



THE INDIAN MUSIC INDUSTRY

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6th March 2019

Shri Goonjan Kumar,
Assistant Director,
Department for Promotion of Industry and Internal Trade,
Ministry of Commerce & Industry,
Government of India,
Udyog Bhawan, New Delhi 110011,
India.

Subject: IMI's comments on the Draft National e-Commerce Policy

Dear Mr. Kumar,

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry (Ministry) has recently issued the *Draft National e-Commerce Policy* (Policy). We, the Indian Music Industry aka IMI, on behalf of our Members, seek to make certain remarks. IMI represents the business and trade interests of Indian recorded music companies on a pan-India basis. IMI is affiliated with IFPI, the association representing the recording industry worldwide.

At the onset, we commend the Government of India for releasing the Policy. The Indian recorded music industry is a digital industry, which in order to grow and flourish, needs a fair and balanced digital market place. The Policy will help guide the future development of e-commerce in India and help bring certainty in the policy space. As the issues addressed in the Policy are crucial for IMI Members, we would like to share our main concerns and priorities with the Government of India. IMI's concerns can be grouped into the following six headings: i) Taxation, ii) Platform liability, iii) Anti-piracy and anti-counterfeiting, iv) Data, and v) Music Exports, and vi) Miscellaneous Issues. These headings are individually discussed below.

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I. TAXATION

Over the years, largely due to rampant online piracy, the Indian recorded music industry has shrunk in size and its revenues were Rs. 850 Cr. in 2018, as per the IMI – IFPI Digital Music Study. However, with the launch of new digital services the industry has turned into growth and, despite the continued problems with high piracy levels, the recorded music industry in India has significant potential to grow further. IMI Members are aligned with the Government’s Make in India and ‘Digital India’ programmes and have invested in both physical formats and digital formats of music. As regards physical formats, IMI Members have invested in the manufacturing of CDs and DVDs. A significant share of revenue comes from the CD / DVD bundled along with the educational materials. As regards digital formats, IMI Members have taken advantage of the various Digital India schemes by the Government of India.

IMI urges the Government of India to note that at this stage any increase in tariffs, customs duties, or other forms of taxation would likely slow down the growth of digital content markets, which would have a negative overall effect on India’s economy and growth.

This would have a particularly devastating effect on the Indian recorded music industry which relies on broad-based consumer take up of digital services for growth and revenue generation. Having made general comments, IMI proceeds to make specific remarks on the taxation aspects of the Policy.

1. On page 10, the Policy states that the digital goods (such as e-books) cause substantial tariff loss to India; and erode India’s tariff commitments at the WTO. IMI urges to government to refrain from imposing any tariffs and/or customs duties. Moreover, IMI urges the Government of India to respect the WTO’s moratorium on e-commerce. IMI is confident that if the Indian digital content markets are allowed to grow without crippling tariffs or other duties, the Government of India will benefit more as the growing Indian music and other content industries will generate taxable revenue in India and create jobs in India.

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2. Likewise, on page 27, the Government of India is silent on applicability of GST. The Government of India must not impose any GST on digital products.

II. PLATFORM LIABILITY

IMI wholeheartedly agrees with the Policy on the need to recognise and establish platforms' social and legal responsibility for the content they distribute (Section I). In few areas is this more acute than with respect to online distribution of copyright protected content. User Upload Content platforms such as Google's YouTube have become the largest online on-demand music distributors, yet these services continue to claim they are not fully responsible for content uploaded by their users and made available by the platforms. So, ensuring that these platforms recognise their legal liability and accept to operate as diligent economic operators to prevent unauthorised content on their platforms is essential to ensure a level playing field and a fair Indian digital content market.

III. ANTI-PIRACY AND ANTI-COUNTERFEITING

IMI aims to reduce piracy in India. Piracy has severe negative effects to the Indian recorded music industry. According to Mr. Shridhar Subramaniam, president of Sony Music India, 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 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

¹ Dialogue 2018 – Vision 2022

² IFPI – IMI Digital Music Study 2108. 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

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

IMI would like to thank the Government of India for recognising the dangers posed by counterfeiting and piracy. We strongly support the inclusion of anti-counterfeiting (page 21) and anti-piracy measures (page 22) in the Policy. Having made general comments, IMI proceeds to make specific remarks on the anti-counterfeiting and anti-piracy aspects of the Policy.

1. IMI agrees with the Government of India concerning the importance of clear rules on online intermediaries' liability (in para 3.18). We wish to stress however that any online intermediary liability privileges (aka safe harbours) should be limited to technical, automatic and passive intermediaries and on the condition that they operate in the manner expected of a diligent economic operator to prevent the availability of infringing content on their platforms.
2. IMI furthermore agrees with the Government of India regarding the importance of mandating seller details (in para 3.9), because it is a useful step for increasing transparency and security online and funnelling liability in any anti-counterfeiting and anti-piracy action.
3. IMI is however deeply concerned about the ineffectiveness of the notice and take down provision (para 3.18) in the Policy. IMI urges the Government of India to modify the "notice and take down" obligation to a "notice and stay down" obligation. This is essential because IMI has observed that contents taken down often reappear not long after they have been "taken down" A "notice and stay down" obligation means simply that on receipt of a notice, service providers should be obliged to take reasonable steps to ensure that all other copies of or URL links to infringing content: (a) are also removed; and (b) do not appear in the future. An example is the website [songs\(dot\)pk](http://songs(dot)pk), which appears online in various

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forms. “Notice and stay down” is an appropriate and proportionate obligation which could be affected using existing, affordable technologies.

4. Furthermore, IMI commends the Government of India for the proposed identification of ‘trusted entities’ (in para 3.18) whose complaints would be resolved on priority. IMI expresses its interest in participating in the formation of any government policy for the recognition of ‘trusted entities’.
5. IMI commends the Government of India for the inclusion of an industry led ‘Infringing Websites List’ (IWL) (in para 3.20). IMI wholeheartedly supports this initiative. IMI has been at the forefront of fighting piracy on behalf of its Members, and would therefore like to be included in the formation of any industry led consortium.
6. IMI specifically commends the government for the proposal to block advertisements on (para 3.20(d)) and revenues to (para 3.20(b)) websites on the IWL. IMI suggests that the Government of India should reiterate in para 3.7 of the Policy the provision related to blocking of revenues to websites in the IWL mentioned above.

IMI thanks the Government for recognising the harm caused by piracy to the Indian recorded music companies. IMI is willing to engage with the Government of India to formulate any policy that could help curb the menace of piracy in India.

IV. DATA

IMI appreciates the Policy’s focus on data as the fuel for the digital economy. IMI furthermore recognises the need for meaningful protection of privacy and personal data, as well as the need to recalibrate competition policy to take account of the role and importance of data combined with network effects in the digital economy. Ensuring a level playing field and a vibrant competitive digital market place, is essential for the Indian music industry. We agree that dominant services should not be allowed to monopolise India’s digital markets on the back of harvesting and

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monopolising user data. Equally, services should be transparent as to how they use the data, in particular to ensure that dominant platforms – such as search engines and social media -- do not use their market power to favour their own services or content to foreclose competition.

However, IMI would caution against imposing draconian and artificial restrictions on cross-border dataflows that would make it India a less appealing market for foreign direct investment and for operation of international digital services. Such measures are likely to limit competition in the Indian digital content markets, to the detriment of Indian consumers and Indian content industries.

V. MUSIC EXPORTS

IMI is keen on working with the Government of India for establishing schemes to promote music exports in India. IMI recognises that while the Government of India has several schemes for the promotion of music, there is no specific scheme for music exports. In addition, the Government of India's schemes for promotion of music include music along with promotion of other arts, such as literature, and tribal art. There is no specific scheme for music exports, unlike other countries such as United Kingdom, Germany and Switzerland.

IMI is pleased to note that the Government of India recognises export promotion through e-commerce (page 32). This inclusion provides a welcome opportunity to frame a specific policy for music exports. IMI urges the Government of India to recognise the export potential of the Indian creative content industries and introduce a policy that promotes pan-India music exports. IMI strongly suggests the government to have a specific scheme for music exports administered by the Indian recorded music industry (in line with the industry led 'Infringing Websites List' mentioned in para 3.20 of the Policy) to take advantage of industry's knowledge and experiences in channelling resources to meaningful export activities. IMI looks forward to an opportunity to assist the Government of India in formulating a music export scheme.

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VI. MISCELLANEOUS ISSUES

Apart from the specific points mentioned above, IMI Members wish to raise a few detailed issues. These are listed individually below:

1. IMI requests the government to provide some clarity on the term ‘sensitive data’ used in para 1.2, and elsewhere in the Policy. Would a foreign audio OTT player providing access to online music be deemed to be handling with sensitive data? Audio OTT services, especially on smartphones, can build individual personality profiles using modern artificial intelligence on the basis of song preferences, listening hours and other data points.
2. IMI urges the Government of India to explicitly state that the term ‘business activities’ (in para 1.2) is only restricted to businesses indulging in lawful activities. Any business entity engaging in unlawful activity (such as providing illegal music downloads or facilitating music piracy in any manner) should not be allowed access to the Indian market. IMI feels that such a step will provide a strong impetus to the establishment of lawful e-commerce businesses in India.
3. IMI notes that the Policy mandates the establishment of e-commerce sites / apps in India (para 3.4). IMI requests the Government of India to explicitly clarify whether foreign audio OTT players would need to register in India in order to provide their services. For the sake of clarity, we do not believe such a requirement would be conducive to growth and creating a vibrant and competitive digital market place.
4. IMI commends the Government of India for recognising that regulations must keep pace with the technological changes (para 4.1). However, IMI urges the Government of India to recognise the supremacy of the freedom to contract in the economy. IMI urges the Government of India not to impinge upon the freedom to contract; as regards the music sector, in cases when content owners are willing to license their content at market rates.

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Despite our concerns, as noted above, the Policy is a positive first step towards the modernisation of e-commerce law in India. IMI would welcome an opportunity to make an in-person representation of its concerns before the Ministry and/or to provide further written information in relation to any questions.

Yours sincerely,

Blaise Fernandes

President & CEO

The Indian Music Industry