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THE INDIAN MUSIC INDUSTRY

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10th February, 2020

To,

Shri Ravi Shankar Prasad
Hon'ble Union Minister of Law & Justice, Communications and
Electronics & Information Technology
Ministry of Electronics and Information Technology
Electronics Niketan, 6, CGO Complex,
Lodhi Road
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.

affiliated to ifpi representing the recording industry worldwide

***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 with the following revision:
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 uniess the person fails to disable access or remove such infringing content upon actual knowiedge or notification.

Intermediaries have been using the aforementioned sections 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. 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.

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. IMI, thus strongly recommends that Rule3(9) with the proposed recommendation be introduced.

IMI would welcome an opportunity to make an in-person representation of its concerns before the MEITY and/or to provide further written information in relation to any questions.

Sincerely,

Blaise Fernandes
President & CEO
The Indian Music Industry

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

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