

29.7.2014

To:

Mr. Agneshwar Sen, Advisor (B&CS),
Telecom Regulatory Authority of India (TRAI), Delhi.



Comments of Indian Music Industry on TRAI Consultation
Paper on Regulatory Framework for Platform Services

A. Introductory:

The “Indian Music Industry”, was formed in 1936 and is the only association of Music labels and music publishers in India. Its membership includes most of the major and smaller music labels, including the Indian subsidiaries of international labels. IMI’s main offices are in Kolkata, Delhi and Mumbai.

IMI has a successful track record of co-operatively working with the Government to develop copyright education & enforcement regime, optimise the tax regime for music industry, and also in combating the ever-increasing music piracy.

B. Major concerns:

Our foremost concern is that the proposed regulatory framework – unless corrected right now -- is likely to seriously erode the distinction existing in rights/copyrights over music content in broadcast through free-to-air FM Radio vis-à-vis licensing of rights over music content in paid/premium Platform Services. The proposed framework is likely to endanger the present copyright licensing structure under Indian Copyright Act; and result in forced misappropriation of valuable intellectual property rights; such an erroneous outcome would tantamount to copyright infringement and interfere with the Constitutional rights of copyright owners – hence, it must be avoided.

As will be explained below, the Copyright Act already provides for mechanisms for voluntary licensing and even for compulsory and statutory licensing under special conditions and circumstances. Therefore, the proposed regulatory framework must take care not to intrude upon the Copyright Act.

A very basic error that is reflected in the Consultation Paper is in Issue No. 14 regarding re-transmission of FM Radio Channels by DPOs. *The question posed, “Should DPO be permitted to re-transmit already permitted and operational FM radio channels under suitable arrangement with FM operator?” is fundamentally flawed.* It implicitly, but quite wrongly, assumes that FM Radio Channels have right and authority to permit re-transmission of their music air-play to DPOs. It is not so. DPOs are required to obtain separate licences from the copyright owner and cannot be allowed to ride piggy-back on the licences of the original licensee i.e. the FM Radio station. This issue is elaborated in our detailed comments on Issue No. 14 below.

Another grave concern regarding PS channels is that they are an inherently unregulated medium, capable of undetected copyright infringement; hence no further liberalization in respect of PS channels should take place before complete successful roll-out of DAS.

Detailed comments on the above and related issues, as posed in the Consultation Paper, are offered below.

C. Comments on Issues for Consultation:

Issue No. 2: It is submitted that the transmission of movie/video or other content by PS in the absence of DAS is a serious threat to the rights of copyright owners. The same, which today is fairly under control due to Copyright law, must not be diluted by or interfered with by the proposed regulatory framework.

Issue No. 4: Yes, it should be mandatory for all DPOs to be registered as Companies under the Companies Act to be allowed to operate PS. This is desirable in the interests of accountability and corporate governance. This will avoid or minimise *benami* operators.

Issue No. 6: Given the future potential reach of PS as envisaged in the Consultation Paper, and the existing level of investment in broadcasting and telecommunications, the minimum net worth required for companies granted licences as PS should not be less than half the minimum net worth required for any other mode of broadcasting.

Issue No. 9: Any music copyright infringement, as evidenced in any injunction, including a temporary injunction, granted by any civil court or charge sheet filed in criminal proceedings against a PS channel should be an automatic disqualification for renewal pending completion of the said civil or criminal proceedings.

Issue No. 12:

12.1: We feel, consistent with our concern about monitoring of PS, that registration for PS should not be transferable, not only without prior approval of MIB, but also without prior intimation to the relevant industry associations of rights owners (IMI in the case of music).

12.2: Interconnection with other distribution networks for re-transmission of PS, i.e. sharing or along re-transmission of the PS channel to another DPO should be strictly prohibited -- rights in content are normally licensed only for a particular PS.

Issue No. 13: It should be a specific obligation/restriction on DPOs that they may not offer PS without certifying that all content that they broadcast will be duly licensed in writing by the copyright owner, and making such licences

available for inspection. Instances of failure to comply, or delay in compliance, should debar them. They should also be subject to disqualification as proposed in our comment on Issue No. 9 above.

Issue No. 14: Re-transmission of Radio channels -- whether radio channels should be allowed to be carried by DPO and what should be the regulatory framework for such services.

This item vitally affects the music industry, since the FM Radio Broadcasting Industry has developed into the single biggest medium for making popular and “hit” songs available to the public, at the cost of traditional modes such as sale of physical copies e.g. CDs. The vital importance of FM Radio Broadcasting is reflected in the fact that as of date, 70-75% of the content aired by FM radio stations is music i.e. film and non-film songs. The remaining 25-30% of content consists of advertisements/commercials, RJ chit-chat, listener interaction, weather/traffic information, radio interviews. The government has decided to permit FM radio stations to broadcast news content also. Even after this, music content will remain dominant. The main attraction for listenership, which is the source of advertising revenue on which FM Radio Stations depend, will always remain music, in India as globally. Correspondingly, radio broadcasting will remain a major source of revenue for the music industry.

The Consultation Paper poses a fundamentally mis-conceived and legally-incorrect question: “Should DPO be permitted to re-transmit already permitted and operational FM radio channels under suitable arrangement with FM operator?”. This manner of posing the question assumes that FM radio channels enjoy rights over copyright-protected content which extend beyond the FM licence itself to DPOs, and **this assumption is completely un-founded and incorrect.** It should be forthwith appreciated that the FM station has no jurisdiction or locus standi.

It is, further, pertinent to say that as per GOPA agreement executed between an FM radio station and the Central Government, territorial restrictions are imposed. Further, under GOPA, the FM radio station has no right to re-transmit or parallel-transmit say through internet simulcast or through cable operator or DTH or otherwise.

Therefore, a DPO/PS must necessarily seek a separate licence from the copyright owner. A limited-purpose licensee like an FM Radio Station cannot sub-licence to a third party like a DPO/PS; and the same would be clear and patent infringement of copyright. The question of permitting a DPO to retransmit an operational FM Radio Channel under suitable arrangement with the FM operator simply cannot arise; any such permission would directly amount to authorisation by MIB/TRAI of an unlawful act affecting the copyright and the commercial interests and Constitutional rights under Article 19(1)(g) of the Constitution of our members, and would make MIB/TRAI also liable for copyright infringement. It unlawful and infringing for a third party to authorise any such copyright-restricted act: this is the sole right and privilege of the copyright owner.

The music label/producer has created and/or acquired the sound recording content after putting in hard work, skill and talent, creativity, costs and investments towards creation and marketing, all financial risks, etc. The music industry in India, for the last many years, is faced with declining physical sales, as new music is available immediately, for free, in FM radio that too repeated many times a day. The listener has lost motivation to buy the physical or digital song.

Further, the industry is badly impacted by continued piracy, both physical and internet/online. **Further, it is known that certain FM radio stations are surreptitiously violating the territorial restrictions and broadcasting into neighbouring districts.** Our members, being music labels, are compelled to

invest financial resources and management time in both civil and criminal litigation to enforce their copyrights. **It is well-known that many local cable operators have political or under-world connections and/or being funded by black money and it is very difficult to enforce copyrights against them.** It will therefore be a very grave injustice if, in this context, MIB/TRAI were to issue any illegal guidelines or rules as above. **We do hope and pray that MIB/TRAI will not take such a step.**

Issue No. 16: Yes; the additional penal provisions suggested by us above should also apply in the case of PS.

D. SUMMARY:

A. Proposed regulatory framework for PS should not, end up eroding the existing rights of the music content copyright owners, in a manner otherwise than provided under the Copyright Act, 1957. That is to say, proposed regulatory framework should not intrude upon or interfere with the Indian Copyright Act. Re-transmission of music content of FM Radio stations by DPOs is illegal and must NOT be permitted.

B. Any PS in infringement of copyright subsisting in the program, prevented by any permanent and/or temporary injunction Order from a Civil Court, or a Charge Sheet filed / Process issued in a private Criminal Complaint in Criminal proceedings against a DPO should be an automatic suspension of its registration or a disqualification for renewal of the registration pending completion of the said Civil or Criminal proceedings.

C. FM radio station has no jurisdiction or locus standi to grant license for copyrighted content broadcast by them. Further, under GOPA, the FM

radio station has no right to re-transmit or parallel-transmit say through internet simulcast or through cable operator or DTH or otherwise.

D. Statutory provision must be made that DPO/PS must necessarily seek a separate license from the copyright owner.

E. Personal hearing:

Since the issues raised are seen to be interfering with the livelihood and statutory rights of copyright-owners, we seek an opportunity for personal hearing and then submit a detailed response, before any precipitate recommendation is made by TRAI which could seriously undermine the Constitutional and statutory rights of music copyright-owners and artists community.

Thanking you

For The Indian Music Industry

Savio D'Souza
Secretary-General