



**MOTION PICTURE ASSOCIATION
OF AMERICA, INC.**
1301 K St, Suite 900E, NW
Washington, DC 20005
(202) 293-1966

January 15, 2019

Submitted via regulations.gov Docket No. USTR–2018–0036

Mr. Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

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

Dear Mr. Gresser:

These are the comments of the Motion Picture Association of America (MPAA) in response to the Office of the U.S. Trade Representative (USTR) November 16, 2018, Federal Register Notice inviting submissions on the negotiating objectives for a U.S.-UK Trade Agreement. This Notice requests comments on the “objectives identified in section 102 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.”

The U.S. motion picture industry plays an important role in expanding the U.S. economy. It is one of the few industries that consistently generates a positive balance of trade. In 2016, that surplus was \$12.2 billion. The industry distributes its films to over 130 countries around the world with well over half of MPAA’s member companies’ revenue coming from overseas.

The industry is comprised of a nationwide network of small businesses; with nearly 93,000 businesses in total located in every state, 87 percent of these businesses employ fewer than 10 people. While some of these small businesses may not directly conduct business overseas, with 70 percent of global box office and a growing share of TV revenues coming from overseas markets, their success relies on a healthy and fair global marketplace.

Putting aside the unsettling uncertainty about the future relationship between the UK and the EU, MPAA is hopeful that a U.S.-UK agreement could serve as a gold-standard for future agreements. Like the U.S., the UK has a vibrant domestic film and television industry with a

Gross Value Added to the UK economy of an estimated £15 billion a year.¹ The industry employs approximately 170,000 individuals in the UK and in 2017, the UK theatrical market was the third largest in the world outside of the U.S. at \$1.6 billion. While the U.S. and the UK markets differ in some respects, they are on the whole both models of openness, balance and diversity.

Together, the U.S. and UK represent the world's two largest exporters of audiovisual services² and share an interest in protecting intellectual property, promoting exports, and attracting inward investment in the audiovisual sector. As such, MPAA believes that the U.S. will find a like-minded trading partner with the UK with complementary objectives for an agreement and a shared philosophy to growing our respective domestic industries. MPAA strongly supports the negotiation of trade agreements that protect intellectual property, foster competition, lower market access barriers to U.S. audiovisual products and services, and promote legitimate digital trade. Below are MPAA's chapter-specific comments on negotiating objectives for a U.S.-UK trade agreement.

Goods and Customs

MPAA member companies export a range of filmed entertainment products to the UK, delivering U.S. produced content to theaters, rental and retail establishments, and free and pay television operators. These products fall under tariff lines 3706.10 and 3706.90 (cinematographic film); and, 8523 (Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs). These products currently receive duty free treatment.

In addition, some of the more recent U.S. trade agreements, including USMCA, include a provision that allows for the temporary, duty-free entry of professional equipment including press, television and cinematographic equipment. Such disciplines should be included in a U.S.-UK agreement.

A U.S.-UK agreement should also include a discipline prohibiting the assessment of duties on digital products delivered via electronic commerce.

Services and Investment

¹ Ibid.

² Total exports for the UK audiovisual industry is over £4 billion a year. Oliver and Ohlbaum Associates Ltd, "The contribution of the UK-based film, TV and TV-related industries to the UK economy, and growth prospects to 2025." September 2018. <https://www.mpaeurope.org/wp-content/uploads/2018/09/OO-UK-AV-sector-economic-contribution-report-FINAL-2018.09.21.pdf>. The U.S. film and television industry generated \$16.5 billion in exports worldwide in 2016, https://www.mpa.org/wp-content/uploads/2018/03/MPAA-Industry-Economic-ContributionFactsheet_2016-FINAL-2.pdf.

A U.S.-UK trade agreement should be comprehensive in scope and secure market access for evolving business models, including in the digital marketplace. The best way to accomplish this is to utilize the negative list format.

The UK film and television industry is well-integrated into global audiovisual supply chains. It is largely open to foreign investment and the government does not restrict foreign television or film production and distribution. And, there are 671 non-domestic TV channels and on-demand services established in the UK, serving not just the UK market, but foreign markets, as well³.

That being said, the UK's WTO audiovisual services obligations reflected in the European Commission's schedule of commitments and MFN exemptions do not reflect the reality of the UK market. The principal services and investment objective for the U.S. audiovisual sector for an agreement with the UK would be securing modernized market access commitments that reflect the openness of the UK market and that could be used as a model for future trade agreements. The U.S. should resist any effort to default to unnecessary cultural carveouts, which would be counterproductive to shared UK and U.S. export interests. MPAA believes it is wholly possible to do this and also accommodate the UK's domestic sensitivities, including preservation of the public broadcasting sector, consistent with existing policies.

The investment chapter should capture all forms of investment, including intellectual property and include disciplines that ensure U.S. investors have the opportunity to establish, acquire, and operate investments in the UK.

Intellectual Property Rights

A strong outcome on copyright and enforcement is a key trade policy objective for the U.S. motion picture and television industry. Copyright underpins the legitimate licensing and distribution of audiovisual content around the world and it is the lifeblood of the industry, and of our efforts to embrace new digital distribution models that meet the expectation of our consumers worldwide. The theft of copyrighted works is exceptionally harmful to our industry's ability to compete globally. 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.⁴

The UK government has prioritized the protection and enforcement of copyright, reflecting the contribution of the creative industries to the UK economy. For example, rights distribution of audiovisual content accounted for approximately £1.5 billion in UK exports⁵. The UK is a global leader on online enforcement and MPAA and its member companies place the highest priority in

³ Ibid.

⁴Ma, 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.

⁵ Oliver and Ohlbaum Associates Ltd, "The contribution of the UK-based film, TV and TV-related industries to the UK economy, and growth prospects to 2025." September 2018. <https://www.mpaeurope.org/wp-content/uploads/2018/09/OO-UK-AV-sector-economic-contribution-report-FINAL-2018.09.21.pdf>.

securing both the legal and practical tools necessary to protect intellectual property rights in the digital age. That being said, the UK market is not immune from effects of online piracy.

Like the USMCA, a U.S.-UK agreement should include obligations to fully implement the WIPO Internet Treaties, including the rights of distribution and communication to the public and explicit protection of electronic copies. The USMCA also includes a strong framework for technological protection measures (TPMs) and uncompromised civil and criminal enforcement remedies and these strong standards should be included in a U.S.-UK agreement.

Consistent with the USMCA and existing U.S. and UK law, a U.S.-UK agreement should provide rights holders with the contractual freedom to license their works on a territorially exclusive basis. Barriers to contractual freedom restrict the quality and scope of content available to consumers and undermines the financing model upon which the U.S. and UK motion picture and television industries are based. Further, a U.S.-UK agreement should also reflect the global consensus on term of protection for copyrighted works which is life of the author plus 70 years and a comparable term for works measured by date of publication.

A U.S.-UK agreement should also reflect the strong enforcement standards of the USMCA on unauthorized camcording, cable and satellite signal theft, *ex-officio* authority for law enforcement, border enforcement, and criminal enforcement, including an explicit provision on aiding and abetting.

On civil enforcement, it is important to secure statutory damages. Statutory damages are imperative in online infringement cases where there is substantial harm but that harm is difficult to quantify. Further, MPAA believes that a U.S.-UK agreement should include an explicit, stand-alone obligation to provide for secondary liability. The doctrine of secondary liability is central to online enforcement and the UK currently provides for joint tortfeasorship which is similar to the intent of secondary liability. A U.S.-UK agreement should also ensure that rightsholders have fully effective injunctive relief, as provided by Rule 65 of the U.S. Code of Civil Procedures, including the ability to extend injunctive relief to appropriate third parties.

A U.S.-UK agreement should reflect the USMCA article on exceptions and limitations to copyright, i.e. a clear recitation of the three-step test. This provides both rightsholders and users a familiar and widely understood and accepted framework for exceptions and limitations to copyright. The three-step test, which is the time-tested standard reflected in TRIPS, the Berne Convention and the 1996 WIPO Internet Treaties, remains a flexible and broadly supported mechanism that supports appropriate exceptions, including in the digital environment.

With regard to online enforcement, a U.S.-UK agreement should include disciplines that can effectively address online piracy. In many ways, the UK has more nimbly and effectively responded to digital piracy than the U.S. To promote a modernized IP trade framework, MPAA recommends moving to high-level language that reflects the fundamental principles on which the DMCA is based and which identifies key elements of the UK system, including no fault injunctive relief orders, as satisfying the standard. Such an approach would be fully consistent with U.S. law and preserve the high levels of protection in the UK's enforcement framework. In so doing, a U.S.-UK agreement would be consistent with the TPA negotiating objective of

“ensuring that standards of protection and enforcement keep pace with technological developments.”

Finally, a U.S.-UK agreement should ensure that internet retransmissions of television signals (whether terrestrial, cable or satellite) is permitted only under market-based negotiations with applicable rights holders as was contained in KORUS and numerous other FTAs.

Digital Trade

The legitimate online marketplace for film and television content continues to expand and diversify. Today there are more than 450 legitimate online services around the world providing high-quality video on demand content to consumers and the UK is a major hub for on-demand services and also an important creator of the audiovisual content distributed by these platforms. It is this high-quality content that drives the success of these platforms and technological developments to respond to this demand.

Cisco estimates that by 2020, there will be one million minutes of video content crossing global IP networks each minute. The U.S. Chamber of Commerce Global IP Center’s 2017 IP Index found a high correlation between strong copyright protection and innovative technologies for enjoying content. The Index also found that countries with high levels of copyright protection had wider and more convenient legal access to video content – more than double the level of advanced and easy access home entertainment.

Establishing disciplines that recognize the integral role of content in the online ecosystem, as discussed in the above intellectual property and services sections, is critically important to facilitating legitimate digital trade. Also important are provisions to ensure the free flow of data between markets and to prevent localization barriers. Finally, a U.S.-UK agreement should ensure non-discrimination of digital products and, as noted above, prohibit the assessment of duties on digital products delivered by electronic commerce.

MPAA opposes any additional obligations in a U.S.-UK agreement that would require changes to the UK’s legal framework for limitations to liability for platform providers to reflect Section 230 of the Communications Decency Act. Because UK law imposes conditions on intermediaries in order to benefit from limitations of liability, any such provision would increase business uncertainty and disrupt online copyright enforcement in the UK. Because of the ongoing domestic debate regarding the scope of the liability shield for platform providers, the suggestion to export these provisions to foreign territories, especially the UK, is especially questionable at this time.

Closing

The five major studios of the MPAA generate billions of dollars annually from filmed entertainment distributed around the globe. Notwithstanding this singular achievement, the U.S. motion picture and television industry faces daunting barriers in many markets as well as

relentless challenges to the integrity of its product, challenges extracting an increasingly unbearable cost. The economic and cultural vitality of the creative industries is one of our nation's most valuable assets.

MPAA supports a U.S.-UK agreement that meets TPA's objectives. The UK is an important market and the UK creative community an important partner in the production and distribution of creative content. MPAA is optimistic that an agreement with the UK could establish a useful precedent for future trade agreements.

MPAA appreciates the opportunity to comment on a U.S.-UK trade agreement and is ready to provide further information or answer questions as requested.

Sincerely,

/Anissa Brennan/

Anissa Brennan
Senior Vice President
International Affairs and Trade Policy