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

**Re: Request for Comments on Negotiating Objectives for a U.S.-United Kingdom Trade Agreement, 83 Fed. Reg. 57,790 (November 16, 2018) (USTR-2018-0036)**

Dear Mr. Gresser:

The American Creative Technology & Innovative Organizations Network for Trade (“ACTION for Trade”) appreciates the opportunity to provide the following comment in response to the request for comments on negotiating objectives for a United States-United Kingdom Trade Agreement, 83 Fed. Reg. 57,790 (November 16, 2018).

ACTION for Trade is a coalition of like-minded business associations and companies that seeks to advance economic growth based on creativity and innovation through the protection of unique intellectual property (“IP”) in the U.S. trade agenda. By bringing creative and innovation-intensive companies together, we aim not only to address the collective concerns of creative and innovation industries, but also to advance an ecosystem in which our members can enhance the value of their creativity- and knowledge-based assets.

With the rise of the creativity- and knowledge-based economy, ACTION for Trade represents the vanguard of the U.S. economy in the global trading system. In these diverse industries—which span audiovisual, music, and literary content development, production, publication, and distribution; biopharmaceutical manufacturing; and technology and software development—companies rely on the strong protection of their IP around the world, new market access opportunities, and fair international trading rules to make their significant contributions to the American economy. Respect for creativity and innovation through the protection of intellectual property rights deserves to be a paramount trade priority given the scale and continued growth of the U.S. innovation economy.

Our industries are among the greatest job creators, including jobs in the manufacturing industry, in both the United States and the United Kingdom. To do this, they rely on the strong protection of their IP around the world, new market access opportunities, and fair international trading rules. This is a premier front for joint U.S.-UK leadership.

### ***Patents and Regulatory Data Protection***

The United States and United Kingdom are home to the most innovative biopharmaceutical and technology industries in the world. A U.S.-UK trade agreement should ensure a favorable climate for the development of these innovative products, including biologics and small molecule medicines. To successfully bring valuable new innovations to market, including technology and medicines, innovators must be able to secure patents on all inventions that are new, have an inventive step, and are capable of industrial application, as international rules require. It also is important to establish high standards for regulatory data protection (“RDP”), including at least 12 years of regulatory data protection for biologics. Furthermore, any RDP provided in the UK should be measured from the date of marketing approval in the UK, not on the basis of marketing approval in the European Union (EU) or elsewhere.

Strong patent protection and enforcement fuels innovation. To that end, a U.S.-UK trade agreement should reaffirm the parties’ existing commitments to patent protection and enforcement and secure the highest international standards. In particular, the agreement should enhance and clarify the following areas of the parties’ patent systems: patent standards, implementing a one-year grace period, restoring lost patent life, pharmaceutical patent enforcement standards, and third country cooperation. Any adjustment of patent life must provide the same protections, scope, and rights as those enjoyed during the regular patent term.

### ***Market Access and Transparency Concerns***

The extensive upfront and high-risk investments made by companies in innovative sectors depend on these companies’ abilities to commercialize their products. Appropriately valuing those products through market-based mechanisms and free from restrictions that artificially lower those products’ prices ensures that future investments in new innovation will continue. Pricing and reimbursement policies that promote biopharmaceutical innovation are transparent, efficient, accountable, and adhere to market-based principles. Such policies include requirements for governments, as part of rulemaking and decision-making processes, to provide a meaningful opportunity for stakeholders to submit comments or applications prior to the finalization of such rules and decisions, the ability to appeal, and the completion of these rulemaking and decision-making processes in a transparent and timely manner. Regulatory processes that are transparent, efficient, and accountable foster private sector innovation and investment.

The United States and the United Kingdom also should address pharmaceutical market access provisions to ensure that each party can continue to access the other party’s dynamic and innovative marketplace. To that end, the pharmaceutical market access commitments included in the U.S.-Korea Free Trade Agreement (KORUS) and the United States-Mexico-Canada Agreement (USMCA) should form the basis for the market access commitments included in any U.S.-UK trade agreement. The commitments in these agreements establish greater regulatory transparency and promote innovation in the development of new treatments and cures that improve access to lifesaving medicines for patients.

### ***Copyright Protections***

The U.S. and the UK maintain among the highest standards of copyright protection and enforcement in the world and have demonstrated critical leadership globally in advancing the creativity and the interests of creators. Trade negotiations between the two countries offer considerable potential to set a new exemplar for such protections. At the same time, it is imperative that these or other negotiations not limit or otherwise diminish the high-standards maintained in both countries. Accordingly, any trade deal must provide for copyright standards that are on par with the level of protection currently offered in the U.S. and the UK.

Strong copyright protection and enforcement are vital to the motion picture, television, music, publishing, and software industries. In turn, strong copyright protections and enforcement, which fuel creativity, are a critical engine that drives economic growth, job creation, and trade competitiveness in both the United States and the United Kingdom. Several rights are critical for the continued growth and viability of the U.S.-UK digital products market. The exclusive making available right is the essential right underpinning all online commerce in content and should be protected in a trade agreement. Additionally, content producers and performers should be granted full exclusive communication to the public and broadcasting rights, instead of remuneration rights. Technological protection measures (TPM), which are used to protect access to copyright-protected works, are also critical for Internet services, including those that are cloud-based, which offer licensed content.

A U.S.-UK trade agreement should also avoid overbroad exceptions and limitations to copyright. Copyright exceptions and limitations are subject to international norms, including the three-step test. This fundamental norm is woven tightly into the fabric of international copyright law. Fundamentally, fair use creates profound uncertainty out of the U.S. legal system context and should not be included in a U.S.-UK trade agreement.

### ***Ensure Strong Enforcement Mechanisms***

Strong IP protection is of limited value without robust enforcement, particularly in the digital environment. The absence of adequate and effective IP enforcement tools constitute important impediments to digital trade. It is no surprise that counterfeiting and commercial piracy causes a significant drain on both the U.S. and UK economies, leading to lost sales for legitimate IP owners, as well as lost tax revenues and duties for government. This results in decreased employment in these industries and diminishes investments in capital improvements and research and development. Counterfeiting and piracy now impact virtually every product and service industry, raising the stakes higher than ever before. With the growth of the digital economy, online enforcement has emerged as a significant challenge for rights holders.

A trade agreement between the United States and United Kingdom should therefore address and develop mechanisms to effectively monitor and enforce against illicit online activity. A strong copyright enforcement framework is predicated upon clear legal basis for liability, including both primary and secondary civil liability, and for aiding and abetting criminal infringement.

For example, website blocking is a highly-effective form of copyright enforcement in the UK, and in numerous other jurisdictions around the world, to combat infringing websites, and is a critical tool in ensuring legitimate trade in digital products and services.

Damages are also particularly critical in promoting a legitimate and sustainable digital trade. For example, the music industry places particular importance on the availability of statutory damages given the difficulties in proving numbers of infringements or obtaining financial records from infringers. In the alternative, damages should be based on the harm caused to right holders and/or profits obtained by the infringer. Damage calculations should take into account deterrence for future infringers and should adequately compensate right holders.

### ***Platform Accountability***

Platform accountability should be a central feature of U.S.-UK digital trade policy. While the Internet presents opportunities for legitimate commerce, there are also significant challenges to such commerce. Such challenges include illicit content, whether copyright infringing or other illegal content, but are not limited to such content. Many other threats to economic and national security as well as individual security and democratic institutions also proliferate in the digital ecosystem. Internet platforms must be more accountable and do a better job in ensuring that their platforms are not used for infringing or other illegal activity. The argument that someone else initiated the illegal activity should not absolve platforms from the reality that, but for their services, the third party may not have been able to engage in the illegal act in the first place. The United States and the United Kingdom should work to enhance regulatory flexibility in this area.

Digital trade policy should not automatically promote safe harbors and platform immunities as the basis for Internet growth. This is particularly true of trade agreement provisions, which often are simply incapable of fully reflecting the complexity, extent and nuance of U.S. law on safe harbors, including its jurisprudence, and where the drafting of such provisions present a significant risk that they will be implemented or interpreted in a manner inconsistent with U.S. law. Rather, governments should reflect and analyze the positive and negative consequences of the various safe harbors and immunities, and consider what adjustments should be made to ensure a safe, lawful and vibrant Internet. Safe harbors should only apply to innocent intermediaries who are truly passive and neutral in the operation of the service. Once the service changes to having a more active role or engagement with third-party content, the risk allocation must shift as well.

Any U.S.-UK trade agreement should take care to avoid the inclusion of overbroad copyright safe harbor provisions that facilitate the misapplication of such safe harbors. For example, safe harbors have been misapplied and expanded by certain music services that actively make infringing music available to exempt them from commercially-licensing the music uploaded by users to that service. Trade agreements should not permit or promote such vast expansions of safe harbors beyond their original intent.

### ***Prohibition on E-Commerce Duties***

A key factor in the explosive growth of digital trade has been the longstanding informal commitment by WTO members to not impose customs duties or taxes on cross-border electronic transactions. Any trade agreement between the United States and United Kingdom should formalize this commitment to ensure that duties do not impede the free flow of information, data, research works, music, video, software, and games for the benefit of authors, creators, artists, and entrepreneurs.

### ***Prohibit Localization and Enable Cross-border Data Flows***

Creative and innovative industries are particularly susceptible to acts, policies and practices abroad that are designed to benefit local producers at the expense of manufacturers and employees elsewhere around the world. These localization barriers have become pervasive and are now a routine part of many transactions between businesses and governments – from securing patents, regulatory approval, and market entry to the most minor administrative formalities. Localization barriers include market participation or other benefits conditioned on local manufacturing, in-country medicine trial requirements, technology transfer requirements, local testing and certification requirements, and de facto bans on imports, such as licensing requirements that virtually prevent market entry. A U.S.-UK trade agreement should specifically reject data localization requirements to encourage cross-border data flows while maintaining a commitment to combating the infringement of intellectual property rights online.

### ***Conclusion***

While trade agreements have traditionally focused on market access and lowering tariffs for the exchange of goods and services, an increasing proportion of the global economy is taking the shape of intangible assets such as creative and innovative work product, intellectual property, and knowledge. Even with respect to manufactured goods, a large portion of the value-added is in the form of brand and character recognition, or technology, R&D, software, and other innovation embedded into the functionality of products. Digital trade has also become a critical feature of the global economy, fueled by the creative and innovative industries.

Protecting a healthy, legitimate, and sustainable marketplace through trade will ensure continued growth in this sector which will, in turn, continue to spur the growth of the world economy. Failure to curb unfair IP actions significantly undermines the time, resources, and efforts that make up the true value of IP in the new economy. We call on trade negotiators from both the United States and United Kingdom to ensure the future trading relationship properly protects and rewards the innovation and creativity that drive our joint economic future and foster development of tomorrow's inventions.

Sincerely,

Brian Pomper  
Executive Director