



United States-Japan Trade Agreement Negotiations
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Comments of the Recording Industry Association of America (RIAA)
November 26, 2018

The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. Our membership includes several hundred companies, many of which are small-to-medium-sized enterprises (SMEs) distributed by larger record labels.

The RIAA welcomes this opportunity to provide information to the Trade Policy Staff Committee (TPSC) in order to assist the Office of the United States Trade Representative (USTR) as it develops its negotiating objectives and positions for the U.S.-Japan Trade Agreement. In response to this *Request for Comments on a Proposed U.S.-Japan Trade Agreement including U.S. Interests and Priorities, in order to Develop U.S. Negotiating Positions* (Federal Register Volume 83, Number 54164 (Friday, October 26, 2018)), RIAA provides the following comments regarding matters relevant to the negotiation of a U.S.-Japan Trade Agreement.

These comments address matters enumerated in the Federal Register Notice, including “(a) [g]eneral and product-specific negotiating objectives for the proposed agreement”, “(b) [r]elevant barriers to trade in goods and services between the United States and Japan that should be addressed in the negotiations”, and (g) “[o]ther measures or practices that undermine fair market opportunities for U.S. businesses, workers, farmers, and ranchers that should be addressed in the negotiations”. Given our significant SME membership, RIAA also urges the TPSC to consider the following comments as also representing the interests and priorities of U.S. sound recording industry small-to-medium sized enterprises (SMEs).

The U.S. Sound Recording Industry Prioritizes U.S. Trade Negotiations

Trade agreement negotiations are a high priority for the U.S. sound recording industry. Our industry is highly trade intensive and relies heavily on international commerce supported by strong trade disciplines that promote creativity and that ensure fair and legitimate trade in

creative goods and services. Supported by such disciplines, including through trade agreement negotiations, our industry makes considerable contributions to U.S. economic growth, high-quality American jobs, and U.S. trade competitiveness. For example, the industry contributed \$143 billion annually in value to the U.S. economy in 2016 and created, directly or indirectly, 1.9 million U.S. jobs across a very wide variety of fields.¹ Likewise, copyright-intensive industries, including the music industry, contributed \$1.2 trillion to the U.S. economy, and grew at an aggregate annual rate of 4.81 percent from 2012 to 2015, compared with average annual growth rate of 2.11 percent for the U.S. economy generally.² These industries supplied 5.6 million jobs in 2015,³ and the compensation paid in the copyright intensive industries far exceeds that of U.S. workers overall – amounting to a compensation premium of 38 percent over the average U.S. annual wage.⁴

Strong trade disciplines achieved through U.S. trade negotiations likewise help drive U.S. sound recording industry exports and surplus of goods and services. For instance, the sale of U.S. copyright products in third countries around the world amounted to \$177 billion in 2015. Notably, these foreign sales surpass the sales of other major U.S. industries, including chemicals (excluding pharmaceuticals and medicines) (\$135.8 billion), aerospace products and parts (\$134.6 billion), agricultural products (\$62.9 billion), and pharmaceuticals and medicines (\$58.3 billion).⁵ As for services, IPR licensing is the second largest services export category valued at \$128 billion in 2017 (representing 16 percent of total U.S. exports of services), and which accounted for a \$77 billion trade surplus that year.⁶

Moreover, the U.S. sound recording industry is digital trade intensive, with digital accounting for 90 percent of our revenues in the United States, and streaming accounting for 75 percent of revenues. The licensing of copyright that protects sound recordings is a digital service that fuels trade in sound recordings, which are digital products that can be streamed or downloaded. The

¹ Siwek, Stephen; *The U.S. Music Industry: Jobs & Benefits*; April 2018; pp. 5, 7,

² Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 2; available at:

http://www.iipawebsite.com/copyright_us_economy.html. The 2018 update to this report is currently under development, but was not available at the time of this filing.

³ U.S. Economics and Statistics Administration and U.S. Patent and Trademark Office; *Intellectual Property and the U.S. Economy: 2016 Update*; 2016; available at:

<https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

⁴ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

⁵ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

⁶ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; “U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016”; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

profound importance of the provision of such services to the U.S. economy is exemplified by the considerable contributions of IPR to the U.S. digital services trade surplus. IP licensing continued to be a key driver of the U.S. digital services exports and surplus. For example, in 2017, IPR licensing accounted for \$129 billion in digital services trade exports and generated an \$78 billion digital services trade surplus, which was second only to financial services by a narrow margin.⁷

To realize the full potential of the sound recording industry's contributions to U.S. economic growth, employment, and trade surplus, it is vital that the U.S. government take active steps to ensure that its policies reflect these priorities, including in the negotiations of a U.S.-Japan Trade Agreement. An agenda for promoting these contributions of our industry consists of high-quality consumer-oriented digital products and services in an ecosystem that advances creativity and innovation through strong copyright protection and enforcement, powers digital trade through licensing music, secures market access for digital products and services, promotes fair competition between content delivery services, and that ensures digital platform accountability.

Japan is a Critical Market for the U.S. Recording Industry

Japan is the second largest music market in the world after the United States and is the largest music market for the sale of physical music products. In fact, Japan accounted for 38 percent of global physical music sales – ranking fifth in the top ten for global vinyl sales – with the physical goods responsible for 72 percent of music sales in that market. Japan ranks third globally for digital music sales, with such digital sales representing 21 percent of music sales in that market. Japan was ranked 15th among markets where streaming contributed to total recorded music market globally. Japan accounts for four percent of the total global streaming revenues for recorded music, ranking sixth behind the United States, the United Kingdom, Germany, South Korea, and France. Finally, the Japanese market has among the highest revenue per capita for recorded music at \$21.57.⁸

Regarding digital services trade generally, Japan was the sixth largest digital services export market in 2017, for potentially ICT-enabled services exports from the United States, amounting

⁷ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; “U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016”; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

⁸ *Global Music Report 2018*; pp. 49-50, 56, 59, 63, and 106.

to approximately \$23 billion.⁹ Regarding IP licensing, the United States had a \$3.7 billion deficit in IPR licensing services exports with Japan in 2014, with a compound annual average growth rate for potentially ICT-enabled services of negative 1.5 percent from 2006 to 2014.¹⁰

U.S. Recording Industry Priorities for a U.S.-Japan Trade Agreement

Trade agreement negotiations between the United States and Japan offer both opportunity and challenge. In particular, U.S.-Japan trade in music and other digital products relies on a strong foundation of copyright protection and enforcement, while loopholes and overbroad immunities for copyright infringement threaten current and future bilateral trade. Several rights are critical for the continued growth and viability of the U.S.-Japan digital music market.

Copyright Protection

- **Making Available Right.** The exclusive making available right is the essential right underpinning all online commerce in content.
- **Broadcast and Public Performance Rights.** Music producers and performers should be granted full exclusive communication to the public and broadcasting rights, instead of the remuneration rights. In particular, Japan should also introduce a public performance right for sound recordings.
- **Technological Protection Measures.** Technological protections measures (TPM), which are used to protect access to copyright-protected sound recordings, are critical for Internet services, including those that are cloud based, which offer licensed content.

Copyright Enforcement

Strong copyright protection in isolation, however, is of limited value without robust enforcement, particularly in the digital environment. Likewise, the absence of adequate and effective IPR enforcement tools constitute important impediments to digital music trade.

⁹ Allen, Shari; Grimm, Alexis; and Steiner, Christopher; “U.S. International Services: Trade in Services in 2017 and Services Supplied Through Affiliates in 2016”; *Survey of Current Business, The Journal of the U.S. Bureau of Economic Analysis*; Volume 98, Number 10; October 2018; available at: <https://apps.bea.gov/scb/2018/10-october/1018-international-services.htm>

¹⁰ Grimm, Alexis; “Trends in U.S. Trade in Information and Communications Technology (ICT) Services and in ICT-Enabled Services”; Bureau of Economic Analysis, Economics and Statistics Administration, U.S. Department of Commerce; May 24, 2016; p.11 and 17, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.

- Primary and Secondary Liability. A strong copyright enforcement framework is predicated upon clear legal basis for liability, including both primary and secondary civil liability, such as contributory and vicarious infringement as well as inducing infringement, and for aiding and abetting criminal infringement.
- Website Blocking. Website blocking is a highly-effective form of copyright enforcement in the EU, 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. The music industry further supports the introduction in Japan of injunctive relief to secure orders to OSPs to deny access to infringing websites that hide the identities of their operators or are located in foreign countries. Given that a local OSP cannot “take down” infringing content based on foreign websites, because such content is not hosted on that OSP’s servers, a number of countries around the world have adopted a legal basis to require local OSPs to prevent their subscribers from accessing specific foreign websites. Moreover, at present, there is no basis in Japanese copyright law for issuing an order against third parties whose services are being used by a copyright infringer unless that third party is also liable for copyright infringement. “No fault” injunctions against intermediaries, such as payment providers or domain registrars, whose services enable infringement, should be made available in Japan.
- Damages. Damages are also particularly critical in promoting a legitimate and sustainable digital music trade. 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.

Barriers to Copyright Protection and Enforcement

Copyright protection and enforcement, and contributions described above that flow from them, face critical barriers that significantly impede legitimate and sustainable digital trade in music and other digital products from the creative sector. Such trade barriers include:

- Overbroad Copyright Safe Harbors. The U.S.-Japan Trade Agreement should not include overbroad provisions on copyright safe harbors that facilitate the misapplication of such safe harbors. 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. Nor should such agreements prevent clarifications of, or amendments to, domestic law in order to ensure that it remains effective and can adapt to the ever-evolving Internet ecosystem. Moreover, trade obligations on ISP safe harbors lend themselves to poor implementation.

- Overbroad Application of Copyright Exceptions and Limitations. 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. Efforts to include U.S.-style fair use in trade agreements are particularly troubling. Fundamentally, fair use creates profound uncertainty out of the U.S. legal system context.
- Lack of Platform Accountability. Platform accountability should be a central feature of U.S. digital trade policy, which should feature prominently in the U.S.-Japan Trade Agreement. While the Internet presents opportunity for legitimate commerce, there are also significant and copious challenges to such commerce. Such challenges include illicit content, whether copyright infringing or other illegal content, but is 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.

Digital trade policy should not automatically promote safe harbors and platform immunities as the *sine qua non* 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. In our view, 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.

Conclusion

RIAA welcomes this opportunity to provide these comments to the TPSC regarding the U.S. sound recording industry's priorities with respect to promoting U.S. trade competitiveness in Japan and globally, where market access, strong IPR protection and enforcement, and platform accountability are mutually reinforcing and contribute to the overall welfare of the U.S. economy, and its businesses, workers and consumers. RIAA looks forward to continuing to engage intensively with the TPSC on negotiations of a U.S.-Japan Trade Agreement.