

July 22, 2016

Committee Secretariat  
Foreign Affairs, Defence and Trade  
Parliament Buildings  
Wellington

Dear Committee Secretariat,

I am writing on behalf of the New Zealand Screen Association (NZSA). The members of NZSA are: Roadshow Entertainment (which also distributes titles of Warner Bros.); Universal Pictures (which also distributes titles of 21<sup>st</sup> Century Fox and Paramount Pictures), and; Sony Pictures (which also distributes titles of Walt Disney Studios). The members of NZSA are all engaged in the distribution of film and television product into the theatrical and home entertainment markets in New Zealand.

We attach here our comments on the discussion document “Trans-Pacific Partnership Agreement Amendment Bill”.

We note that we would appreciate the opportunity to speak to our submission.

Thank you for the opportunity to make this submission.

Yours faithfully,



Matthew Cheetham  
Managing Director

Committee Secretariat  
Foreign Affairs, Defence and Trade  
Parliament Buildings  
Wellington

22 July 2016

**SUBMISSION ON TRANS-PACIFIC PARTNERSHIP AGREEMENT AMENDMENT BILL BY THE NEW ZEALAND SCREEN ASSOCIATION**

The New Zealand Screen Association (**NZSA**) represents the Motion Picture Association in New Zealand, including Roadshow Pictures, 21st Century Fox, Paramount Pictures, Sony Pictures, Universal Pictures, Warner Bros., and Walt Disney Pictures.

As the Committee may be aware, a recent PWC analysis noted that the total impact of the measured creative industries to New Zealand's GDP in 2014 was \$3,848 million, of which \$1,303 is attributable to the film and television industries.<sup>1</sup> The measured creative industries directly employed 19,234 workers, of which 14,431 are within the film and television industries; within the film and television sectors, 92% of all employees are engaged in either production, TV broadcasting, or film exhibition. We note that a similar study compared the economic impacts of the wine industry and found that the estimated economic impact of the film and television industry in 2011 was considerably greater than that of the wine industry in 2009.<sup>2</sup>

The Trans-Pacific Partnership Agreement (**TPPA**) is intended to facilitate regional commerce including legitimate trade in creative works. TPPA parties, including New Zealand, recognised that Technological Protection Measures (**TPMs**) are vital to achieving this goal when they negotiated the TPPA. Unfortunately, the draft bill fails to correctly implement these important provisions to the detriment of creators, consumers and the broader digital trade ecosystem.

In this submission we focus primarily on clauses 226A – 226M of the Trans-Pacific Partnership Agreement Bill (the **Bill**). Those clauses seek to implement Article 18:68 of the TPPA which covers TPMs.

Our primary submission is that the proposed TPM regime amendments do not meet New Zealand's TPPA obligations. It goes without saying that any failure to fulfil a party's obligations under the TPPA, is

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<sup>1</sup> <http://wecreate.org.nz/wp-content/uploads/2015/09/PwC-FINAL-Summary-Creative-Sector-Report-25-September-2015-KAB.pdf>

<sup>2</sup> <http://www.screenassociation.co.nz/resources.php>

a failure to comply with the TPPA itself and could subject that party to dispute settlement. Perhaps more importantly, strong protections for TPMs are critical to the growth of legitimate digital business models which benefit creators, distributors, and consumers. Faulty TPMs provisions are a disservice to each of those stakeholders.

Beyond TPMs, we also take the opportunity to make some initial, broader remarks about New Zealand's copyright landscape in light of the distinct but related impending Creative Sector Review.

### **TPMS, COPYRIGHT AND DIGITAL CONTENT**

TPMs enable new digital distribution technologies and business models for creative works like film, music and games. They do so by providing technological protections that define the terms of allowable access and use – e.g., through passwords, encryption, paywalls, copy controls, and time and use limits. There are two basic types of TPMs: those which control access to content; and those which inhibit illegal copying. The TPPA obliges contracting states to protect both access and copy control TPMs.<sup>3</sup>

TPMs are a vital plank in the modern copyright regime. They enable rights holders and authorised distributors to offer new and innovative content distribution models. In turn, those models allow consumers to enjoy content at a time, from a place, on a device, and at a variety of price points (e.g., sale, rental, subscription, etc.). Many of these models such as iTunes, Netflix, Lightbox and Neon, are fully developed and now functioning to the great benefit of consumers in New Zealand. None of them would be possible without TPMs. In sum, TPMs foster the creation of diverse business models and enable industry to respond to consumers' demands. TPMs are good for creators, authorised distributors, and consumers. TPMs are good for creators because they help protect their work from theft and allow a variety of distribution partners. TPMs are good for distributors because they allow a diverse range of business models to co-exist in the marketplace. In the absence of TPMs, all distribution models would collapse into a single approach that devalues content – unlimited copying and ubiquitous availability. TPMs benefit consumers because they foster the breadth and variety of business models and choices that consumers demand, while helping to ensure incentives exist for the creation of more content in the future. TPMs serve a critical role in driving the growth of the digital content marketplace to the benefit of consumers, content creators, distribution platforms and service providers.

Copyright is the most valuable asset any author ever has. It is the incentive to create new work. The NZSA is concerned that some submissions on TPPA implementation propose dilution of copyright in this

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<sup>3</sup> Article 18.68.5

country. These stakeholders suggest that copyright can actually stifle innovation. That is not true. There is no empirical or anecdotal evidence for such a proposition. It is the sort of argument which comes from those with obvious, but often undisclosed, commercial interests in monetising other people's creativity without paying much or anything for it. While couched in terms of how relaxing copyright would benefit the New Zealand economy, there is little if any credible evidence provided by these interests to support this. More concerningly, the argument skates over the irreparable long-term damage that would be done to New Zealand's creative industries by diluting copyright. A recent report by the Global Intellectual Property Centre found clear correlations between strong copyright protection and economic growth, including in the digital economy<sup>4</sup>. In particular, the report found that economies with stronger copyright protection:

- have greater access to digital technologies and creative content than economies with less favorable IP environments (p. 17)
- are at least 30% more likely to have larger and more dynamic content and media sectors than are countries with less favorable IP regimes (pp. 23-24)
- see more than double the amount of online creativity than that of economies with weaker copyright environments (p. 25).

The fact is that small countries need strong IP rights to compete and succeed on the world stage. Why create and commercialise new work from a base in New Zealand, when you can create it in other jurisdictions with more robust legal protections? Similarly, lack of robust copyright protection discourages legitimate distribution businesses and platforms from entering a national market. Far from encouraging innovation, weaker copyright law actually serves as a comparative disadvantage over time.

## **TPM AMENDMENTS DO NOT MEET NEW ZEALAND'S TPPA OBLIGATIONS**

### ***Exceptions to TPM circumvention liability go too far***

The NZSA is concerned that the Bill's proposed Copyright Act amendments do not meet New Zealand's TPPA obligations. We note in particular:

- a. **Legalising TPM circumvention must be carefully circumscribed:** The proposed new **section 226D** excludes any act which "is a permitted act under Part 3 [of the Copyright Act] or otherwise does not infringe the copyright in the TPM work" from the TPM circumvention provisions. This approach conflates TPM circumvention with copyright infringement and is therefore at odds with Article 18.68.3, which prohibits TPPA parties from subsuming TPM

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<sup>4</sup> [http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/2016/GIPC\\_IP\\_Index\\_4th\\_Edition.pdf](http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/2016/GIPC_IP_Index_4th_Edition.pdf)

violations into copyright infringement. It does so because the two are quite separate: copyright delineates an author's bundle of rights; TPMs, by contrast, limit use to the conditions upon which the work was offered and prevent illegitimate access to the content (e.g., timed out viewing in the case of a rental, limiting the number of copies in the case of a licence, etc.) Again, TPMs define technologically the parameters of digital distribution models. Allowing broad circumvention of TPMs directly undercuts all digital distribution models.

Such a broad exception is inconsistent with Article 18.68.4(a), which allows exceptions and limitations only if there is an actual or likely adverse impact on non-infringing uses, based on evidence. No such evidence of actual or likely adverse impact accompanies the Bill.

Additionally, a broad exception is inconsistent with Article 18.68.4(b), which requires that exceptions be permitted only to enable a legitimate use by intended beneficiaries of an exception. When coupled with 18.68.4(a) and 18.68.4(c), which prohibits exceptions that "undermine the adequacy of [a] Party's legal system for the protection" of TPMs, it is clear that the TPPA's carefully crafted language requires that exceptions be drawn narrowly, focused on actual use cases where TPMs actually interfere with non-infringing uses, not indiscriminate broad exemptions as proposed by the Bill.

We wonder if perhaps s226D was developed at a time when New Zealand consumers were unable to readily and legally access copyright content online. However, with the advent of a multitude of legitimate online distribution models into the country in the last few years, the problem that s226D was trying to address no longer exists. Moreover, s226D in its current form threatens the continued existence of legitimate online distribution models in New Zealand. We respectfully suggest that the Committee delete s226D from clause 42 of the Bill.

- b. **Knowledge of end use should not be required for TPM circumvention liability:** The proposed new **sections 226A and 226AB** imposes a knowledge requirement on the restriction on dealing in TPM circumvention devices and providing TPM circumvention services. As it stands, s226A(2) and s226AB(2) appear to mean that a person is only liable for trafficking TPM devices or services if he or she was aware that the device/service was, or was likely to be, used for a particular prohibited purpose. This provision guts the trafficking restriction as a practical matter, as it will be almost impossible to establish except in the most egregious cases. This requirement is inconsistent with Article 18.68.1(b) of TPPA,

which does not permit parties to impose a knowledge requirement on downstream use as a threshold to (civil) trafficking liability.

These sections threaten the very viability of legitimate online distribution models in New Zealand and we accordingly recommend the Committee delete s226A(2) and s226AB(2) from clause 40 of the Bill.

Proposed new **section 226C(2)(a)** provides that criminal liability only applies if the TPM trafficker knows the TPM circumvention device/service is or is likely to be used for infringing purposes.<sup>5</sup> This is inconsistent with TPPA Article 18.68.1. To be sure, the TPPA only requires criminal sanctions for “wilful” conduct. But that wilfulness involves wilfulness relating to the promotion/marketing or design, or knowledge of a device or service’s circumvention capabilities, **not** knowledge of how the device/service will be used downstream. As a practical matter, this rule would gut the criminal trafficking provision as it would be impossible at the point of sale to determine how a device would be used. Let’s be real – circumvention devices exist precisely because they enable infringement. Knowledge requirements relating to the use of circumvention devices will be the enabler of scoundrels that will claim no specific knowledge while trafficking in devices and services that cause massive infringement of creator’s rights.

We recommend the Committee amend s226C(2)(a) and (b) in clause 42 of the Bill to bring it into compliance with the corresponding provisions of the TPPA and the reality of the circumvention marketplace.

### ***Legalising TPM circumvention must be carefully circumscribed***

The TPPA expressly protects both access and copy control TPMs. But the Bill creates a loophole with respect to access controls that could swallow the rule in most of the cases where access control TPM are circumvented. The effect of section 226AC is that a person would not be liable for circumventing access control TPMs unless that circumvention resulted in a separate act of copyright infringement. First, this loophole is inconsistent with Article 18.68 of TPPA, which requires penalties for circumvention of TPMs separate from those for infringement.

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<sup>5</sup> Section 226C(2)(a), TPPA Bill

Second, the proposal shows a significant lack of understanding of the role of access controls. Ensuring the legal integrity of access controls is key to the digital content marketplace. Without access controls, creators and distributors have no viable way of ensuring that they receive compensation for the consumption of content. Therefore, legal protection against the circumvention of such access controls must stand independently from any nexus as to whether or not the copyright in the content has been violated. By way of example, simply reading a copyright work or watching copyright video content without reproducing it, distributing or performing it, or making it available may be non-infringing depending on the context. On the basis of section 226AC, a person could legally circumvent encryption and/or password protection and/or other access controls for video content services, to watch movies distributed by a content provider such as Lightbox, Neon or Netflix, without paying subscription fees. This is the very type of activity that TPPA requires to be prohibited under the access control TPM protections.

Legalising such TPM circumvention creates unbounded and uncertain exceptions to liability, wherein the exception to liability for TPM circumvention would largely swallow the rule against circumvention. Again, such a provision wrongly conflates protection of the integrity of TPMs with protection for underlying copyrights in the works to which the TPMs are applied.

***Knowledge of end use should not be required for TPM circumvention liability***

The TPPA requires parties implement:

- a. civil liability for manufacturing, importing, distributing, offering for sale or rental or otherwise providing devices, products or components or services that:
  - I. are promoted or advertised for the purpose of circumventing a TPM;
  - II. have only a limited commercially significant purpose other than to circumvent a TPM; or
  - III. are primarily designed for the purpose of circumventing a TPM; and
- b. criminal liability if a person engages wilfully, for commercial advantage, financial gain or commercial purpose in any of the activities in paragraph 24.1.

Article 18.68.1(b) does not require the offending person to know what the end user will do with the copyright work once he or she uses the circumvention device or service to remove the TPM(s). Rather, the TPPA focusses on the inherent illegality of TPM circumvention devices/services because of the

stripping away of protections without licence or authorisation. It is this free standing and independent legal protection of TPMs that is required by the TPPA- the end use of the copyright work is irrelevant.

No footnotes or other exceptions to Article 18.68.1 justify the qualifications introduced by sections 226A(2) and 226AB(2) of the Bill.

The Bill leaves access TPMs unprotected and conflates TPM circumvention liability with copyright infringement. New Zealand must, under Article 18.68.3:<sup>6</sup>

*provide that a violation of a measure implementing this Article is independent of any infringement that might occur under the Party's law on copyright and related rights.*

The practical effect of the Bill is that rights holders have to prove that the offender knew their customers would use, or would be likely to use, the circumvention device/service to infringe copyright.

Faced with that almost impossible barrier to enforcement, rights holders will be less inclined to make their works available to new digital platforms, and digital distribution businesses and services will be disincentivised to enter the New Zealand market because it will be more difficult for them to protect the integrity of their platforms.

#### ***Other areas of inconsistency between the Bill and the TPPA***

**Proposed s226C(1):** Article 18.68.1 requires that criminal procedures and penalties be applied to a person found to have engaged wilfully and for the purposes of commercial advantage or financial gain (which could mean “for commercial purposes”). The proposed new s226C(1) uses the words “in the course of a business”.

**Proposed s226H:** It is not clear to us how the proposed new s226H exception is intended to work. As drafted, it appears to permit circumventing an access TPM embedded in a device to access content if viewing that content would not infringe copyright. As described above, this position is inconsistent with New Zealand’s TPPA commitments to protecting access TPMs. We recommend this exception is amended to narrow the exclusion.

**Proposed s226J(4):** For clarity and consistency, we recommend that the exception allowing circumvention “for the sole purpose of identifying and disabling a capability to collect or disseminate personal information” also be limited to where:

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<sup>6</sup> Article 18.68.3. The only exception to this requirement is that a TPPA party need not create a separate criminal penalty if it otherwise criminalises wilfully circumventing a TPM to access protected works for commercial advantage or financial gain.

- the capability is part of the TPM or the TPM work itself; and
- the circumvention does not otherwise violate any other law.

**Amended s234:** Clause 44 of the Bill sets out proposed amendments to the Regulation-making power in s234 of the Act. Section 234 allows the Minister to make regulations prescribing circumstances and matters that exempt and limit the TPM circumvention prohibitions. The TPPA specifically references matters that TPPA parties must consider when providing for limitations and exceptions to the TPM circumvention prohibitions, including:

- giving due consideration to whether rights holders have taken appropriate and effective measures to enable the relevant beneficiaries to enjoy the limitations and exceptions to copyright and related rights;<sup>7</sup>
- obliging parties to only include a limitation or exception to enable the legitimate use of a permitted limitation or exception under the TPPA by its intended beneficiaries and ensuring that limitation or exception does not authorise the making available of devices, products, components or services beyond those intended beneficiaries; and<sup>8</sup>
- ensuring that the exceptions, both individually and taken as a whole, do not undermine the adequacy of the party's legal system for the protection of effective TPMs or the effectiveness of legal remedies against TPM circumvention.<sup>9</sup>

NZSA is concerned that the broad language and rights in clause 44 of the Bill may not clearly capture all of the elements specifically required by Article 18.68.4 of the TPPA.

**Amended s135:** The proposed amendment to s137(4) provides that s137 will only apply to items which are "specified items". "Specified items" in the amended s135 means items "other than for private and domestic use". Article 18.76.9 and footnote 125 allow TPPA parties to exclude "small quantities of goods of a non-commercial nature contained in travellers' personal luggage" and "small quantities of goods of a non-commercial nature sent in small consignments". We recommend that clause 13 of the Bill is amended to align the terminology to that used in the TPPA.

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<sup>7</sup> Article 18.68.4(a)

<sup>8</sup> Article 18.68.4(b)

<sup>9</sup> Article 18.68.4(c)

**Proposed s135A (both Copyright Act and Trade Marks Act):** Article 18.76.4(a) requires the competent authority detaining suspected infringing goods to inform the rights holder of:

- the names and addresses of the consignor, exporter, consignee or importer;
- a description of the goods;
- the quantity of the goods; and
- the country of origin of the goods, if known,

either at the time of detention or within 30 working days of seizure or determination.

The proposed s135A requires Customs to notify the detention to the rights holder, but does not otherwise require Customs to provide the information specified in Article 18.76.4(a) to a rights holder.

**Section 142:** While s142(2) obliges the court to have regard to the need to ensure that no pirated copy is disposed of in a manner that would “adversely affect the claimant”, Article 18.76.7 requires that “except in exceptional circumstances, the goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder”.

#### ***No need for a new “fair use” exception***

With the Creative Sector Review underway in anticipation of the impending review of the Copyright Law, we take the opportunity to make some initial, broader remarks about New Zealand’s copyright landscape.

Some submitters might suggest that TPM protection selectively exports US law without its checks and balances, such as the fair use doctrine. That proposition is misconceived for at least three reasons:

- a. First, through the “substantial taking” test and the “idea/expression” doctrine, New Zealand already has a legal mechanism which enables creators to “build on the works of others”. In its submission on TPPA implementation,<sup>10</sup> Google says that New Zealand creators receive an “automatic no” when they ask whether they can do that. But that dramatic statement is incorrect. New Zealand copyright law has always enabled creators to “build on the works of others” by insisting that:

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<sup>10</sup> Submission on the Implementation of the Trans-Pacific Partnership Intellectual Property Chapter (<http://www.mbie.govt.nz/info-services/business/intellectual-property/tpa-intellectual-property-chapter/submissions/26-Google.pdf>).

- i. copyright only protects original expression, not the expressed ideas (say it differently, or design it another way, and there is no infringement);<sup>11</sup> and
  - ii. infringement only occurs where there's been a "substantial taking" from the copyright work in question. The "substantial taking test" has long been a yardstick for fairness. Through this doctrine, the Courts decide whether certain "borrowing" is fair, or whether it actually amounts to unfair free-riding off someone else's creative endeavour.<sup>12</sup>
- b. Secondly, while "fair use" in the US has decades of developed case law to help judges interpret the confines of what is permissible, New Zealand does not and so will be subject to a long period of uncertainty over the meaning of the term. Devoid of U.S. case law, "fairness" is deeply subjective and impossible to define in legislation and has been misapplied elsewhere.<sup>13</sup> The US concept of "fair use" has been built on decades of case law (and indeed, the four factors in the U.S. statute were drawn from a century or more of case law before that). New Zealand common law advice would, in turn, take decades to develop. The Copyright Act's existing list of permitted acts and exceptions is extensive, robust and well-understood. Most importantly, it also provides certainty and this is paramount for both owners and the users: people have to know where they stand.

Part 3 of the Copyright Act contains a host of permitted acts and exceptions, consistent with the UK and Australia. These permitted acts and exceptions cover incidental copying, fair dealing for the purposes of criticism, review, news reporting, research and private study, copying for education purposes, by libraries and archives and for public administration. Fair dealing for these purposes is clearly described in the legislation,

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<sup>11</sup> *Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490, 497 refers to a number of the long line of cases establishing this common law position. *Henkel KGaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 at [38] repeats the case law that if sufficient skill and effort goes into creating a work, the work will likely be sufficiently original to attract copyright.

<sup>12</sup> Copyright Act s29(2)(a). What is "substantial" will always be a matter of fact and degree, assessed by the Courts when deciding whether the defendant has taken a substantial part of the original work. For example, the final paragraphs of *Henkel* (at [52]): "In a field where the level of originality is low on both sides, we consider Holdfast's work is sufficiently distinct that it cannot fairly be said to be a copy of a substantial part of Henkel's work."

<sup>13</sup> See, e.g., 2014 case brought against Hebrew University, a court approved as fair use placing up to 20% of a book's pages in an electronic repository.

enabling a person to understand at the outset whether their dealing with a copyright work will be permitted or not.

There are no effective “overseas guidelines” which could fast track a fair use-type defence. British law, for example, has long eschewed fair use for the safety valves of:

- i. the idea/expression dichotomy;
- ii. the substantial taking doctrine; and
- iii. expressly permitted acts and other codified exceptions to infringement.

Australia and Canada have each considered, and rejected, adoption of interpretive factors for a permissive fair use exception, in favour of the more certain expressly permitted acts under their concepts of “fair dealing.”

- c. Thirdly, the United States fair use regime is also well balanced by the strictness in remedies when one oversteps its bounds, in the form of guaranteed statutory damages. Fair use – as interpreted in a given circuit in the US – only works when buttressed by the risk of material penalties for overstepping the mark and unfairly exploiting someone else’s creativity.<sup>14</sup> Without consequences and improperly interpreted, fair use will be seen as a free licence to copy. Over time the risk is that the public will translate the test into an uncertain and subjective standard. We support implementing a statutory damages regime in New Zealand for other reasons (as detailed below in this submission). We wish to emphasise that a statutory damages regime alone is not sufficient to support a fair use exception.

NZSA believes that New Zealand’s current system of exceptions and limitations in Part 3 of the Copyright Act fully complies with the TPPA. New Zealand has developed its extensive fair dealing permitted acts and exceptions over decades to thoughtfully balance the interests of rights holders and users. The TPPA does not require any recalibration of New Zealand’s existing approach.

## **CAMCORDING**

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<sup>14</sup> 17 US Code §504. Statutory damages are set at between \$750 and \$30,000 (increasing to \$150,000 if the court finds the infringement was committed wilfully).

NZSA is pleased that TPPA parties recognised the serious damage that unauthorised camcording does the motion picture industry by criminalizing this activity in Article 18.77.4. Illegal camcords account for significant rate of piracy while movies are in theatres and materially impacts all movie revenue.

The Government should enact a specific prohibition in the Bill against unauthorised recording in movie theatres, supported by criminal liability in order to optimally implement its TPPA obligation. A specific prohibition is necessary to address concerns raised as recently the summer season of 2015/2016, when the local enforcement authorities were willing to work with local exhibitors to crack down on camcording but were unsure themselves of what they had authority to do in the event they caught someone in the act of illegally recording the movie. It is clear that the current state of New Zealand law is unclear at best on this critical issue.

A recent study found that online piracy – which often can be sourced to an illegal incident involving camcording – can result in upwards of a 15% reduction in box office revenue for a motion picture<sup>15</sup>. Experience globally demonstrates that an appropriately targeted camcording law, which allows enforcement against someone caught in the act of camcording, is necessary to have a significant deterrent impact on such activity.

A criminal sanction is only as good as its ability to be enforced. The New Zealand Police is the prosecuting agency in camcording offences. The Police need the best and clearest offence provision in order to:

- a. make good arrest and prosecution decisions; and
- b. accurately reflect the offence in the charging document pursuant to s17 of the Criminal Procedure Act 2011.

As noted above, experience has demonstrated that it can be difficult for the Police to bring sections 131, 132 and 134 of the Copyright Act together to prosecute a camcording offence. A better approach to reflect the TPPA obligations in Article 18.77.4 is for camcording to be a standalone offence provision in Part 6 of the Copyright Act 1994. There is no legitimate reason to camcord a film.

## **STATUTORY DAMAGES**

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<sup>15</sup> Liye Ma, Alan L. Montgomery, and Michael D. Smith - "The Dual Impact of Movie Piracy on Box Office Revenue: Cannibalization and Promotion" - SSRN-id2736946.pdf

Statutory damages encourage respect for copyright and help compensate right holders where actual damages are difficult to calculate - as they always are for digital infringement.

In our view, New Zealand's current system, encased within s121(2) of the Copyright Act, is ineffective. Additional damages are extremely difficult and expensive to access through litigation in this country. It seems that any additional damages awards to date have been outstripped by the cost of enforcement. By contrast, statutory damages provide ex ante certainty about outcome upon liability. And in our experience, certainty drives efficient settlements in infringement cases. We also observe that statutory damages for copyright (and trade mark) infringement benefit small business more than anyone else because those firms rarely have the resources and commercial appetite to gamble on the outcome of expensive civil litigation. We encourage the Ministry to consider introducing a statutory damages regime, if not now, then as part of a comprehensive review of the Copyright Act.

We appreciate the opportunity to provide comments to the Committee and we look forward to discussing this further. We request the opportunity to appear before the Committee to speak to our submission.

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