

IND0037 Alliance For Intellectual Property

Introduction

The Alliance for Intellectual Property is a unique association of 19 organisations representing IP-rich businesses and creators – sectors that continue to grow and outperform the wider economy. Our members include representatives of the audio-visual, music, toy and games, sports rights, branded manufactured goods, publishing, retailing, image, art and design sectors. We share a collective interest in ensuring that Intellectual Property (IP) rights, which deliver such significant benefits to so many individuals across the UK, are recognised by policymakers for the value they deliver, and that a legislative regime exists that enables this value and contribution to be fully realised.

We are delighted to provide a response to the House of Lords International Agreements Select Committee's Inquiry into UK-India Trade Negotiations.

IP and Trade

The UK has one of the best developed and applied IP regimes in the world. Whilst there is always room for improvement in any system, it means that creators and businesses have been able to use that framework to develop exciting and innovative products, designs and content using the latest technology and manufacturing techniques. The advantages of our current system must not be jeopardised as we seek to develop new trading relationships.

It is vital therefore that the protection and promotion of IP is at the heart of UK trade policy, ensuring that everything we create in the UK has the potential to achieve its maximum value and that creators are rewarded for their endeavours. Opportunities provided by any new trade relationships should not threaten the UK's regime, but rather be used to raise standards, where necessary, in the jurisdictions with which we negotiate. This will not only protect and promote British IP but provide opportunities for creators and rights holders worldwide to benefit socially, culturally and economically in the same way that the UK has.

Trade negotiations often focus heavily on tariffs. However, given that tariffs can be reduced by both parties without the need for change in domestic legislation, it is worth underlining that high-value UK digital exports only exist for trade purposes thanks to strong IP legal frameworks. We would welcome the Department ensuring, therefore, that negotiations place as great an emphasis on negotiations around the IP Chapters as those involving tariffs.

Principles for Free Trade Agreements (FTAs)

The Alliance has some high-level principles in relation to IP that we believe should be the basis of any FTA.

Provisions within IP Chapters of future FTAs should promote both ratification and adherence to the terms of the International Treaty provisions for recognition and enforcement of copyright, trade mark, design and other IP rights, which provide the foundations for development of the businesses represented by members of the Alliance.

We therefore want the negotiations to encourage national reform where current practice falls short of standards which UK legislation has already recognised are necessary for the effective development of IP laws, including in the digital environment.

Specifically:

(a) **defending standards**, such as the Berne Convention's Three Step Test for defining the scope of exceptions and limitations to copyright, against moves towards "watered down" or overly vague descriptions that require litigation to interpret and detrimental costs to businesses. In considering such a defence, we must take into account the huge importance of the UK design sector and the central role that IP rights play in allowing designers to contribute to the UK both culturally and economically;

(b) **allowing flexibility** for higher levels of protection to be applied, whilst pushing for new standard levels of protection when international norms have already moved beyond minimum levels established under International Treaty provisions (for example, on the terms of protection for copyright and building on recent UK changes to registered design rights, recognising the further steps needed to bring parity with the current UK system);

(c) **promoting recognition** at the international level of rights, such as the Artists' Resale Right, when International Treaty provisions have yet to be adopted at global level;

(d) **making provision for effective enforcement of rights, including in a digital environment**, by expressly requiring that countries continue to provide for civil liability for secondary infringement, and by promoting the application of systems of good practice developed between established and emerging online intermediaries - particularly those linked to updated provisions for injunctive relief - while avoiding overly prescriptive language that might lock in outmoded aspects of systems for rights owners serving notices on platforms covering notice and take down;

(e) **sustaining the UK's trade mark exhaustion regime**, ensuring that no trade agreement dictates the UK's sovereign ability to decide its exhaustion regime.

India and IP

India has made great strides to modernise its IP legal framework in recent years, which is to be applauded. As India's economy has modernised and become more open, so has its approach to IP issues. We view the discussions on a future trade agreement with India as an opportunity to encourage India to continue this modernisation of its legal framework while finding opportunities to co-operate on measures to reduce infringement and improve efforts in enforcement where the significant challenge lies.

The UK and India have a shared interest in protecting IP. India has many well-loved domestic brands and both countries share a passion for music, cinema, sport, literature and art. Nurturing and growing these and other IP rich sectors should therefore be a shared interest. The UK and India share many common legal concepts and frameworks and therefore dialogue can be conducted from a shared perspective. Though there are some differences between the UK and India's legal frameworks and changes that could be made to improve IP protection in India, the Alliance sees the inclusion of an IP Chapter in any future Free Trade Agreement as a way of finding new ways to forge co-operation between our judiciaries, IP offices, law enforcement bodies and policymakers. This co-operation would be to the benefit of both countries and help support the development and growth of IP rich industries for mutual benefit.

Legal Framework

Statutory licensing

Section 31D of the Indian Copyright Act, 1957 provides an option for statutory licensing for communication of published literary works, musical works and sound recordings to the public, by way of broadcast or by way of performance. By way of explanation, statutory licensing means that owners of copyright works become forced sellers, meaning the full value of their works cannot be exploited as they would through proper commercial negotiations.

In 2016, the Ministry of Commerce and Industry issued a memorandum that said that statutory licensing did not just cover radio and television broadcasting but also internet broadcasting. In 2019 The Mumbai High Court found that the Government's interpretation was incorrect and the Government attempted to provide clarity using secondary legislation. Unfortunately this action has only confused matters further with the result that streaming and other internet services are using the lack of clarity to reduce the amount they pay for content and refusing to pay royalties to certain rights holders, such as music publishers.

We would therefore see as a priority in the negotiations for the UK Government to **urge the Indian Government to withdraw its memorandum of 2016 and issue clear guidelines to limit the scope of statutory licensing to traditional broadcasting.** In addition, the royalties paid by broadcasting organisations are arbitrarily set and **we would like to seek greater transparency for the basis of these low payments.**

Copyright Term

India's term for the protection of Copyright is 60 years after the death of the person who created the work. It is very positive that India's copyright term is longer than that provided for in international treaties (50 years) and is longer than some other countries such as New Zealand. **We have therefore encouraged the Government to use the trade negotiations to urge India to extend its term further to 70 years** as a signal that it would then be viewed as a modern economy alongside the UK, EU, US and in total over 90 countries worldwide that have extended their term of copyright to at least 70 years.

Technical Protection Measures (TPMs)

Technical Protection Measures are crucial in the digital environment in that they help protect content from piracy. Provisions contained within the WIPO Internet Treaties provide for protection for TPMs and their circumvention. It is extremely positive that India has now signed these treaties, however, in relation to the circumvention of TPMs, rights holders have to prove there has been an intention to infringe copyright. This creates a high bar for legal challenges. In addition, the law does not prohibit the manufacture, importation and dealing in devices that facilitate TPM circumvention. We have therefore urged the UK Government to use the trade negotiations **to understand why India has chosen this interpretation of the Internet Treaties and to see whether further reform of these laws in India might be possible.**

No-fault injunctive relief

No-fault injunctive relief has been successfully used in the UK and multiple UK trading partners to reduce online copyright infringement. The Alliance welcomes the fact that India now has such a regime in place, including dynamic orders.

The Alliance believes that with both the UK and India having established no-fault injunctive relief there is an opportunity to include wording that is consistent with the UK Copyright Act Section 97a which would help promote the use of no-fault injunctive relief globally.

Copyright exception for "educational instruction"

The UK publishing industry faces significant issues in India regarding the commercial-scale unauthorised photocopying and reprinting of academic books.

In 2016, the Delhi High Court interpreted the Copyright Act 1957 as allowing for such copying for the preparation of 'course packs' or the compilation of parts of educational text books prescribed by syllabus and the distribution of such course packs to students so long as the activity was justified by the purpose of "educational instruction".

We believe such an interpretation is inconsistent with India's international treaty obligations under TRIPS and the Berne 3-step test and are encouraging the UK Government to ask the Indian Government to clarify the law to confirm expressly that the exception does not extend to the creation of "course packs" for distribution to students nor the photocopying of unlimited extracts of educational books.

Collecting Societies

Indian legislation provides for the constitution of collective management organisations (CMOs) in India. However, this designation is only for a short period of time, creating a disincentive for the investment required to set up a CMO. In addition, it can take significant amounts of time to receive approval – as an example, Phonographic Performance Ltd, a UK collecting society in the music sector has been seeking approval since 2018. We would hope that **dialogue around the trade negotiations could help to unblock some of**

these issues in India and reinforce the importance of transparency and data collection in any agreement.

Artist Resale Right

India's copyright laws provide for an Artist Resale Right, but it has never been fully enacted, so it is unclear who is liable to make payments nor how they are to be distributed. India has a growing art market, for both domestic and UK art. **We hope that UK should use the dialogue around the trade negotiations to seek mutually beneficial ways of fully enacting the Artist Resale Right.**

Camcording in cinemas

Camcording in cinemas has been a significant issue in India. In a very positive development, in 2020 the Indian Government drafted a new law that would make it unlawful to possess an audiovisual recording device to transmit or make a copy of a motion picture (in whole or in part, and whether of the audio or video materials), while it is being performed in a cinema. We believe the **UK Government should use the dialogue around the trade negotiations to welcome this move by the Indian Government and ensure swift and effective implementation.**

Enforcement

Enforcement of IP rights remains challenging in India. One of the reasons for this is the absence of a strong centralised IP enforcement function and the lack of effective interagency co-operation both at a national level and across the 29 states. As an example, criminal copyright infringement falls under a national criminal code, but cybercrime enforcement and proceedings are the responsibility of the individual states. Encouraging India to improve the co-ordination of its enforcement activity would be a positive step and would help to build on the number of positive steps India has taken to improve the enforcement of IP rights, including:

- **Notable enforcement actions in some states:** There have been notable positive efforts in the form of enforcement action against online copyright piracy by the Telangana Intellectual Property Crime Unit (TIPCU) and the Maharashtra Cyber Digital Crime Unit, which has, for example, taken significant steps to suspend domain names being used to infringe IP rights. Similar dedicated units in other states would be welcome.
- **Cell for IPR Promotion and Management ("CIPAM"):** This body aims to co-ordinate enforcement and to increase awareness of the need for better copyright protection and enforcement at the federal level (including India's representation to international organisations). CIPAM has also engaged in training on IPR matters in order to address gaps in expertise and to make IPR enforcement more effective. It has also engaged with select foreign IP offices in connection with international best practices in various fields.
- **Registering of Trademarks:** India has taken great strides to improve its registration process for trademarks, with online applications having simplified

the process immeasurably. This means registration can take a few months rather than a few years as it used to. However, when challenges are made litigation can take too long, particularly in simple and unambiguous cases. **We believe greater co-operation between the UK and India's judiciary and between our IP offices could further reduce the friction in India's system.**

Challenges do remain, however.

Counterfeiting

India remains a problem in relation to counterfeiting. Despite ongoing improvements huge challenges continue to exist for brand owners.

Despite IP enforcement improving in recent years, it is still relatively ineffective in dealing with specific issues such as the growth in online sales of fake goods, through illicit websites and rogue platforms.

The OECD's recent report on trends in counterfeiting confirms that India remains in the top 25 (24th) provenance economies in terms of their propensity to export counterfeit goods. Within this it is second on the list of economies for counterfeit perfumes and cosmetics and 13th on the list of source countries for toys and games.

The Authentication Solution Providers' Association (ASPA) have also reported that counterfeiting increased by almost 17% in 2020 compared to 2019 and that the Indian economy loses over \$13bn every year.

The top 10 sectors affected by counterfeiting include fast-moving consumer goods (FMCG), which saw a 63% increase in cases, alcohol, pharmaceuticals, agriculture, infrastructure, automotive, tobacco, fashion and apparel. However, more domestic household products have also been seized such as hygiene articles and foodstuffs.

The increasing ruthlessness of counterfeiters have been further exemplified during the COVID19 pandemic when fake hand sanitizers, masks and personal protective equipment (PPE) kits were found to be on the increase.

Unfortunately, many Courts in India continue to be lax in providing sufficient deterrent penalties. One high-ranking Chief Justice of the High Court has openly commented that "there is clear lack of judicial sensitivity and a proactive approach to preventing recurrence". **We would therefore encourage the UK to use the trade negotiations to encourage greater co-operation between the UK and Indian judiciary on how to use the court system to create disincentives to IP infringement.**

Although IP enforcement departments do exist in certain regions, they are often under-resourced and have stretched responsibilities. Nevertheless, in some territories these units have improved the local situation. Regrettably, in other areas there is a scarcity of enforcement resources focused on IP crime and a clear lack of knowledge and techniques to deal with the problems

This problem is reflected in the fact that states such as Uttar Pradesh, Rajasthan, Madhya Pradesh, Jharkhand, Haryana, Bihar, Punjab, West Bengal, Maharashtra, Odisha, Delhi, Chhattisgarh and Karnataka have very weak response rates to counterfeiting and have, therefore, witnessed increases in cases.

The lack of a national Government strategy in India to coordinate enforcement tactics on the ground remains an issue and **we hope the UK Government will use the trade negotiations to find ways to co-operate in this area to support India in the development of such a strategy.**

Copyright

Safe harbour provisions

Under the Indian Copyright Act and its Information Technology act, there are limitations on the liability of Internet Service Providers (ISPs) in relation to copyright infringement. These laws mean that the safe harbour is not limited to genuinely neutral and passive ISPs, does not prevent the abuse of the safe harbour by deliberately infringing services and means rights holders have to obtain a court injunction to ask a service to take down infringing content. **We hope the UK Government will urge the Indian Government to give clarity to these laws.**

Proposed Decriminalization of Copyright Infringement Offenses

In June 2020, as part of a package of reforms to its copyright laws, the Indian Government suggested that it might decriminalize copyright infringement offences in the Copyright Act 1957. This would remove a key deterrent to infringement and run counter to India's TRIPS obligations. **We believe the UK Government should urge India to abandon this idea.**