and signal theft) and via Customs enforcement.
10. Recognising that in terms of protection for designs, the UK system is not an adequate replacement for the European system in its current operation. For example that UK Unregistered Design Right is not an equitable right with the Community Unregistered Design Right, because of its shorter term and the fact that the UK right does not cover surface decoration whereas the EU right protects individual character in particular, lines, contours, texture, colour combinations and surface decoration whereas the UK right only protects shape and configuration.

In addressing these provisions it should be noted:-

USA

The USA is a vital export partner for IP rich industries represented by the Alliance for IP.

Although the country still considers itself at the forefront of the international drive to improve copyright regimes, both through its Special 301 report and activity at the WTO, there are concerns at the effect of current transposition of some international treaty provisions within the United States when addressed in terms of UK export markets.

Rights holders were likely to have been unsettled by the US Appeals Court ruling in October 2015 that “Google Books” constituted fair use and was not a violation of the authors’ copyright.

The US music publishing community would also have been concerned by the suggestion in a review carried out by the US Department of Justice at the end of 2015 that ASCAP and BMI could license 100% of the rights required to publicly perform any musical work in their respective repertoire regardless of whether the work is wholly or partially owned by its members. US Copyright Office rejects the idea that full performance rights to a co-written song could be granted without fully owning the rights to the track.

Whilst we understand that the US trade mark system requires proof of use of registered trade marks to ensure that the US trade mark register is not “cluttered” with unused marks, some of the US requirements prove particularly onerous and costly for non-US businesses, especially when the USPTO adds further levels of proof via additional random audits. The US proof of use requirements highlight potential risks were a trade agreement to seek to harmonise procedural aspects of respective IP granting and verifying regimes. Another concern would be moving towards a ‘fair use’ system which can cause uncertainty; an example being the ‘Brammer vs Violent Hues’ case involving photographs³.

³ <https://www.copyright.gov/fair-use/summaries/russellbrammer-violenthuesllc-4thcir2018.pdf> and <https://www.asmp.org/legal/asmp-stance-on-brammer-v-violent-hues-productions/>

Also, the US lacks a tool like section 97A CDPA, instead relying on an outdated safe harbour that allows websites and services that generate substantial amount of money from infringement of IP rights to still benefit from a safe harbour.

Japan

Provisions supporting copyright exploitation and cost-effectiveness are recognised. However reported decline at national level in perception of copyright balance between rights owner and user is a concern for those reliant upon copyright and related rights to support the basis for exports.

2015 saw some amendments to its Copyright Act and developments arising out of the Trans-Pacific Partnership agreement pursuant to which Japan and other countries agreed to strengthen IP rights. The latter is likely to lead to more reforms to its copyright laws and strengthening of rights holders' positions, by for example extending the term of protection.

Australia

Good provision for enforcement is recognised, including a remedy similar to the section 97A remedy available in the UK, but concerns over cost effectiveness for those seeking to enforce rights exist. Some current developments include:-

- June 2015 – The Australian parliament inserted site blocking provisions into the Copyright Act 1968, applicable to sites outside Australia where “the primary purpose” is copyright infringement, or facilitating copyright infringement. The Australian Government required the ISP industry and rights holders to develop a code to address peer-to-peer piracy. A landmark Federal Court decision requiring an ISP to disclose names and addresses of its customer who has illegally downloaded the 2013 film Dallas Buyers Club.

However, uncertainty remains due to the ongoing debate in respect of the recommendations made by the Australian Law Reform Commission a few years ago that Australia should adopt a fair-use style flexible copyright exception.

Canada

Procedural improvements introduced in 2015 by the Federal Court of Canada allow for improvements for cost-effectiveness of enforcement.

From 1 January 2015, Canada has operated a notice-and-notice regime for ISPs seeking to avoid liability for user-uploaded infringing materials. ISPs can escape liability provided they pass on relevant information to users under the notice they get from the rights owner. While this notice and notice provision is wholly ineffective, Canada's enforcement score will have been improved courtesy of a record \$10 million damages award, made in early 2014, by the Canadian Federal Court.

However, concerns exist over the application of rules for some widely interpreted copyright exceptions and limitation, particularly in the area of education, and the damaging knock on effects that provisions have had for the strength of local educational publishing businesses.

In addition, Canada remains on the US Government's Special 301 Report Watch List as the US Government considers that it has not yet gone far enough in addressing the problems of piracy and counterfeit goods.

Canada remains on the US Government's Special 301 Report for the following reasons:

- Concerns around full implementation of its commitments pursuant to the WIPO Internet Treaties, and the US has said that Canada should continue to address the challenges of copyright piracy in the digital age.
- Canada does not provide customs officials with the ability to detain pirated and counterfeit goods that are moving in transit or are transhipped through Canada.

Mexico

As yet, Mexico has failed to fully implement the WIPO Copyright Treaties. The policy by which Mexican customs authorities and the Attorney General's Office worked jointly to intercept and prosecute transshipments of counterfeit and pirated goods, in place up to 2011, has shifted so that authorities now only take action against transshipments of suspected infringing goods if there is evidence of "intent for commercial gain" within Mexico.

Mexico is on the US Government's Special 301 Watch List for the following reasons:

- There is widespread availability of pirated and counterfeit goods in these markets and throughout Mexico including goods made available by Transnational Criminal Organisations.
- Infringement cases are extremely lengthy and appeals of initial decisions can continue for over 10 years
- The US suggests Mexico needs to improve coordination among federal and sub-federal officials, devote additional resources to enforcement, bring more IPR related prosecutions and impose deterrent penalties against infringers.
- Mexico is yet to fully implement WIPO Internet Treaties.
- There remains an issue with enforcement against the unauthorised 'camcording' of motion pictures in cinemas
- Enforcement against suspected infringing goods at the border remains hampered. Following a shift in policy, Mexican authorities can only take criminal action against in-transit shipments of suspected infringing goods if there is evidence of "intent for commercial gain" in the Mexican territory, which is very difficult to determine.