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September 28, 2021

Mr. Arunesh Kumar Singh  
Section Officer, IPR  
Copyright Section  
Department for Promotion of Industry and Internal Trade  
Ministry of Commerce & Industry  
Government of India  
Udyog Bhavan,  
New Delhi-110 011

RE: U.S. Music Community Comments in Response to the DPIIT Letter Dated August 23, 2021, Regarding File No. P-24011 (12)/7/2021-IPRS-VII, Seeking Comments on India's *Review of the Intellectual Property Rights Regime in India* by the Department Related Parliamentary Standing Committee on Commerce

Dear Mr. Singh:

We are a group of music organizations representing the overwhelming majority of U.S. songwriters, lyricists, composers, recording artists, record companies, music publishers, managers and collecting societies. We welcome the opportunity to comment on the "Review of the Intellectual Property Rights Regime in India" (the "Review") prepared by the Department Related Parliamentary Standing Committee on Commerce ("DRPSCC") on July 23, 2021. Specifically, Section 14.8(ii) of the Review provides as follows:

[t]he Committee recommends the Department to amend Section 31D for incorporating 'internet or digital broadcasters' under statutory license.

We are writing to respectfully convey our strong opposition to the DRPSCC recommendation to amend Section of 31D of the Copyright Act 1957, as last amended in 2012 ("Section 31D"), to extend the statutory license under that section to "internet or digital broadcasters".

## **Introduction**

India is the 17<sup>th</sup> largest music market in the world. The U.S. music community and their partners are investing heavily in India, adding ₹8,700 crore to the Indian economy and supporting nearly 37,000 jobs each year. India has deep, rich and diverse musical traditions, and significant broadband penetration and mobile phone use. While it is a country poised for tremendous growth, both in terms of music consumption within its borders as well as music exports to the world, its extraordinary potential remains as-yet not fully realized.

We are concerned that a proposal by the DRPSCC to expand Indian Copyright Act Section 31D statutory license to incorporate ‘internet or digital broadcasters’ puts this all at risk. Section 31D currently provides for a statutory license at court-determined rates for content when broadcast over the airwaves. Because of their interactive nature, streaming services are not considered broadcasts in the same way as television or radio, and therefore currently right holders negotiate directly with streaming services to agree on market rates for digital music.

India’s current practice is consistent with international practice and global copyright agreements, including the World Intellectual Property Organization (“WIPO”) Performances and Phonograms Treaty (“WPPT”). Rather than allow rightsholder to negotiate directly with streaming platforms to agree on licensing terms, as provided by the WPPT, the proposed amendment would have courts determine the rates. Not only would this result in lower licensing rates, and therefore lower royalties for artists and songwriters, it would also contravene India’s treaty obligations.

We note that Section 31D was originally introduced to assist the fledgling FM radio industry, which has now grown to become several times the size of the Indian recorded music industry. We would respectfully suggest that the underlying rationale of Section 31D is no longer appropriate and is now out of date.

Record labels work in partnership with performers to create and distribute music. Following nearly 20 years of decline because of piracy, streaming is the driving force behind the music community’s recent return to growth. The music community’s streaming transformation has made more diverse music available to more fans in more places than ever before. This in turn contributes to job creation and economic growth in India.

Direct licensing for streaming facilitates the creation and distribution of music and the resulting employment and economic contributions by ensuring that rightsholders can negotiate mutually agreeable terms with streaming services to make music available to fans, which allows labels to reinvest in their performers and to create more great music.

Expanding the Section 31D statutory license would devastate the creative community in India and drive down creators’ incomes to subsidize digital services. This is why Indian creators’ organizations oppose the amendment to Section 31D as strongly as do international creators. And it would make India a outlier by rejecting standard international practice.

We respectfully urge the Government of India to consider the full impact of the DRPSCC proposal and to strongly oppose this shortsighted and damaging attack on the music community and India’s streaming economy for the following reasons:

- ***the proposal would profoundly harm the economy in India;***
- ***the proposal fails to achieve its stated objective;*** and
- ***the proposal is inconsistent with the original intent of the law of India and violates India’s international treaty commitments.***

## **The Proposal Would Profoundly Harm the Economy of India**

A healthy streaming ecosystem for music requires that both parties are able to license music in the open market on mutually-agreeable terms that benefit both sides. Where right holders and streaming services can engage in commercial negotiations to agree the fair value of music, both sides benefit. Creators can re-invest in making more music, while streaming platforms can strive to make the music they have licensed available to more music lovers.

In turn, manifold benefits flow to workers, to consumers, to economies and to other national priorities of India, such as cultural protection and diversity. More jobs are created by the streaming economy when it is growing. More consumers are accessing more diverse forms of music in more languages and dialects from a broader collection of artists when the streaming ecosystem is healthy. More rupees enter the Indian economy when creators and streaming services are both succeeding.

These benefits are not exclusively economic in nature and also extend to the cultural priorities of India in terms of creating opportunities for diverse cultural expression and protection by ensuring accessibility and support. It is this multiplicity of benefits that has driven, not only the recovery of the music community, but have made the streaming economy a critical part of the Indian economy and society.

Without these protections, creators and investors are starved of the value of their creations. Streaming without authorization from music creators not only contravenes India's international obligations, it is inconsistent with its economic and cultural objectives – *i.e.*, to increase employment, to promote economic growth, and to preserve India's unique and vibrant creative ecosystem.

## ***The Proposal Would Devastate India's Creative Sector***

For more than a decade, the 2000s witnessed widespread dislocation in the Indian music sector. While digital music services proliferated, so too did music piracy. The wide availability of unauthorized music on the Internet had a catastrophic impact on the sector, as many digital platforms failed to seek authorization for the music they made available. Music creators were unable to derive value for their music from those platforms. Creators were starved of resources and the sector faced a profound contraction in India and around the world.

While the *emergence* of streaming has helped drive recovery for the music sector in India, expanding Section 31D to cover Internet transmissions would be devastating and would again put the music sector's future in India into serious question. The DRPSCC's proposed amendment to Section 31D would result in the following negative consequences for the music sector in India:

- *The proposal would significantly reduce income for creators.* In 2020, online streaming services accounted for over 85 percent of the total Indian recording industry revenue. Extending the Section 31D statutory license to cover music streaming would cause a dramatic contraction of the Indian streaming market, starving the music sector of investment, and threatening the viability of the sector itself. We continue to experience the negative consequences of the Section 31D statutory license that was set for radio broadcasting. And this result is not limited

simply to the balance sheets of companies endeavoring to create and invest in the Indian music market, but would impose profound human costs on creators who will struggle to make a living, feed their families and contribute to India’s cultural vibrancy and diversity, particularly in these most challenging times.

- *The proposal would expand inequality between creators and streaming services.* Imposing a statutory licensing on music right holders *vis-à-vis* streaming services would create vast legal and economic asymmetries by depriving right holders of exclusive copyright protection. The protections provided by exclusive making available rights under copyright give rights holders the possibility to negotiate with streaming services on an equal footing. If the Section 31D statutory license is extended to Internet transmissions, creators would lose that equal footing. The ability to negotiate fair commercial terms with streaming services would be lost.
- *The proposal would dramatically cut investment in the Indian creative sector.* The growth in India’s streaming economy is due in large part to the music community’s investment in the country’s creative ecosystem. That growth is the result of tremendous effort, including the creation of partnerships between domestic and international creators, the development of markets for diverse languages and dialects, the cultivation of domestic performers and the introduction of international artists, and the establishment of new labels for genres both new and old. Fortunately, more growth has fueled a virtuous circle of investment. However, DRPSCC’s proposed amendment would end that virtuous circle by ushering in a new era of decline. Deprived of revenue, the music sector would be unable to continue to invest. In turn, this unsustainable scenario would lead to a vicious cycle where streaming services would suffer because the creative sector they depend on would be depleted.
- *The proposal would diminish India’s cultural export potential.* India’s music sector offers enormous potential for export-driven economic growth. While India’s film sector exemplifies the positive economic contributions that result from exporting creative content, India remains poised to fully realize the true potential of its music community. We submit, however, that DRPSCC’s proposed amendment would prevent that potential from being realized. When revenue is drastically reduced, so too is investment, particularly in the hard work it takes so that local artists can breakthrough to foreign audiences. In short, when the domestic market suffers, so too does the market for international exports of Indian music.
- *The proposal would deny key legal protections to creators in the Indian streaming economy.* Under its current law, India provides music creators with the right to prevent others from making their music available via streaming without authorization. This legal protection is a critical feature of the success of the streaming economy, in India and globally. When India acceded to the WIPO Internet Treaties (i.e., the WPPT and the WIPO Copyright Treaty (“WCT”)), this act was hailed by the music community. It symbolized both a commitment to international legal norms for the protection of copyright in the digital age, but also a recognition of the importance of the creative sector to India’s digital economy. The DRPSCC’s proposal

would directly contravene India's international treaty obligations, including under the WIPO Internet Treaties.

### ***The Proposal Threatens India's Digital Leadership***

The DRPSCC's proposed amendment departs from international norms, both commercially and legally. The amendment to Section 31D would isolate India and put India's streaming ecosystem at a profound disadvantage compared to its counterparts in the rest of the world.

The Indian music sector would not only suffer at home but would be exported less and reach far fewer international markets. While Indian streaming services might benefit in the domestic market in the near term, their fate in foreign jurisdictions would be grim. With a business model that depends on concessional rates for music, their ability to compete and innovate in markets where no such subsidy exists would be profoundly diminished.

Like its business community, India itself would also suffer. As an outlier, foreign direct investment in India's digital economy would also decline. In its isolation, India's leadership role would be reduced, including in international organizations where treaty compliance is an obligation. Rather than being among those countries that chart the course for the future of digital commerce and trade, India risks relegation from the inner circle of digital thought leadership. India's soft power would also be diminished, as the export of one of the country's most valuable resources and most persuasive ambassadors – its creative content – would suffer.

### **The Proposal Fails to Achieve its Stated Objectives**

According to Section 14.8(ii) of the Review, the rationale underlying DRPSCC's recommendation to amend Section 31D is to:

*ensure a level playing field by making content accessible on similar terms to both traditional and internet broadcasters alike.*

The proposed amendment would not achieve this objective. In fact, the proposed amendment would have the opposite effect and would create vast and profoundly negative consequences for India's creative sector and digital economy.

### ***The Proposal Introduces Disparities Between Broadcasters and Streaming Services***

We respectfully submit that DRPSCC's proposal would fail to create the level playing field between traditional broadcasters and streaming services that it seeks, and instead would create significant disparities between the two distinct business models. This proposal would serve only to introduce asymmetries by subsidizing streaming services that have already succeeded in deploying their business models and are rapidly expanding.

It should also be noted that any comparison between streaming services and traditional broadcasters should take into account the relative maturity and success of each business model. Today, both streaming services and traditional broadcasters have grown and developed significantly. Neither is

a start up, neither is in its infancy, and both have grown to become successful, including relative to the Indian music sector.

We recall that Section 31D was introduced to assist the fledgling FM radio industry, which has now grown into several times the size of the Indian music industry. Today's streaming services are simply not comparable to the radio broadcasters when Section 31D was first introduced. Therefore, streaming services do not fall within the rationale of Section 31D.

### ***The Proposal Introduces New Disparities Between Creators and Streaming Services***

We also submit that the proposal would remove the level playing field between streaming services and creators in India. With exclusive copyright protection, creators can reach mutual agreement on commercial terms with streaming services. The proposal deprives creators of such protection, and would remove their parity *vis-à-vis* those services. Creators would be placed on a new and unequal footing with streaming services in India. The DRPSCC's silence regarding the effect of the proposal on the Indian creative sector and the lack of an assessment of its impact on that sector is most concerning. Ultimately, the proposed amendment serves only to benefit streaming services at the considerable expense of creators, consumers, and the Indian economy.

### ***The Proposal Subsidizes the Decline of the Economic Contributions of Streaming***

Finally, and paradoxically, the DRPSCC recognizes the "significant contributions" of the creative sector to the India economy, but recommends a change to law that would place those contributions in profound peril. According to Section 14.8(ii) of the Review:

*The Committee recommends the Department to amend Section 31D for incorporating 'internet or digital broadcasters' under statutory license in wake of the rise in digital or OTT platforms with manifold increase in music as well as movie apps and its significant contribution to economy.*

However, instead of maintaining and increasing those significant contributions, this proposal would only serve to undermine such contributions of the creative sector to the economy of India.

### ***The Proposal is Unnecessary Because it is Based on a Non-Existent Problem***

We respectfully submit that the proposed amendment rests on a false premise, i.e., that streaming services require economic assistance. In fact, the opposite is true. Streaming services are doing very well in India. These services have become mature and successful business enterprises in a thriving economic sector. In fact, the DRPSCC proposal itself acknowledges the "rise in digital or OTT platforms with manifold increase in music as well as movie apps and its significant contribution to the economy."

According to *The Hindu* on August 16, 2015, music streaming was the third most used service on the internet followed by emails and social media. The article noted further that Gaana, Saavn, and Wynk, which provide music streaming services have been subscribed to by over 20 million users each. While streaming services in India are valued in the millions, they currently are only paying a small fraction towards licensing costs, far lower than international standards.

Moreover, while we appreciate that it is important to ensure a vibrant start-up ecosystem in India, we would submit that established Internet companies like Airtel, Gaana, Wynk and others cannot and should not be considered as “start-ups”. Instead, they are flourishing businesses. As such, streaming services in India do not require concessional rates for acquiring content.

### **The Proposal is Inconsistent with the Original Intent of the Law of India**

Section 31D was introduced into the Indian Copyright Act in the latest revision of the Act in 2012. It contains a statutory license provision for “*broadcasting organizations desirous of communicating to the public by way of a broadcast...*”. Under the provision “broadcasting organizations” can bypass negotiations with right holders and instead apply to the Intellectual Property Appellate Board (IPAB) for a license on terms set by the IPAB. Section 31D applies to both musical works and sound recordings.

The Section 31D statutory license was originally introduced to encourage the growth of the fledgling Indian FM radio broadcasting industry. As a result, the Copyright Board (the predecessor to the IPAB) set a statutory license fee of two percent of net advertising revenue to be paid by radio stations to the owners of copyrights of sound recordings. By significantly cutting down the then existing voluntarily negotiated licensing rates, the Copyright Board’s decision amounted to subsidization of the Indian radio broadcasters at the expense of the domestic music industry. This statutory license fee was set for a duration of ten years.

Further to the 2012 revision to the Copyright Act, the government of India published a DIPP Office Memorandum in 2016 (now DPIIT, i.e., the government department responsible copyright matters), which states that the Section 31D statutory license extends to Internet broadcasting organizations, which has been interpreted to include internet transmissions. The 2016 Office Memorandum is, however, inconsistent with the 2012 revision to the Copyright Act.

Section 31D specifically requires that the Copyright Board fix different licensing rates for *radio* and *television* broadcasting. If the Indian Parliament had intended the statutory license to cover Internet transmissions, it would have required that a licensing rate should be fixed for Internet transmissions as well.

In terms of legislative intent underlying Section 31D, it is clear that the drafters did not intend to cover Internet exploitation via streaming. When the Copyright Amendment bill of 2010 was under initial deliberations, only “*radio*” was covered under the proposed version of Section 31D. Subsequently, following deliberations by the Department Related Parliamentary Standing Committee, “*television*” was also included by specific reference under Section 31D as proposed, which was consequently enacted by Parliament and notified by the Central Government.

The DIPP Office Memorandum led to a series of legal actions. Challenged by the right holders, Indian courts have so far rejected applications by online streaming services for statutory licenses. For example, in April 2019, the Bombay High Court in *Tips Industries v. Wynk Music* found that Section 31D was limited to radio and television broadcast only, and rejected the 2016 Office

Memorandum as both inconsistent with the Copyright Act and beyond the scope of DIPP’s authority (see also Radio Next v. Union of India).

### **The Proposal Violates India’s International Treaty Obligations**

Furthermore, we submit that the proposed amendment also runs afoul of international copyright law. The right of broadcasting was first included in Berne Convention (1928 revision, Article 11bis), with the two most relevant provisions on producers and performers’ broadcasting rights included in the Rome Convention (1961, Article 12) and the WPPT Treaty (1996, Article 15). The WIPO Guide to the Copyright and Related Rights Treaties (publ. no. 891) clearly distinguishes broadcasting from Internet transmissions as follows:

*Broadcasting’ is communication of a work or an object of related rights to the public by wireless transmission. It covers both terrestrial broadcasting and satellite broadcasting.*

*‘Broadcasting’ is not to be understood as including interactive making available of works and objects of related rights over computer networks (where the time and place of reception may be individually chosen by members of the public).*

In fact, in February 2012, during the 24<sup>th</sup> Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), Smt. Alpana Dubey, First Secretary, in her representation on behalf of India, reiterated India’s position to protect the broadcasting organizations and not include “retransmission over computer networks” or retransmissions over any other platforms “as they are not broadcasting in the traditional sense”.

In addition, discussions at WIPO on a possible Treaty on the Protection of Broadcasting Organizations show that member state delegations consider that the definition of broadcasting should be consistent with already existing definitions of broadcasting in other WIPO Treaties and all definitions of the activity and the transmitting entities clearly distinguish between “broadcasting” on the one hand, and “communication to the public” on the other hand. At the December 2015 SCCR meeting, the Indian delegation among others reiterated the view that the Treaty should not cover retransmission over computer networks or over other platforms, as these activities were not broadcasting in the traditional sense.

India joined the WIPO Internet Treaties in 2018. These treaties oblige contracting states to grant record producers and artists an exclusive right for interactive making available. The proposal to extend the Section 31D to cover Internet transmissions are incompatible with these obligations.

### **Conclusion**

Therefore, we respectfully recommend that the Government of India reject the DRPSCC’s recommendation to amend Section 31D of the Copyright Act to incorporate “internet or digital broadcasters” within the existing statutory licensing for radio and television broadcasting. We further respectfully urge the Government of India to commit that it will not extend the Section 31D statutory license to Internet transmissions. We thank you again for this opportunity to provide written comments and for your consideration of these comments.

Sincerely,

Alliance for Recorded Music

American Association of Independent Music

American Society of Composers, Authors and Publishers

Broadcast Music, Inc.

Music Artists Coalition

National Music Publishers' Association

Production Music Association

Recording Academy

Recording Industry Association of America

Screen Actors Guild-American Federation of Television and Radio Artists

The Society of Composers and Lyricists

Songwriters Guild of America