

THE INDIAN



MUSIC INDUSTRY
Formerly IPI Estd. 1936

THE INDIAN MUSIC INDUSTRY

266, Kaachwala Bldg. 2nd Floor, Dr. Annie Besant Road., Opp. Old Passport Office, Worli, Mumbai -400 030
Tel. : +91 22 6660 8349 / 8350 • Website : www.indianmi.org

28th May, 2019

To,

Shri Sudhi Ranjan Mishra,
Additional Secretary,
Department of Legal Affairs,
Ministry of Law & Justice,
Government of India,
Shastri Bhawan, New Delhi 110001,
India.

Subject: Proposed Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters - IMI Comments

Dear Shri Mishra,

IMI represents the business and trade interests of the Indian recorded music companies on a pan-India basis. IMI is registered under the West Bengal Societies Registration Act, 1961. IMI is affiliated to IFPI, the association representing the recording industry worldwide.

The proposed **Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters** (hereinafter referred to as the "Convention", please refer to *Annexure A*) would be negotiated in a **Diplomatic Conference in June (18 June – 2 July)** in the Hague. As we understand, you have been involved in the abovementioned project relating to the Convention and will be one of the attendee representatives from the Indian Government at the Conference. We believe that the proposed text can have unintended and negative consequences for the music industry and therefore we, the Indian Music Industry aka IMI, on behalf of our Members, seek to make certain remarks.

The aforementioned project pursues a laudable objective of increasing international legal cooperation thereby *i.e.* facilitating international trade and business. This objective is best achieved through creating an "enabling" convention – *i.e.* one that authorises judges to recognise and enforce foreign judgments, in appropriate circumstances, where no legal basis is currently available.



Page 1 of 6

Regd. Office : BF-170, Sector-1, Salt Lake City, Kolkata - 700 064.

affiliated to



representing the
recording industry
worldwide

However, a global convention should not constrain judicial authority to *refuse* recognition of foreign judgments, where there are objective grounds to do so. While certain highly harmonised systems addressing the recognition of judgements already exist on a regional level, especially in Europe, the same level of harmonisation is not feasible at a global level because of the much more diverse nature of the judicial systems involved.

We believe that the proposed text of the Convention, in its current form, is not ripe for adoption. Unless certain key changes are made, we recommend that judgements dealing with copyright and related rights – including regarding subsistence, infringement, and contracts – the main or one of the main objects of which is the use or transfer of copyrights or related rights – be excluded from the scope of the Convention (in Art 2.1 and 2.2).

IMPACT ON THE MUSIC SECTOR

As such, the proposed Convention would have a direct impact on the recorded music industry in India, in particular, in the following areas:

- Judgments in contractual matters (including IP licensing / distribution agreements as well as employment contracts, Art.5(1) of the Convention;
- Judgments in copyright infringement cases (Art.5(3)) of the Convention;
- Judgments on the ownership or subsistence of copyright (Art.5(3)) of the Convention;

PROBLEMATIC PROVISIONS

The draft Convention (May 2018 version) proposes that participating countries retain the right to be “more generous” and continue to grant recognition based on their domestic rules in addition to the “Convention grounds”. However, the Convention is strict regarding refusal of recognition: once a foreign judgment meets the Convention’s “eligibility criteria” for circulation, then a requested court can only refuse to recognise such a judgment if one of the Convention’s exhaustive grounds for refusal is present. This principle of mandatory circulation of eligible judgments is central to the Convention’s architecture and is justified by the need to improve legal certainty and to promote international legal cooperation.

However, in reality, despite the stated laudable objectives, IMI believes that limiting the grounds for refusal in this way, creates risks of abuse of the proposed system or unwelcome outcomes that outweigh the likely benefits of the proposed Convention.



A handwritten signature in black ink, appearing to be a stylized 'M' or similar character.

As the issues addressed in the proposed Convention are crucial for IMI Members, we would like to share our main concerns and priorities with you. IMI's concerns can be grouped into the following five headings: i) "Jurisdictional filter" for copyright infringement disputes, ii) Unavailability of the remedies of interest to copyright right holders, iii) The risk of preclusive effects / *res judicata*, iv) Restrictions and a high evidentiary threshold for refusal of recognition, v) Possible interference with the parties' agreement and reduction of legal certainty. These headings are individually discussed below.

I. THE "JURISDICTIONAL FILTER" FOR COPYRIGHT INFRINGEMENT DISPUTES (ART.5.3(b))

Under this provision, a judgment is eligible for circulation if the foreign court applied *lex loci protectionis* to the copyright infringement (which, because copyright is territorial by its very nature, is always the case in copyright infringement cases). However, if the defendant "has not acted in that State to initiate or further the infringement" or their activity "cannot reasonably be seen as having been targeted at that state" then the judgment is not eligible for circulation.

IMI would caution against these additional conditions (often presented as "safeguards") as they could end up making the Convention irrelevant in cases involving online infringements of copyright because defendants often claim they were not "targeting" the territories where the copyrights were infringed and where proceedings were subsequently brought. This could, in turn, block our efforts to reduce piracy in India which has severe negative effects to the Indian recorded music industry.

According to the IMI-Deloitte Report, music piracy causes an annual loss of ~ INR 1500 Cr. to the Indian recorded music industry.¹ According to the IFPI – IMI Digital Music Study 2018, 76% of surveyed Indian internet users had pirated music online in the previous three months.² A report estimates that large pirate websites operating in India can earn up to USD 4 million annually.³

IMI also wishes to highlight that digital piracy is a national security threat as well. Websites hosting pirated content often surreptitiously install malware on users' computers that collects personal information which is subsequently misused. Pirate

¹ IMI-Deloitte Report, 2018, p. 42, available at http://indianmi.org/be/wp-content/uploads/2019/02/Audio-OTT-Economy-in-India_web_v3.pdf

² IFPI – IMI Digital Music Study 2018. Page 3. <http://indianmi.org/be/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf>

³ FICCI – SIPI – VeriSite. Badvertising: When Ads Go Rogue. Page 5. https://www.creativefirst.film/show_pdf/74



websites have been linked to cyber-crime, fraud and terrorism. Furthermore, these websites often also display prohibited advertisements.

II. UNAVAILABILITY OF THE REMEDIES OF INTEREST TO COPYRIGHT RIGHT HOLDERS.

In most copyright infringement cases brought by copyright right holders, the claimant seeks an injunction, and / or deterrent damages. It would be essential to provide for a legal basis for recognition of injunctive relief orders in certain cases, yet, the proposed Convention does not foresee such a possibility at all. Instead, it excludes injunctive relief orders in IPR infringement cases (Article 11) from its scope.

Recently, in a landmark judgment dealing extensively with the issue of online piracy by the Delhi High Court,⁴ a permanent injunction against infringing websites from, in any manner, making available to the public any cinematograph work/ content in relation to which the plaintiffs have copyright, was issued. In accordance with Article 11 of the proposed Convention as referred above, such dynamic injunctive relief orders are excluded from the scope of the proposed Convention. Since injunctions are one of the most important and effective remedies available to copyright holders, such a provision would greatly reduce efforts undertaken to tackle online piracy in copyright matters.

Moreover, the proposed Convention does not guarantee that damages awards would be enforced fully as the proposed Convention allows the courts to refuse enforcement of "punitive" awards, including punitive elements of statutory awards. It is expected that defendants in most cases would seek to portray statutory or pre-determined damages as "punitive" damages, which are ineligible for enforcement, thereby further limiting the relevance of the Convention to copyright holders.

III. THE RISK OF PRECLUSIVE EFFECTS / RES JUDICATA.

A further particular concern relates to declaratory judgments, which are eligible for circulation under the Convention. There is a more than insignificant risk of abuse if the proposed provision of declaratory judgment is adopted as is. An infringing website such as songs(dot)PK, could seek to legitimise its business model by applying for a declaratory judgment of non-infringement in a jurisdiction with a lax copyright regime and then leverage such a declaratory judgment to proceedings in other jurisdictions in order to preclude local proceedings between the same parties. Additionally, this

⁴ UTV Software Communications Ltd vs 1337TX.TO & Ors.



A handwritten signature or mark consisting of a stylized, cursive-like shape.

risk is increased by the restrictions to the requested court's authority to refuse the recognition of such judgements referred to below.

IMI fears that such declaratory judgments would make it extremely difficult to effectively curb the increasing menace of online infringement of copyrighted matter.

IV. RESTRICTIONS AND A HIGH EVIDENTIARY THRESHOLD FOR REFUSAL OF RECOGNITION.

Under the proposed Convention, the general rule is that once a judgment meets the "jurisdictional filters" it shall be given recognition and be enforced in Convention countries. The proposed Convention sets out certain grounds for refusal of recognition (Article 7) but refusal of recognition is treated as an exception to the general rule and accordingly the evidentiary standard required for successfully challenging recognition is high.

IMI believes that the aforementioned issue can create considerable risks of abuse where the national legal systems may operate with varying standards of transparency and integrity. Although, Art.7(b) provides that "fraud" is a ground for refusal of recognition of a foreign judgment, procedural fraud such as corruption of a foreign court is notoriously difficult to prove and right holders might be unable to do so in practice.

IMI is of the opinion that there is a real risk that judgments tainted by serious flaws could benefit from circulation under the Convention and it would be difficult to prevent such abuse due to restrictions on judicial discretion and the high evidentiary thresholds required for refusal of recognition (Article 7).

V. POSSIBLE INTERFERENCE WITH THE PARTIES' AGREEMENT AND REDUCTION OF LEGAL CERTAINTY.

The proposed Convention is not meant to interfere with the parties' agreement regarding the applicable law and jurisdiction. The general rule is to defer to the parties' agreement as evidenced in the contract. However, the proposed Convention contemplates various cases where the parties' agreement could be set aside or deemed invalid and a judgment by a court from a jurisdiction different than that foreseen by the parties could be accepted for circulation.

The possibility of such unpredictable outcomes – especially as regards the place of performance of a contractual obligation (Art.5(1)(g) cases) or as regards the parties'



A handwritten signature in black ink, consisting of a stylized, cursive name.

agreement on the forum (Art.5(1)(m) -- is detrimental to legal certainty and the freedom of contract. Therefore, the provisions setting out jurisdictional filters applicable to contractual disputes create certain risks that are likely to outweigh the benefits of the proposed Convention.

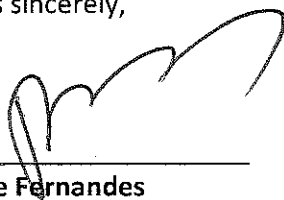
CONCLUSION

IMI supports the overarching objectives of the proposed Convention – namely, improving international judicial cooperation, enabling courts to recognise certain foreign judgments and reducing the need for costly and repetitive litigation across multiple jurisdictions. However, it is respectfully submitted that the proposed Convention text does not strike the right balance between the level of regulatory harmonisation and the reality of differences between the judicial systems across the member countries. Moreover, the proposed text contains provisions that reduce legal certainty or create outright risks for copyright right holders.

Combined with the limited benefits for copyright right holders under the proposed Convention, the risks outweigh the potential benefits for the music industry. Therefore, in the absence of fundamental changes to the text, IMI requests that copyright be comprehensively excluded from the scope of the Convention (Article 2(1) and 2(2) included).

IMI would welcome an opportunity to provide further written information in relation to any questions.

Yours sincerely,



Blaise Fernandes
President & CEO
The Indian Music Industry

