

## International Trade Committee: Impact on UK/EU Trade Policy - BAPLA Submission

### About BAPLA

**BAPLA members provide a 'vital economic link' for many professional photographers, supporting their ability to derive income and reinvest in their creativity.** Founded in 1975, BAPLA is the UK trade association for picture libraries and agencies. We have a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as SMEs, archives and cultural heritage institutions. Members include *Bridgeman Images, British Pathé, Camera Press, Lee Miller Archives, Science Photo Library, PA Images, Magnum Photos, Alamy and Getty Images*, to name but a few. Our members are the main source of licensed images you see every day in print and digital media, and as such have contributed to the UK economy for over 40 years.

**The UK image licensing market is the second largest global market in the world<sup>1</sup>.** The image sector has always been about growth and innovation, adopting new technologies as they arise in order to meet with customer demands. For over 40 years BAPLA has championed the recognition of marketplace value of photography. During that time BAPLA members have invested heavily in technological innovation allowing them to move from analogue to digital, digitising millions of images of great historical and artistic value in order to offer access to digital copies. The global still images market is projected to reach £3.21 Billion (\$4.46 Billion) by 2021<sup>2</sup>.

**BAPLA members generate revenue for, and manage the interests of over 120,000 creators rights holders.** For decades, our members have supported a wide breadth of experienced and new young image-makers. Significant investment is made on an ongoing basis in accurate keywording and adding metadata, allowing for seamless customer experience on the one hand, and full remuneration of the creators on the other. Investment in maintaining a custodial role – preserving, digitising, referencing collections, is also an integral part of running an image library and agency. A number of our members are also suppliers of software that offer ways to search for and process online infringements.

### BAPLA responses to the following questions on the Impact on UK/EU Trade

BAPLA welcomes the opportunity to respond to the International Trade Committee on the impact that future arrangements between the UK and EU could have on wider UK trade policy. As BAPLA members predominantly operate as a service industry focused on IP, specifically copyright, deriving benefit from primary licensing, and returns from secondary licensing when IP assets are reused (e.g. photographs licensed to publications being redistributed and used in education and media monitoring organisations), we have prepared our response to the following two questions:

- How would UK-EU arrangements pertaining to the regulation of services and investment affect wider UK trade policy?
- How would UK-EU arrangements pertaining to cross-cutting regulatory issues – including data protection, competition policy, consumer protection and social and environmental legislation – affect wider UK trade policy?

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<sup>1</sup> GSIM Report 2012, with Germany first & the USA third - [http://www.stockimagemarket.uni-hd.de/downloads/GSIM\\_Survey\\_2012\\_Part\\_III.pdf](http://www.stockimagemarket.uni-hd.de/downloads/GSIM_Survey_2012_Part_III.pdf)

<sup>2</sup> <https://www.technavio.com/report/global-general-retail-goods-and-services-global-still-images-market-2017-2021>

BAPLA also welcomes the Government's messaging on the intention to forge a new digital partnership with the EU to facilitate growth in e-commerce, drive competitiveness by reducing digital trade barriers, and encourage innovation through information exchange and best practice. In this context, given the significant support the creative industry has received from the Government in addressing the 'value gap' between creators and internet service providers using copyright content without consent and compensation, we trust that the EU Copyright Directive, in particular 'Article 13' is embedded into national law post-Brexit.

## A Complimentary Status

**As a service industry, BAPLA members core business activities are in digital trade.** Licensing digital content online has become the norm for the Image Sector. A small proportion of members sell goods as a secondary source of income to their primary business in digital licensing, with both income and investment utilised to innovate in new technologies.

Our members have thrived under a compatible UK/EU regulatory IP framework and frictionless trade environment for the best part of 25 years, since the establishment of the European Union. The ease of market adaptability, combined with a common understanding of market value, practices, administration processes, and close proximity, has provided certainty and stability, allowing new business entrants to thrive and established companies to expand their market reach across Europe, either through partnerships or directly. Arguably it has enabled BAPLA members to be the second largest image market worldwide<sup>1</sup>.

**Regulations that service the 27 EU countries have played a significant trading role for BAPLA members, enabling barrier free trade and a common understanding of the rules including liability of online service providers<sup>3</sup>.** Replicating free trade agreements with other global territories, whether bi-lateral or multi-lateral, does not automatically offer similar 'barrier-free' opportunities, particularly if trading territories operate under a regulatory 'fair use' regime for copyright that facilitates ambiguity and uncertainty. Note that such 'fair use' regime is being heavily driven by 'open rights groups' and 'technology giants' across some countries<sup>4</sup> we now look to trade with. The advantage of sharing UK/EU regulatory alignment that includes a strong copyright regime (incl. 'fair dealing'), is that it provides the capacity to invest and grow within the creative industry sector<sup>5</sup>. In addition, the ease with which setting up partnerships, coupled with importance of local operational and cultural knowledge and customs, outstrips other territories by a significant margin. A BAPLA members survey undertaken in 2016 as part of the trade paper for the Alliance for IP<sup>6</sup>, showed 83% of members license images to EU customers, accounting for 40% of their total income.

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<sup>3</sup> BAPLA Submission for Call for Views: Modernising the European copyright framework <https://bapla.org.uk/wp-content/uploads/2018/08/Call-for-views-on-modernising-the-European-copyright-framework-2016.pdf> and BAPLA response to Select Committee on the European Union Internal Market Sub Committee <https://bapla.org.uk/wp-content/uploads/2018/08/Call-for-evidence-on-online-platforms-2015.pdf>

<sup>4</sup> For example, South Africa currently looks likely to implement a "fair use" regime to its copyright laws <http://infojustice.org/archives/40677>

<sup>5</sup> Creative Industries add more than £100bn to UK <http://www.thecreativeindustries.co.uk/uk-creative-overview/news-and-views/news-creative-industries-add-more-than-%C2%A3100bn-to-uk>

<sup>6</sup> Alliance for IP Trading Places: The UK's IP Future - Pages 57-62 [https://docs.wixstatic.com/ugd/e1dfe1\\_84e21db5fbc54000be3116e09508663a.pdf?index=true](https://docs.wixstatic.com/ugd/e1dfe1_84e21db5fbc54000be3116e09508663a.pdf?index=true)

Annually, BAPLA members invest in attending a European industry event provided by CEPIC<sup>7</sup> – it is the largest event for commercial still and moving images in the world, representing 90% of the market worldwide, hosting up to 410 delegates from 244 companies and 30 countries, making it a key networking and information hub for visual content providers. In comparison, the US market is far more difficult to penetrate directly, despite there being a smaller scale annual trade event, which is inherently due to a national policy first approach - essentially meaning that local suppliers are preferred over international sources; in addition, there is no equivalent event undertaken in the Asia-Pacific (APAC) market for the Image Sector, despite a desire to expand in this territory. **The key challenge is replicating the market value which inherently features in a shared European culture, and where UK market value for images has been able to thrive.** In APAC territories market value is much lower and so more investment in resources and the ability to compete in unfamiliar territories is required. As a result, the reliability on a smaller number of agents in these territories make it more challenging to have a competitive edge.

Digital licensing has eased the process of licensing content, but brand awareness online in certain territories remains challenging. Tariffs for licensing content online is not comparable with other worldwide countries, such as Korea, Japan or Brazil, where the value of an image is far lower, and Withholding Tax adds to the administrative burden.

**BAPLA members would ultimately prefer consideration for a high standard reciprocity approach in any UK/EU future deal to ensure trade continuity, one that considers a dynamic alignment, such as with copyright enforcement.** In addition to step up the case for a strong global IP regime, particularly for copyright both in the physical and importantly the digital world.

## UK IP Regulations

**Copyright is the bedrock of our industry.** We heavily rely on a strong copyright regime, domestically and internationally to both help us thrive as creative businesses and to enable us to protect our rights from copyright infringement. In general, the values underpinning UK copyright law, namely its fundamental focus on the protection of investment and balance between the exclusive rights of a copyright owner on the one hand, and copyright exceptions on the other, has served us well, and provided the necessary stability for the UK to build a world-class offering, giving our UK businesses the ability to punch well above our weight. The fact that copyright law across 27 European countries follows a similar regime gives significant business certainty to UK-based image libraries and agencies.

**UK IP divergence from EU law could set an unwelcome precedence for the UK.** The US regulatory regime is largely permissive towards tech platforms, with Online Service Providers (OSPs) and Social Media Platforms (SMPs) causing significant issues and uncertainty for image rights holders, impacting on their ability to effectively generate income (e.g. for every ‘single’ authorised use on *one* social media platform, 36 were unauthorised commercial duplications<sup>8</sup>). OSPs and SMPs are in a highly advantageous position, utilising ‘safe harbour’ provisions to their own economic benefit and taking full advantage of a ‘limited liability’ regime, which affects competitiveness and manipulates a ‘digital barrier’ for image rights holders. That combined with a ‘Fair Use regime’ in the US gives rise to greater uncertainty and less investment per capita.

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<sup>7</sup> CEPIC Congress Annual Trade Event <http://ceplic.org/congress>

<sup>8</sup> DIT Consultation UK preparation for an independent trade policy: [https://bapla.org.uk/wp-content/uploads/2018/10/DIT-Consultation-Trade-Negotiations\\_BAPLA-Submissions-Response\\_26-Oct-2018.pdf?dm\\_t=0,0,0,0,0](https://bapla.org.uk/wp-content/uploads/2018/10/DIT-Consultation-Trade-Negotiations_BAPLA-Submissions-Response_26-Oct-2018.pdf?dm_t=0,0,0,0,0)

The Government is undoubtedly supportive of creative industry rights holders here in the UK. A complete break in the relationship between the UK and the EU could have severe implications for both UK and EU IP systems, particularly from an enforcement perspective. Therefore **BAPLA strongly urges for there to be an improved and better regulated regime that rejects any widening of 'safe harbour provisions', by leading on protection and enforcement online in the UK, Europe, and worldwide.**

An example to consider is the legislation the Dominican Republic introduced in 2000<sup>9</sup>. They passed legislation governing liability for copyright and trademark infringement, in which it recognises 'contributory infringement' and 'vicarious liability'. Under 'contributory infringement' a party may be guilty of infringement when it causes or contributes to the infringing conduct of another party and has knowledge of the other party's infringing activities.

The UK and EU share a respectful copyright regime, one that is underpinned by a positive attitude towards copyright itself. Whereas the US regime, permissionless exploitation of content is able to be undertaken to a greater extent, harming creative rights holders across the spectrum. In contrast, UK companies have greater reassurance when undertaking trade deals with an EU country such as Germany. That said BAPLA members grant digital licensing anywhere to any country without a Free Trade Agreement, content licensing itself doesn't require an FTA. The main issues in those circumstances when licensing in other overseas territories such as APAC are Withholding Tax regimes, copyright enforcement, and lack of advisory support given by embassies abroad<sup>10</sup>.

With thanks to the Berne convention<sup>11</sup>, which effectively is equivalent to an FTA for the creative sector, the basic regulatory framework is there and if it was to improve the situation on enforcement, such as providing a standard of protection of works, then this would be warmly welcomed by our members. Works in the UK have basic protection recognised across Europe and worldwide, in that respect we would suggest it makes sense to maintain reciprocity and not introduce a new regime that takes value away from creators.

### Cross-cutting Regulatory Issues

A further significant regulatory framework which provides BAPLA members with certainty between the UK and EU is **the opportunity to address anti-competitive behaviour**. In recent years CEPIC and Getty Images have taken out anti-trust cases against Google, due to the actions undertaken by the platform, which created significant business inequality online. The opportunity to undertake such a challenge and provide leverage under the EU framework should be recognised and supported.

In addition, whilst the resources to introduce new GDPR regulations into UK law were an inconvenience, the reassurance for member's customers has been beneficial. The concern will arise with any new FTA outside of the EU bloc. Data exchanges through sophisticated AI systems, or the lack of security over sharing data with overseas territories must be a consideration. Now BAPLA members have adopted EU general data protection regulations we would expect this to be maintained and not tampered with.

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<sup>9</sup> Alliance for IP Trading Places: The UK's IP Future - Pages 57-62

<https://www.worldipreview.com/article/isp-liability-the-implications-of-l-oreal-v-ebay>

<sup>10</sup> <https://www.allianceforip.co.uk/alliance-trade-report>

<sup>11</sup> [https://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](https://www.wipo.int/treaties/en/text.jsp?file_id=283698)

One reciprocal arrangement which comes under IP is the introduction of the Collective Rights Management regulations. BAPLA members have benefitted from the introduction of EU law which has given rise to a choice for rights holders to collect secondary rights revenue for the first time.

IP-based goods and services are greatly impacted by regulation in areas such as dealing with database rights, data protection and provisions as to exhaustion of analogue and digital rights. Again, the UK creative industry derives some benefit from uniformity of approach in these areas. It is worth noting here that in relation to digital exhaustion, whilst the UK government had previously indicated that, post-transition, it will follow a hybrid UK/European Economic Area exhaustion of rights system, the current Dutch case C-263/18 (NUV/GAU v. Tom Kabinet)<sup>12</sup>, which could introduce digital exhaustion, is now, as we understand, supported by UK Government. The serious impact this would have on licensing digital content is extremely worrying. We must hope the CJEU recognises this impact and will judge otherwise.

### Barrier-Free Trade with the EU

BAPLA members remain concerned about any effects that may reduce 'barrier-free trade' with the EU, such as dealing with 27 different tax regimes and VAT which necessitates a border between those that are in a common VAT area and those that are not. In addition, any regulatory changes that could increase costs to image rights holders would be extremely unwelcome.

**We need a digital infrastructure with the EU that provides security and efficiency, otherwise we risk becoming increasingly marginalised and potentially lose our status as the second largest market in the sector.** The digital transformation online, which has led to digital inequality, requires work to preserve fairness on a global scale and the UK should be striving to ensure not only Europe but other territories undertake this responsibility. As long as the UK Government takes steps to preserve cultural content values within the online ecosystem, we have the chance to continue to be world leaders with the image sector.

Overall BAPLA hopes to see internationally a closer proximity to our own robust IP regime to increase confidence and investment, and strengthen our ability to innovate on an international level in order to maintain our global position. But we must not be supplanted into a precarious unstable position that places our business lead in Europe and the rest of the world under threat.

For and on behalf of BAPLA

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<sup>12</sup> [http://www.alai.org/en/assets/files/resolutions/181012-opinion-tom-kabinet-case-en.pdf?dm\\_i=5VL,603UT,QW899,NIYIW,1](http://www.alai.org/en/assets/files/resolutions/181012-opinion-tom-kabinet-case-en.pdf?dm_i=5VL,603UT,QW899,NIYIW,1)