

THE INDIAN

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MUSIC INDUSTRY  
Formerly IPI Estd. 1936

## THE INDIAN MUSIC INDUSTRY

266, Kaachwala Bldg. 2<sup>nd</sup> Floor, Dr. Annie Besant Rd., Opp. Old Passport Office, Above Saraswat Bank,  
Worli, Mumbai - 400 030 • Tel. : +91 22 6660 8349 / 8350 • Website : [www.indianmi.org](http://www.indianmi.org)

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Date: 31<sup>st</sup> August, 2017

To,

Shri S. K. Gupta

Pr. Advisor (B&CS),

Telecom Regulatory Authority of India

**Subject: Response to consultation paper on issues related to digital radio broadcasting in India**

Dear Shri S. K. Gupta:

We thank the Telecom Regulatory Authority of India for this initiative to come out with a consultation paper on issues related to digital radio broadcasting in India. IMI a.k.a. the Indian Music Industry, an affiliate of IFPI a.k.a. the International Federation of the Phonographic Industry is pleased to submit its response to TRAI's consultation paper.

In this response, we would like to cover the following points:

- 1) IMI & IFPI's support of the development of digital terrestrial radio in India.
- 2) The importance of music content for radio broadcasters and hence the importance of protecting the rights of the recording industry.
- 3) Role of the record industry in the success of radio broadcasters.
- 4) The soaring revenues of the radio broadcasting industry and subsequent lack of revenue for music rights owners from radio.
- 5) Recording industry licensing of radio stations and problems with the legal framework in India.
- 6) Impact of remuneration rights, statutory licensing and Copyright Tribunal rate-setting.



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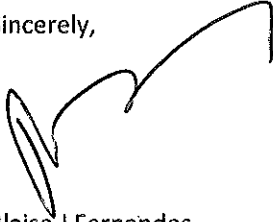
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On behalf of IMI & IFPI, thank you for giving us the opportunity to respond to this consultation paper and we look forward to continuing a mutually rewarding partnership.

Thanking you,

Sincerely,



Blaise J Fernandes

President & CEO

The Indian Music Industry

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### RESPONSE TO CONSULTATION PAPER ON ISSUES RELATED TO DIGITAL RADIO BROADCASTING IN INDIA

We, IMI a.k.a. the Indian Music Industry, an affiliate of IFPI a.k.a. the International Federation of the Phonographic Industry, support the Indian Government's commitment to developing the radio infrastructure in India. The record industry is a key stakeholder in the broadcast industry, with music being the most used, most popular and, therefore, the most valuable content used by broadcasters.

- 1) IMI & IFPI supports the development of digital terrestrial radio in India, provided the rights in music broadcasted by radios are adequately protected and fairly remunerated**

IMI & IFPI supports the Government's initiative to develop the digital spectrum in India. As a key stakeholder, the recording industry promotes the wide availability of music on fair terms.

We note that the consultation includes questions on the spectrum licensing arrangements for broadcasters. While we would not make submissions on the precise arrangements for spectrum licensing, we do make the following general submissions:

- IMI & IFPI supports a diverse and competitive broadcast environment, which is supported by transparent and non-discriminatory licensing of spectrum. Competition in the broadcast marketplace enhances the services available to users and ensures a diversity of content offered.
- Spectrum licence fees, if any, should take into account the need to ensure that broadcasters are able to pay fair market value for the content, including music, which drives the popularity of radio services. The current situation in India in which sound recording right holders receive less than 1% of radio revenues for their use of music is not sustainable and is hampering the growth of the Indian music industry.



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### 2) Recorded music and the radio industry

The recorded music industry is a digital industry. Globally, 50% of revenues come from some 360 digital services licensed by the record industry. Yet despite the growing popularity of online music streaming services, broadcast radio continues to be by some distance the most popular way to consume music, even among internet users:

- According to the latest IPSOS survey conducted for IFPI, 68% of all internet users had used radio to listen to music.
- Music continues to be the most valuable programming content for radios. According to an industry discussion by KPMG, India's radio stations continue to focus on film based music for the most part in order to appeal to the broadest possible audience.
- The average time spent listening to radio was estimated at 14-15 hours a week<sup>1</sup>. Like the TV broadcasting "12-minute (per hour) Ad cap regulation", there is no directive for Radio, however, 48 minutes of spoken words plus music would be a good estimate. Another market research done in 2009 by Netscribes claimed that 70% of all radio programming is Bollywood music in most major cities, that's 42 minutes per hour, hence music is the important content for radio broadcasters.

Meanwhile, according to PricewaterhouseCoopers, global radio industry revenues will continue to grow to an estimated US\$ 49 billion by 2020, with terrestrial radio advertising revenue estimated to grow from 31 billion in 2015 to 35 billion in 2018.

In India, radio industry revenues in 2016 were INR 22.67 billion<sup>1</sup>, and these revenues are expected to double between now and 2021<sup>2</sup>.


### 3) Record industry revenues from the broadcast of music are disproportionately low compared to the value of music rights to broadcasters

Licensing revenue from radio broadcasting and other performances of sound recordings has become an important part of the industry revenue mix. Performance rights revenue now represent some 14 % of global industry revenue, and 23 % if industry revenues in Europe. In India, however, performance rights income accounts for only 9 % of industry revenues.

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<sup>1</sup> KPMG Indian Media and Entertainment Industry Report 2017, p. 147

<sup>2</sup> *Ibid.* p.168



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Radio industry payments for recorded music, its key input, do not match the value of the use of recorded music to radios. In India, 2016 record industry revenues from radio were USD 3,112,828.90<sup>3</sup>, or **less than 1%** of radio industry revenues of INR 22.67 billion<sup>4</sup>. The reason for the unreasonably low remuneration in India is that the rates radios pay for their use of recorded music are not determined in fair commercial negotiations but by the Copyright Tribunal, which has plainly failed to grasp the value of sound recording right in broadcasting.

Moreover, while music content continues to be crucial for radio broadcasters, there is evidence that the heavy rotation of recordings by radio has a negative effect on the uptake of other forms of paid consumption of music. For example, a study conducted for IFPI by IPSOS found that 19% of Indian internet users do not pay for music subscription services because listening to radio gives them all the music they want<sup>5</sup>.

#### 4) Recording industry licensing of radio stations and problems with the legal framework in India

*An overview of the licensing framework*

The recording industry licenses radio stations to use its sound recordings in the following ways:

Type of use	Rights licensed	*Relevant provisions from international treaties
Terrestrial analogue broadcasting (FM etc)	Broadcasting	Article 12 Rome Convention Article 15 WPPT
Terrestrial digital broadcasting (e.g. DAB)	Broadcasting	Article 12 Rome Convention Article 15 WPPT

<sup>3</sup> IFPI data.

<sup>4</sup> KPMG Indian Media and Entertainment Industry Report 2017, p. 152

<sup>5</sup> IFPI IPSOS research 2017

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Type of use	Rights licensed	*Relevant provisions from international treaties
Simulcasts of terrestrial broadcasts (i.e. when the terrestrial programme is communicated simultaneously online, without any user interactivity such as pause, skip or rewind).	Communication to the public	Article 15 WPPT
Webcasting (i.e. where a radio programme is communicated online only, without any user interactivity such as pause, skip, or rewind).	Communication to the public	Article 15 WPPT
Online catch-up services (i.e. where users can choose to listen to programmes after they are first communicated).	Making available to the public	Article 14 WPPT

*\*We understand that India is yet accede to the WIPO Internet Treaties, but that the Indian Government is committed to accede to the WIPO Performances and Phonograms Treaty (WPPT) in addition to its existing accession to the WTO TRIPs Agreement (TRIPS) and the Phonograms Convention.*

The above table highlights the important differences in the rights engaged by different methods of music dissemination. In the context of this consultation, it is vital to understand the relevant legal differences between (analogue or digital) broadcasting over the air and online transmissions. In India, in the context of broadcasters' use of music there are two notable obstacles to record companies receiving fair value for their music:

***a) Impact of remuneration rights, statutory licensing and Copyright Tribunal rate-setting***

Section 31D of the Indian Copyright Act sets out a statutory licensing system for the broadcast of literary or musical works or sound recordings, and provides that the Copyright Tribunal should set the royalty rates for these uses of works. In enacting section 31D, the Indian legislature chose to adopt the minimum level of protection for the broadcast of sound



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recordings – a right of remuneration. Many countries in fact give greater protection by providing sound recording producers with an exclusive right for broadcasting and communication to the public, as allowed by the Agreed Statement to Article 15 WPPT.

The very substantial disparity between the value of music to broadcasters and the revenues paid to the record industry for that music is largely caused by record companies' inability to freely negotiate terms with broadcasters, due to a combination of remuneration rights, statutory licensing, and rate setting by the Copyright Tribunal.

According to Advocate Ananth Padmanabhan of the Madras High Court<sup>5</sup>, the Copyright Tribunal has evolved from operating as an alternate institutional body, to the one that's supplementary to the judicial framework. However, even in its new role, the Copyright Tribunal have been used as a tool to undermine judicial independence. Its competence is undermined by a lack of independence and transparency; and the separation of power. One such example being the setting of royalty rates.

The Board sets the royalty rates for both, the broadcasters and content providers. Despite this enormous responsibility implied in this case, the Board is vested with unconstrained judicial power. For instance, the newly introduced 31D sub-section (3) only mandates that the rates of royalty for radio broadcasting shall be different from television broadcasting. However, it doesn't recommend a method on how the Board should go about fixing the rates for either.

Where rates are set by a Tribunal, they should reflect fair terms that would have been negotiated between by a willing buyer and a willing seller, and take into account the value of the rights in trade – in other words, the value derived by the user of the rights. These fundamental principles have been recognised by *US Copyright Act* section 114<sup>6</sup> as well as the *EU Collective Rights Management Directive* Article 16(2), which provides:

*“Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation”*

<sup>5</sup> Advocate Ananth Padmanabhan, Madras High Court is the author of *Intellectual Property Rights: Infringement and Remedies* (2012) | Source: Manupatra

<sup>6</sup> Section 114(f)(2)(B)

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The fact that in India, 2016 record industry revenues from radio were USD 3,112,828.90<sup>7</sup>, or less than 1% of radio industry revenues of INR 22.67 billion<sup>8</sup> illustrates very clearly that this important principle has been overlooked in rate-setting in India.

### *b) Attempts to extend the statutory licensing scheme to online transmissions*

The Government's 2016 Memorandum on the scope of section 31D compounds the problems faced by the record industry in India

Section 31D was clearly intended to apply only to broadcasts and it does not, therefore, cover Internet transmissions, whether interactive (covered by the making available right) or non-interactive (covered by the communication to the public right). Indeed, there is no option in WPPT for providing "making available to the public" as a mere remuneration right or subjecting the exclusive making available right to statutory rate-setting.

However, in a 2016 Memorandum issued by the Indian Government, the scope of the section 31D statutory license was said to extend to the licensing of digital music services that are currently licensed individually on free market terms all around the world. The Memorandum is flawed because it fails to take account of the profound legal and commercial differences between broadcast services and online digital music services.

According to IFPI market statistics already 65 percent of the Indian recording industry revenues come from digital services, a substantially higher share than the global average of 50 percent. The recording industry is at the forefront of the digital age, having already licensed 40 million tracks to some 360 digital music services worldwide, including Indian home-grown digital services such as Saavn, Wynk and Gaana. The recording industry constantly explores new and innovative ways of enabling consumers to experience music at affordable prices. Never before have consumers had access to so much music. There is simply no market failure requiring the draconian and internationally unprecedented market intervention set out in the Memorandum.

If Indian law is interpreted in the way proposed in the Memorandum, it would not be compliant with the WPPT to which the Government has committed to accede, which provides for exclusive right of making available. Moreover, the Memorandum appears to imply that also the exclusive reproduction right for sound recordings set out in the TRIPS Agreement and

<sup>7</sup> IFPI data.

<sup>8</sup> KPMG Indian Media and Entertainment Industry Report 2017, p. 152



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in section 14(e)(i) of the Indian Copyright Act 1957 (as amended in 2002) would be downgraded to a mere remuneration right, in contravention of the TRIPS obligations. We are concerned that the Indian law would become the international exception and, as a result, so would its commercial environment.

A fair and balanced legal framework, one that adequately protects also the interests of content owners, is an essential part of a properly functioning broadcast market. As we explain above, music is the most valuable input for radio, and right holders must be able to obtain fair revenues for the use of their content.

In order to achieve this goal, we urge the Government to take into account the following:

1. While oversight of collective licensing schemes by a Copyright Tribunal may be appropriate, the fundamental element of an analysis of the reasonableness of a licence fee is the value of the rights in trade to the user. The Indian Copyright Tribunal has failed take this appropriately into account in the past, and the government should ensure it is obliged to do so in the future.
2. Sound recording right holders should be able to exercise their rights with respect to online communications freely without the impediment of statutory licensing, which merely serves to suppress the value of music.
3. The section 31D Memorandum should be revoked.
4. To ensure protection of Indian works and recording abroad India should accede to WCT and WPPT without delay.

