

## Initial comments on the European Union-New Zealand Free Trade Agreement negotiations (EU-NZ FTA)

Joint Submission from the Motion Picture Distributors' Association New Zealand (MPDA)  
and the Home Entertainment Association of New Zealand (HEANZ)

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MPDA and HEANZ appreciate the chance to offer comments as New Zealand commences negotiations for a free trade agreement with the European Union. We believe the EU-NZ FTA presents an excellent opportunity for New Zealand to strengthen its creative sector, attract foreign investment and support New Zealand's creators through implementing a number of international best practices currently in place in the European Union. We outline some of these practices in this initial brief submission below.

### About us

The MPDA is an industry association that assists with the distribution of films in New Zealand and collects information relating to box office, admissions and ratings.<sup>1</sup> HEANZ is an industry association which aims to facilitate the production and distribution of home entertainment content in New Zealand.<sup>2</sup>

In 2016 the NZ screen industry contributed \$1.015 billion to New Zealand's real GDP and is estimated to have directly contributed \$6.04 billion to GDP from 2010 to 2015. In 2015 there were approximately 14,000 people working in the industry.<sup>3</sup>

### Include a Strong IP chapter in the EU-NZ FTA

Copyright is the bedrock on which New Zealand's creative sector is built. Ensuring that creators have effective tools to both monetise and protect our content in the digital and physical realms is essential to our continued operation in New Zealand. We would encourage the New Zealand Government to ensure that an intellectual property (IP) chapter is included in the EU-NZ FTA and that it includes strong copyright provisions which allow us to protect and distribute our content in diverse ways.

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<sup>1</sup> MPDA's members include: Roadshow Entertainment (NZ) Ltd (also distributing Warner Bros. movies); Sony Pictures (NZ) Ltd; the Walt Disney Company (New Zealand) Ltd.; Twentieth Century Fox New Zealand (also distributing Universal Pictures movies), and; Paramount Pictures (NZ) Ltd.

<sup>2</sup> HEANZ's members include Roadshow Entertainment (NZ) Ltd (also distributing Warner Bros Video License); Sony Pictures (NZ) Ltd (also distributing Disney Home Entertainment content), and; Universal Pictures New Zealand (also distributing 20th Century Fox and Paramount Home Entertainment content).

<sup>3</sup> New Zealand Institute of Economic Research, "The Economic Contribution of the Screen Industry", available at <https://www.nzfilm.co.nz/sites/default/files/2017-12/NZIER%20report%20the%20Economic%20Contribution%20of%20the%20Screen%20Industry%2022%20November%2017.pdf>.

New Zealand is close to completing its domestic procedure for ratifying the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This multilateral agreement was a considerable step forward and requires New Zealand to, among other things, accede to the WIPO Internet Treaties (WCT and WPPT). New Zealand has the opportunity to adopt or improve on some of the best practices currently in place in Europe through the bilateral FTA process and the upcoming review of New Zealand's Copyright Act. The EU has been at the forefront on issues related to adapting copyright for the digital age, especially when it comes to addressing online infringement as part of its Digital Single Market initiatives.

### Platform responsibility

One area in which the European Union has been leading the way is in increasing the responsibility of online platforms for content displayed on their services. Much has changed in the online world since intermediary liability schemes were first constructed in the 1990s. The digital environment can no longer be thought of as separate from the brick and mortar world. Conduct that is illegal offline should be illegal online. The EU has made this point clear. In September 2017, the European Commission published a Communication in which they suggested that **'what is illegal offline is also illegal online'** and recognised that "while online platforms are important drivers of innovation and growth in the digital economy" they carry a "significant societal responsibility in terms of protecting users and society at large and preventing criminals and other persons involved in infringing activities online from exploiting their services". The Communication further elaborated on the principle of online responsibility as follows:

...the constantly rising influence of online platforms in society, which flows from their role as gatekeepers to content and information, increases their responsibilities towards their users and society at large. They should therefore be proactive in weeding out illegal content, preventing its reappearance, put effective notice-and-action procedures in place, and establish well-functioning interfaces with third parties (such as trusted flaggers).

Since that time the European Union has sought to introduce a range of measures to encourage platforms to take more responsibility to combat unlawful behaviour online.

The specific obligations which platforms will be required to adopt are still being discussed in the European Parliament. Some of the measures being considered which may be of most interest to New Zealand policy makers include:

- Duties for large platforms to have a pre-upload filtering mechanism in place so that a minimum of unlawful content appears on their platforms in the first place; and
- A measure requiring platforms to take down unlawful content and keep it down once it has been flagged by an authorised party.
- Measures for online transparency: EU law (Article 5 of the E-Commerce Directive) requires that online businesses provide valid contact details. Having the concept of online transparency laid down in law is key for the ability to combat unlawfulness online. Infringers, whether they be businesses or intermediaries, are facilitated in their unlawful behaviour, including tax evasion, by the ability to operate in complete anonymity online. The problem exists on three levels:
  - i. Marketplace intermediaries allowing the (ab)use of their service by anonymous sellers/uploaders;

- ii. Search, hosting, domain and advertising intermediaries providing their services to infringing websites (e.g. The Pirate Bay); and
- iii. Hosting, advertising and payment intermediaries themselves operating anonymously.

It should be common ground between the Parties to ensure that the online space be a safe, transparent and legal place to conduct commerce. We urge New Zealand to look to the EU legal framework and potentially to Australia as examples of how intermediary liability rules can be updated and guided to better facilitate legitimate digital trade.

### **Injunctive relief and no-fault remedies**

One measure that is already firmly in place across Europe is the availability of injunctive relief. Under Article 8.3 of the EU Copyright Directive, creators can choose to enforce their own rights in countries across Europe by applying to have intermediaries disable access to infringing websites on a no-fault basis.<sup>4</sup> This approach has mostly been applied in the context of site blocking and has proven to be effective: A 2015 Carnegie Mellon study concluded that disabling access to 19 sites resulted in a reduction of 25% in overall piracy in the UK, and correlated to an average increase in visits to paid streaming sites such as Netflix by 12%.<sup>5</sup> Similarly, a 2018 study in Australia found that overall piracy reduced by 25% as a result of no-fault injunctive relief.<sup>6</sup> This provision has been successfully applied by rights holders against domain name registries and registrars, hosting providers and search engines, all resulting in cessation of services to infringing websites. This has fostered a healthier online ecosystem for both consumers and legitimate businesses alike.

Article 8 of the EU Copyright Directive states:

#### Article 8 Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

**3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.<sup>7</sup>**

Having a legal framework that makes it simple for rights holders to work with online service providers to deny access to infringing sites is a necessary remedy for building a healthy online

<sup>4</sup> The Copyright Directive is implemented in the 28 EU Member States and the additional three States that are part of the European Economic Area (i.e. Iceland, Liechtenstein and Norway).

<sup>5</sup> Danaher, Smith and Telang, "The Effect of Piracy Website Blocking on Consumer Behavior", available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2612063](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063).

<sup>6</sup> Incopro, "Site Blocking Efficacy – Key Findings", available at: [https://www.creativecontentaustralia.org.au/literature\\_210629/2018\\_Research\\_-\\_Incopro\\_Study](https://www.creativecontentaustralia.org.au/literature_210629/2018_Research_-_Incopro_Study).

<sup>7</sup> Bold emphasis added.

ecosystem that New Zealand's consumers can trust and engage in with confidence. Such injunctive relief is in place in over 40 countries worldwide and in one-third of APEC economies. We would encourage the Government to introduce a provision in the Copyright Act modelled off section 97A of the United Kingdom's *Copyright, Designs and Patents Act 1988*, which provides a clear and unambiguous statute with a proven track record of effectiveness.

### Online transparency

We encourage the Government to ensure that anonymous services are denied access to intermediary services such as hosting, advertising, and search. In the physical world, businesses cannot hide behind anonymity; this should not be allowed for internet-based businesses, either.

### Proactive measures

Quoting from the aforementioned EU Commission Communication:

Online platforms should, in light of their central role and capabilities and their associated responsibilities, not limit themselves to only reacting to any notices which they may receive, but also to adopt effective proactive measures to detect and remove illegal content online.

Automatic tools and filters can be used to identify potentially infringing content and private and public research is advancing in developing such tools. For instance, in the field of copyright, automatic content recognition has proven an effective tool for several years.

We encourage the Government to take the lead in bringing stakeholders together for the purpose of the development of voluntary codes of conduct for the same purposes.

### Term of protection

A further example of where an EU FTA could augment the CPTPP concerns the term of protection for copyrighted works. EU member states have all moved to what is now the globally accepted minimum standard term of protection – life plus 70 years. This globally accepted minimum standard term of protection for copyrighted works has a direct benefit to the creators of these works, as well as consumers. Such a term creates entrepreneurial opportunities, encouraging investment in new creative works, as well as the preservation, restoration and reissuing of older works in exciting new formats. This provides consumers more choice and preserves our cultural heritage. More than 90 countries around the world agree that setting copyright terms to this global minimum standard is necessary and appropriate in today's highly inter-connected world in which there is little distinction between local and global distribution of a wide variety of copyright-based products.

We encourage the Government to update its term of protection of copyrighted works from 50 to 70 years after publication or death of the author or after the work is lawfully made available to the public. This would be consistent with the best practices set out in the European Union's Directive 2006/116/EC and Directive 2011/77/EU. The EU-Japan Economic Partnership Agreement recently concluded includes a copyright term of protection based on 70 years, notwithstanding that this Trans-Pacific Partnership (TPP) obligation was suspended in the CPTPP provisions. Choosing not to provide term at the globally accepted minimum standard would leave New Zealand's creators at a disadvantage compared to their counterparts not just in the EU, but compared to their counterparts all over the world, whose countries are free to apply the "rule of the shorter term" to New Zealand works.

### Technological Protection Measures (TPMs)

TPMs protect creative work like movies, TV shows, music and games through passwords, encryption, paywalls, and time and use limits. There are two types of TPMs: those which control access to content and those which prevent unauthorized copying. Copyright owners use TPMs to authorize the distribution and making available of their works online and to prevent unauthorized access to and use of their works. The main difference in what is delivered to a consumer as between a \$5.99 movie rental, \$24.99 purchase, or movie streamed via SVOD service, are the TPMs enforcing the terms of each transaction. Protection of both types of TPMs is central to the functionality of online business models, allowing rights holders to enable the diversity of offerings and price points consumers demand.

New Zealand's legislation currently does not protect TPMs which control access to content. For example, under New Zealand's current law, a person could legally circumvent password protection or encryption measures to watch a movie through a service like Lightbox, Neon or Stuffpix without paying the subscription fees which fund those services. Nor does it protect against devices which enable trafficking or circumvention of infringing content.

New Zealand should adopt the global minimum standards for copyright in the digital environment including protections for TPMs, which are established by the WIPO Internet treaties. Although the specific provisions governing TPMs in the TPP's Article 18.68 were not carried over into the CPTPP, they, nevertheless, provide strong guidance on the specifics needed to restrict access and copying as obligated by the WCT and WPPT, incorporated by reference into the CPTPP. The European Union's Directive 2001/29/EC provides an excellent example which New Zealand could follow to implement these international norms.

### Market Access

There is a disparity between the level of market access New Zealand currently provides to its creative industry market and level of market access the EU currently provides to its creative industry market. This disparity is underscored when one examines both parties' WTO obligations. New Zealand has always embraced free trade, recognizing that competition and foreign investment benefit consumers and the economy more broadly. Indeed, cultural promotion and open markets are compatible and complementary. The disparity of openness places New Zealand creators at a disadvantage. While we would not question existing EU or national financial support measures, we encourage the Government to ensure that New Zealand's creative industries are not removed from the scope of an NZ-EU trade agreement via a broad sectoral carveout and, rather, that cultural sensitivities are accommodated utilizing the flexibilities of modern trade agreements.

We look forward to supporting the Government in their negotiations with the EU. We are ready and available to provide further information on the above points.

Yours sincerely,

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