

British Association of Picture Libraries & Agencies  
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Registered no. 2876327

## **Consultations on trade negotiations UK preparation for an independent trade policy once UK leaves the EU**

### **Responses to Consultation Questions**

1. Yes – BAPLA consents to its response being used as part of the Government’s published consultation response.
2. Yes – BAPLA looks forward to continuing to work with the Department for International Trade as relevant negotiations progress.
3. This response is made on behalf of BAPLA in its capacity as a business trade association. Contact: Isabelle Doran, Head of Policy & Public Affairs, BAPLA  
Email: [isabelle.doran@loupeimages.com](mailto:isabelle.doran@loupeimages.com)
4. The name of the association is the British Association of Picture Libraries and Agencies (BAPLA).
5. BAPLA is a unique trade association representing 125 UK picture libraries and agencies. Further details about [BAPLA](#) are covered in the pages below.

BAPLA is the UK trade association for picture libraries and agencies, founded in 1975, incorporating a broad and diverse membership, including: sole traders; major stock, production and news agencies; SMEs; cultural heritage industries and image technology companies.

A substantial percentage of images seen every day in print and digital media are supplied by BAPLA members. The UK image licensing market is the second largest global market in the world.

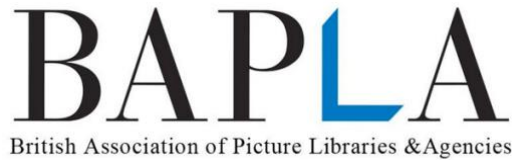
6. Members of BAPLA have significant industry presence, either independently or through trading partners, operating within the United States of America (2nd), Australia & New Zealand (5th), and other territories within membership of CPTPP, notably Japan (4th), Canada (8th), Korea (9th)<sup>1</sup>.

This paper has been prepared in response to all four of the UK Government’s 2018 trade consultations, noting that many key issues run across trade agreements. As members of the British Copyright Council and Alliance for IP, our submission should be taken into consideration alongside these two trade association submissions. In addition, with respect to the constantly changing political parameters, and associated uncertainty, we expect to add further considerations in due course.

Further comments below.../

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<sup>1</sup> Survey of BAPLA members undertaken, June 2017.



**#ValueOurImages**

## **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 *Alamy, Bridgeman Images, Lee Miller Archives, Science Photo Library, PA Images, Magnum Photos, British Pathé, 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>2</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 over the years 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>3</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.

## **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.

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<sup>2</sup> & <sup>4</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>3</sup> <https://www.technavio.com/report/global-general-retail-goods-and-services-global-still-images-market-2017-2021>

The value of the image industry is entirely based on the reliable commercial exploitation of copyrighted images, as our members utilise new and innovative ways to provide licensable access to their archives. It is one reason why UK businesses in the image sector are the second largest global market leaders in the world, ahead of the USA<sup>4</sup>. The ability to do this rests on the security and value of their images, which requires a stable legal framework. It is crucial not to introduce uncertainty into this area at such a critical time, while our members are looking to expand into new territorial markets.

This paper aims to provide a response on behalf of BAPLA members to the consultations by the Department of Trade and Industry, in relation to bilateral Free Trade Agreements between the United Kingdom and the United States, Australia and New Zealand, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”; and all “FTAs”)

## Overall Summary

1. **Defend the UK<sup>5</sup> and EU copyright standards, which includes the Berne ‘Three Step Test’ and provides certainty due to our clearly defined list of exceptions to copyright (as opposed to being fooled by a mirage that creative prosperity stems from ‘fair use’)**
2. **Push for higher levels of copyright protection including a global standard of 70 years p.m.a for the term of protection, as a strong copyright regime enables successful growth and investment for the UK creative sector, going beyond the ‘minimum’ levels established within TRIPS**
3. **Encourage provision for effective enforcement of copyright online, including by narrowing the liability exemptions afforded to online intermediaries, thus giving UK rights holders greater options to protect cultural assets**

## Our Key Concerns

BAPLA supports the arguments made in submissions in the consultations by the British Copyright Council and the Alliance for IP.

BAPLA welcomes the Government’s acknowledge that the UK IP framework is a vital part of the UK business environment, including copyright enforcement. The UK has one of the strongest creative content sectors in the world, which we believe is due to our dependable and supportive copyright laws. As such we would **urge the Government to ensure that there is no watering down of the UK’s current copyright framework**, but instead they should look to: **Further enhance our UK position including the most recent developments in copyright in EU law, in particular, the stricter approach to the liability of online service providers for infringing, or facilitating the infringement of copyright.**

Our concerns relate mostly to copyright and, we assume, are less complex than other creative sectors, but are nevertheless **vital for the continuation of our success** as one of the largest markets for licensing images globally.

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<sup>5</sup> Copyright, Designs and Patents Act 1988 c. 48 Part I, Chapter I, Duration of copyright, Section 12 <https://www.legislation.gov.uk/ukpga/1988/48/section/12>, which take into consideration international agreements Berne/TRIPS/WIPO Internet treaties Three-Step Test.

**> Term: The UK Image sector has enjoyed copyright term of life of the creator plus 70 years**

Photographers and picture agencies have inherently benefitted from a longer term of protection. As one previous IPO civil servant, Ed Quilty, stated during the Hargreaves Review,

*“The one thing about photographs, which does make them different from some other types of work, is that they can often increase in value as they get older”<sup>6</sup>.*

The ROI for ‘bringing to market’ images is one reason for the success of a unique part of the creative industry. It cannot be underestimated how much investment is attributed over years to making an image collection commercially accessible. Image libraries and archives have taken on a ‘custodial role’, marketing and investing in the images they have. Image archive collections are constantly revived at any time to the benefit of rights holders.

Archives are extremely valuable, preserving our cultural records of past lives. Investment is spent on bringing them to ‘life’ - news and entertainment anniversaries can be revived at any time, decades into the future<sup>7</sup>, to the benefit of rights holders and the public alike. Investment to maintain such historic collections costs a significant amount. The industry would not exist if there isn’t feasible long-term investment and the opportunity for commercial remuneration.

‘Life + 70 years’ also greatly benefits not only the creator, but also their heirs. The legacy of a collection is particularly important and widely benefits the next generation of image-makers to learn and understand the “golden age of photography” in order to create further valuable works. From members’ experience, it is a challenge to provide access without income generation. Commercial archives serve an important purpose, and it is crucial not to ignore the costs of a ‘living archive’<sup>8</sup>. When a work is ‘out of copyright’ it becomes far more complex, if not impossible to control, leading to exploitation beyond borders. One member highlighted the economic impact to their collections by shortening the commercial lifespan to the detriment of the business, commenting that one collection, worth approx. £120,000 (\$150,000), would net them only £25-30,000 (\$30-40,000) if copyright term was reduced, which equates to about a 75-80% drop in income. In addition, many of the smaller estates would suffer significantly as a result.

Whilst the Berne Convention is Life + 50 years, a Life + 70-year term is also widely reciprocated in Europe and the US.

**> Exceptions & Limitations: We fully support the certainty of a prescriptive and exhaustive list of exceptions underpinned by a concept of “fair dealing”, rather than an open ended “fair use” regime**

‘Fair Dealing’ in the UK and Europe is not the same as the US ‘Fair Use’ which has different, far more complex stipulations, and has given rise to unpredictable outcomes due to the associated broad ranging concept of transformative use.

There are several reasons not to be seduced by any proposed trade terms that resemble ‘fair use’ over ‘fair dealing’. Firstly, the UK has already developed a significant body of case law that

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<sup>6</sup> Hargreaves Review Where Next Jun12.pdf, page 116m, Q244

<sup>7</sup> The Hulton Archive - <https://www.gettyimages.co.uk/collections/hulton-archive>

<sup>8</sup> Martin Parr Foundation “The foundation supports and preserves the legacy of photographers who made, and continue to make, important work focused on the British Isles” - <https://www.martinparrfoundation.org/about/>

underpins the 'Fair Dealing' doctrine, which is understood and respected.

BAPLA members are generally far more wary of seeking to enforce their copyright in the US, as there is greater risk involved due to the breadth of interpretation and therefore uncertainty around what constitutes 'fair use'. A number of high-profile cases, many of which include photography, have proven this to be the case<sup>9</sup>. Therefore, the result of introducing any compromise as part of trade negotiations that recognises **'Fair Use' would increase the likelihood of failed litigation for rights holders and hasten an extensive and devastating 'chilling' effect on the image industry, creating a new era of uncertainty and as a consequence stifle creativity.**

It also plays into the hands of those organisations with the deepest pockets, and thus able to afford expensive litigation, in consequence negatively affecting many SME's. In the recent years, the photography industry has fought an 'uneven battle' with dominant 'search and social media platforms' and whose business models capitalise on unauthorised use of copyright content, including millions of images. It is our fear that adopting the uncertain 'fair use' approach to balance the interest of right holders and users will simply hand over more power to US tech giants whilst reducing the opportunities for the creation of a sustainable technology industry in the UK based on the respect of intellectual property rights. This would also cause the UK to miss out on tax generating licensing activity by the tech companies and the creative sector alike. **In order to support creative industry SMEs to innovate and develop, we need to ensure the continuation of a 'Fair Dealing' framework for fixed exceptions to copyright.**

### **> Enforcement: The effects of limited liability for service providers and the 'Value Gap' Creation**

While the current copyright regime has supported us in the analogue world, it has become far less effective online over the last few years. We can attribute this to two issues:

1. One is the correlation to the meteoric rise of the US tech giants that have used the Safe Harbour provision<sup>10</sup>, allowing them to keep responsibility for conduct on their website at arm's length;
2. The other is the perception and education of copyright, which is an essential property right, equal under EU law to freedom of expression - creators essentially require both in order to create and earn a living from their creations.

Together, these issues have resulted in perpetuating rampant disregard for image owners' rights online. Certain commercial content sharing service platforms have capitalised on the situation, redirecting income generation solely to themselves with their users and third-party copyright owners who provide the fuel for their platforms missing out - hence the 'Value Gap'. **A recent survey by BAPLA of its members found that 94% of BAPLA members reported experiencing copyright infringement, while 81% have undertaken paid-for services to pursue**

<sup>9</sup> List of Fair Use cases - <https://fairuse.stanford.edu/overview/fair-use/cases/>

In addition, a few **photography cases**: Kelly v. Arriba Soft Corp, USA, 2003 - <https://fairuse.stanford.edu/case/kelly-v-arriba-soft-corp/>; Cariou vs Prince, USA, 2014 - <https://pdnpulse.pdnonline.com/2014/03/richard-prince-settles-photographer-patrick-cariou.html>; Morris vs Richard Prince, USA, 2016 <https://pdnpulse.pdnonline.com/2016/06/richard-prince-sued-time-photographer-dennis-morris.html>; Brammer vs Violent Hues Productions, USA, 2018 - <https://pdnpulse.pdnonline.com/2018/07/court-rules-photographs-are-factual-depictions-copying-them-is-fair-use.html>.

<sup>10</sup> US Safe Harbour provision - <https://www.copyright.gov/legislation/dmca.pdf>

**infringements online<sup>11</sup>**. And these infringement identification services only reach the tip of the iceberg.

The above two key factors have created significant inequality online whereby **certain tech giants have and continue to amass great fortunes to the detriment of creators with little or no remuneration flowing back to them, posing an existential threat to the image licensing sector**. The global digital advertising market is reported to have grown by 21% last year to a staggering \$88 billion. But 90% of that growth is attributed to two US companies<sup>12</sup>.

Advertising is driven by user attention, which in turn is driven by compelling content. Certain tech giants have taken advantage of the current arbitrary loophole of the US pre-internet 'safe harbour' provision protected in the US DMCA under 'limited liability' relating to material online<sup>13</sup>, which affords them no responsibility for the content that is posted on their platforms, but amasses them billions of dollars at the expense of creators. The pre-internet 'safe harbour' provisions are now 20 years old and no longer fit for purpose, they drastically need modernising to accommodate new technology and emerging enterprises, which have advanced incredibly fast and as such the old provisions no longer apply.

These platforms, acting as intermediaries, are no longer 'mere conduits' as they not only curate what users see, they also drive traffic to legitimate sources down, facilitate commercial infringements, and conduct third party commercial licensing deals. **Without full and appropriate measures to support rights owners, their ability to enforce their rights online in a fair manner is an impossible challenge.**

Many BAPLA members have had little recourse to challenge these commercial content sharing platforms simply because our members are deemed less significant as a consequence of having less resources and the burden of handling millions of infringements, creating a 'Value Block'.

**This 'Value Block' affects all image creators who depend on commercial licensing.**

Recognising remuneration to rights holders for all commercial online use needs to be restored to support our businesses and to future-proof them.

## Country Specific Concerns

Please refer to further details provided by the **British Copyright Council** and **Alliance for IP** submissions on specific concerns relating to trade agreements/reviews for: **CPTTP** countries - incl. **Canada** (notice and notice regime), **Japan** (treatment of rights owners), and **Mexico** (the failure to fully implement WIPO Copyright Treaties) - overall specifically '*Chapter 18*' on Intellectual Property; **Australia** - on copyright infringement and their consideration for a 'fair use' system; **New Zealand** - on suggestions relating to copyright term and again 'fair use' system; **USA** - on the consideration for ring-fencing out-of-date 'Safe Harbour' provisions and including further digital rights that protects this<sup>14</sup>, which are woefully unfit for purpose.

## Support UK Copyright Law

<sup>11</sup> BAPLA Surveys (access members only): <https://bapla-news.org.uk/5VL-5SM1C-75QW8992B/cr.aspx>

<sup>12</sup> <https://adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebook-and-google-contribute-90-of-growth/>

<sup>13</sup> 512. Limitations on liability relating to material online <https://www.copyright.gov/title17/92chap5.html>

<sup>14</sup> RIAA Comment On New USMCA Trade Agreement: "Unfortunately, the agreement's text also enshrines outdated property rights limitations for works made available on Internet platforms" <https://www.riaa.com/riaa-comment-new-usmca-trade-agreement/>

**We fully support UK copyright law.** We believe it forms an essential part of protecting creators in the wake of the rampant rise of commercial content sharing service platforms. We believe we have a strong and supportive UK copyright regime, but **it could be made exemplary by addressing enforcement online, providing effective world-class 21<sup>st</sup> century legal protection.** It could be the defining moment which sets the UK as a rule-maker and simultaneously protecting valuable cultural heritage and innovation.

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## Appendix:

### Comments from BAPLA Members on Copyright Term 70 Years p.m.a & Cost of Infringements

#### BAPLA Member, Topfoto

It has only been 30 years since 1988 act increased the copyright protection from 50 to 70 years at the end of the year of the death of the creator. The intended beneficiaries of this change in the law would have gained very little in that time and a reversal in that stance would be highly detrimental to those who have been planning for the extended protection. A good example in the image industry is the investment it makes in the digitisation of 'in copyright' collections in the anticipation that it will receive a level of return via Intellectual property ownership. For TopFoto, in 2010, we made a conscious effort to digitise a collection from 50 years ago even though the collection had many images pre-dating 1960. There were a number of factors influencing this decision but one of them was the copyright duration would allow a long tail return that is necessary when licensing material has a historical editorial value rather than a short frame commercial one. If copyright duration was reduced now to 50 years some of the images, from that digitisation effort, which were produced by photographers who died shortly after would already be out of copyright. In addition, one must also take into account the many photographs in press archives that are taken by staff that are unattributed which do not have additional individual life period appended to the duration. Therefore a 50-year copyright duration would undoubtedly deter digitisation efforts of some very important works illustrating our cultural history from a section that is in desperate need of conservation, in preference for more contemporary material which is in far more stable state.

#### BAPLA Member, Bridgeman Images

Bridgeman Images is a family-owned SME, generating the majority of its revenue from export sales of image licences. We have an important sales office in US, and Australia/New Zealand is one of the largest sales territories in which we do not have an office.

Artists' estates continue to fund and carry out valuable work throughout the period of copyright, both to protect and further an artist's reputation and to support an artist's dependents and successors. Looking at two estates that we have represented, the Fondation Giacometti (died 1966) has recently opened a new exhibition and study centre in Paris, while Stanley Spencer's (died 1959) estate in part supports his surviving daughter. Copyright fees generated by Bridgeman Images on their behalf have contributed significantly to these activities. If we cannot guarantee a period of copyright of life + 70 years there may be negative impacts on our business:

- Significant loss of revenue for ourselves and the estates we represent;

- Difficulty in attracting the estates of artists who may prefer to be represented by competitors in other countries who guarantee longer periods of copyright;
- Confusion over existing licensing arrangements for works going out of copyright;
- Additional risk and legal fees related to the reduction in term;
- Confusion for our clients over when and what permissions they need to clear in different territories: uncertainty over rights is one of the major obstacles to using and exploiting artistic images.

### **BAPLA Member, Magnum Photos**

Copyright being set to 70 years after the death of the artist helps the longevity of the images and actually ensures that the revenue earned from licensing the pictures during their copyright period enables the estates managing the artists can continue making the work available. There is a growing cost for the preservation, software, archiving and more in keeping archives “alive” after the death and to retain the context of the original artists for further generations to study, influence and develop their own work. Any reduction in copyright would mean that the preservation of these collections would be lessened due to market conditions. History, wherever possible, should not be decided completely by market conditions.

### **BAPLA Museums Copyright Group**

Museums and other cultural heritage organisations invest huge amounts of money and resource in photographing their collections. This makes their collections more accessible to the public, is important for preservation, collections management and educational purposes, but also generates much needed revenue for the parent institution through commercial licensing of images.

Any changes to current copyright protection would have a significant impact on cultural institutions’ ability to cover the costs of digitising their collections. It would reduce the amount of revenue they could generate from image licensing and also impact on other commercial activities. This would affect valuable income streams and damage these organisations’ income generation capability.

Any reduction in the term of copyright would cause institutions to re-evaluate the investment they can make in digitisation projects, as this will have a direct impact on the level of return they can make on it, and they may not be able to justify the costs involved in making certain collections accessible where they are not able to recoup some of the costs through licence fees.

Cultural heritage organisations do not have the resources to chase copyright infringements and therefore any reduction in copyright protection via safe harbour provisions or fair use policies will only serve to further undermine these institutions’ ability to generate revenue through their intellectual property.

These organisations often represent the artists whose works they hold in their collections, protecting the artists’ estates and providing a valuable service for rights holders as well as image users. As guardians of the nation’s art, museums and galleries support the highest possible protection of creators’ rights to allow them to continue their work and contribute to the UK’s much celebrated creative industries.

### **BAPLA Member, Stockfood UK**

In order to continue to attract and retain the very best photographers (the lifeblood of our business), StockFood has needed to make the enforcement of copyright a part of our everyday working. In addition to the direct loss of income from images not being legitimately licensed, we have needed to invest in systems and in people. StockFood has needed to develop new workflows to manage a complex business and absorb costs to third party providers for the



detection of possible infringements. After detection, we need to cross-reference with our own database of legitimate licenses and liaise with photographers before contacting people about any suspected infringement of copyright.

Although a good number of businesses are quick to acknowledge their oversight and work with us for prompt and amicable settlement, we do have to spend a great deal of time educating people about widely held incorrect assumptions about copyright and the “free” availability of images on social media and ISPs. Many of those interactions can be fraught, abusive or even threatening. StockFood has been unfairly characterised as a company dealing in extortion on some websites which brings undoubted reputational damage.

StockFood pursue infringements because we feel that we have a responsibility as an agency to protect the copyright of our photographers.

### **BAPLA Member, Getty Images**

Our mission is to move the world with images. This means more than just moving hearts, minds and opinions; images today power commerce, policy, culture, ideas and perceptions. The power of an image is undeniable – a single frame can change the world. It can spur action, drive change, incite emotion, putting faces to issues in a way that words simply cannot. For all the content that we license, copyright is both the raw material and the finished product. Copyright is the lifeblood of our industry. A sustainable and robust copyright framework is therefore essential for us to recoup our investments, to allow us to make available such powerful and catalytical images. Virtually all of our customers use images online, this is where we urge the UK Government to pay close attention during its trade negotiations, to ensure that legal incentives are in pace for copyright content to be respected online to the same extent as it is in the physical world. In particular, we’d urge UK trade negotiators to follow the lead of the EU legislators in seeking to hold online intermediaries more accountable for the images that they display, whether uploaded by their users or scraped from other websites. Getty Images was founded in the UK 23 years ago and maintains one of its largest full-service offices here as well as the world’s largest commercial analogue photographic archive in the Hulton Archive. We wish to see the UK remain a world leader on the copyright stage.

### **BAPLA Member, Loupe Images**

Loupe Images, launched in spring of 2006, specialises in inspirational interiors and lifestyle photography. As an SME licensing digital content for over 12 years, we have born witness to the unequivocal change that has taken place online, whereby content sharing platforms have taken advantage of pre-internet ‘Safe Harbour’ provisions and amassed significant revenue from content our image industry has created and marketed online. The number of infringements has exponentially increased to the point at which we had to take action and employ copyright enforcement services to chase unauthorised uses of our images several years ago. For a small enterprise we have found it economically challenging to chase handfuls of infringed images across thousands of commercial websites, and are powerless to handle individual DMCA notices to content sharing platforms simply because of the resources required to do so. With the help of one of the services we use, we identified using one collection, of approx. 4,000 images, that for every ‘single’ authorised use on one social media platform, 36 were unauthorised commercial duplications. And given that it would take approx. 20 minutes per image to request the removal of each unauthorised use under the current system, it simply isn’t economically viable. It is time to update and improve copyright enforcement so that we can license all commercial uses online and continue to contribute to the UK economy.