

Principles for bilateral trade negotiations between the UK and India

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector. UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society.
2. According to our latest research (published in our Music by Numbers 2019 report, the music industry added £5.2 billion value (income for UK music business) to the UK economy in 2018; £2.7 billion of this GVA was derived from exports. We expect that within ten years the Indian music market will be the second largest market behind China based on the strong growth of the market in the last years. Asian countries such as South Korea, China and India experienced robust growth with considerable gains for the music industry in 2019 (18.7% for recorded music alone specifically in India). This double digit growth in India has been sustained for several years now. India constitutes potentially an enormous market for music created and produced in the UK. But the development of a legitimate and competitive market has been mired in piracy, lack of licensing and erroneous application of limitations of liability. The UK is a significant net exporter of music. So, a strong copyright and enforcement regime is of utmost importance for the UK music industry in markets of the future such as India; as is unrestricted market access. At the moment our members often hesitate before investing in the Indian market in view of the shortcomings in copyright protection and enforcement.
3. India is a member of the relevant international copyright treaties (in particular the Berne Convention, the TRIPS agreement and the 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) providing minimum standards of protection as well as national treatment. However, we note specific areas in Indian copyright law which should be addressed in bilateral trade negotiations between the United Kingdom and India:
 - I. **Increase term of protection to the international standard of 70 years after the death of the composer (for literary and musical works) or after publication (for sound recordings, with equivalent provisions for performers' rights) as is the case in the United Kingdom.**

- II. Clarify that user upload platforms such as YouTube require licences for the use of music; they are outside the scope of the provisions limiting the liability of intermediaries in the Information Technology Act 2000.
- III. Clarify that digital services require direct licences, in particular streaming services. They are not covered by the statutory licensing regime for radio and TV broadcasts in Section 31D of the Indian Copyright Act.
- IV. Put pressure on radio and TV broadcasters to fully license their programs via all relevant collective management organisations, Indian Performing Right Society - IPRS (for songwriters, composers, and music publishers) and Phonographic Performance Limited India – PPL (for sound recordings/ performers), in accordance with Indian copyright law.
- V. Remove India’s reservation to the WIPO Performances and Phonograms Treaty and ensure that its protection for sound recording rightsholders and performers is fully and clearly compliant with that treaty.
- VI. Enforce existing copyright laws by pursuing physical and digital infringements of users.

In detail.

I. Increase term of protection to 70 years

- 4. The term of protection has been harmonised at international level in various trade agreements (e.g. the recent US, Mexico, Canada trade deal and the European Union/ Japan Economic Partnership Agreement). In addition to the administrative advantages of a harmonised approach internationally, an increased term will benefit both the UK and the Indian music industry. It should not be controversial to change the term of protection in Sections 22 (musical/ literary works) and 27 (sound recordings, with equivalent provisions for performers’ rights) of the Indian Copyright Act to 70 years after the death of the author or the release of the sound recording respectively.

II. Clear rules on the liability of user upload platforms

- 5. Indian copyright law provides limitations to liability for intermediaries based on a law dating from 2000 – Section 79 Information Technology Act 2000 (comparable to “safe harbors” in the United States DMCA 1998 and the limitations to liability in the UK Electronic Commerce (EC Directive) Regulations 2002) with the policy objective to support the then nascent market for digital services. It has been widely acknowledged in the United States, the European Union, and the United Kingdom that these limitations to liability are inappropriate in 2020.

In particular, the imbalance which favours digital service providers needs to be rectified. The transfer of value or “value gap”, is the term used to describe the gulf between the value of the music exploited by so-called user upload platforms and the royalties returned to creators.

User upload platforms (in particular YouTube) represent by far the largest on-demand music source in India. This is facilitated by the misapplication of limitations of liability for intermediaries which enables user-upload platforms to avoid licensing music on fair terms. In reality this hinders the establishment of the legitimate market for online music services, as evidenced in the IMI Digital Music Study India 2018: the wide availability of music on services such as YouTube and the large consumption of pirated content present considerable challenges in persuading users to pay for the benefits of streaming. According to the study, the overall conversion rate for streaming services from free users to paying users is around 1%. The study asked those who do not pay for streaming what prevents them from converting to paying users and more than half of the respondents (52%) cited the availability of music on YouTube.

User upload platforms were not the intended beneficiary of the limitations of liability. They are providing more than a technical, automatic, and passive service to their users. The legal framework on limitations of liability needs to expressly clarify that user upload platforms are not able to avoid obtaining a licence by claiming that they qualify under the limitations provided for intermediaries in the Information Technology Act 2000.

III. Clarify that digital services require direct licences for streaming services.

6. The Department of Industrial Policy and Promotion (DIPP) has issued an Office Memorandum on the interpretation of Section 31D of the Indian Copyright Act in 2016 stating inaccurately that Internet broadcasting is subject to a statutory licensing regime under Section 31D. Consequently, composers and performers as well as music publishers and record companies are deprived of the fundamental right under Indian copyright law to determine how their work is used. In a Court decision in April 2019 the Bombay High Court decided that Section 31D only refers to radio and TV broadcast (notwithstanding the DIPP Office Memorandum which has no legislative relevance). In reaction to the Court’s interpretation of the legislation, the DIPP has proposed in a draft amendment to the Memorandum that the statutory license covers each mode of broadcast, including by internet. This conflicts with Indian copyright law as interpreted by Indian courts.

More worryingly the administrative overriding of judicial decisions disregards the principle of separation of powers fundamental for a democratic society. This issue needs to be highlighted in bilateral trade negotiations with the Indian government; it damages both the UK and the Indian music industry.

IV. Put pressure on radio and TV broadcasters to fully license their programs via the collective management organisations

7. In addition to the high level of unlicensed activity in India, radio and TV broadcasters often refuse to obtain all necessary licences. Under Indian copyright law, radio and TV broadcasters require licences for sound recordings (including performances) from PPL and for musical and literary works from IPRS; these two collective management organisations, PPL and IPRS, offer simple licences for radio and TV broadcasters. The bilateral trade negotiations provide an opportunity to highlight the infringement of copyright laws by Indian radio and TV broadcasters to the detriment of the UK as well as the Indian music industry.
8. This is in addition to the low rates for the licences Indian radio and TV broadcasters would have to pay if they would obtain licences in the first place. Within the bilateral trade negotiations Government should raise the issue of rate setting and the supervision of the process by authorities.

V. Remove India's reservation to the WIPO Performances and Phonograms Treaty and ensure that its protection for sound recording rightsholders and performers is fully and clearly compliant with that treaty.

9. When acceding to the WIPO Performances and Phonograms Treaty in 2018 India filed a reservation that it would not apply the provisions giving sound recording rightsholders and performers a right to equitable remuneration in respect of public performances and communications to the public (excluding those "making available" or "interactive" communications which are the subject of exclusive rights under the treaty but including terrestrial television and radio broadcasts and many internet radio services).
10. As for the application of the WIPO Performances and Phonograms Treaty in practice, there are several licensing bodies in India licensing the public performance or broadcast of commercially published sound recordings, notably PPL India and Novex. Through these licensing bodies revenues are paid to the UK sound recording industry, subject to the limitations noted elsewhere in this paper.
11. The situation for performers is more ambiguous; there is no express right for performers to equitable remuneration for the communication to the public (of published sound recordings featuring their recorded performances) in line with the international standards and treaties. Instead, there is only a right to receive ongoing payment, akin to a contractual royalty rate. As a minimum, we would like to see the introduction of a clear right of performers to equitable remuneration for such communications; this would remove the current ambiguity surrounding performer rights in India.
12. Withdrawing the reservation to WIPO Performances and Phonograms Treaty and making the changes above would assist in ensuring that British performers are properly protected in India for the public performance or broadcast of commercially published sound recordings featuring their recorded performances.

VI. Enforce existing copyright laws by pursuing physical and digital infringements

13. In view of the prevalence of physical and digital piracy in India, our members are only now starting to invest in the Indian market. The low level of enforcement of copyright renders investing in the Indian music market economically challenging. In addition, faster and more cost efficient access to the courts to tackle physical and online infringement is required.

We note a positive development regarding website blocking orders in India. Such orders constitute an efficient and cost effective way for internet access service providers to prevent their customers from accessing copyright infringing services; if they are not the hosts of the infringing material. Website blocking orders require access providers to block access to websites with infringing content. This is particularly important if the relevant website is not within the jurisdiction of India.

In the last eight years, the courts in India have been developing an approach to website blocking orders specifically applying to copyright infringement. Most recently, the Delhi High Court in *UTV Software Communications Ltd v 1337X.to* in April 2019 allowed for “dynamic” website blocking orders which addresses the problem of blocked websites reappearing with different domain names.