Administration
MBE 148/45 Glenferrie Road
Malvern, Vic 3144
Phone: 03 9507 2315
Fax: 03 9507 2316
Email: admin@mca.org.au
Website: www.mca.org.au
ABN 85 070 619 608
Executive Director
Tel: +61 (0)2 9251 3816
Fax: +61 (0)2 9251 3817
Email: mca@mca.org.au
Music. Play for Life campaign
Tel: 02) 4454 3887 or 0439 022 257
Email: tina.mpfl@mca.org.au
Website: www.musicplayforlife.org
Australia's representative to the International Music Council

Music Council of Australia

Australia-India Comprehensive Economic Cooperation Agreement
Free Trade Agreement Division
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221
September 6, 2011

By email: indiafta@dfat.gov.au

Dear Sir/Madam

The Music Council of Australia appreciates the opportunity to make a submission to the Department of Foreign Affairs and Trade regarding the forthcoming Comprehensive Economic Cooperation Agreement between India and Australia.

The Music Council is the national peak organisation for the music sector. Its membership of 50 is drawn from national organisations and distinguished individuals from across the entire music sector. It seeks to advance music and musical life in Australia by providing information, undertaking research, mounting advocacy and organising projects. It is the Australian affiliate to the International Music Council, based on the UNESCO campus in Paris.

The Music Council has a long standing interest in free trade agreements and takes the view that cultural sovereignty is effectively a human right – that it is important for all societies to hear their own stories, see representations of their own lived experience, listen to the music that expresses their spirit. Axiomatically, where considered appropriate, governments should be free to support their cultural sector or parts thereof in the event of systemic market failure. Equally important is the role that culture plays at the local, national and international level, in nation building and in its bridge-making role in international affairs, in reflecting identity, expressing that identity to ourselves and abroad and in hearing and seeing the cultural expression of other societies.

In 2009 Australia became a party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This Convention, as the Office for the Arts[1] explains:

> promotes respect and dialogue between cultures and recognises the importance of protecting the diversity of cultural expressions that exist around the world.
>
> The Convention affirms the right of state parties to protect and promote a diversity of cultural expressions. It recognises the value of cultural goods, services and activities as carriers of meaning and identity and their integral role in sustainable cultural and economic development.
>
> The Convention also promotes international dialogue and cooperation in protecting cultural expressions, particularly those in immediate danger or at risk of extinction.

The Convention is not an expression of cultural protectionism, rather, as the Commonwealth Foundation[2] explains:

> It tackles trade issues within the cultural sector. Asserting the sovereign rights of states to challenge conventional wisdom on trade liberalization by adopting strong cultural policies to protect their cultural expressions, the Convention proposes a new framework of guiding norms which prioritises cultural diversity and human development, while simultaneously appreciating the economic value of the creative industries and cultural sector.[3]

Key objectives of the Convention[4] include:

> (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;
>
> (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
>
> (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples.

The Convention reflects Australia's position in regard to the negotiation of free trade agreements since the time of the General Agreement on Tariffs and Trade (GATT) when then Prime Minister Menzies decided Australia would make no commitments in respect of its cultural industries, in particular in respect of television. When it was first negotiated, the GATT focused on international trade in goods and put in place the principles of free trade that endure today – the principles of most-favoured nation, national treatment, transparency, no extension of existing preferential trading arrangements and a

---

[1] Office for the Arts, Department of Prime Minister and Cabinet, Australian Government, *Cultural Diversity*, viewed 26 July 2011 http://www.arts.gov.au/topics/cultural-diversity

[2] Mark Nowottny, *Putting Culture First: Commonwealth perspectives on culture and development*, Commonwealth Foundation, p. 24.

[3] Mark Nowottny, *Putting Culture First: Commonwealth perspectives on culture and development*, Commonwealth Foundation, p. 24.

[4] UNESCO, 2005, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Paris, Article 1, page 3, viewed 19 July 2011 http://unesdoc.unesco.org/images/0014/001429/142919e.pdf.

commitment to ongoing liberalisation. Two sectors emerged as contentious – agriculture and audiovisual services – and they remain so today.

The GATT navigated the conflicting desires of countries pursuing free trade for cinematographic works and those placing a high value on indigenous production and the right to foster indigenous cultural expression. At the time, the champions for cinema to be treated differently from other goods were the United Kingdom and France. The result was a compromise. Members were allowed to introduce or continue screen quotas and subsidise their local industry but tariffs and restrictions on imported films were not allowed. However, importantly, the GATT negotiators did not compromise the rights of member states to determine their own cultural policy in new media.

The General Agreement on Trade in Services (GATS) entered into force in 1995. It provides for the extension of the multilateral trading system to services, covering four modes of supply – cross border trade, consumption abroad, commercial presence and the presence of natural persons. A positive listing agreement, countries are able to decide on a sector by sector basis what they wish to liberalise and which modes of supply they wish to cover. Australia has not made any commitments in GATS that would compromise the government's ability to support and regulate Australia's cultural industries in any manner it sees fit now and in the future.

Foreign ownership rules were introduced in Australia concurrent with the advent of television in 1956. At the time the legislation was introduced, Prime Minister Menzies questioned whether "the most intimate form of propaganda known to modern science" should be in the hands of "people who do not belong to this country"[5]. Menzies' concerns about television were reiterated in the 1960s when GATT negotiations included moves by the United States for liberalisation of television. The Australian delegation was instructed that Australia "would prefer to retain complete freedom of action and not enter into any commitment on the matter, particularly at a time when the television industry in Australia is in its infancy and the lines of its development are uncertain". By making no commitments in the audiovisual sector in the GATS negotiations, the Government retained its capacity to give effect to its cultural and broadcasting policy. Australia also took out a Most Favoured Nation exemption to quarantine film co-production agreements and one to respond to any unreasonable and unfair unilateral actions in the audiovisual subsector.

Menzies' decisions were prescient and served to protect Australia's cultural industries for half a century with bipartisan support that concessions would not be made in respect of culture in the context of trade agreements.

As the government explained in Geneva in July 2001 in respect of the General Agreement on Trade in Services, again a multilateral positive list agreement:

> Australia has long recognised the essential role of creative artists and cultural organisations in reflecting the intrinsic values and characteristics of our society, and is committed to sustaining our cultural policy objectives within the context of multilateral trade agreements.[6]

---

[5] Cited in the Australian Broadcasting Authority's Submission to the Productivity Commission Review of Broadcasting, page 15, and cited in Productivity Commission, 2000, *Report on Broadcasting*, page 333, viewed 19 July 2011 http://www.pc.gov.au/__data/assets/pdf_file/0003/26598/broadcst.pdf.

[6] Australian Intervention on Negotiating Proposal on Audiovisual Services, CTS Special Session, July 2001, Geneva

During the last decade Australia embarked on a raft of bilateral and plurilateral trade agreements. An early agreement was the Singapore Australia Free Trade Agreement which included a comprehensive reservation as follows[7]:

> Australia reserves the right to adopt or maintain any measure with respect to:
> - the creative arts, cultural heritage and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services;
> - broadcasting and audiovisual services, including measures with respect to planning, licensing and spectrum management, and including:
> . services offered in Australia;
> . international services originating from Australia.

Creative arts and cultural heritage are defined as follows[8]:

> 'Creative arts' include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film, television, video, radio, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid arts work which uses new technologies to transcend discrete artform divisions.
> 'Cultural heritage' includes: ethnological, archaeological, historical, literary, artistic, scientific or technological moveable or built heritage, including the collections which are documented, preserved and exhibited by museums, galleries, libraries, archives and other heritage collecting institutions.

Australia's position was again articulated in the *Joint study into the costs and benefits of trade and investment liberalisation between Australia and Japan* which was released on 20 April 2005. That study identified those services activities where Australia has not made commitments in the GATS or has listed limitations to its GATS market access and national treatment obligations and, in respect of Australia's cultural industries, noted:

> Australia reserves the right to adopt or maintain any measure with respect to the creative arts, cultural heritage and other cultural industries, including broadcasting, film and other audiovisual services, entertainment services and libraries, archives, museums and other cultural services (*Broadcasting Services Act 1992, Radiocommunications Act 1992*). Specific measures currently in place include local content quotas for television, subsidies and favourable tax treatment for Australian films, and film co-production arrangements with selected countries. Australia has made no specific commitments, and has MFN exemptions, for audiovisual services in GATS.[9]

Regrettably, the joint study was released the year after the conclusion of negotiations for the Australia United States Free Trade Agreement in which considerable concessions were granted to the United States that compromise Australia's capacity to adopt or maintain any measure it considers appropriate to support its cultural sector. The only other time that

---

[7] Singapore Australia Free Trade Agreement, Annex -II(A)-12, viewed 19 July 2011 http://www.dfat.gov.au/fta/safta/annex_4_ii_a.pdf.
[8] Singapore Australia Free Trade Agreement, Annex -II(A)-12, viewed 19 July 2011 http://www.dfat.gov.au/fta/safta/annex_4_ii_a.pdf.

[9] Department of Foreign Affairs and Trade, 2005, *Joint study into the costs and benefits of trade and investment liberalisation between Australia and Japan*, DFAT, page 69, accessed 19 July 2011 http://www.dfat.gov.au/geo/japan/tef-study/chapter4-1-2.pdf.

occurred arose from the drafting of the Closer Economic Relations Agreement with New Zealand, an inadvertent consequence of which has been the High Court finding that New Zealand programs must be treated as eligible content for the purposes of the Australian Content Standard that applies in respect of commercial free to air television programs.

However, the Music Council understands that bipartisan support remains for Australia's long standing approach to trade agreements in respect of its cultural industries and assumes that will be the case with respect to the forthcoming agreement with India. In the event the agreement is a positive list agreement no concessions should be granted and in the event it is a negative list agreement a reservation along the lines of the one contained in the Singapore Australia Free Trade Agreement should be negotiated.

The Music Council considers that this position is also consistent with Australia's obligations under the UNESCO Convention, which India ratified in 2006[10] three years ahead of Australia.

As the *Australia – India Joint Free Trade Agreement (FTA) Feasibility Study* observes, 'Australia and India both have vibrant audiovisual sectors'[11] with the Joint Study Group responsible for the feasibility study finding 'that there is further potential in services trade between India and Australia' including in audiovisual services[12]. Nonetheless, it is difficult to think of an entertainment industry anywhere in the world that has developed along such dramatically different lines to the Australian industry than the Indian industry.

Almost uniquely for a thriving entertainment industry, the Indian industry has developed and grown in the absence of government assistance mechanisms. For almost a century, the film and television industries in India and the United States were unique internationally in their independence from government support mechanisms. However, in the mid 1990s, the film and television industry in the United States grew increasingly 'footloose' seeking government assistance for both television programs and feature films from, initially and principally, overseas governments keen to attract production to their shores and subsequently from a number of American state governments. Government subsidies vary from payroll tax exemptions to 'offsets' ranging between 15 per cent to as much as 40 per cent of production budgets. Consequently, today the Indian film industry is unique in its capacity to thrive and prosper in the absence of government subsidy or other forms of government support.

Indeed, the one thing that is common to both the Australian and Indian entertainment industries is the toll taken by piracy, impacting far more severely on the Indian industry than the Australian industry.

Both the Indian and Australian entertainment industries are open markets. In the case of Australia, overseas material predominates and, even on free to air commercial television

---

[10] UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Paris, 20 October 2005, accessed 19 July 2011 http://portal.unesco.org/la/convention.asp?KO=31038&language=E&order=alpha.

[11] Department of Foreign Affairs and Trade, Australian Government and Ministry of Commerce & Industry, Department of Commerce, Government of India, 2010, *Australia – India Joint Free Trade Agreement (FTA) Feasibility Study,* Commonwealth of Australia, page 75, accessed 19 July 2011 http://www.dfat.gov.au/fta/aifta/Australia-India-Joint-FTA-Feasibility-Study.pdf.

[12] Department of Foreign Affairs and Trade, Australian Government and Ministry of Commerce & Industry, Department of Commerce, Government of India, 2010, *Australia – India Joint Free Trade Agreement (FTA) Feasibility Study,* Commonwealth of Australia, page 106, viewed 19 July 2011 http://www.dfat.gov.au/fta/aifta/Australia-India-Joint-FTA-Feasibility-Study.pdf.

and radio where an overall local content quota of 55 per cent and up to 25 per cent respectively applies, the television and radio market remain among the most open to overseas programming of any market internationally. Although, particularly in the last decade, overseas material has made some inroads into the Indian market, local content continues to predominate.

The shape of the entertainment industries in India and Australia reflect the historical, social, cultural, demographic, economic, language and religious differences between the two countries notwithstanding the fact that both were once British colonies and both share English as a national language.

As DFAT is aware of the shape of the Australian industry and as has been articulated in detail in previous Music Council submissions regarding other trade agreements, this submission seeks to give some small insight into the huge Indian industry and hopefully highlight how dramatically different it is from Australia's. The mere fact that India's domestic market is 1.18 billion (CIA estimate 2011) compared with Australia's 23 million indicates that notwithstanding differences in GDP per capita of US$3,200 and US$41,000 respectively (CIA estimate 2010)[13]

Although neither the constitution nor the law mandates a national language, in India Hindi and English are de jure the official languages. However, the constitution specifies that a state of India can officially adopt one or more languages in use in the state or Hindi and English for official purposes. The language diversity alone, means the music market in India is dramatically different from that in Australia.

Music Language Distributions[14]

Hindi	65%
Tamil	7%
Telugu	9%
Kannada	3%
Marathi	3%
Others	12%
International	1%

[13] Central Intelligence Agency, 2011, World Fact Book, CIA, accessed 30 August 2011 https://www.cia.gov/library/publications/the-world-factbook/geos/as.html and https://www.cia.gov/library/publications/the-world-factbook/geos/in.html.
[14] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, Chart 6.3, page 83, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

This language diversity is also evident in films:

Language-wise share of number of films released[15]

Hindi	18%
Telugu	17%
Tamil	15%
Kannada	14%
Marathi	8%
Malayalam	7%
Bengali	6%
Bhojpuri	5%
Gujarati	5%
Others	5%

The makeup of the physical sales of music demonstrates another significant difference between the two markets. Unlike in Australia, in India film score music dominates the market followed by devotional music.

Genre-wise Distribution of Overall Physical Sales (Music)[16]

Films	62%
Devotional/Spiritual	12%
Ghazals	1%
Pop/Rock	8%
Classical	5%
Others	11%
Folk	1%

As everyone is aware, Indian films are startlingly and uniquely different to the genres produced elsewhere globally. Neil Spencer explains:

> Law number one [of filmmaking] is the simplest and, says Ashutosh Gowariker, the young director of *Lagaan*, is taught to all Indians in their infancy. 'Our mothers lean over us in the cot,' he tells me with a chuckle, 'and whispers in our ears, "All movies shall have songs and dances."'[17]

In terms of output the Indian entertainment industry is the largest entertainment industry in the world and has been the industry most impervious to the output of America's entertainment industry. As the co-writer of *Mission Kashmir* and *Move 5* (aka *Chess*) (both directed by Vidhu Vinod Chopra), Suketu Mehta observed in 2004:

> The Indian entertainment industry at the beginning of the twenty-first century is worth three and a half billion dollars, a minor part of the global 300 billion dollar entertainment industry. But it is the world's biggest movie industry when it comes to production and viewership. The 1,000 feature films and 40,000 hours of TV programming and 5,000 music titles that the country produces are exported to

---

[15] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, Chart 4.7, page 62, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[16] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, Chart 6.1, page 83, accessed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[17] Spencer N. 2002, 'Salaam Bombay' in *The Observer*, 7 April 2002, accessed 24 July 2010 http://observer.guardian.co.uk/life/story/0,6903,679966,00.html.

seventy countries. Every day fourteen million Indians see a movie in one of 13,000 theatres; worldwide, a billion more people a year buy tickets to Indian movies than to Hollywood ones. Television is galloping in; the country has sixty million homes with TV, of which twenty-eight million are cabled, bringing to city and hamlet alike a choice of around a hundred channels. . .

India is one of the few territories in which Hollywood has been unable to make more than a dent; Hollywood films make up barely five per cent of the country's market. Resourceful saboteurs, the Hindi moviemakers. When every other country's cinema had fallen before Hollywood, India met Hollywood the Hindu way. It welcomed it, swallowed it whole and regurgitated it. What went in blended with everything that had existed before and came back out with ten new heads.[18]

Since 2004, television continued 'galloping in' apace. By 2009, of India's 207 million households, 124 million had television, a penetration of 60 per cent.[19] Direct-to-home (DTH) satellite television services, with their capacity to offer digital signal clarity, are now playing a pivotal role in the growth of television, 'rapidly progressing in rural India as it boosted its penetration to 64% in 2010 as compared to 49% in 2009 and 34% in 2008'[20]. Indeed, television is changing dramatically and very quickly. In 2010, India had some 250 television news channels, more than any other country anywhere, representing half of all channels. However, news channels over the past two years have started to lose viewers to general entertainment channels.

While film has long been India's preferred form of entertainment, as the country has developed, particularly in the last decade, television is making huge inroads, as the figures above indicate.

Viewership Share Across Genre: 2009 and 2008[21]

Channel	2009	2008
Hindi general entertainment channels	26.2	22.5
Regional general entertainment channels	24.2	25.0
Hindi movies	11.7	11.5
Cable	7.9	9.3
Kids	5.5	5.1
Regional movies	4.0	4.7
Regional news	3.7	3.2
Hindi news	3.4	4.6
Sports	2.8	3.2
Regional music	2.4	2.1
Terrestrial	1.7	1.9
Music	1.7	1.9
Others	4.3	4.2

[18] Mehta S. 2004, *Maximum City – Bombay Lost and Found*, Random House, New York, page 321.
[19] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, page 24, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.
[20] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, page 25, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.
[21] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, Chart 2.19, page 30, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

Major music channels all have a mix of music/non-music content. In 2009, the split for selected channels was as follows[22]:

Zing! (Zee Music)	60:40 (music/non-music)
Channel [V]	65:35 (music/non-music)
MTV	30:70 (music/non-music)
VH1	50:50 (music/non-music)

Despite their popularity, the music channel market leader 9X M took a large hit with its gross rating points plunging from 33.6 in 2008 to 16.8 in 2009, whilst nonetheless clinging to its market leader status. Conversely, others increased their position over the same period with both Music India and B4U Music each moving from 3.4 to 6.7[23].

Popular music platforms like iPod are revolutionizing the way consumers access their music of choice, as is the case elsewhere, and music channels are responding by changing their mix of programs, with many rebranding themselves during 2009. Additionally, the cost for broadcasters of acquiring music has increased significantly 'up to Rs. 2,000-4,000 per song, per airing, from Rs. 500-1,000 [a] few years back'[24] to the distinct advantage of music companies.

Regional general entertainment channels are booming, increasing from 114 in 2008 to 135 in 2009 accompanied by an increasing share of advertising spending. Many are also going global. Sixteen Indian channels now operate in the Middle East and the 'Sun Network's channels are available in 27 countries from US, Europe to New Zealand and Malaysia'[25].

Overall, 2009 was an eventful one for the Indian television industry with the first half affected by the global financial crisis and the second half demonstrating recovery and an acceleration in growth. Advertising rates dropped following the financial crisis but volume of advertising increased by 31 per cent. DTH grew from nine million to 14 million between 2008 and 2009. Regional channels gained in prominence, driven by low production costs and the desire of advertisers to reach niche regional language audiences, and competition in the Hindi general entertainment channel sector increased.

As indicated above, the music industry in India is volatile but its future is looking positive. PricewaterhouseCoopers made the following assessment in 2010[26]:

---

[22] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, Table 2.24, page 34, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[23] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, Table 2.25, page 34, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[24] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, page 35, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[25] PricewaterhouseCoopers, 2010 *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, page 32, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[26] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, page 80, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

	2009	2014
Market size	USD 0.16 billion	USD 0.55 billion
Physical sales	USD 0.08 billion	USD 0.05 billion
Mobile VAS (value added services)	USD 0.04 billion	USD 0.40 billion

Music market consists of consumer spending on:

- Physical sales: Includes revenues from cassettes and CDs through distributors and retailers as well as modern retail and online sales/home delivery.
- Mobile VAS: Sale of music in the form of various products like ring tones, songs, Caller Ring Back Tone (CRBT) and others that [happen] through the mobile.
- Radio Broadcast: Radio stations including government's All India Radio, private FM stations and satellite radio play music from various sources; they pay royalty [sic] for the content played, a part of which comes to the music company.
- Online Download: Sale of music through internet download. This does not include pirated or illegal download.
- Public Performance: Royalty paid by event organizers for the use of music in their events and at public places.

While increasing mobile telephony penetration and the advent of 2G and 3G along with portable music players have boosted digital music, physical sales continue to plummet largely due to piracy. Some players, like Nokia's Ovi store, are moving to take advantage of the advent of digital to offer free music online, offerings that also come digital rights management free. While mobile VAS music revenues are soaring, principally dominated by CRBT downloads, it is anticipated that demand for live streaming will increase in coming years.

Music royalties have long been a bone of contention in respect of public performance, a rapidly growing sector of the music industry, and particularly acute in radio. According to PricewaterhouseCoopers[27]:

> Music composers feel that they do not get their share of the royalty revenues of the music they have composed. To amend this, the central Government has proposed an amendment to give independent rights to authors of literary and musical works in cinematograph films. This is being done to ensure that music composers retain their right to receive royalties and the benefits of copyright societies. It also ensures that composers receive royalty [sic] when their music is commercially exploited.

A successful resolution to the struggle over royalties would inject welcome and appropriate revenue into the music industry.

The structure of the Indian film industry has for most of its existence been remarkably different from that of the Australian industry. In 2005, PricewaterhouseCoopers and FICCI[28] described, somewhat quaintly, the industry in the following terms:

---

[27] PricewaterhouseCoopers, 2010, *Indian entertainment and media outlook 2010*, PricewaterhouseCoopers, page 85, viewed 23 July 2011 http://www.pwc.com/gx/en/entertainment-media/pdf/PwC_India_EM_Outlook_2010.pdf.

[28] PricewaterhouseCoopers & FICCI, March 2005, *The Indian Entertainment Industry – An Unfolding Opportunity*, PWC & FICCI, page 25.

> Though the segment has primarily been in the hands of unorganized sector till late, several development [sic] in terms of corporatization and other initiatives have changed the face of the film industry.

This oblique language refers to the fact that, despite its size, the film industry was not granted industry status by the Ministry of Industry until 2000. Dubbed 'corporatisation', being afforded industry status led to substantial changes. In the absence of industry status throughout the 20th century, access to legitimate finance was difficult. Many production companies were family businesses. Some producers were able to self-finance productions but many others were forced to turn to other sources. Suketu Mehta[29] described film financing in Bombay:

> Most Bollywood productions do not get bank loans, they are funded privately. The banks do not understand or trust Bollywood. The funds required for a production are huge, and a family in the industry may be working on several projects. The time between investment and return can be years if the film doesn't do well. Who would have that amount of cash lying around? Only the underworld. The gangs are very happy to see black money turn into Technicolor dreams. A hit film can bring in a fourfold return on investment within the first four weeks of its release. So for the underworld, investing in films is one of the quickest ways to get a return on illegal investment. Without underworld financing, the Hindi film industry would collapse overnight.

The UK Film Council suggests interest rates on private film finance during the 20th century ranged between 36 and 48 per cent, compared with the 16 per cent charged by the Industrial Development Bank of India (IDBI)[30].

However, as Malini Menon[31] observed in 2005, industry status changed the way the industry operates:

> In the last five to six years, a quiet revolution has been sweeping the film industry. The journey to corporatization began post-2000, when industry status was given to Bollywood. Following this, funding from financial institutions like IDBI and banks began to trickle into the showbiz kitty in 2001-02.

With bank financing, flowed the need for greater accountability, including written contracts – almost entirely absent in the industry before 2000 – and better compliance with a raft of relevant legislation. The impact has been widespread and, given the predominant position of film music in the music sector, has had beneficial outcomes in the music sector as well as the film sector.

Another matter that needs highlighting is the difference between the intellectual rights regimes in India and Australia. As the United States Office of the Trade Representative 2010 Special 301 Report[32] observes:

---

[29] Mehta, S. 2004, *Maximum city – Bombay Lost and Found*, Random House, New York, page 387.

[30] Vir, P. Woodward J. & Watson N, April 2002, *The Indian Media and Entertainment Industry, A Report based on a UK Film Council Fact Finding Visit to India*, UK Film Council, page 4.

[31] Menon, M. 4 April 2005, *Film industry yet to become marketing savvy*, exchange4media.com, FICCI FRAMES, page 2.

[32] Office of the United States Trade Representive, 2010, *2010 Special 301 Report*, USTR, accessed 29 August 2011 http://www.mpaa.org/Resources/a12d0045-7f7b-4c46-9264-814be5855cd9.pdf.

> India will remain on the Priority Watch List in 2010. India continues to make gradual progress on efforts to improve its legislative, administrative, and enforcement infrastructure for IPR. India has made incremental improvements on enforcement, and its IP offices continued to pursue promising modernization efforts … Some industries report improved engagement and commitment from enforcement officials on key enforcement challenges such as optical disc and book piracy. However, concerns remain over India's inadequate legal framework and ineffective enforcement. Piracy and counterfeiting … remains widespread and India's enforcement regime remains ineffective at addressing this problem. Amendments are needed to bring India's copyright law in line with international standards, including by implementing the provisions of the WIPO Internet Treaties. Additionally, a law designed to address the unauthorized manufacture and distribution of optical discs remains in draft form and should be enacted in the near term … The United States encourages India to improve its criminal enforcement regime by providing for expeditious judicial disposition of IPR infringement cases as well as deterrent sentences, and to change the perception that IPR offenses are low priority crimes. The United States urges India to strengthen its IPR regime and will continue to work with India on these issues in the coming year.

The International Intellectual Property Alliance estimates the level of piracy for movies in India at 80 per cent[33]. Despite this depressing fact, and despite many pundits pegging India as the fourth largest site for intellectual property piracy, nonetheless, as the World Intellectual Property Organisation (WIPO)[34] explains, in some, albeit few, countries that dominate their own domestic markets there is some light at the end of the tunnel, noting '[l]ocal firms are much more likely to aggressively compete for audiences on price and services – the domestic market is their market.' The WIPO report explains further:

> The growth of digital piracy since the mid-1990s has undermined a wide range of media business models, but it has also created, in many cases for the first time, affordable access to software and recorded media. In our view, the most important question is not whether stronger enforcement can stem this tide and preserve the existing price and market structure — our studies offer no reassurance on this front — but rather whether stable cultural and business models can emerge at the low end of these media markets, capable of addressing the next several billion media consumers. The present paper provide [sic] glimpses of this reinvention as costs of production and distribution decline, and as producers and distributors compete and innovate.
>
> The factor common to these new models, our work suggests, is neither strong enforcement nor the innovative use of digital distribution, but rather the presence of firms in national markets that actively compete on price and services for local audiences. Such competition is endemic in some media sectors in the United States of America and Europe, where digital distribution is reshaping media access around lower price points. It is widespread in India, where large domestic film and music industries dominate the domestic market, set prices to attract mass audiences, and in some cases compete directly with pirate distribution.

---

[33] Karaganis, J. 2010, *Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior*, Advisory Committee on Enforcement, WIPO, page 4, accessed 29 August 2011 http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_6/wipo_ace_6_5.pdf.

[34] Karaganis, J. 2010, *Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior*, Advisory Committee on Enforcement, WIPO, page 4, accessed 29 August 2011 http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_6/wipo_ace_6_5.pdf.

However, it is early days yet and the light is at the end of a very long tunnel. The International Intellectual Property Alliance[35] sums up the entertainment industry in India at present as follows:

> India has the potential to be a leading market for the creative industries – both foreign and domestic. The country produces the greatest number of films in the world (1,288 full-length feature films, and a staggering 2,961 films overall), boasts a creative and diverse music market, a prolific publishing industry (70,000 titles in 2009), and a vibrant software market. Key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. However, piracy stifles the market and keeps India's creative industries from reaching their potential. Nearly two out of every three software applications is unlicensed. The legitimate music market shrank over 23 percent between 2006 and 2009, according to the Indian music industry group, IMI. Physical piracy displaces legitimate sales. Illegal camcording of movies off the screens in India and pay TV theft rob creators of their due …Increased internet access and mobile penetration translate to growth in illegal downloads as well as mobile device piracy allowing rampant digital piracy of copyright materials.

In Summary

Whilst both India and Australia have vibrant cultural sectors, India's cultural sector dominates its domestic market whereas Australia's does not. Australia's cultural sector benefits from and, in some sectors, is dependent upon government subsidy and other forms of government intervention such as legislated quotas. India's does not. Additionally, the Indian industry's financial and regulatory independence of government may at some point lead it to attempt to insist on a similar independence in its trading partners as the United States attempted to do in the negotiations for the Australia United States Free Trade Agreement. As is the case with the American market, only small inroads have been made into the Indian market by foreign product. Overseas product is not excluded by government-introduced barriers but rather by indifference to overseas product on the part of distributors and broadcasters and, possibly, audiences. The Australia-India audiovisual and cultural balance of trade already heavily favours India, albeit audiences largely found within the Indian diaspora here.

These substantial differences mean that Australia, in accordance with long-standing policy and having regard to its obligations under the UNESCO Convention, must ensure that the drafting of a Comprehensive Economic Cooperation Agreement between India and Australia quarantines Australia's right to support its cultural sector and maintains the right to make any interventions it considers appropriate to address market failure now and in the future. An explicit and comprehensive statement of cultural sovereignty is needed in any negative list agreement with India. As noted above, the Singapore Australia Free Trade Agreement offers an appropriate and robust precedent for the drafting of a cultural reservation. In any positive list agreement with India, consistent with GATS, no commitments should be made that could at any time compromise Australia's capacity to support its cultural sector in any manner considered appropriate by government now and in the future.

---

[35] International Intellectual Property Alliance, 2011, *2011 Special 301 Report on Copyright Protection and Enforcement: India*, IIPA, page 1, accessed 27 August 2011 http://www.iipa.com/rbc/2011/2011SPEC301INDIA.pdf.

The Music Council hopes that this outline demonstrates clearly the great differences that distinguish the sectors in the two countries. To compare the vibrancy of the Indian industry with Australia's is similar to comparing Australia's music industry to that in the Cook Islands or Samoa. The latter are successful within their own context but it is not surprising that neither has produced an international music phenomenon like say Kylie Minogue. There is no market failure in India while Australia is confronted with market failure and so is to a significant extent reliant on the interventions that our government can make. Kylie Minogue's career is in no small part due to Australian content quotas on television and radio that quarantine the space to afford young performers the opportunity to demonstrate and develop their capacity and talent.

Thank you again for the opportunity to make this submission. Should you require any further information or explanation, we would be pleased to assist.

Yours sincerely

Dr Richard Letts AM
Executive Director