

Intellectual Property Rights and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Introduction

1. The Alliance for Intellectual Property is a unique association of organisations representing IP-rich businesses and creators – sectors that continue to grow and outperform the wider economy. Our members include representatives of the audiovisual, music, toy and games, business software, sports rights, branded manufactured goods, publishing, retailing, image, art, and design sectors. We share a collective interest in ensuring that Intellectual Property (IP) rights, which deliver such significant benefits to so many individuals across the UK, are recognised by policymakers for the value they deliver, and that a legislative regime exists that enables this value and contribution to be fully realised.

IP and Trade

2. The UK has one of the best developed and applied IP regimes in the world. Creators and businesses have been able to use that framework to develop exciting and innovative products, designs and content using the latest technology and manufacturing techniques. The Taylor Wessing Global IP Index (GIPI5) ranks the UK third globally, while the 2020 US Chamber of Commerce International IP Index ranks the UK second. The advantages of our current system must not be jeopardised as we seek to develop new trading relationships.
3. It is vital therefore that the protection and promotion of IP is at the heart of UK trade policy, ensuring that everything we create in the UK has the potential to achieve its maximum value and that creators are properly rewarded. Opportunities provided by any new trade relationships should not threaten the UK's world leading regime, but rather be used to raise standards, where necessary, in the jurisdictions with which we negotiate. This will not only protect and promote British IP but provide opportunities for creators and rights holders worldwide to benefit socially, culturally and economically in the same way that the UK has.

Principles for Free Trade Agreements (FTAs)

4. The Alliance has some high-level principles in relation to IP that we believe should be the basis of any FTA.
5. Provisions within IP Chapters of future FTAs should promote both ratification and adherence to the terms of the International Treaty provisions for recognition and enforcement of copyright, trade mark, design and other IP rights, which provide the foundations for development of the businesses represented by members of the Alliance.
6. We therefore want the negotiations to encourage national reform where current practice falls short of standards which UK legislation has already recognised are necessary for the effective development of IP laws, including in the digital environment.

7. Specifically:

(a) defending standards, such as the Three Step Test for defining the scope of exceptions and limitations to copyright, against moves towards “watered down” or overly vague descriptions that require litigation to interpret and detrimental costs to businesses. In considering such a defence, we must take 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, by expressly requiring that the US and UK both continue to provide for civil liability for secondary infringement, and by promoting the application of systems of good practice developed between established and emerging online intermediaries - particularly those linked to updated provisions for injunctive relief - while avoiding overly prescriptive language that might lock in outmoded aspects of systems for rights owners serving notices on platforms covering notice and take down;

(e) sustaining the UK’s trade mark exhaustion regime, ensuring that no trade agreement is inconsistent with, nor undermines, the UK’s exhaustion approach which we will believe should avoid any shift to an international regime.

CPTPP

8. We are very supportive of the Government’s determination to seek new trade agreements with our international trading partners. We are also supportive of the Government’s stated objectives in relation to IP that it articulated ahead of negotiations with Japan, the US, Australia and New Zealand which is *‘to secure provisions that protect the UK’s existing intellectual property standards and seek an effective and balanced regime which encourages and support innovation.’*

9. Our members are keen to increase trade in the Asia-Pacific region as they view it as a region with significant growth opportunities. Whilst membership of CPTPP may bring benefits in relation to a reduction in tariffs for some industries, many of our members rely more on the IP framework to drive their growth and economic benefit.

10. We are concerned that the rush to join CPTPP may result in the embrace of IP standards that are significantly weaker than those present in UK law and will not deliver growth opportunities to our members, and that this fact may have been missed. We are concerned about potential inconsistencies with UK law, and in accepting region-wide standards that are far weaker than UK law we will threaten the very existence of high-value UK exports such as e-books, music, games, image, art and audiovisual works in these markets.

11. Ultimately there are very different realities of market access at stake: the tangible commodities exported by many of the CPTPP partners can be traded physically in the absence of prohibitive tariffs. By contrast, high-value UK digital exports only exist for trade purposes thanks to the copyright legal framework, and thanks to legal protection for digital security technology used to secure online distribution (known as Technical Protection Measures or TPMs). Without such protections, these UK exports become infinitely reproducible and thus lose their economic value. Protection of these UK works is therefore not something to be treated as a secondary “nice-to-have” priority: it is fundamental to our export potential. Ensuring UK-analogous protection for copyrights and TPMs in high-growth markets such as Vietnam and Malaysia is vital to ensuring that the UK gets the benefits of the CPTPP bargain.
12. The opportunity to swap comprehensive market access for IP improvements will only come once in a generation. Once we have granted broad market access for tangible goods exports from high-growth markets such as Malaysia and Vietnam through CPTPP, our leverage to obtain IP improvements will have largely vanished. We do not see what incentives trading partners would have to voluntarily raise IP standards once we have a tariff agreement in place that would have already benefited their exports: experience shows that this simply does not happen. An IP exporting nation such as the UK must ensure that raising IP standards to UK-analogous levels is part of the benefit of the bargain in any comprehensive trade agreement, including CPTPP.

Specific Issues with CPTPP

13. We believe that the CPTPP falls short in its ambition to strengthen IP rights and protection.
14. Specifically:

Exceptions

15. The CPTPP contains a provision on exceptions and limitations (Art.18.66) (which determine how content can be used by consumers without the permission of the copyright owner in clearly defined ways) titled “Balance in Copyright and Related Rights Systems” which urges the parties to “find an appropriate balance” in copyright systems “among other things by means of exceptions and limitations”. We believe this creates an encouragement to introduce more exceptions, which is unhelpful given the UK has thoroughly reviewed its exceptions regime in recent years and concluded that it strikes the right balance.

Technical Protection Measures

16. In the digital environment, content owners rely on Technical Protection Measures (TPMs) and Rights Management Information (RMI) to prevent piracy (by preventing the copying of a digital work for example using software). Without these protections, UK content exports are exposed to piracy and therefore lose their economic value. The CPTPP provisions (Article 18.68 and Article 18.69) that support these protections and would ensure signatory countries have legislation in place to prevent the circumvention of TPMs and RMI are suspended, leading to a lack of protection in critical, high-growth markets such as Vietnam and Malaysia.

Term of Copyright

17. The CPTPP contains a suspended provision (Article 18.63) which would have extended the term of copyright to 70 years after the death of the author – as in the UK, EU, Japan and many other developed countries (the US being higher at 90 years). The suspension of this provision prevents UK rights owners from maximising their economic rights, and represents a clear departure from the principle of seeking UK-analogous protections.
18. The economic impact to creators and businesses by shortening the commercial lifespan of their works could be to the detriment of their businesses. For example, one image archive collection, worth approx. £120,000 (\$150,000), would net them only £25-30,000 (\$30-40,000) if copyright term was reduced from 70 years after death to 50, which equates to about a 75-80% drop in income.¹

Rights of creators

19. The CPTPP does not accept the rights of creators to enjoy exclusive rights (Article 18.3), which underpins their ability to generate income from their work and which are enshrined in UK law. We support language that balances the exclusive rights of creators and the need for users to access content. The CPTPP replaces this language with ‘a balance of rights and obligations’ in the interest or promotion of technological advances. This fails to recognise the need for creators to generate income from their work, alongside the rights of consumers to access content. The Article also states that copyright shouldn’t interfere with the international transfer of technology. We are concerned that this language could give undue influence to technology and social media companies, enabling them to define whether reasonable rights for creators impede their business models. A worst-case scenario may be that this influence leads to the weakening of copyright law in any of the CPTPP countries.

Safe Harbour limitations

¹https://bapla.org.uk/wp-content/uploads/2018/10/DIT-Consultation-Trade-Negotiations_BAPLA-Submissions-Response_26-Oct-2018.pdf?dm_t=0,0,0,0

20. The CPTPP provisions concerning ISP safe harbours (Art.18.81-82) are suspended and the UK should ensure that they are *not* progressed via the Agreement. The liability of digital service providers and the responsibilities they have for helping to reduce online harms that take place on, or are facilitated by their services, is a topic of significant public discourse across the world, including in the UK. It is vital that the UK retains sovereignty on how it can regulate in this space. The UK should, at the very least, agree a legally binding side letter or a protocol to the effect that the UK would not be bound by these provisions of the pre-existing CPTPP, even if the original members agreed to lift the current suspension of this provision.

Artist Resale Right

21. The Artist's Resale Right (introduced in the UK in 2006) entitles artists to a royalty when their work is resold by an art market professional. ARR royalties are a much-needed income to sustain artists in their practice, with 81 per cent using their ARR for living expenses and art materials. The CPTPP has no measures in relation to ARR, meaning that UK artists and their estates are unable to receive royalties when their works are sold on the secondary market in the CPTPP member countries who have not introduced such a right unilaterally.

Public performance and broadcast rights

22. We welcome the express reference in the CPTPP to the Berne Convention 1886 and especially the two WIPO Internet treaties of 1996. However, signatory countries are allowed to opt out of some of these obligations and continue not to recognise protection for the use of recorded music in broadcasting and public performance (see Art.18.62(3)(b)) and some key provisions, such as full national treatment (Art.18.8, footnote 4, last two sentences).

Communication to the Public

23. The definitions in the CPTPP (18.57) are different to those found in UK law, meaning how content is made available to the public, and therefore how and when it has copyright protection, are not consistent. This creates problematic issues for rights owners as to how and who uses their content and creates potential loop-holes for infringers.

Collective management

24. All free trade agreements entered into by the UK should include a clear statement confirming rights holders' have the power to decide whether, and to whom, to mandate any rights; and the right of right holders to exercise effective control over any collective management organisation that manages rights on their behalf (for example the collection of royalties from music played on the radio)

25. This issue is particularly relevant in the Pacific region where some countries do not offer the standards of good collective management service to which right holders in the UK are used. We are supportive of the references to collective management in the CPTPP (Article 18.70) but would prefer that it go further to reflect the key principles of freedom of choice and right holders' control over their Collective management organisations, and in particular should refer to standards of accountability, good governance and transparency as is the case in the UK.

Design rights

26. The majority of UK and global 3D designers rely on unregistered design rights (UDR), spanning furniture, product, lighting, fashion and many other sectors. In the UK it is not a crime to use an unregistered design without permission.
27. Universally, amongst other IP rights, there is a disparity and unlevel playing field for designers, and design right is often referred to as the "Cinderella" right.
28. The UK design regime is complex. Post Brexit, designers lost the valuable automatic protection of unregistered Community design rights lasting for 3 years in EU27 leaving them vulnerable if there is no clarity about simultaneous publication.
29. Globally, design protection is even more complex, with very little protection for unregistered designs. Most designers are lone, micro and SME and rely on unregistered design rights nationally and globally, and it is too costly and time prohibitive to take legal action, especially on a global stage.
30. For example, in the UK there is a new Supplementary Unregistered Design (SUD) right lasting 3 years; an unregistered design right (covering shape and configuration) lasting between 10 and 15 years; and a registered design right lasting 25 years. Whereas, in Australia, registered design right lasts for 10 years and there is no protection for unregistered designs. In the other 10 member countries of CPTPP, there is also no unregistered design rights protection and there is no commitment for CPTPP members to become signatories to the Hague Agreement under the Geneva Act, which enables the registration of an international design.
31. Design exports globally in 2013 were worth £34 billion. Unless there is a focus on reciprocity it is likely that the UK's design exports will be compromised within a CTPPT agreement without the correct safeguards. Nationally, UK design and design skills produce £85.2 billion to the UK's GVA.

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