



October 2018

Department for International Trade

Free Trade Consultation – UK-New Zealand

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. A full list of UK Music members can be found in the annex.

2. Intellectual Property, and copyright specifically, are key elements of international trade; in particular for the successful UK music industry. The key international agreements underpinning the modern music business globally are the WIPO Internet Treaties (WCT/WPPT); the main international trade agreement containing the provisions on copyright and its enforcement, the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, is referred to as a core provision of any free trade agreement in the accompanying papers to the consultation at hand.
3. The music industry contributes £4.5 billion Gross Value Added of which £2.6 billion are revenues derived from export (UK Music Measuring Music 2018 report). New Zealand is an export market for British music which we expect to be further increased in the future. UK collective management organisation PRS for Music collect substantial amounts from the public performance and communication to the public of musical works of British composers and music publishers from New Zealand. This is in addition to other income streams such as Synchronisation to films or advertising. British performers and record companies receive considerable income from licensing sound recordings into New Zealand – whether directly through license deals with digital services, or indirectly, through licensing certain uses of recordings through PPL. Furthermore, New Zealand represents a strong market for physical products such as CDs and Vinyl.
4. At this stage our main concerns relate to the prominence of the interests of the music industry as part of the creative industries; i.e. that copyright remains a key consideration during the negotiations of a free trade agreement. In the context of any free trade agreement our main objective is to ensure that the UK copyright standards, which represent the global best practice, are adopted by the UK's trade partners or, short of outright adoption, are followed as closely as possible.

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Copyright.

5. New Zealand has been a member of the Berne Convention since 1928 and the 1994 TRIPS agreement, but surprisingly for a developed economy, has not yet ratified the WIPO Internet Treaties (WPPT/WCT). Reference to the international obligations in any Free Trade Agreement provides a welcome reminder to the importance of legislative and practical copyright framework as well as clarifying the application of international standards under existing copyright laws, including the WPPT/WCT, which New Zealand is in the process of acceding to.

The New Zealand copyright law is based on the UK approach to copyright (mainly the UK 1911 Copyright Act); however, it would be helpful that it be improved for instance by

- introducing WCT/ WPPT-compatible technical protection measures, including protection against circumvention of access controls
- increasing the term of protection to life plus 70 years for musical works and to 70 years for sound recordings as is the case in the European Union and the United States (for sound recordings, it is actually longer). Introduction of a straightforward term extension to 70 years for sound recordings is particularly needed in place of the 2-step term extension (first to 60 years, then to 70 years) which New Zealand had committed itself to doing under the original 12-country Trans-Pacific Partnership agreement.

General.

6. Free Trade Agreements can assist UK artists by removing such barriers to trade and investment. Discussions on a Free Trade Agreement provide the ideal opportunity to address such shortcomings at a bilateral level. We note that a Free Trade Agreement (FTA) is defined as an international agreement which removes or reduces tariff and nontariff barriers to trade and investment between partner countries. It should be very simple for UK musicians to tour in New Zealand and vice versa for New Zealand musicians to tour in the UK. Also, the high level of protection offered to New Zealand recordings in the UK should be matched in New Zealand.

Education.

7. The lack of knowledge on copyright for right holders and users alike became apparent during recent political discussions on copyright. In order to appreciate the importance of copyright for individuals, companies and users, we suggest a high level reference to copyright education in the trade agreement along the lines of the recently signed Economic Partnership [Agreement](#) between Japan and the European Union expressly recognising the value of promotion of public awareness concerning protection of intellectual property.

ARTICLE 14.7 - Promotion of public awareness concerning protection of intellectual property

Each Party shall take necessary measures to continue promoting public awareness of protection of intellectual property including educational and dissemination projects on the use of intellectual property as well as on the enforcement of intellectual property rights.

No detailed “safe harbours” provisions in free trade agreements.

8. Currently, legal initiatives at UK and European level address the role of content online platforms within the value chain. The “safe harbour” provisions under US law or the limitations of liability provisions in the UK e-Commerce provisions will be updated to take into account technical developments in the last 20 or 18 years respectively. The extent of such changes will only become apparent once these initiatives are adopted (in the European Union - the proposed Directive Copyright in the Digital Single Market and in the UK - the Digital Charter). We note that the withdrawal from the European Union provides a good opportunity for UK government to unilaterally improve the situation for British composers, performers and right holders, most of them micro business or small and medium enterprises.

This should not be jeopardised by including in a trade agreement with New Zealand detailed references to rules concerning the limits on ISPs liability. Any limitations on secondary copyright liability can only achieve the same result if the liability rules to be limited are the same in both countries. While both New Zealand and the UK recognise the possibility of an internet service provider being secondarily liable for copyright infringements committed by third parties, the precise rules differ a bit and these differences need to be kept in mind when considering the need for any common provisions on the limitation of liability in certain cases.

We urge the UK Government not to introduce such provisions in any free trade agreement (not as has been done in the United States - South Korea trade agreement and most recently, in the US-Mexico-Canada provisional agreement).

Technical protection measures

9. Compared to UK law (as well as EU law and the WPPT), the New Zealand copyright legislation on technical protection measures is defective in that:

- there is no prohibition on the act of circumvention
- there is no protection for access controls and
- all the devices/services provisions contain complex knowledge qualifiers that would make them difficult or impossible to rely on in practice.

Therefore, we urge the UK government to ensure that adequate standards of protection are included in provisions on TPMs so as to match the level of protection offered in the UK.

Exhaustion.

10. Different approaches to exhaustion exist and in the absence of any compromise during the discussions of the TRIPS agreement, Article 6 of the TRIPS agreement expressly refers to national solutions to exhaustion. We suggest to continue such approach. UK Music members generally prefer national exhaustion which will enable British composers, performers and rightholders to sell their works reflecting the specifics of individual markets.

Exceptions.

11. We do not expect any changes to the established UK approach to exceptions following the withdrawal from the European Union. We hope that the New Zealand approach to exceptions also remains based on the established “fair dealing” system and not consider a change to a US style “fair use” approach. There seems a tendency in

current reviews of copyright in several countries (e.g. Australia) to consider weakening copyright by introducing “fair use” style exceptions. Changing to a US style, open-ended fair use approach would not only weaken the protection of all rightholders including those from New Zealand and the United Kingdom. It would also lead to increased legal uncertainty for right holders and users alike. Even in the United States there is no clarity on the scope of the fair use exception despite over 170 years of case law interpreting such exception. All that the fair use exception does in practice is enable prolonged and costly litigation, often to the detriment of smaller copyright right holders who frequently lack the resources and litigation budgets of the sort available to various technology companies.

We ask the UK Government to reject a US style fair use approach in a free trade agreement.

Third party injunctions and a clear legal basis for website blocking

12. There is no specific provision in New Zealand copyright law to allow for no-fault third party injunctions in copyright cases (no injunctions such as those under Art.8 (3) Copyright Directive or Art.11 Enforcement Directive in the EU), so any action would have to rely on the inherent jurisdiction of the courts. To date, the existence of such power has not been tested in New Zealand courts. The music market in New Zealand is not immune to online piracy services based abroad and thus third-party website blocking injunctions are much needed to address the problem of foreign-based pirate services.

Thus, New Zealand should provide for a clear legal basis for third-party (no fault) injunctions against online intermediaries (access providers) in copyright cases. This could be done through adding a specific provision enacted as part of the Copyright Act, similar to. S 97A Copyrights, Designs and Patents Act 1988 (CDPA) in the UK. That is not the only way in which it could be done, but it would make sense in drafting terms given the similarities between New Zealand copyright law and the CDPA.

Therefore, we recommend that such a provision should be expressly included amongst provisions referring to the minimum standards of IPR enforcement that both parties undertake to offer to right holders.

Collective management.

13. In our view each free trade agreement the United Kingdom concludes should contain a statement on collective management organisations given their importance for the income of composers, performers and rightholders. Such statement should not only acknowledge the importance of collective management organisations but also refer to general standards of accountability, good governance and transparency as is the case in the United Kingdom.
14. Moreover, while the UK and New Zealand both have good standards of governance and accountability of CMOs towards their members, the same cannot be said of certain third countries with which both the UK and New Zealand trade. Therefore, it might be useful for the UK and New Zealand to include in their trade agreement provisions which could subsequently become best practice for use vis a vis third countries (such as e.g. Indonesia, Malaysia, etc).
15. In this context we note the reference to cooperation on collective management of rights in some of the European Union Free Trade Agreements (for instance Korea (Article 10.8), Singapore (Article 11.8); Japan (Article 16). We would welcome similar provisions

in any Free Trade Agreements the United Kingdom were to conclude stressing the importance of high standards of accountability, good governance and transparency. E.g.

Singapore: *Article 11.8 Cooperation on Collective Management of Rights*

The Parties shall endeavour to promote dialogue and cooperation among their respective collective management societies with the purpose of ensuring easier access and delivery of content between the territories of the Parties, and the transfer of royalties arising from the use of works or other copyright-protected subject matter.

Japan: *Article 16 Collective Management*

The Parties:

- (a) recognise the importance of promoting cooperation between their respective collective management organisations;*
- (b) agree to promote the transparency of collective management organisations;*
- and*
- (c) endeavor to facilitate non-discriminating treatment by collective management organisations of right-holders they represent either directly or via another collective management organisation.*

Annex

UK Music's membership comprises of:-

- AIM – The Association of Independent Music – the trade body for the independent music community, representing over 850 small and medium sized independent record labels and associated music businesses.
- BASCA exists to celebrate, support and protect the professional interests of all writers of music.
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition represents and promotes the interests of featured recording artists in the music industry.
- MMF – Music Managers Forum - representing over 500 UK managers of artists, songwriters and producers across the music industry with global businesses.
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, remixers, programmers and mastering engineers.
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.
- Musicians' Union representing 30,000 musicians.
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs,

restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.

- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 114,000 composers, songwriters and publishers and an international repertoire of 10 million songs.
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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