

International Trade Select Committee Inquiry: Agreement with New Zealand

Introduction

1. The Alliance for Intellectual Property is a unique association of 19 organisations representing IP-rich businesses and creators – sectors that continue to grow and outperform the wider economy. Our members include representatives of the audio-visual, music, toy and games, business software, sports rights, branded manufactured goods, publishing, retailing, image, art and design sectors. We share a collective interest in ensuring that Intellectual Property (IP) rights, which deliver such significant benefits to so many individuals across the UK, are recognised by policymakers for the value they deliver, and that a legislative regime exists that enables this value and contribution to be fully realised.
2. We are delighted to provide a submission to the Select Committee with regard to the UK-New Zealand Agreement in Principle. Whilst our members have interests across the proposed agreement, our submission will focus on the IP Chapter. Clearly the views expressed in this submission might change as the full text is agreed; however, the Government has provided enough information regarding the Agreement for us to provide some initial comments.

IP and Trade

3. The UK has one of the best developed and applied IP regimes in the world. Creators and businesses have been able to use that framework to develop exciting and innovative products, designs and content using the latest technology and manufacturing techniques. The Taylor Wessing Global IP Index (GIPI5) ranks the UK third globally, while the 2020 US Chamber of Commerce International IP Index ranks the UK second. The advantages of our current system must not be jeopardised as we seek to develop new trading relationships.
4. It is vital therefore that the protection and promotion of IP is at the heart of UK trade policy, ensuring that everything we create in the UK has the potential to achieve its maximum value and that creators are properly rewarded. Opportunities provided by any new trade relationships should not threaten the UK's world leading regime, but rather be used to raise standards, where necessary, in the jurisdictions with which we negotiate. This will not only protect and promote British IP but provide opportunities for creators and rights holders worldwide to benefit socially, culturally and economically in the same way that the UK has.

Principles for Free Trade Agreements (FTAs)

5. The Alliance has some high-level principles in relation to IP that we believe should be the basis of any FTA.
6. Provisions within IP Chapters of future FTAs should promote both ratification and adherence to the terms of the International Treaty provisions for recognition and enforcement of copyright, trade mark, design and other IP rights, which provide the foundations for development of the businesses represented by members of the Alliance.
7. We therefore want the negotiations to encourage national reform where current practice falls short of standards which UK legislation has already recognised are necessary for the effective development of IP laws, including in the digital environment. Specifically:
 - a) **defending standards**, such as the Berne Convention's Three Step Test for defining the scope of exceptions and limitations to copyright, against moves towards "watered down" or overly vague descriptions that require litigation to interpret and detrimental costs to businesses. In considering such a defence, we must take into account the huge importance of the UK

design sector and the central role that IP rights play in allowing designers to contribute to the UK both culturally and economically;

- b) **allowing flexibility** for higher levels of protection to be applied, whilst pushing for new standard levels of protection when international norms have already moved beyond minimum levels established under International Treaty provisions (for example, on the terms of protection for copyright and building on recent UK changes to registered design rights, recognising the further steps needed to bring parity with the current European system);
- c) **promoting recognition** at international level of rights, such as the Artists' Resale Right, when International Treaty provisions have yet to be adopted at global level;
- d) **making provision for effective enforcement of rights, including in a digital environment**, by expressly requiring that the US and UK both continue to provide for civil liability for secondary infringement, and by promoting the application of systems of good practice developed between established and emerging online intermediaries - particularly those linked to updated provisions for injunctive relief - while avoiding overly prescriptive language that might lock in outmoded aspects of systems for rights owners serving notices on platforms covering notice and take down;
- e) **sustaining the UK's trade mark exhaustion regime**, ensuring that no trade agreement is inconsistent with, nor undermines, the UK's regional exhaustion approach resulting from current EU status.

The Agreement in Principle with New Zealand

- 8. We believe the Agreement in Principle will bring some significant benefits for those creators, businesses and industries that rely on a strong legal IP framework for their success and overall we believe the Government has negotiated some significant changes for which it deserves credit.
- 9. In the New Zealand negotiations we were pleased that the Government prioritised the IP Chapter. In many of the other negotiations the focus has been on tariff reductions. While the benefits from a reduction in tariffs can sometimes be easier to quantify they are far less important for many IP rich businesses, particularly the creative industries where tariffs are low or zero. Of far greater impact for their future growth is a strong IP framework and tackling market access issues.
- 10. We hope that the prioritisation of the IP Chapter reflects a growing understanding of its importance within the Department of International Trade and the wider Government.
- 11. In the Secretary of State for International Trade's recent five point plan for digital trade, she rightly pointed out that Intellectual Property (IP) frameworks in trade agreements can make a significant contribution to consumer protection, driving growth and delivering economic benefits to the UK. She added that protection of copyright works is "not a nice-to-have priority; it is fundamental to our export potential and the success of Global Britain."
- 12. In addition, the Department's Global Trade Outlook report highlighted how IP rich sectors would drive growth in comparison to goods. It stated that "*Rising incomes should see demand for services grow quickly and their share of global GDP rise from 75% to 77% between 2019 and 2030. As living standards rise and middle-class populations expand (mostly in Asia) demand for service sectors – including intellectual property recreation & media, financial, digital and transport services – should all rise quickly.*"

13. Clearly, therefore, a rebalance away from seeing tariff reductions as the single most important priority in negotiations towards the relative increase in importance of the IP Chapter will help drive economic growth and in the negotiations with New Zealand we were pleased to see that evidenced.

Agreement in Principle

14. We have listed below the issues that we asked the Government to prioritise in its negotiations with New Zealand and the results from the Agreement in Principle. They include a number of significant successes in the negotiations including:
 - a) Length of copyright term
 - b) Injunctive relief
 - c) Artist Resale Right
 - d) Copyright exceptions
 - e) Intermediary liability
15. It would appear that less progress was achieved in relation to Technical Protection Measures and Design rights but overall we would assess the negotiations as having been a significant success and it will send a strong message to other countries with whom the UK is negotiating.

Copyright Term

16. Copyright Term is a valuable part of the Intellectual Property framework. It provides incentives for creators to innovate throughout their whole lives, and creates assets that provide for ongoing investment following a creator's death. The Berne Convention recognises this, providing for a minimum term of 50 years after death and other international copyright treaties provide a similar minimum standard. However, in many developed countries, including the UK, US and Europe, policymakers have rightly decided that extending Term beyond 50 years is in the public interest, both from a fairness and economic viewpoint. There is clear precedent for using trade negotiations to extend Term - for example, Japan agreed to extend its Term during its negotiations with the EU.
17. New Zealand's copyright term is only 50 years, placing it out of step with most advanced economies including the US, EU, Japan and Australia. The UK should therefore use the negotiations with New Zealand to increase its term to 70 years after death.
18. **A commitment from New Zealand to extend copyright term by 20 years for authors, performers and producers, which will be implemented within 15 years of entry into force of the FTA.**

Maintaining the UK's Injunctive Relief powers

19. In the UK, rights holders can apply to the civil courts for no-fault injunctive relief. One particular form of no-fault injunctive relief successfully used in the UK is known as website blocking. This allows IP rights holders to apply to the court for orders requiring intermediaries, such as Internet Service Providers, to disable access to websites that make infringing content available. This also includes a requirement that the website remains blocked in future, regardless of any changes in IP and DNS addresses.
20. New Zealand has legislation which, while similar in some respects to the UK's injunctive relief, the New Zealand Government has opined does not permit site blocking. We would

therefore urge the UK Government to use the trade negotiations to press for New Zealand to adopt site blocking legislation, particularly as it is in the process of reviewing some elements of its copyright law.

21. **The chapter will also include commitments to ensure effective enforcement of IP rights including injunctive relief, and a requirement that routes to legal recourse be accessible and not unreasonably costly.**

Artist Resale Right (ARR)

22. The Artist's Resale Right (introduced in the UK in 2006) entitles artists to a royalty when their work is resold by an art market professional. ARR royalties are a much-needed income to sustain artists in their practice, with 81 per cent using their ARR for living expenses and art materials. New Zealand considered introducing an ARR in 2007 but, despite the scheme being well supported, the law stalled in Parliament and was not adopted. This prevented UK artists and their estates from receiving royalties when their works are sold on the secondary market in New Zealand. We therefore urge the UK Government to use the trade negotiations to press New Zealand to introduce a reciprocal ARR law so that UK artists are not deprived of royalties when their works are sold on the New Zealand art market.
23. **A commitment to adopt or maintain artist's resale right schemes and operate them on a reciprocal basis. In New Zealand's case this scheme will be introduced within 2 years of entry into force of the FTA.**

Copyright Exceptions and Limitations

24. Any future UK FTA must include balanced copyright exceptions and limitations and uphold standards, such as the Berne Three Step Test (which will help determine the balance by defining the scope of exceptions and limitations) against moves towards "watered down" or overly vague descriptions that require litigation to interpret and detrimental costs to businesses.
25. Exceptions play an important role in the UK's gold standard copyright framework. The UK system appropriately balances the rights of the author/creator/producer/owner, whilst facilitating society's use or access to copyright works in clearly defined circumstances for clearly defined purposes.
26. The UK has a stable set of exceptions that are decided upon through UK legislation following consideration by parliament. Any attempt by other trading nations to amend or broaden these domestic exceptions through free trade agreements should be resisted in the strongest terms. The UK Government should resist any pressure to agree to any changes that would broaden the UK regime whilst making the case that widening the New Zealand regime, where it would reduce income for rights holders, would create significant economic uncertainty.
27. **No other commitments in the IP chapter will require changes to IP regulatory settings for either New Zealand or the UK.**

Online Intermediaries

28. The UK government should, as a matter of priority, oppose any obligations under an FTA that would broaden liability shields for online intermediaries or digital platforms. In the digital age, it is imperative that rights holders are able to enforce their exclusive rights and protect against unlawful access to their content on online platforms or marketplaces,

including by ensuring there are incentives for cooperation by intermediaries. Where relevant, right holders may seek to employ licensing solutions, at their sole discretion.

29. It should be remembered that these so-called “safe harbour” provisions were first introduced over 20 years ago to protect service providers that played a passive role in providing the infrastructure of the internet. In recent years, they have been relied upon by entities that bear little resemblance to those basic infrastructure providers, and in fact actively curate, promote and monetise content. The UK should not accept any expansion of these provisions through FTA obligations, bearing in mind the continuing exponential growth of technology and digital platforms’ power and impact on the market for content.
30. **No other commitments in the IP chapter will require changes to IP regulatory settings for either New Zealand or the UK.**

Design Rights

31. This is a very complex area but a distinction can be drawn between the design laws of Canada, Australia, and New Zealand, which have a Commonwealth and UK heritage, and those of Japan and the US, which do not. The UK Government should argue for reciprocal recognition of a discrete regime for protection of unregistered designs in those countries with a Commonwealth heritage, as currently exists under UK law through the Unregistered Design Right provided for in the Copyright, Design and Patents Act (CDPA) and the Supplementary Unregistered Design Right (the old EU Community Unregistered Design Right). These rights offer 10-15 years and 3 years protection for designers where their designs are unregistered and are infringed. In New Zealand, Industrial designs are protected in two ways – by registration under the Designs Act 1953 or automatically under the Copyright Act 1994. As with Australia, there is no separate regime for unregistered designs.

Registered Designs

32. The New Zealand Designs Act 1953 is closely modelled on the UK Registered Designs Act 1949 before it was amended by the CDPA and the IP Act 2014. The first method affords protection and an absolute monopoly for up to 15 years subject to passing the formal process of application and registration. Following a successful registration, the registered design will be infringed even by an independently produced design which is similar. To qualify for registration a design must be applied to an article. The design is not the article itself but is rather the concept of a shape, form, or ornament applied to that article. A design feature must be applied to an article by any industrial process or means.

Unregistered Designs

33. Any industrial design which is in the form of a graphic work is likely to fall within the artistic work category of the Copyright Act 1994 and thus be protected automatically under copyright law. However, an independently produced drawing will not infringe as the requirement remains that the second ought to be derived from the first in order to be found as infringing.
34. The only requirement for copyright protection is originality. As part of its negotiations with New Zealand, the UK should argue for reciprocal recognition of a discrete regime for protection of unregistered designs in New Zealand as currently exists under UK law.
35. **A commitment from New Zealand to make all reasonable efforts to join the Hague Agreement on Industrial Designs.**

Technical Protection Measures

36. Technical Protection Measures (TPMs) are routinely used in the UK to enforce the terms applied to digital services, for example streaming services, and are vital in protecting revenue. Existing provisions in New Zealand in relation to TPMs do not give rightsholders the same powers as in the UK, namely:
 - a) The definition of TPMs may not be sufficient for a court to conclude that the measures used by streaming services are protected
 - b) New Zealand has no prohibition on the act of circumvention of TPMs
37. The UK Government should use its negotiations with New Zealand to highlight the disparity in the TPM regimes between both countries.

38. **No other commitments in the IP chapter will require changes to IP regulatory settings for either New Zealand or the UK.**

Members: Anti-Copying in Design, Anti-Counterfeiting Group, Association of Authors' Agents, British Association of Picture Libraries and Agencies, BASE, British Brands Group, BPI, British Toy and Hobby Association, Design and Artists Copyright Society, Educational Recording Agency, English Football League, Entertainment Retailers Association, Film Distributors Association, Motion Picture Association, Premier League, Professional Publishers Association, Publishers Association, UK Cinema Association, UK Interactive Entertainment Registered in England and Wales. Company number: 5976983. Registered address as above.