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THE INDIAN MUSIC INDUSTRY

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29th January 2019

Shri Pankaj Kumar,
Additional Secretary,
Cyber Laws & E-Security Division,
Ministry of Electronics and Information Technology
(Government of India)
Electronics Niketan, 6, CGO Complex,
Lodhi Road, New Delhi - 110003

Subject: Comments on the Draft of Intermediary Guidelines, 2018

Dear Mr. Kumar,

The Ministry of Electronics & Information Technology (Ministry) has recently issued *The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018* (2018 Rules). We, the Indian Music Industry aka IMI, on behalf of our Members, seek to make certain remarks. IMI represents the business and trade interests of Indian recorded music companies on a pan-India basis. IMI is affiliated with the International Federation of the Phonographic Industry (IFPI), an organisation representing the interests of the recording industry worldwide. IMI Members hold an extensive repertoire of protected intellectual property, including copyright protected works.

One of the major concerns of IMI is reducing piracy in India. Piracy has severe negative effects to the global creative copyright industry, including in India. According to Shridhar Subramaniam, president of Sony Music India, music piracy causes a loss of ~ INR 1500 Cr. to the Indian recorded music industry, annually.[1] According to the IFPI – IMI Digital Music Study 2018, 76% of Indian internet users pirated music online in the previous three months.[2] There has been an increase in the content consumption in line with the increased penetration of

[1] Dialogue 2018 – Vision 2022
[2] IFPI -- IMI Digital Music Study 2108. Page 3. http://indianmi.org/be/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf

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

smartphones and cheaper data charges in India.[3] A report estimates that large pirate websites operating in India can earn up to USD 4 million annually.[4]

Digital piracy is also a national security threat. Websites hosting pirated content often surreptitiously install malware on users' computers that collects personal information which is subsequently misused. Pirate websites have been linked to forms of cyber-crime, fraud and terrorism. Furthermore, these websites often also display prohibited advertisements.

IMI welcomes the introduction of the 2018 Rules as it provides an opportunity to modernise the intermediary liability law in India. In addition to some general remarks, IMI has specific concerns relating to Rule 3(3) regarding safe harbour and the removal of Rule 3(4) of the 2011 Rules, as well as recommendations relating to Rule 3(9) in the 2018 Rules, all of which are elaborated below.

General remarks

The Information Technology Act 2000 law defines "intermediary" broadly: "with respect to any particular electronic message, any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message".

The breadth of this definition means that care must be taken in relation to the 2018 Rules such that liability privileges and/or other benefits and obligations of the regime are not applied to types of service for which they are not intended.

In addition, naturally, intermediary liability limitations only make sense if the underlying liability for the relevant wrongful or tortious act is clearly established. As regards to copyright infringements, it is essential that the 2018 Rules set out clear rules on primary and/or secondary liability for intermediaries that engage or whose services are used in copyright infringing activities.

[3] E&Y FICCI Media and Entertainment Industry Report 2017. Page 188
[4] FICCI – SIPI – VeriSite. Badvertising: When Ads Go Rogue. Page 5. https://www.creativefirst.film/show_pdf/74

The Scope of Online Intermediary Liability Privileges (aka Safe Harbours)

Any intermediary safe harbours should be limited to technical, automatic and passive intermediaries and on the condition that they operate in the manner expected of a diligent economic operator to prevent the availability of infringing content on their platforms.

Safe harbours were introduced to protect service providers that provide essential technical infrastructure for the internet so that it could develop without an unreasonable burden of liability. With the benefit of safe harbours, the online sector has grown exponentially.

However, in recent years safe harbours have been relied upon by entities that bear little resemblance to essential infrastructure providers – these include so called user upload services (such as YouTube) that actively curate, promote and monetise content their users upload on their platforms. This deprives copyright holders of fair revenues and gives these services an unfair advantage over other digital music services which license directly from right holders. This market distortion, known as the 'Value Gap', has been recognised by the EU, where draft legislation to clarify that active user upload services are (i) engaging in copyright restricted acts and (ii) cannot benefit from safe harbours for the content they make available, is at an advanced stage.

In terms of the specific drafting, IMI proposes that Rule 3(3) of the 2018 rules should include the words "*or otherwise provide access to*" after "*host or publish*" in line 1. A further sentence at the end of Rule 3(3) should clarify that the exemption applies only if all such activities of the intermediary are of a technical, automatic and passive nature and that it does not apply to any service playing an active role in respect of content on or passing through its service.

Additionally, to ensure that all intermediaries are required to comply with the due diligence obligations set out in the 2018 Rules, IMI proposes that the safe harbour provision at section 79 of the Information Technology Act 2000 should be amended to read "*...if he proves that the offence or contravention was committed without his knowledge AND [replacing OR] that he had exercised all due diligence...*"

The removal of the notice and take down provision

IMI is extremely concerned that the deletion of Rule 3(4) of 2011 Rules from the 2018 Rules will facilitate digital piracy in India. Rule 3(4) of the 2011 Rules mandates intermediaries to take down any content falling within Rule 3(2) pursuant to a notice given by an affected person. Thus, IMI Members can issue a notice to intermediaries to remove infringing content as specifically listed in Rule 3(2)(d) of the 2011 Rules (replicated in the 2018 Rules).

As per the 2018 Rules, infringing content can only be removed pursuant to a court order or a government direction. In the 2018 Rules, content failing within Rule 3(2) can only be removed pursuant to Rule 3(3)(b) of the 2018 Rules. Rule 3(3)(b) of the 2018 Rules provides a safe harbour protection to intermediaries only if they remove infringing content pursuant to a court order or a government direction. Rule 3(3)(b) of the 2018 Rules does not allow IMI Members to issue a notice to the intermediaries to remove infringing content.

Effective notice and take down is an essential remedy for the creative industries to try to limit the distribution of infringing content posted online. This is especially the case in respect of content made available prior to its commercial release date ("pre-release" content). Every minute that pre-release content remains online undermines the investment made in producing, developing and marketing content protected by copyright. By way of example of the scale of the need for notice and take down, in 2017, the international music industry body IFPI sent over 11 million individual URL take down notices to over 6,700 different websites requesting the removal of content which infringed copyright.

Accordingly, safe harbour legislation must include a specific obligation to take down content if the intermediary becomes aware of facts or circumstances, or should reasonably have been aware of facts or circumstances, from which the infringing activity is apparent. This type of "red flag" knowledge should not only arise from a take down notice sent by a right holder but should be characterised by reference to steps a diligent economic operator would be expected to take in the circumstances. In addition, "notice and take down" should mean "notice and stay down": on receipt of a notice, service providers should be obliged to take reasonable steps to ensure that all other copies of, or URL links to, infringing content: (a) are also removed; and (b) do not appear in the future. This is an appropriate and proportionate obligation which could be effected using existing, affordable technologies.

The 2018 Rules will lead to greater availability of infringing content owing to the additional time, resources and cost required in obtaining the requisite court order or government direction, as required under Rule 3(3)(b) of the 2018 Rules. Thus, the 2018 Rules as currently drafted will increase the availability of infringing content exponentially in India. The additional hurdle imposed in having to obtain a court order or government direction is particularly critical in cases of a new release of a copyright work (including pre-release content, described above) because the bulk of the monetisation happens within the first few hours, days and weeks of the release of the sound recording.

IMI firmly believes that the proposed 2018 Rules must re-introduce the deleted Rule 3(4) of 2011 Rules. According to footnote 1 of the 2018 Rules[5], Rule 3(4) of the 2011 Rules is to be deleted pursuant to the judgment given by the Supreme Court in *Shreya Singhal v. Union of India* dated 24.03.2015. The judgment in *Shreya Singhal v. Union of India*, however, only dealt with offensive messages falling within Rule 3(2)(b)[6] of the 2011 Rules and the consequent punishment under Section 66A of the Information Technology Act, 2000. The judgment does not deal with hosting of infringing content on the internet. As seen above, the 2018 Rules in its existing form will dramatically increase digital piracy in India. The deletion of Rule 3(4) of the 2011 Rules in 2018 Rules gravely harms the interests of IMI Members, as well as the whole of the creative content industry. Consequently, Rule 3(4) of 2011 Rules, deleted in the proposed 2018 Rules, should be reintroduced.

The obligation to deploy automated tools to identify and remove content

The introduction of an obligation in sub rule 3(9) of the 2018 Rules to deploy automation tools to identify and remove unlawful content is positive step forward for the intermediary regime. Such automated tools are already commercially available at affordable cost and widely utilised by service providers.

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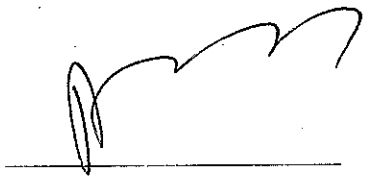
[5] Footnote 1 of the 2018 Rules states that: "This sub-rule has been modified as per Supreme Court Judgment in the matter of Shreya Singhal Vs UOI dated 24.03.2015."

[6] The intermediary shall observe following due diligence while discharging his duties, namely: Such rules and regulations, privacy policy or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that: is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

IMI has two recommendations in relation to Rule 3(9). Firstly, IMI believes that the provision would be clarified (and the creative industries would immensely benefit) if the rule explicitly specified that 'unlawful content' under Rule 3(9) includes *inter alia* content which infringes intellectual property, for example, by adding the words "of the type specified in sub rule 3(2)" at the end of the Rule 3(9) provision. Secondly, IMI is concerned that intermediaries may escape legal liability owing to the lack of an enforcement provision for Rule 3(9) in the 2018 Rules. IMI strongly believes that the 2018 Rules must make intermediaries liable for each and every violation of Rule 3(9) as well as every other rule of the 2018 Rules.

Despite our concerns, as noted above, the 2018 Rules are a positive first step towards the modernisation of intermediary law in India. IMI would welcome an opportunity to make an in-person representation of its concerns before the Ministry and/or to provide further written information in relation to any questions arising.

Yours sincerely,



Blaise Fernandes
President & CEO
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