EU – NEW ZEALAND DISCUSSIONS FOR A FREE TRADE AGREEMENT
SUBMISSION OF RECORDED MUSIC NEW ZEALAND

Recorded Music New Zealand appreciates the opportunity to provide initial comments on the EU-NZ FTA discussions that have recently commenced.

I. ABOUT US

Recorded Music NZ is a non-profit organisation representing the interests of record companies and recording artists in New Zealand. Our members include the New Zealand branches of the three major record companies Universal Music NZ, Sony Music NZ and Warner Music NZ, as well as a multitude of independent record companies and distributors, including Flying Nun, Rhythmethod and DRM NZ; and nearly 3000 registered individual kiwi recording artists.

Our Licensing division administers collective licensing of sound recordings when broadcast on radio and television and publicly performed in bars, clubs, gyms and other venues, either directly or through our joint initiative OneMusic with APRA (the organisation representing songwriters, composers and music publishers). We also provide market analytics and industry reporting and manage industry projects including the annual Vodafone NZ Music Awards, the Official NZ Top40 Charts, The NZ Music Hall of Fame and our Music Grants programme for educational and/or charitable music projects.

II. NZ MUSIC INDUSTRY

(a) GDP and Exports

The music industry is a major contributor to GDP and jobs in New Zealand. In 2016 the industry directly added $251.7 million to national GDP and provided the equivalent of approximately 2,152 FTEs; while indirectly contributing $552.6 million to national GDP and supporting 4,784 FTEs.[1]

Export is a key part of our business – over the period 2014 to 2016, musicians received approximately $25 million per year from overseas earnings.[2] The EU is an important destination for New Zealand music exports and NZ music is available on digital music services across the EU, with recording artists such as Lorde, Fat Freddy's Drop and Ladi6 enjoying chart success in several EU countries.

There are several aspects to the music industry's trade with the EU, most significantly:

- royalties from the sale and use of NZ music in Europe are paid back to NZ artists and record companies; and
- royalties from the sale and use of European music in NZ are paid back to EU artists and record companies.

(b) Digital Music in New Zealand

The music industry has long been at the forefront of technological change and today, recorded music is a digital business. In 2017, 70% of NZ recorded music revenues were derived from digital music

[1] PWC, Economic Contribution of the New Zealand Music Industry, 2016, available at https://www.recordedmusic.co.nz/nz-music-industry-economic-report-2016/.
[2] PWC, Overseas Earnings for NZ Musicians 2012 to 2016, July 2017.

services,[3] ie music streaming and downloads, a higher proportion of digital than Australia or the UK and well above the global average of 54%.[4]

This is no coincidence. Record companies have embraced digital business models, partnered with technology companies and taken risks in licensing content in new and innovative ways, all while continuing to invest in finding and developing the best talent and bringing it to market in a way that meets consumer demands.

This ongoing investment has led the New Zealand recorded music industry from dramatic decline to modest growth. From 2000 to 2014 the industry experienced 14 years of decline in revenues due to piracy and radical change in music consumption models. In 2017, recorded music revenues in NZ grew by 11% in 2017 and by double digits in the two years before that.[5] The growth has been driven New Zealanders enthusiastically signing up for subscription music streaming services such as Spotify and Apple Music.

Today New Zealand consumers have access to more music than ever before, at affordable price points. All music is released globally on the same day each week, meaning that NZ music fans don't need to wait to access their favourite music legally. The music industry is continuing to license and invest in innovative technologies to deliver music to consumers in the way they want – home smart speakers and virtual reality headsets are just a couple of examples.

The capacity of the music industry to continue investing, developing artists' careers and delivering great music to consumers depends on having the right legal framework in place. In particular, copyright and digital trade are key areas for the music business. It is against this background that we provide our initial comments on the discussions for a EU-NZ Free Trade Agreement.

III. EU – NZ FREE TRADE DISCUSSIONS

Copyright protection is fundamental to the sustainability and future growth of the music industry. Record companies are the principal investors in music production, reinvesting an estimated 27% of their revenues back into artist and repertoire development and promotion.[6] This investment is dependent on the existence of appropriate copyright protection and the ability to effectively enforce it.

For that reason we welcome the inclusion of an IP Chapter in the EU proposed text for a free trade agreement. Below we highlight some aspects of EU law that, if implemented in the agreement, would facilitate and improve digital trade in music, and benefit both local and EU music industry as well as New Zealand music consumers.

(a) Copyright Term

We note the EU proposed text for a free trade agreement incorporates a copyright term of 70 years[7] and we support New Zealand adopting this longer term.

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[3] Recorded Music New Zealand Annual Report 2017, available at https://www.recordedmusic.co.nz/recorded-music-nz-annual-report-2017/

[4] IFPI Global Music Report 2018, available at http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2018.

[5] Annual Report as above.

[6] IFPI Investing in Music Report 2016, available at http://www.ifpi.org/investing-in-music.php.

[7] Available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395, EU Trade Transparency in Action website.

New Zealand is one of very few countries that does not give its artists and record companies a 70 year term of copyright protection for their work.[8] Our recording artists and their record companies stop earning revenues from their recordings 50 years after they are released. This is out of step with international norms and with the EU as a trading partner. As a result of the shorter term, NZ artists lose out on revenues generated in New Zealand and also in the EU as EU countries take a reciprocal approach and apply a shorter 50 year terms to NZ music being exploited in their jurisdiction.[9] In addition, currently EU artists and record companies will only receive 50 years of revenues in New Zealand.

We note the government's comments about copyright term in the context of implementing the CPTPP.[10] In the context of TPP, extending copyright term was seen as a substantial cost for New Zealand, based on a 2009 economic study. We have submitted many times previously that we believe the conclusions of that economic study are unsound.

Setting aside the merits of that study, the music market has changed significantly since 2009 when the study was undertaken. We would urge trade negotiators to take a fresh look at this issue in light of the current realities of the music market. We are ready to assist MBIE, trade negotiators and the government in this task.

(b) Injunctive relief against intermediaries

The EU legal framework includes useful provisions relating to enforcement of copyright, in particular providing for courts to issue injunctions against intermediaries whose services are being used to infringe copyright.

These provisions have been implemented by member states and applied in practice in 14 EU countries, to require internet service providers to block their subscribers' access to infringing websites and services based overseas (called "website blocking"). For example, ISPs in 11 EU countries have been ordered to block access to the well-known infringing website The Pirate Bay. The provisions have also been applied to issue orders against other intermediaries that are facilitating or contributing to copyright infringement (whether innocently or not), including domain registrars and search engines.

The first website blocking orders for copyright infringement were issued in Denmark in 2007, and since then there is a long history of orders being issued by EU member state courts, and successfully implemented by internet service providers. Website blocking has also been implemented as a remedy for copyright owners in several other countries including Australia and Singapore.

Academic and other research indicates that website blocking, when properly implemented, is an effective remedy to tackle piracy. A 2018 report from Carnegie Mellon studied the impact of numerous waves of website blocking in the UK11. The analysis found that the site blocking implemented in the UK not only reduced total visits to blocked sites by up to 90% but also increased licensed activity by around 11%.

[8] 66 countries, and 32 out of 35 OECD countries provide a term of 70 years or longer. The OECD countries that do not provide 70 years are New Zealand, Japan (which has now committed to a 70 year term via the recent EU FTA) and Switzerland (where draft legislation has been proposed including a 70 year term).
[9] Art 3(2) and 7(2) Directive 2006/116.
[10] See https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/tpp-and-cptpp-the-differences-explained/
[11] Danaher, B., Smith, M, Telang, R. (2018) *The Effect Of Piracy Website Blocking On Consumer Behavior*.

In New Zealand, approximately 25% of people that obtain music from the internet have used an infringing website of some kind;[12] and over 30% of 18 to 24 year olds have used infringing stream ripping services.[13] This is resulting in lost revenues to artists, record companies and the wider music industry.

New Zealand law currently does not explicitly provide for the ability for right holders to obtain website blocking injunctions. The New Zealand government should implement such a remedy to assist in tackling piracy and illegal use in New Zealand, making it a more attractive market for licensed music from the EU and elsewhere.

(c) Digital trade/user upload platforms

We recommend that trade negotiators consider the recent EU initiatives relating to user upload platforms.

In 2016 the EU Commission released a proposal for a Directive on copyright which included a recognition that:[14]

> "*[o]ver the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to copyright protected content uploaded by their users without the involvement of right holders have flourished and have become main sources of access to content online. This affects rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it*."

The EU document is referring to "user upload" services such as YouTube that monetise music uploaded by their users. These services built up their audiences by streaming music uploaded by members of the public, and relying on "safe harbours", limitations on liability of service providers, that appear in the EU e-Commerce Directive, New Zealand copyright law and many other laws around the world. As the EU Commission recognised, this puts right holders in an unfair bargaining position and reduces the revenues they are able to obtain in licence deals, while giving user upload services an unfair advantage over other digital music services.

Safe harbour privileges were introduced into laws around the world starting from the late 1990s to allow the internet to develop without fear of wide-ranging copyright liability. The privileges were intended for companies such as internet service providers that play a passive role in providing the infrastructure for the internet: the "pipes" and storage space used by others to transmit content. However, over time the privileges have been relied on by sites which actively monetise, promote and engage with content via curation and recommendations. They have also been relied on by pirate websites, most notably MegaUpload.

The EU proposal for a Directive, which is currently progressing through the EU Parliament, includes three elements that will be of interest to trade negotiators:[15]

[12] Horizon consumer research, March 2017.
[13] Horizon consumer research, October 2017.
[14] Recital (37), Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, available at https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market
[15] Above footnote 14.

- clarification that where user upload platforms store and provide access to copyright works uploaded by their users they are liable for communication to the public and obliged to conclude licensing agreements with right holders, unless eligible for a safe harbour
- clarification that safe harbours are not available to service providers that play an active role, including by optimising the presentation of the uploaded works or promoting them
- an obligation on user upload platforms to take appropriate and proportionate measures to ensure that infringement does not occur on their platforms.

The EU free trade discussions provide an opportunity to avoid perpetuating mistakes from the past, and take a fresh look at safe harbours for internet service providers, in light of recent developments in the EU.

(d) Technical protection measures

We note that the EU proposed text for a Free Trade Agreement includes a commitment to provide adequate protection for technical protection measures ("TPMs"), including a prohibition on the act of circumvention and prohibition on dealings in certain types of circumvention devices and services. The level of protection provided by New Zealand's corresponding TPM provisions falls short of that offered in the EU in a number of respects and we would support a review of New Zealand's TPM provisions as part of the EU discussions.

In today's music market, streaming is the dominant method of consumption and TPMs are routinely used to implement and enforce the terms applied to music streaming services. In particular, TPMs are used to prevent users from downloading or making a permanent copy of recordings licensed for streaming.

Stream ripping is the process of obtaining a downloadable file from a streaming-only service such as YouTube. It is typically done by using a stream ripping website or app, in order to obtain a file that can then be kept and listened to offline or on other devices. Stream ripping has become the most common way of illegally downloading music.

Stream ripping results in lost revenues to the music industry by reducing traffic to streaming platforms, which reduces advertising revenues, and reducing sales of premium subscription streaming services, which themselves offer offline and mobile access in return for a monthly fee. These losses affect both New Zealand and EU artists and record companies.

We are concerned that the existing New Zealand provisions on TPMs do not give right holders effective tools to take TPM based enforcement action against these stream ripping websites. There are a number of issues with the New Zealand provisions including:

- The definition of "technical protection measure" may not be sufficient for a court to conclude without doubt that the measures used by music streaming services, which involve access control components, are protected
- New Zealand law has no prohibition on the act of circumvention itself, so right holders would be forced to argue that the stream ripping website is providing a device or service

The provisions relating to devices are heavily qualified and in particular require right holders to prove that the person distributing the device "knows or has reason to believe that it will, or is likely to, be used to infringe copyright". While there is little doubt that stream ripping websites are almost exclusively used for infringing music downloads, proving a complex state of knowledge on the part of the site operator is likely to be difficult.

We believe that a review of New Zealand's TPM provisions, with reference to the EU model, is required in order to bring NZ law into line with the EU and provide effective protection for EU and NZ right holders.

IV. CONSULTATION WITH STAKEHOLDERS

As trade negotiators have experienced, the public debate on trade issues, and in particular on IP issues, can be unhelpful. The debate is often dominated by a few vocal groups that do not necessarily represent the views of NZ business or ordinary New Zealanders. As a representative of New Zealand based companies, SMEs and individuals, we appreciate this opportunity to provide input to trade negotiators and commend MFAT on its consultation program.

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