

THE INDIAN MUSIC INDUSTRY

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Date: 13th December, 2017

To,

Shri Alok A. Dimri IFS

Joint Secretary
MER Division,
Ministry of External Affairs,
New Delhi.

Sub: Protection of IPR in RCEP would benefit the creative industry of India

Dear Shri. Alok Dimri,

We, IMI a.k.a. the Indian Music Industry, an affiliate of IFPI, represent the interest of the music labels aka record companies in India. In the digital age, Music travels far and wide. We are hopeful the next 'DESPACITO'* will come from India. The potential is huge and in this connection, we are pleased to present our case in favor of the Regional Comprehensive Economic Partnership (RCEP) for the benefit of the Indian Music industry and the Indian creative industry as a whole.

Sir, RCEP offers a great opportunity for the protection of Indian IPR around the region especially in many ASEAN markets, where Indian music and Indian content is always consumed.

On behalf of IMI thank you for your kind consideration and we are happy to answer any queries.

Thanking you,
Sincerely,


Blaise J. Fernandes

President & CEO
The Indian Music Industry

*Billboard: 'Despacito,' Latin Rules YouTube's Top 10 Music Videos for 2017; See Annex 1.

AFFILIATED TO



representing the
recording industry
worldwide

Proper protection of IP rights in RCEP would benefit the creative industry of India both as a soft power and economically.

There are currently close to 31 million people of Indian origin living outside of India ^[1] making it one of the largest ethnic diasporas in the world. The Indian diaspora is present practically in every part of the world. It numbers more than a million each in nine countries, while as many as twenty-one countries have concentrations of at least a hundred thousand ethnic Indians ^[1]. Due to cultural and historical similarities, migrants from South Asian countries like Pakistan, Bangladesh and Sri Lanka, display a common 'Indian' identity ^[2] creating a huge South Asian diaspora with over 40 million people globally. And since almost all people of Indian origin & South Asians living overseas tend to engage with or connect to their culture as much as possible, these 40 million people become consumers of the Creative Content originating in India. They try to re-connect with their homeland through mass media content ranging from film, news, music etc. and the Internet is one of the biggest and easiest ways for this engagement with their historical roots is Indian media. These factors make South Asian diaspora one of the largest consumers of Bollywood films and music outside of India ^[3]. For context, Saavn, a streaming service for Indian music is the only such service with users in every single country on the planet.

Although, the Indian film and music industries have always targeted the massive South Asian diaspora in regions like the Middle East, U.K and North America ^[1], it is now expanding its reach way beyond traditional markets. For instance, Amir Khan starrer "Dangal" by Disney collected over INR 1200 Cr. at the Chinese box office alone and was among the top 5 grossing films in the Chinese market for the year even outperforming Disney's own blockbuster franchise "Pirates of the Caribbean" in China. "Dangal" collected INR 1975 Cr. globally, including Indian box office (INR 512 Cr.) ^[4]. In other words, an Indian film made over twice as much in China than in India. The Dangal case study, similar to a few others such as Bahubali 2, 3 idiots, P.K. etc. is important because it broadens the reach of the Indian media outside of the massive Indian diaspora around the world. Therefore, the Indian media industry is becoming a global player and a major soft power for India in addition to becoming an economic one.

^[1] Ministry of External Affairs, Govt. of India: *The Indian Diaspora* (<https://www.mea.gov.in/images/pdf/NRIs-and-PIOs.pdf>)

^[2] *Global Indian Diasporas*: Amsterdam University Press; Edited by Gijbert Oonk; p.9, p.212

^[3] *Beyond Bollywood: The Cultural Politics of South Asian Diasporic Film* by Jigna Desai; p.4

^[4] Money Control News: "Dangal, Bahubali 2's dream global run ends, rake in Rs 2000cr, Rs 1600cr"

However, these figures don't tell the entire story because they don't account to the true potential value of the media.

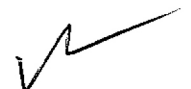
Value Degradation

The digital media consumption is here to stay and it has the potential to benefit the media industries and the wider economy worldwide. The huge and growing demand in India for creative content online offers an opportunity for growing the creative industries. This opportunity can materialize if the right regulatory framework is in place to ensure that the value of creative content flows back to producers and creators. Given the huge demand for Indian creative content abroad, India also has a distinct interest in seeing foreign countries adopt regulatory frameworks in which the value of creative content exports is protected. The rampant digital piracy within India costs the Indian movie industry alone a staggering INR 1800 Cr. every year accompanied by a loss of 60,000 jobs^[6], and to put it in perspective, the industry grossed little over 1300 Cr. in 2016. In other words, the pirates earned 35% more than the producers from works they didn't create and to make it worse, they didn't contribute to the economy or paid any taxes. And then there is piracy in the music industry, technology, trademarks & patents.

In an effort to protect their IP, film producers like 'Balaji Motion Pictures' secured a John Doe court order on 830 websites that puts the onus on ISP to block access to such infringing websites. Fox Star Studios and Red Chilies Entertainment are among some other major production houses that secured such orders^[6]. While this may seem like a solution, there are challenges in sustaining it on an ongoing basis. Given the fact that Bollywood is the largest producer of film in the world, applying for a John Doe order each time leads to wastage of valuable time and resources for both the industry, government and the judiciary. And these reactive steps create a "whack-a-mole" situation where blocked websites are soon compensated by new rogue ones.

Hence, there's an urgent need for setting up a global legal level playing field for value-creating artists and producers like Amir Khan and Balaji Motion Pictures to ensure that their works are protected domestically

^[6] KPMG FICCI Media and Entertainment Industry Report 2016; p. 120, p.146



and overseas and that this protection is a responsibility of all the stakeholders and not just the owners. The stakeholders in the creative economy value chain include various services along the online distribution and delivery chain. All of these stakeholders, as well as consumers, have an interest as well as a responsibility in the new digital economy. The government, with its responsibility to ensure economic development is balanced overall and that there is job creation all along the economic value chain, has a special responsibility to ensure that India's transition into a digital economy benefits all stakeholders along the creative value chain.


RCEP could be a major contributor to this cause due to its regional nature and because its IP Chapter may govern various IP issues that the individual countries may otherwise lack the impetus to address.

Indian Creative Industry Can Benefit From RCEP if It Connects India to the Global IP-based Markets

1. Accession to international treaties

For context, the international community adopted the WIPO Internet Treaties in 1996 for meeting the challenges posed by internet and digital technologies. India amended its copyright law to comply with the Treaties only in 2012. Seemantani Sharma, an International Copyright Lawyer at the Asia Pacific Broadcasting Union argues that a plausible reason for this delay can be attributed to its low internet penetration rate which was merely 1.5 percent in 1996, when the Treaties came into being. However, as of 2016, 34.8 percent of India's population has access to digital networks. Therefore, technological backwardness as a reason for not acceding to the Treaties became irrelevant. This historical context is important for India to make an informed decision, but the reality of the internet-connected world can no longer be ignored. India's vibrant domestic entertainment industry and its position globally are not the same as the considerations applicable to some developing countries, many of which have ratified the WIPO Internet Treaties. Hence the argument that these Treaties are ill-suited for developing countries is both outdated and unfounded.

The accession to the Internet treaties is important as they are essential instruments to support the growth and development of the Indian local copyright industries including the music industries. The accession will encourage investments as having ratified international IP treaties would give confidence and assurance to foreign investors that a clear, internationally accepted legal framework has been / will soon be put in place in the country, and therefore their interests in their works and creations would be adequately protected. It also ensures that foreign repertoires are well protected in India under reciprocity provisions.



On the other hand, the non-accession harms the local music industry as most countries recognise protection on a reciprocal basis and, given India's failure to ratify the Internet treaties, protection of Indian artists and recorded music (especially online music) is not always available in foreign countries. Moreover, while some countries do protect Indian music online, such protection is strictly speaking discretionary. Accession to the Internet Treaties is therefore a key for India to boost the development of its local sound recording industry and unleash its enormous trade potential.

It is therefore essential for India to accede to the Internet treaties, and to include in the RCEP IP Chapter that other contracting parties should all accede to these treaties.

2. Commitment to more effective online IPR enforcement

As discussed before, parts of the Indian creative industry value chain have benefitted heavily from the digital resolution, whether it's the music streaming services like Saavn reviving the recording industry or cheaper data rates allowing for online video streaming on paid and ad-supported platforms like Hotstar. However, to realise the \$100 Billion-dollar vision ^[7] for the Indian creative industry, it's imperative to tap into its true potential. In other words, the Indian creative industry can only go on to become a global leader, a major contributor to India's economy, create millions of jobs and continue to remain India's biggest soft-power if India connects itself through the international IP conventions to the rest of the world and if the protection of IP and prevention of value degradation from unlicensed distribution and outright piracy is a top priority for all the stakeholders.

Online piracy is a pandemic issue. It is well known that it has been a problem in many other Asian countries such as China too and it affects not only the right holders of its own but all trading partners. Therefore, the RCEP is a proper instrument to bind the contracting countries to fight online piracy together by putting in place effective measures to do so.

3. Term of protection

The current term of protection of sound recordings is 60 years in India, whilst the international trend is to protect recorded music for at least 70 years. This is already the case in the EU, US (even longer), Australia Singapore and South Korea.

A longer term of protection would increase the economic incentives for producers to invest in new and existing talent, and provide artists with retirement income. The costs of developing and promoting artists



and repertoires and marketing are very high, amounting to around 27% of the total revenue of record companies in 2015. The majority of signed artists do not break even, so returns from successful recordings are even more important when it comes to re-investment. A higher potential return would give stronger confidence and incentive to record companies to invest in new music and artists, ultimately helping the entire music sector to grow.

A longer term of protection also allows record companies to have an economic incentive to make their catalogues of older recordings available. This would contribute towards the preservation of local culture, by ensuring that classic, older recordings continue to reach the consumers of different generations. This is particularly the case in the digital era when music content, new or old, can be easily and legally accessible through the Internet. Without the extended term, classic recordings will be in the danger of losing copyright protection and their producers and artists will then lose protection and income.

The extended term would also ensure adequate protection for performers, who work hand in hand with producers and record companies. Performers' income depends on revenues they receive from the sale of their recordings and payments from secondary forms of use such as broadcasting and public performances. Term extension would mean that all these sources of income would continue for a longer period, to the benefit of all performers. As life expectancy is getting longer, this is a vitally important issue for all performers.

Therefore, the IP Chapter of the RCEP should ensure that its contracting parties are aligned to the term of protection of at least 70 years since publication.

4. The problems of safe harbour

Asia-Pacific countries have a real opportunity to connect their economies to one another based on the international copyright treaty standards. However, they should not be naïve in the face of calls for giving special privileges to online distribution services, which are already benefiting the most economically, or suggestions that doing so would be in public interest. Safe harbour provisions were meant to protect up-and-coming digital businesses, but these liability privileges are now being abused by big corporations. Whilst a safe harbour for truly neutral, passive intermediaries is not itself objectionable, a lot of ISPs however have taken the advantage of its country's safe harbour system to distribute user-uploaded content and build businesses on the back of copyright protected content without remunerating right holders fairly. These ISPs claim to be protected by the safe harbour against copyright liability and argue



that they do not need a license for the making available and distribution of copyright protected content. Some of these ISPs offer right holders the opportunity to monetise their content as an alternative to taking down content. The terms offered by these ISPs appear however to be substantially worse than those negotiated freely between right holders and some other digital music service providers. This creates a significant problem to the copyright industry which is known as the "value gap" where right holders do not benefit fairly and proportionately from the use and consumption of their works. If right holders are unable to generate enough revenue to reinvest in finding, developing and marketing new talent, their ability to bring new creations to consumers will be curtailed. This causes serious and lasting detriment to artists and consumers.

The crucial point is that these ISPs should not be eligible for safe harbour protection in the first place because they are actively involved in the making available and distribution of content. They present, select, arrange and use the content (e.g. they offer search functions, playlists of popular or similar videos/titles), and they seek to generate revenues from the user-uploaded content. To the extent that these ISPs provide functions which go beyond the mere hosting, caching or transmission of content, they should be treated like any other digital content distributor and required to obtain proper licenses from right holders. Needless to say, "pirate services" that are designed or operated with the clear intention of inducing or promoting infringements, or facilitate or enable infringements, should never be shielded by the safe harbour.

For instance, under the pretext of enabling free or low-cost platforms that enable anyone to reach an audience of millions, 'safe harbor' liability exceptions have allowed major tech companies, such as YouTube to grow and generate huge profits by turning itself into the world's biggest music distribution platform carrying almost every recorded song in history^[8], while producers' and creators' earnings do not increase correspondingly^[9]. Under this 'safe harbour' protection, YouTube and other distribution services are given special privileges that are not needed at a time when these companies are the most powerful players in the digital economy.

^[7] CII: *Convergence: The New Multiplier for Indian Media & Entertainment's \$100 Billion Vision*; p.9

^[8] "Back to the future: The Digital Millennium Copyright Act and the Trans-Pacific Partnership" Matthew Rimmer | Faculty of Law, Queensland University of Technology

^[9] "Dear Congress: The Digital Millennium Copyright Act (DMCA) Is Broken And No Longer Works For Creators." 180+ Artists appeal to Congress in an open letter.



Whereas many RCEP countries are considering these issues domestically, there is no international convention setting any global rules on the issue of ISP liability privileges. RCEP countries would be wise not to bind themselves to any particular legislative model by incorporate any of the safe harbour systems, such as the US DMCA, that are currently under scrutiny.


5. Open-ended exceptions and so-called 'fair use'

Open-ended exceptions, such as the so-called 'fair use' exception, and calls for liberal interpretation of the three-step test^[10] are also problematic. These concepts are promoted by some in the name of 'public interest' or the general public, but these references obfuscate the fact that the real beneficiaries of these 'copyright flexibilities' are the companies that build their business on the back of copyrighted content. The main problem with these open-ended exceptions and 'flexibilities' is that they bring uncertainty and increase the likelihood of legal action. With 42,13,425 cases pending in Indian courts^[11], it's not ideal to add to the burden.

For countries with overburdened courts and distinct local needs or domestic views on exceptions, such as the RCEP participating countries, it would be dangerous and counterproductive to attempt to make commitments in this area. Any commitments should focus first on the accession to all of the relevant international copyright treaties administered by WIPO and the RCEP should not require the countries to adopt any kind of open-ended fair use exceptions.

^[10] Three-step test: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works 1) in certain special cases, 2) provided that such reproduction does not conflict with a normal exploitation of the work and 3) does not unreasonably prejudice the legitimate interests of the author."

^[11] Press Information Bureau, Government of India, Ministry of Law & Justice: Pending Court Cases



Annex 1**billboard****'Despacito,' Latin Rules YouTube's Top 10 Music Videos for 2017**

The "Latin revolution". The "Despacito" effect. It's no secret Latin music blew up in a big way in 2017, though a new report published by YouTube hammers home the impact Latin American music videos are having on its global platform.

Latin artists were behind six of the ten most-watched music clips on its streaming service in 2017, led convincingly by Luis Fonsi and Daddy Yankee's "Despacito." Of course "Despacito" would rule. It's the most-viewed video in YouTube history.

The mega-hit smashed multiple records along the way as it became the first video to reach 3 billion views and then 4 billion views, a milestone no other music video has passed on the giant streaming server. The clip, shot in Spanish and without Justin Bieber's additional verses, was first posted on Jan. 12 of this year and raced to the crown as most-watched video on YouTube in just 204 days.

Currently, "Despacito" has more than 4.4 billion views and it was the top music video of 2017 in more than 50 countries, according to a statement issued Wednesday (Dec. 6).

With "Despacito" at the crest of the wave, J Balvin and Willy William's "Mi Gente" was flowing close behind at No. 3 (and with more than one billion views); while Maluma's "Felices los 4" (No. 4, also with more than one billion views); Chris Jeday's "Ahora Dice" featuring J. Balvin, Ozuna and Arcángel (No. 6); Nicky Jam's "El Amante" (No. 7) and Enrique Iglesias' "Subeme La Radio" featuring Descemer Bueno, Zion & Lennox, all make the cut.

Just hours after Ed Sheeran was named as the year's most-streamed artist on Spotify, the British singer-songwriter comes in at No. 2 on YouTube's list of most popular videos with "Shape of You". Sheeran's Divide hit has more than 2.5 billion views on YouTube and it's recognized as the sixth most-viewed clip of all-time (Sheeran also appears twice in YouTube's separate Top Trending Videos list).

Videos starring Bruno Mars, Jason Derulo and DJ Khaled (featuring his all-star pals Justin Bieber, Quavo, Chance the Rapper, Lil Wayne) also make the YouTube top 10. Check out the tally below.

2017 Top 10 YouTube Music Videos

1. Luis Fonsi -- "Despacito" ft. Daddy Yankee
2. Ed Sheeran -- "Shape of You"
3. J Balvin, Willy William -- "Mi Gente"
4. Maluma -- "Felices los 4"
5. Bruno Mars -- "That's What I Like"
6. Chris Jeday -- "Ahora Dice" ft. J. Balvin, Ozuna, Arcángel
7. Nicky Jam -- "El Amante"
8. Jason Derulo -- "Swalla" ft. Nicki Minaj & Ty Dolla \$ign)
9. DJ Khaled -- "I'm the One" ft. Justin Bieber, Quavo, Chance the Rapper, Lil Wayne
10. Enrique Iglesias -- "Subeme La Radio" ft. Descemer Bueno, Zion & Lennon