



August 2021

## Free trade agreement between the UK and India

### Open consultation

1. UK Music is the collective voice of the UK's world-leading music industry. UK Music represents all sectors of the music industry – bringing them together to collaborate, campaign and champion music. UK Music promotes the music industry as a key national asset to all levels of Government and publishes research on the economic and social value of music.
2. India already is an important market for UK music talent; its significance will continue to grow over the next decade (India is expected to have the third largest economy by 2030) due to its young, music loving, and tech savvy population. Despite India's incredibly rich musical heritage, a world-famous Bollywood music and film industry, flourishing broadcast industry (both AV and terrestrial radio), revenue return to both Indian and international music companies, songwriters and composers continues to fall very seriously short from reflecting the real value of music. Deficiencies in the Indian copyright and enforcement regime are the main reason for limited market access and investment opportunities for the UK music industry. We hope the UK government will be able to address our concerns during the negotiations of a free trade agreement.
3. According to our latest research (published in our Music by Numbers 2020 report), the music industry added £5.8 billion value (income for UK music business) to the UK economy in 2019 (pre-Covid); £2.9 billion of this GVA was derived from exports. We expect that within ten years the Indian music market will be the second largest in the world behind only China based on the strong growth of the market in the last years. This is reflected by the data provided by the Indian music industry. 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 in India). This double-digit growth in India has been sustained for several years now and much of the growth will be driven by international (and therefore UK) repertoire. India constitutes potentially an enormous market for music created and produced in the UK.
4. 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 to India. 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.

5. 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 the 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.

### **Summary of recommendations to boost UK and Indian trade and investment capacity.**

- I. Increase term of protection to the common international practice 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. Withdrawal of WPPT reservation.
- III. Clarify that user upload platforms such as YouTube require licences for the use of music and that they are outside the scope of the provisions limiting the liability of intermediaries in the Information Technology Act 2000. Introduce business to business transparency obligations on digital services.
- IV. Re-emphasise that digital services are liable under existing copyright law for the use of music and consequently that they require direct and negotiated licences from all relevant music rightsholders. This should be done by clarifying that digital services are required to obtain a license from rightsholders under Indian copyright law. Section 31D does not provide statutory licensing for digital services as argued by a Government memorandum contrary to Indian court decisions. There is specifically no market failure which justifies statutory licensing instead of negotiated licensing. To support clarity on Indian copyright law regarding user obligations and towards the achievement of value and protections by rightsholders, we urge that the negotiations ask for the removal of the inaccurate government advice on Section 31D from 2016.
- V. Ensure that radio and TV broadcasters obtain all necessary licences for the sound recordings and musical works that they broadcast, whether as part of their music services or when such works are included in other programming, and properly pay for those licences. Currently there is serious avoidance by broadcasters of their licensing liabilities to rightsholders. Users of music should take all appropriate licenses via relevant collective management organisations and rightsholders in accordance with Indian copyright law. To further support the proper functioning of the copyright market we ask for a dedicated and specialist tribunal body to resolve disputes over licensing terms.
- VI. Enforce existing copyright laws by pursuing practically and via a dedicated authority, the physical and digital infringements of users. This should include express reference to public authority and criminal investigative authority cooperation between the UK and India. It should also expressly provide for website blocking orders.

- VII. Maintain the ease with which UK musicians and support staff can apply for and purchase visas to tour in India

**In detail:**

**I. Increase term of protection to 70 years**

6. 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 United Kingdom/ 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. Withdrawal of WPPT reservation**

7. Both the United Kingdom and India are parties to the WIPO Performances and Phonograms Treaty ("WPPT"). However, India made a reservation concerning the application of Article 15(1) limiting the remuneration for performers and producers of phonograms in respect of broadcasts and communications to the public. This reservation should be withdrawn.

**III. Clarify that user upload platforms such as YouTube require licences for the use of music**

8. 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, India and the United Kingdom that these limitations to liability are inappropriate in 2020 given the market dominance of digital services. 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.
9. User upload platforms (in particular YouTube) represent by far the largest digital 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 this 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.

10. 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 and are generating significant revenues from their use of music. The legal framework on limitations of liability needs to clarify that user upload platforms cannot avoid obtaining a licence by claiming that they qualify under the limitations provided for intermediaries in the Information Technology Act 2000.

#### **IV. Re-emphasise that digital services are liable under existing copyright law for the use of music**

11. 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 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. However, 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 licence covers each mode of broadcast, including by internet. This does not appear to take account of the court decision and will have a significant chilling effect on the ability of rightsholders to negotiate reasonable licence terms with Indian digital platforms.
12. Re-emphasising the liability of digital services is of particular priority due to the consultation by the Government of India in summer 2021 regarding recommendations from the Parliamentary Standing Committee that would seek to amend Section 31D to incorporate internet and digital services under statutory licences.

#### **V. Ensure that radio and TV broadcasters fully license their programmes and pay appropriately for those licences.**

13. 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 using sound recordings and musical and literary works. The relevant collective management organisations offer simple licences for radio and TV broadcasters for including sound recordings and compositions in their programmes. Indian radio and TV broadcasters often only license the use of sound recordings; in fact, only 3 of more than 300 private radio broadcasters in India have obtained the appropriate licences for broadcasting musical works. This amounts to widescale infringement of copyright (both as regards the communication to the public and the reproduction right) at the expense of composers and music publishers; this requires urgent enforcement action. The bilateral trade negotiations provide an

opportunity to highlight the infringement of copyright laws by Indian radio and TV broadcasters to the detriment of UK, as well as the Indian, composers and music publishers.

14. In a collective licensing environment it is essential that there is a mechanism for resolving disputes between rights holders and users. The UK government should address the system regarding licensing rate disputes within a free trade agreement; at the moment the responsibilities are unclear in India. In the past, the Intellectual Property Appellate Board was responsible for the resolution of disputes over licensing tariffs for Indian radio and TV broadcasters (similar to the UK Copyright Tribunal). It seems that this function is now being transferred to the High Court with little, if any, copyright expertise.
15. Licensing fees paid by radio and TV broadcasters are inadequate, if they are paid at all. The licensing rates are typically based on a percentage of the income of radio and TV broadcasters, so there can be no argument about rates being low on the grounds that it is a developing market.
16. Finally, the mechanical reproduction right exists by law in India but it is ignored by licensees and nothing is collected.

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

17. In view of the prevalence of physical and digital piracy in India, our members have not been investing in the Indian market commensurately with its importance. 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. This should be addressed in a specific chapter on enforcement. The Free Trade Agreement should contain high level reference to efficient enforcement as well as detailed rules as is the case in most Free Trade Agreements (c.f. UK/Japan Economic Partnership Agreement Articles 14.45 onwards). More specifically the Free Trade Agreement should include express reference to public authority and criminal investigative authority cooperation between the UK and India.
18. 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. This should be provided within legislation.

## **VII. Maintain the ease with which UK musicians and support staff can apply for and purchase visas to tour in India**

19. As is the case with all free trade agreements we urge government to proactively address the situation of touring musicians; globally, artists need simple and clear procedures to obtain visas and work permits including their equipment.
  
20. In the last few years, India has made great progress with making visas and touring easier for international artists, including those from the UK. Musicians and support staff need a simple e-Business visa which costs \$100USD and has an average turnaround time of 72-hours. The process is seen as straightforward, as UK musicians and support staff only need to provide a few key forms of documentation, including a business card. There is great potential for UK musicians to increase their presence in India and therefore their export value. We encourage the UK government to maintain the ease with which UK artists can tour India. We would welcome a dedicated information page or campaign to highlight what a great market India is for UK musicians.