New Zealand Creative Sector Submission to MFAT
Digital Economic Partnership Agreement Negotiation

This submission is made on behalf of WeCreate, whose members are listed on the WeCreate website, https://wecreate.org.nz/about-us/members/ In addition to our members we have a number of *Friends* that are businesses operating in the creative sector. WeCreate is the alliance of New Zealand's creative sector organisations and industries, incorporating over 25,000 members. Our mission is to catalyse the growth of the sector, advance its collaboration with other sectors and serve as the interaction point for Government to maximise the opportunities our creativity offers.

2 WeCreate appreciates the opportunity to be consulted on New Zealand's participation in the Digital Economy Partnership Agreement (DEPA) negotiations with Singapore and Chile. This submission focuses on cross-sectoral and general policy issues. It has been informed by engagement with the creative sector including, *inter alia*, at the 2017 and 2018 'Creative Economy Conversations' and at the 2019 'Creative Economy Digital Trade Conversation' as well as specifically in the preparation of this submission. Individual members of WeCreate may have different views on specific issues.

Summary

3 The New Zealand creative economy is increasingly dependent on, and benefits hugely from, digital technology. Digital trade – through digital channels including streaming, downloads, platforms, and licensing of digital content – and digital enablers including the digitisation of services and production, mean that there is potential for a substantial expansion in creative economy exports from New Zealand. This would generate benefits for New Zealand including an increase in export revenue and a contribution to enhanced productivity and broader competitiveness for the economy.

4 However, as is the case for other export sectors, creative economy exporters are increasingly challenged by measures in the global digital regulatory environment that add costs or difficulty to cross-border activity. WeCreate accordingly welcomes the efforts by the New Zealand Government to secure a trade-friendly "global digital marketplace", including through the WTO e-commerce negotiations and in its DEPA negotiations with Singapore and Chile. While New Zealand creative exporters have not encountered significant trade barriers in relation to exports to the latter markets, we strongly support the efforts of these three small, open, globally-oriented economies to develop a pathfinder towards a more trade-friendly digital trade environment around the world.

4 WeCreate considers that in the DEPA negotiations, New Zealand negotiators could usefully emphasise trade-friendly approaches in the following areas:

- Services trade barriers, including around cross-border financial services;
- Challenges in relation to the dominant position of platforms;
- Barriers and restrictions in relation to cross-border data flows, including compliance costs in relation to privacy regulations and local presence;
- Challenges in relation to the protection of intellectual property rights and online piracy;
- and overall, a streamlining of global regulatory approaches to digital trade, to minimise the creation of a "digital noodle bowl" of divergent or conflicting approaches.

Submission

3 Creativity is in New Zealand's DNA: we benefit from a powerful combination of unique stories, culture and values; highly-skilled creative people; a long tradition of innovative approaches, and a ready embrace of modern technologies – all of which enables us to unlock and share our creativity more broadly, including offshore. The "creative economy" spans a wide range of sectors, including publishing, recorded music, art, design, architecture and fashion, videogaming, artificial reality and virtual reality, screen, advertising and other segments. These sectors can be a powerful engine for broader New Zealand economic growth. Creative industries generate revenue themselves as well as acting as a multiplier in other sectors, helping to generate broader economic gains in terms of productivity, international competitiveness and enabling innovative new business models. The Ministry for Business, Innovation and Employment has estimated that digital goods and services are already the third-largest New Zealand export sector, and that productivity improvements in the sector have a multiplier effect on New Zealand's GDP.[1]

4 The advent of digital and telecommunications technology has meant that the way that creative content is produced, distributed and consumed has been completely transformed over the last two decades – not just in New Zealand, but globally. In many cases, creative sectors have become digitised from end to end, with some industries such as videogaming "born global", while others such as screen, music and publishing transformed through digital production, editing and distribution. The creative sector generates revenue through multiple global digital channels (streaming, downloads, other online services), e-commerce platforms, performance rights (broadcasting), licensing of digital content, goods and services and direct sales. In large part, this trade is 'weightless', helping to contribute to the transition of New Zealand to a more sustainable, low-carbon economy.

5 The digital revolution has also helped to unlock the potential of creative small businesses – the vast majority of this sector in New Zealand – to participate in cross-border trade at lower cost and with broader reach in a way that was not possible before. Physical creative exports traditionally relied on securing international distributors, territory-by-territory releases, and deep pockets to finance high legal, marketing and distribution costs. By contrast, digital creative exports can have global reach from Day One, opening up new opportunities for smaller or independent creators in a wider of markets and consumers, and enabling rapid growth. Digitisation can lower costs and help keep content more secure. It can also unlock vertical integration (notably in the gaming sector) and the potential for value-added 'spinoff' products.

6 The global appetite for creative content is growing as the number and reach of disruptive entertainment platforms increases.[2] New Zealand creative exports enjoy growing demand in large emerging markets such as India, China, South-East Asia and the Middle East. In addition to direct exports, there are also opportunities for co-production with international producers and for supplying our creative expertise and services as part of international value chains. New Zealand, as a small but sophisticated and wealthy market, can also serve as a useful 'test-bed' for global content (for example, the Pokemon Go Harry Potter app was tested here).

The Digital Economic Partnership Agreement

7 New Zealand creative economy exporters have not to date encountered significant challenges or barriers to creative digital exports to Singapore or Chile. This no doubt reflects the general openness of these economies to digital trade, as is reflected in their very high rankings in the European Centre for International Political Economy's '*Digital Trade Restrictiveness Index*' (DTRI).[3]

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[1] Ministry of Business, Innovation and Employment, 'Building a Digital Nation', https://www.mbie.govt.nz/info-services/digital-economy/documents-and-images/building-a-digital-nation.pdf

[2] See UNCTAD, exports of creative services were estimated at USD$424 billion in 2005, or 3.4% of global trade, with a growth rate of nearly 9% over the period 2000-05

[3] https://ecipe.org/wp-content/uploads/2018/05/DTRI_FINAL.pdf

Chile and Singapore rank, respectively, at 56 and 57 out of 65 countries in terms of restrictiveness (New Zealand, the least-restrictive country in the Index, ranks at 65).

8 Nevertheless, WeCreate supports the DEPA as a "pathfinder" to broader plurilateral or even global rules: this becomes all the more important when considering that, in the same ECIPE Index, the top ten most restrictive countries cover nearly half of the world's population, and a number of these most-restrictive countries are important creative economy export destinations for New Zealand, including notable markets around the Asia-Pacific.[4]

9 Typically, the barriers encountered by creative economy exporters in global markets include the following broad categories: traditional "services trade" barriers; challenges in relation to the dominant "platform-based" business model for some sectors; barriers in relation to cross-border data flows; other burdensome regulatory requirements; and challenges in relation to the protection of intellectual property rights. In some cases, greater openness to trade also has implications for the sustained viability of the New Zealand domestic creative economy.

Restrictions or prohibitions on the provision of digital goods or services

10 As for other services exporters, New Zealand creative sector exporters can encounter traditional "services" trade barriers including:

- restrictions or costs in relation to financial services – including relatively high financial transfer fees, especially for very large volumes of very low value transactions, or "microtransactions", as are common in the video gaming sector;
- discriminatory rules for the provision of online retailing, local presence requirements, limitations on foreign ownership and licensing and registration requirements;
- local content requirements;
- inability to use VOIP services in some territories;
- high visa costs and processing timeframes for business travel in some markets (especially for touring performers and offshore screen production activities);
- challenges around enforcement of end-user licensing agreements (for example, liability issues in relation to end-user licences in some markets e.g. access by a child of unsuitable content).

Challenges in relation to the market power of platforms

11 Digital platforms including e-commerce sites have unlocked significant opportunities for New Zealand creative sector exporters, providing a path to market that minimises the challenges of distribution, marketing and back-office functions such as payments and cybersecurity, and enabling innovative business models that can generate significant value and scale. At the same time, however, some large platforms exercise significant control over pricing, market intelligence and engagement with customers. These storefronts may raise challenges for New Zealand creative exporters, which are often very small and lack sufficient heft to influence large global platforms or their algorithms. Challenges may include:

- high fees (with few alternatives, such as online competitors or bricks-and-mortar retail options);
- lack of independent arbiters to settle disputes – dispute terms and settlement processes are imposed by the platforms;
- lack of access to customer- or product-related data (such information is closely-held by platforms), making it difficult for exporters to respond to market signals;

[4] Digital Trade Restrictiveness Index, ECIPE (2018), https://ecipe.org/dte/

- lack of influence over platform algorithms that may be important to discoverability;
- overly-broad limitations on liability of online platforms for intellectual property rights infringement, or so-called "safe harbours"; and
- platforms may not be regulated sufficiently to safeguard creator IP.

Barriers in relation to data flows

12 Restrictions on cross-border data flows add "hassle" and cost to business activities. Barriers encountered by New Zealand creative exporters include:

- restrictions on cross-border data flows, especially in relation to some markets, notably China;
- burdensome privacy or cybersecurity requirements, especially GDPR, notably in relation to monetising content and advertising; overall, *ensuring* compliance (rather than *being* compliant *per se*) adds significant legal and other costs;
- issues around sovereignty, control and jurisdiction of data;
- forced data localisation – in some cases, business have been able to find work-arounds (e.g. via licensing) and in some cases this is encountered as a commercial/contractual requirement rather than a regulated one. But forced data localisation (and/or associated local presence requirements) add significant costs and "hassle". The alternative – treating some markets' data differently to others – would likewise add costs and difficulties, leading to a view that in some cases it is simply easier not to supply those customers/markets;
- issues around the use of data in AI; and
- data transfer costs and inefficiencies – e.g. in relation to sending large files from New Zealand screen production overseas and back to New Zealand for post-production.

Other burdensome regulatory requirements, other issues

13 Other barriers that New Zealand creative exporters have encountered, both regulatory and otherwise, include:

- regulatory compliance costs across markets – especially where regulatory approaches and standards differ across markets – work against innovative business models. Territory-specific advice (and compliance/enforcement) in relation to local regulations and negotiating and enforcing contracts is both necessary and expensive;
- issues around liability and enforcement (especially in relation to artificial intelligence activity);
- issues around establishing/verifying identity;
- tax treatment;
- legal challenges around cryptocurrency and blockchain; and
- for e-commerce in relation to creative goods, challenges around traceability in supply chain; freight costs and import duties for inputs.

New Zealand domestic considerations

- global digital distribution offers new opportunities (markets and inputs) but could also mean that the domestic New Zealand tax base and domestic market, infrastructure and skills are eroded (local suppliers become relatively less competitive and this has impacts on the sustainability of domestic businesses); and
- shortage of workers with the right skills.

Intellectual Property

14 WeCreate notes that intellectual property (IP) protection is not mentioned in the briefing provided to the Minister for Trade and Export Growth, nor in the DEPA statement by New Zealand, Singapore and Chile. As noted above, creative content is a major driver of digital trade flows and the use of internet-connective devices around the world, but the expansion of digital trade must be predicated on both robust intellectual property protections and the ability to enforce such protections. Such an environment encourages the creation of high-quality creative content because of the assurance it provides to content creators in relation to the safe dissemination of that content and their ability to extract value from it. In short, copyright and other IP protections are at the heart of a successful creative economy, at home and abroad. A recent study on business experiences in the Asia-Pacific found that 83 percent of small businesses identified enforcement of intellectual property laws as either a "major" or "minor" problem in their cross-border e-commerce activities. [5]

15 Specific IP challenges encountered by the New Zealand creative sector include:

- online piracy – New Zealand authors, musicians, filmmakers and other creators have experienced substantial erosion in the value of their work due to illegal copying via peer-to-peer or streaming sites. This is a significant issue and an impediment to realising the full value of digital exports;
- subversion of technological protection measures (TPMs);
- lack of harmonisation in certain key areas, for example New Zealand's shorter copyright term of 50 years compared to 70 years in place in Singapore, Chile and many other OECD countries;
- overly broad limitations on liability, or "safe harbours", for online platforms; and
- performance requirements including forced transfer of source code or technology – these often feature in commercial relationships (e.g. contractual obligations) and are a "business reality" in some markets – but should not be a regulated requirement.

16 WeCreate urges New Zealand to include intellectual property rights protection in the DEPA negotiations; this should build on existing approaches in the WTO TRIPS Agreement, WIPO Internet Treaties and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), including in relation to copyright-protected content, copyright term, performance rights, and enforcement procedures. With regard to cross-border data flows and a free and open internet, while restrictions can and do act as barriers to trade, provisions on cross-border data flows must not interfere with the exercise and protection of legitimate intellectual property rights.

New Zealand's objectives for DEPA

17 New Zealand's objectives for DEPA should accordingly include the establishment of a rules-based, open global trading environment that supports cross-border data and digital trade flows (while recognising the need for certain restrictions to meet legitimate objectives, including the protection of intellectual property rights). Regulation should be as light-handed as possible, non-discriminatory, least trade-restrictive, and developed using good regulatory practices and through a process of robust consultation with stakeholders, including those in the creative economy.

18 Specifically we would endorse approaches that include:

- a permanent moratorium on tariffs on electronic transmissions

[5] ABAC (2015), 'Driving Economic Growth through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers', University of Southern California Marshall School of Business, https://www2.abaconline.org/assets/2015/4%20Manila/MSMEEWG%2035-053%20USC%20Marshall%20SMMEs%20in%20e-Commerce%20Research%20Project%20Full%20Report.pdf

- a prohibition on data localisation requirements and other restrictions on cross border data flows, with a high threshold for any exceptions (including the concept of measures being 'no more trade-restrictive than necessary to meet a legitimate objective')
- electronic authentication and recognition of e-signatures
- adequately resourced and streamlined Customs procedures, including e-border processes and paperless trading, consistent with the obligations in the WTO Trade Facilitation Agreement, to smooth trade flows and reduce compliance costs, especially for SMEs
- a high *de minimis* threshold for e-commerce
- cooperation on global approaches to cybersecurity, privacy, access to data for law enforcement and consumer protection – seeking to align approaches where possible
- further liberalisation of trade in digital services, including through removal of market access and national treatment restrictions on digitally-provided services
- a prohibition on requirements to provide source code and forced technology transfer
- consultative processes for the development of regulations and technical standards, and mutual recognition of conformity assessment
- given the crucial role played by e-payments/fintech in e-commerce, trade-enabling approaches to cross-border financial services
- platforms to be subject to competition policy disciplines that ensure a more level playing field for SMEs
- transparency (for exporters) around laws and regulations relating to data regulation

ENDS

Recommendations to the Ministry of Foreign Affairs and Trade

19 WeCreate recommends that the Ministry:

a. **note** WeCreate's support for the negotiation of an ambitious and trade-friendly global rules framework for digital trade, based on the approach taken in CPTPP, and drawing on APEC and ABAC Principles for Non-Tariff Barriers;
b. continue to **consult widely** with sectors likely to be impacted directly by the negotiations, and with other stakeholders

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