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10th February, 2020

To,

Dr. Shashi Tharoor,
Member of Parliament,
Chairperson, Department Related Parliamentary
Standing Committee on Information Technology,
97, Lodhi Estate,
New Delhi - 110003

Subject: RULE 3(9) OF THE DRAFT INFORMATION TECHNOLOGY [INTERMEDIARIES GUIDELINES (AMENDMENT) RULES] 2018

Dear Sir,

The Ministry of Electronics and Information Technology (MEITY) issued certain amendments vide Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018.

We, the Indian Music Industry ("IMI"), welcome the opportunity to comment on the proposed rules, more specifically on Rule 3(9) of the proposed rules. IMI represents the business and trade interests of the Indian recorded music companies on a pan-India basis. IMI is registered under the West Bengal Societies Registration Act, 1961. IMI is affiliated to IFPI, the association representing the recorded music industry worldwide.

Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018

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Regd. Office : BF-170, Sector-1, Salt Lake City, Kolkata - 700 064.

Rule 3(9): *The Intermediary shall deploy technology based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful information or content*

IMI Position:

IMI welcomes the proposed amendment and suggests the revision as provided below:
The Intermediary shall deploy technology based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful ***and/or infringing*** *information or content.*

Rationale:
Section 51 of the Copyright Act, 1957 consists of a provision for secondary infringement under Section 51(a)(ii) whereby copyright is deemed to be infringed when any person without a license granted by the owner permits for profit any place to be used for the communication of work to the public where such communication constitutes of infringement of the copyright in the work, unless such person was not aware and had no reasonable ground to believe that such communication to public would be an infringement of copyright.

On the other hand, Section 79 of the Information Technology Act grants to a safe harbour to such persons unless the person fails to disable access or remove such infringing content upon actual knowledge or notification.

Intermediaries have been using the aforementioned section to evade their liability by arguing that they should be insulated from liability for the infringing material towards copyright owners, by virtue of being mere facilitators of user-upload activities and claiming that there are major challenges in identifying the nature of the material being posted. They further demand such rightful owners to provide an actual list of URLs/weblinks to enable removal/disable access to such infringing content. With the rapid growth of technology and the increasing number of digital platforms primarily driven by hosting user generated content such as Facebook, Twitter, YouTube, Instagram, Tik Tok, Dailymotion, etc. the number of such URLs/weblinks would probably run into billions and there is no practical way for the owner to actually trace each such URL/weblink. On the other hand, such services

earn revenues running into thousands of crores by displaying advertisements on such infringing content, causing undue monetary loss and disadvantage to the authorised owner of copyright.

The internet, its intermediaries, and its standard business models are rapidly evolving. For instance, intermediaries that once qualified as passive pipelines of information, now actively track, manage, and control the users, data and content on their platforms. Thus, there is a need for outdated safe harbour provisions and exceptions that shield internet intermediaries from liability to be updated.

Record labels make large financial investments and take upfront risks, particularly for emerging artists. These risks encompass advance artist payments, funding of recording costs, music video production, deficit funding of artist touring activities, and marketing and promotion. While overall music consumption in India has never been higher[1], payments to those who create it i.e. record labels have not kept pace. Notably, video streaming platforms, especially those which have a user-generated content model, host copyrighted material on their websites/apps to monetise content generated by creators. Such platforms argue that they should be insulated from liability for the infringing material, owing to their predominantly user-generated nature; by virtue of being mere facilitators of user-upload activities and claiming that there are major challenges in identifying the nature of the material being posted.

While on the one hand, such intermediaries claim inability to control the content on their services, on the other hand, these services point users to the posted content and monetize it by selling advertisements and/or harvesting user data generating revenues to the account of USD 726 million (based on individual revenue figures published by major intermediaries such as Google, Facebook, Bytedance). They however evade making any payment to owners of copyright using the defence of "safe harbour" causing undue losses to such copyright owners on a daily and recurring basis.

This leads to origin of the "value gap" and narrowing it in the light of the above is a key challenge for the recorded music industry in India. Value gap can be defined as the growing mismatch between the value that digital platforms as listed above extract from music and the revenue returned to the music community[2] (those who create and invest in music).

[1] IMI-IFPI Digital Music Study 2019 as appended and also available at: http://indianmi.org/be/wp-content/uploads/2019/09/output.pdf

[2] https://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2019

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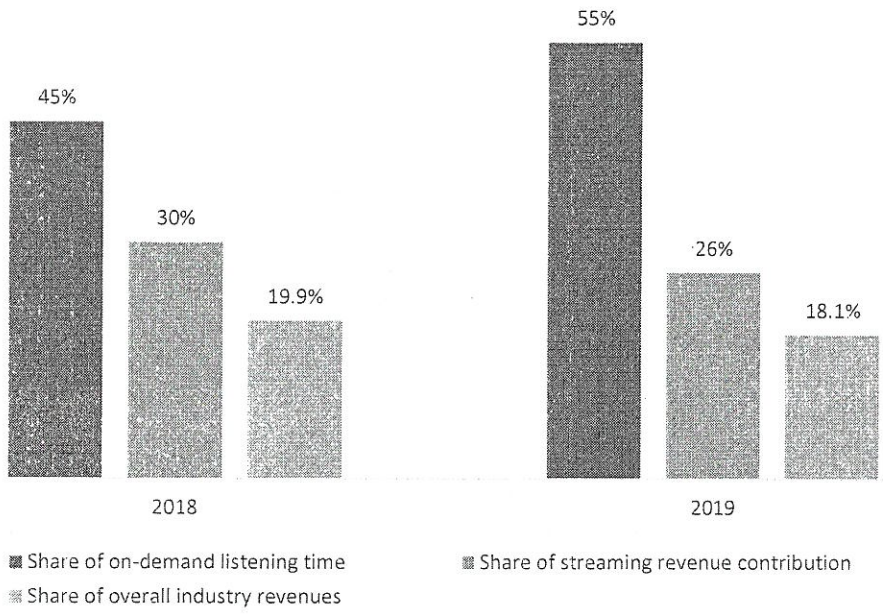
Such user generated content driven video streaming services in India account for 55% watch/listening time, however, revenues arising therefrom only account for 26% of overall streaming revenues. This is a wider gap when compared to 2018, where video streaming accounted for 45% of all watch/listening hours on such services but generated 30% of overall streaming revenues for the recorded music industry. Such a value gap is reflective of outdated safe harbour provisions, which needs to be brought in line with technological advancements in India.



The rising value gap from video streaming services

In light of the aforesaid, the only reasonable remedy seems to be the introduction of a content mapping/fingerprinting system by the services that facilitates the removal of content at the very time of upload.

In the alternative, the content mapping/fingerprinting system can also be used to facilitate monetisation as done by YouTube, wherein once a particular content uploaded by the user matches with that of the copyright owner, the advertising revenue earned on each such matched user generated content is split equally with the copyright owner.

IMI, thus strongly recommends that Rule3(9) with the proposed revision be introduced to help narrow the glaring value gap.

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IMI would welcome an opportunity to make an in-person representation of its concerns before the Department Related Parliamentary Standing Committee on Information Technology and/or to provide further written information in relation to any questions.

Sincerely,

Blaise Fernandes
President & CEO
The Indian Music Industry

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