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Hon. Devin Nunes
Chairman, Subcommittee on Trade
Trade
House Ways and Means Committee
1102 Longworth House Office Building
Washington, D.C. 20515

Hon. Charles B. Rangel
Ranking Member, Subcommittee on
Trade
House Ways and Means Committee
1102 Longworth House Office Building
Washington, D.C. 20515

**Re: U.S. – India Relations: Challenges for the Public Performing Right in Music
Post March 13, 2013 Hearing Submission by ASCAP**

Dear Chairman Nunes and Ranking Member Rangel:

On behalf of the over 450,000 songwriter, composer and music publisher members of American Society of Composers, Authors & Publishers (“ASCAP”), we write to commend your Subcommittee’s recent hearings regarding our country’s burgeoning bilateral trade relations with India. Certainly there are bright spots, but the same cannot be said for the recognition of the public performing right in musical compositions.

Under a reciprocal agreement with the Indian Performing Right Society (“IPRS”), IPRS collects royalties for the public performance in India of music created and published by ASCAP members, while ASCAP does the same for performances in the U.S. of music of IPRS members. Sadly, recent court rulings in India have stripped all holders of the public performing right in music of their exclusive right to control and to be compensated for, the public performance of their musical works when broadcast over the radio or performed in films in cinemas.¹ To make matters worse, in

¹Ref: Music Broadcast Pvt. Ltd. V. Indian Performing Right Society, suit No. 2001 of 2006 (High Court of Judicature at Bombay, July 25, 2011), and Indian Performing Right Society v. Aditya Pandey, cases CS (OS) Nos. 1185/2006, 6487/2006 and 7027/2006 (High Court of Delhi at New Delhi, July 28,

an effort to “remedy” these cases, India enacted “The Copyright (Amendment) Act of 2012, further amending the Copyright Act of 1957,” effective June 21, 2012 (the “Act”). Instead of “fixing” these court decisions, the Act has – in fact – created a whole new set of complexities and confusions. While the Act restores a right of remuneration in the public performing right in music, the Act could be read to make ASCAP and IPRS members wholly dependent for the collection of this remuneration on third parties, the rights holders of sound recordings and films.

Both these court decisions and India’s Act, raise serious questions concerning India’s compliance with its obligations under the Berne Convention and the TRIPS Agreement. The latter require recognition of the exclusive right of authors to authorize communication of their musical works to the public and receive remuneration directly for such exploitation.²

In June of 2012, in response to these developments, and in particular, the fact that the Act does not make it clear whether it applies retrospectively, or only prospectively, IPRS appealed one of the decisions to India’s Supreme Court. The international association of performing right organizations (“PROs”), the Confédération Internationale des Sociétés d’Auteurs et Compositeurs (“CISAC”) has joined IPRS with a petition of its own, supported by some of the world’s larger PROs, including ASCAP. The timeline for a final decision is unclear, but given the well-known tendency of Indian courts to be mired in backlog and delay, resolution, and thus relief, is not expected in the near term.³

Below we describe the problems created by the case on appeal, and next turn to why the Act, amending India’s copyright law, has not remedied the situation even on a prospective basis, but instead, created a whole new set of encroachments on the public performing right in music.

The Court Decision Now on Appeal to the Indian Supreme Court

The decision of May 8, 2012, *Indian Performing Right Society v. Aditya Pandey* (“*Pandey*”), now on appeal before India’s highest court, its Supreme Court, held—contrary to well-established international copyright laws—that songwriters and

2011; see also *Indian Performing Right Society v. Eastern India Motion Picture Association*, AIR 1977 (2) SCC 820.

²The Annex attached hereto, provides a more detailed analysis of the ways in which these rulings and the Act appear to violate India’s international obligations under Berne and TRIPS. See also Written Submission of the International Intellectual Property Alliance (IIPA) Regarding 2013 Special 301 Review, Feb. 8, 2013, submitted via www.regulations.gov, Docket No. USTR-2012-0022, wherein the problems with the recent Act are also discussed at pages 64-69 (“IIPA Report: India Section”).

³Estimates of the number of pending cases run anywhere from 20 million to over 31 million cases; some estimate it will take anywhere between 320 to 466 years to clear these cases. See, e.g., http://articles.timesofindia.indiatimes.com/2010-03-06/india/28143242_1_high-court-judges-literacy-rate-backlog; http://www.msnbc.msn.com/id/29164027/ns/world_news-south_and_central_asia/t/report-india-court-years-behind-schedule/; http://www.atimes.com/atimes/South_Asia/JF28Df02.html.

music publishers lose their exclusive public performance right in their musical compositions once the composition is embodied in a sound recording, and by analogy, an audio-visual work or film. As a result of this deeply flawed decision, radio stations broadcasting recorded music would only be required to pay license fees to sound recording companies (or record labels), and would not have to pay license fees to the music creators and publishers represented by IPRS. Similarly, film producers exhibiting films with music can refuse to pay IPRS. A separate case reached a similar conclusion, with the result that broadcasters are increasingly refusing to pay IPRS anything for the public performance of music, including music in the ASCAP repertoire.⁴

In short, the decision effectively disenfranchises the world's songwriters, music composers and music publishers of their exclusive public performance right in music in India, causing economic harm to all of them. Here is why: Through representation agreements with foreign PROs, like ASCAP, IPRS is the designated representative and agent in India for licensing the public performance right in the musical works of effectively all the world's songwriters, music composers and music publishers as well as its own members in India. Under these representation agreements, IPRS collects license fees and distributes royalties on behalf of its own members and the members of the foreign PROs for the public performance of their musical works, whether embodied in a sound recording or an audio-visual program, when that sound recording or audio-visual program is publicly performed.

Similarly, IPRS enters into representation agreements with foreign PROs so that its members' public performance rights in their musical works can be represented in the countries of the foreign PROs. Such is the case with ASCAP and IPRS, which entered into reciprocal representation agreements, effective as of January 1, 2004, that allow IPRS members to receive royalties from ASCAP for performances of their works in the U.S. and allow ASCAP members to receive royalties when their works are publicly performed in India.

The Act Amending India's Copyright Law, June 2012

The 301 Report to the USTR of the International Intellectual Property Association ("IIPA") on India clearly explains why this legislative effort to "fix" the recent court decisions has only created more problems. As summarized by IIPA, Section 18(1) of the Act provides that:

"the author of a literary or a musical work shall not be deemed to have assigned or waived 'the right to receive royalties to be shared on an equal basis with the assignee of the copyright in two cases: 1) when included in a cinematograph film' for all 'utilization' other than 'the communication to the public of the work along with the cinematograph film in a cinema hall'; and 2) when 'included in the sound recording but not forming part of any cinematographic film.'

⁴See note 1.

New Sections 19(9) and (10) of the Act preserve the right of the author to claim an equal share of royalties [‘and any other consideration payable’] as to 1) ‘utilization’ of ‘any work’ in a cinematograph film in a cinema hall’; and 2) ‘utilization’ of a ‘any work’ in a ‘sound recording with does not form part of any cinematograph film.’”⁵

These new provisions cast a cloud over the ability of creators of musical works and their publishers to negotiate the terms of the exploitation of their independent exclusive rights, whether through direct contractual relationships, or using IPRS, to negotiate and collect remuneration for them. Instead, authors may be left to seek remuneration from the owners of sound recordings and cinematographic works, without the new Act providing any guidance as to how to do so, nor what “royalties and other consideration” means, nor how to interpret the terms “on an equal basis” and “an equal share.” Is it a share of gross or net revenues? What are the permissible deductions? Merely recognizing that authors have a right of remuneration from third parties, over whom they have no control and without making clear the manner in which authors can enforce their remuneration right is not a solution. Moreover, it does not comply with India’s Berne and TRIPS’ obligations (as detailed in the attached annex).

The Resulting Harm to U.S. Music Creators, the U.S. Economy & Its Balance of Payments

Why are these developments in India harmful to America’s music creators? Because our members represent one bright and growing area of the U.S. economy, helping both the smallest of the U.S.’ entrepreneurs, its music creators, as well as supporting the continued growth of the copyright industries which contribute to the U.S. job market and economy.⁶ For example, despite these challenging economic times, U.S. PROs, like ASCAP receive \$5 to \$6 dollars for every dollar that they send overseas. The sums received from foreign PROs by three U.S. PROs in 2012, came to close to three-quarters of a billion dollars. Almost all of these royalties were paid to individual U.S. songwriters, composers and authors. Music publishers’ royalties, on the other hand, tend to be paid by the foreign PRO to the local subpublisher, and remitted back to the U.S. publisher under its contractual terms with its foreign subpublisher.

Up until these questionable lower court rulings in India, and the confusing attempt to “fix” them through amending India’s copyright law, the relationships between ASCAP and IPRS were reciprocal. That is, ASCAP has sent and does send

⁵See IIPA Report: India Section, at page 65, supra at note 2.

⁶A recent government study found that copyright-intensive jobs accounted for 5.1 million U.S. jobs in 2012, and that between 1990 and 2011, these industries experienced an employment increase of 46.3%. See Economics and Statistics Administration and the U.S. Patent and Trademark Office, “Intellectual Property and the U.S. Economy: Industries in Focus,” available at www.uspto.gov/news/publications/IP_Report_March_2012.pdf.

royalties to IPRS for its members; and likewise IPRS sent royalties to ASCAP for its members. With the increasingly popularity in the U.S. of India's music, television programs and movies containing the musical works of IPRS members, these royalties for IPRS are likely to grow.

However, the same cannot be said when looking at the future of American music creators' right to be fairly compensated for the performance of their works in India, against the clear evidence of the ever-increasing popularity and exploitation of American musical works in India.

Up until these recent court and legislative developments, ASCAP had high hopes for increasing its receipt of royalties from India for its members. Why? There are several reasons, including India's increasingly globalized economy, but two are illustrative of these hopes: the growth in India's radio market and the exponential growth of live concerts.

To be clear, royalties received from India by ASCAP, were mostly from radio. While not substantial, they were growing in the past few years, and thus, ASCAP's expectations that American music on radio was on the verge of "taking off" had begun to grow as well due to the convergence of several recent trends in the Indian radio market.⁷ First, the Indian government has supported extending FM radio services from about 86 cities, to 227 new cities, which will result in a total of 839 FM radio channels. In addition, India's mobile phone users are increasingly listening to radio on their mobile phones, from 20% in 2009 to 25% in 2011, and that is without taking into account the roll out of new FM stations, as well as increasing listenership on other platforms like the internet and tablets. Third, and most importantly, the growth in stations has led to greater content offerings, shifting content away from traditional movie sound tracks and devotional music, to a broader array of offerings. For example, "Radio One has gone completely English in Mumbai and Delhi, . . . targeting [a] premium audience segment. Fever FM [was] the first radio to experiment in this direction. Hit FM, Radio Indigo, Chennai Live are other [all] English FM stations."

American music publishers and record labels have been following these trends as well: Sony Music established genre-specific music labels, including in urban and hip-hop formats in India; MTV Unplugged entered the Indian market featuring live music performances; and, perhaps of greatest significance, the number of live events, particular by foreign groups, "increased nearly 15-20 times between 2004 and 2011. While in 2004, India had approximately 300-400 live events, the number increased to 6000-7000 in 2011 with ticket prices also increasing substantially."⁸ These live events included concerts by a wide and diverse range of well known American songwriters and performers, from Bryan Adams and Metallica to Lady Gaga and the renowned Cuban American rapper and singer, Pitbull, with such foreign concerts garnering far higher ticket prices than local popular artists.

⁷See <http://www.indiabuznews.com/?q+node/3141> , visited March 20, 2013, "M&E Industry: No looking back 3."

⁸Ibid.

Although many issues in the U.S.'s bilateral trade relations with India may be intractable, our issue, that is, restoring the exclusive right in the public performance of music, should not be. Contrary to international principles, creators of music should not be forced – by Indian law – to become dependent on the holder of another exclusive copyright, whether in a sound recording or a film, to obtain remuneration for such performances, on grounds that are not laid out in the law and are ambiguous at best. This problem can be fixed in the near term by restoring the independent and exclusive right in the public performance of music in India, including the right to receive remuneration directly, for all songwriters, composers, authors and their publishers.

Respectfully submitted,

Joan M. McGivern
SVP, Legal Department
ASCAP
Emailjmcgivern@ascap.com
Tel. 212-621-6204

cc: Members of the Subcommittee on Trade,
House Ways & Means Committee

Rep. Kevin Brady, TX
Rep. Dave Reichert, WA
Rep. Vern Buchanan, FL
Rep. Adrian Smith, NE
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Rep. Peter Roskam, IL
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Rep. John Larson, CT
Rep. Earl Blumenauer, OR
Rep. Ron Kind, WI

Stanford K. McCoy, Assistant USTR for Intellectual Property & Innovation
Shira Perlmutter, Chief Policy Officer and Director for International Affairs, U.S.
Patent & Trademark Office
Karyn Temple Claggett, Assoc. Register of Copyrights and Director of Policy &
International Affairs, U.S. Copyright Office
Paul Williams, President, ASCAP
John LoFrumento, CEO, ASCAP
Roger Greenaway, EVP, International, ASCAP
Randy Grimmet, EVP, Membership
Elizabeth Matthews, EVP & General Counsel
Willie Yeung, Asia Pacific Rep., ASCAP
Alec French, Thorsen French Advocacy
Harriet Melvin, The Capitol Group

ANNEX: INDIA’S POTENTIAL VIOLATIONS OF THE BERNE CONVENTION AND THE TRIPS AGREEMENT

For the Subcommittee’s benefit, set forth below is a more detailed explanation of why if the decision were to be upheld, and the 2012 Amendment to India’s Copyright Law not changed, the Indian Government will be in breach of its international obligations under the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) and the Agreement on Trade Related Aspects of Intellectual Property Law (the “TRIPS Agreement”).⁹ Either way, India’s current position is inconsistent with the laws of all other Member States of the Berne Convention, including those of the U.S.¹⁰

THE OBLIGATIONS OF INDIA UNDER THE BERNE CONVENTION

The Berne Convention protects the rights of authors in their literary and artistic works (art. 1). “Literary and artistic works” are defined in art. 2(1) as including *inter alia* “musical compositions with or without words.” The expression “with or without words” in the Convention means that any words accompanying the music are protected like the music itself.¹¹ The works mentioned in art. 2 shall enjoy protection in all countries of the Union and the protection shall operate for the benefit of the author and his or her successors in title (art. 2(6)). This includes those who, for whatever reason such as transfer or assignment, become entitled to the copyright.¹² Thus, India as a party to the Berne Convention is obliged to protect “musical compositions with or without words” as works and to ensure that such protection benefits the owners of the copyright in such works.

The Berne Convention is governed by the principle of national treatment. The principle is laid down in art. 5 of the Berne Convention, which reads as follows:

“(1) Authors shall enjoy, in respect of works for which they are protected under the Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”. [Emphasis added.]

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his [or her] rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when

⁹India’s international copyright obligations have been implemented by the International Copyright Order, 1999 (S.O.228E of 24 March 1999, published in the Gazette of India, Extra Pt II, Sec. 3(i) dated 6 April 1999).

¹⁰ The analysis set forth below synthesizes the Expert Opinion of Dr. Gillian Davies, submitted to the Supreme Court of India on January 31, 2013, to accompany CISAC’s application. Dr. Davies is based in London, and is an internationally recognized authority on intellectual property, and particularly copyright, having spent over four decades working and publishing in the field.

¹¹WIPO Guide to the Berne Convention, 1978, para. 2.6(e)

¹²WIPO Guide, para. 2.22.

the author is not a national of the country of origin of the work for which he [or she] is protected under this Convention, he [or she] shall enjoy in that country the same rights as national authors.”

Thus, the Convention sets a minimum standard of protection and art. 36 thereof states that, at the time a country becomes bound by the Convention, it is understood that it will be in a position under its domestic law to give effect to the provisions of the Convention. Thus, the statement made in the *Pandey* decision, now on appeal to India’s Supreme Court, where the Court held in relation to the impact of international conventions that "It is always open to a legislature keeping in view the socio-economic conditions in a country to confer lesser or larger rights" is incorrect insofar as conferring lesser rights are concerned. The minimum rights of the Berne Convention must be implemented but it is of course open to parties to the Convention to confer greater rights and in such case nationals of other Member States would benefit from such rights under the principle of national treatment.

The right of public performance of authors of musical works is laid down in art. 11 Berne Convention, which provides:

“(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

- (i) the public performance of their works, including such public performance by any means or process;
- (ii) any communication to the public of the performance of their works.

Art. 11 *bis* concerns the right of broadcasting of authors of all literary and artistic works, including authors of “musical works with or without words.” In this respect, authors enjoy the exclusive right of authorizing:

- (i) the broadcasting of their works or the communication to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

These provisions apply to both sound and television broadcasts to the public and are cumulative.¹³

Thus, India is obliged by the Berne Convention to recognize the rights of public performance, broadcasting and communication to the public of the authors of all “works” as defined under art. 2(1) of the Convention, including both the Indian authors of works represented by the IPRS and also the Berne Convention nationals who are the authors of the works represented by ASCAP and other foreign PROs around the world.

¹³WIPO Guide, para. 11 *bis* 14.

SOUND RECORDINGS ARE NOT COVERED UNDER THE BERNE CONVENTION

Sound recordings are not included in the definition of the expression “literary and artistic works” laid down in art. 2(1) of the Berne Convention. Nevertheless, they are protected under the TRIPS Agreement and by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (The Rome Convention). But, India is not party to the Rome Convention.

However, art. 9(1) of the Berne Convention gives authors of literary and artistic works the exclusive right of authorizing the reproduction of such works in any manner or form and art. 9(3) specifies that any sound or visual recording shall be considered to be a reproduction.

As a result of the different rights granted to authors and producers of sound recordings, separate rights subsist with respect to: (a) the music and lyrics embodied in a sound recording; (b) the fixation of the performances recorded on it; and (c) the sound recording itself. Someone who wishes to exploit the sound recording in whatever manner including by public performance, broadcasting or communication to the public must, therefore, acquire or clear all these separate rights. Any unauthorized exploitation will be actionable by any individual right owner. This was the situation under the Indian Copyright Act 1957 (prior to the 2012 Act) and under the U.S. Copyright Law. Importantly, when an author authorizes the reproduction of the author’s musical and literary work in a sound recording, the author does not also give a license to the producer of the sound recording to publicly perform, broadcast or communicate to the public the work embodied in the phonogram. Rather, the author retains those separate rights. In addition, to the extent that national law provides the producer of the sound recording with a public performance right, that right is completely independent of, and not subordinate to, the public performance right in the musical composition and lyrics embodied in the recording.

THE OBLIGATIONS OF INDIA UNDER THE TRIPS AGREEMENT

Art. 2 of the TRIPS Agreement imposes an obligation on Members to comply with the substantive provisions of the Berne Convention, namely arts. 1 - 12 and 19, which include all the Berne Convention provisions already referred to above. The obligation to accord national treatment to authors who are nationals of the Berne Convention is laid down in art. 3. The TRIPS Agreement provides for a dispute settlement procedure under the World Trade Organization (WTO) (art. 64). Under this procedure, sanctions may be imposed on a Member, which fails to comply with its obligations under the TRIPS Agreement, including the obligation to comply with the substantive provisions of the Berne Convention. Thus, should the impugned decision be upheld and the law not amended, India could find itself the subject of a complaint filed under the TRIPS dispute settlement procedure and at risk of trade sanctions being imposed.