

The Impact Of User Generated Content

The New Media shows people engaging with the Internet in a number of innovative different ways in their lives. Internet users are evolving from a passive audience to participatory users submitting vast amounts of information on the net. In particular, the Web is seeing a surge in User Generated Content (“UGC”), which refers to various kinds of publicly available media content contributed by end users. UGC web services have become an increasingly popular platform for, inter alia, blogging, video, file, story and photo sharing, social networking, and other user contributions of work on Web pages and is anticipated that that the industry is forecasted to grow on a rapid scale.

However, on the flip side, the growth of this new medium of communication has opened new opportunities for economic threats. UGC services allow for free and quick downloading of significant amounts of material that is copyrighted by persons other than the uploading users. This has led to worry amongst copyright owners that their intellectual property rights are not being sufficiently protected and, as a result, caused them to suffer a negative economic effect throughout the industry, including the print and entertainment industries.

Statistics reveal that the rise is directly translating into the rise of piracy levels in India. The rising number of video-hosting sites means that it is virtually impossible to keep track of illegal videos. Although piracy of intellectual property is not a new phenomenon to the media and entertainment sector, the scale of the problem is unprecedented. A recent study estimates that the Indian entertainment industry loses \$4 billion and more than 800,000 jobs each year because of piracy¹. Therefore, as internet capabilities expand and thousands of copies are streamed across the internet daily, it harms producers, legitimate retailers and other stakeholders on a regular basis.

The Indian Information Technology Act (“ITA”), recently notified, provides immunities to “intermediaries” (the definition encompasses Internet Service Providers (“ISP”), network service providers, search engines, auction sites etc) and exemption from liability for third party information, data, or communication link made available or hosted by him. This safe harbor is available to the intermediaries *provided* that the intermediary does not:

- (i) initiate the transmission,
- (ii) select the receiver of the transmission, and
- (iii) select or modify the information contained in the transmission².

¹ The Effects of Counterfeiting and Piracy on India’s Entertainment Industry, Ernst &Young, India

² Section 79, Information Technology Act, 2000

Further, the ITA prescribes that the intermediary observe due diligence while discharging his duties, for example, implementing active notice and takedown procedures and/or expeditiously moving or disabling access to that material on that resource upon notice of the illegal activity.

These provisions are in consonance with the safe harbor provisions offered under the Digital Millennium Copyright Act (“**DMCA**”) in the United States which provide that ISPs shall be absolved of liability under certain conditions.

However, inspite of the safe harbor provision, UGC sites have been pulled into courts and their services have culminated into a series of litigations between the service provider and the content holders, a trend also occurring in India. Further, it is pertinent to note that the ITA, as amended, does not absolve an intermediary of liability, if found liable under the Indian Copyright Act. This stems from a newly added proviso to Section 81 of the ITA which reads:

"The provisions of this Act [ITA] shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. *Provided that nothing contained in this Act shall restrict any person from exercising any rights conferred under the Copyright Act, 1957 or the Patents Act, 1970.*" (emphasis provided).

Section 51 of the Copyright Act, 1957 (“**CR Act**”) stipulates that Copyright in a work shall be deemed to be infringed, when “*any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright*”. (emphasis provided).

It is a fact that ISPs allow their servers to store vast amounts of user information and material and for transmitting that information and material. The ISP servers are actually located at their business premises and hence it is assumed that they would fall under the requisite of “any place” and could be held liable for the infringing activities of third parties whose material they store or transmit if other requirements are fulfilled. Also, the ISP platforms would be deemed to be “any place” where the infringing activities are conducted. The expression “permits for profit” means that to be held liable the activities of ISP should be for profit meaning thereby that it should be financially benefiting out of the infringing activities. ISP’s normally derive profit from selling advertisements to advertisers which are displayed alongwith the content on their page. Further, “any person who knowingly infringes or abets the infringement of copyright” is made criminally

liable under Section 63 of the CR Act. If an ISP is said to have abetted the infringement of copyright' is a question to be decided by the courts in the light of actual facts.

Therefore, if the intermediary is found liable under the above provisions of secondary liability or under any other provision of the Indian Copyright Act, it cannot take recourse to Section 79 to quash the "right" of a person alleging infringement.

In this environment, it has become mandatory to execute programs and bring UGC service providers and chief aggregators together to create awareness and respond to the rising concerns with respect to intellectual property influenced by the growth of the internet. Coalition building is imminent between key content owners and website providers to discuss the impact of the UGC models and ways to mitigate risks. In this context a set of guiding principles that would bring together a consensus amongst all the parties involved to resolve the conflicts that are budding between the key stakeholders would be beneficial as the Web 2.0 evolves into a successful participatory business model.

Industry initiatives have been developed in the United States to develop self-governance measures, through a set of guiding principles - User Generated Content Principles ("UGC Principles"), negotiated among various industry stakeholders that look to the web-hosting companies to implement features such as state-of-the-art filtering software, watermarking and displaying information about the importance of intellectual property rights on their websites, and in return, copyright owners would not sue them for copyright violations committed by the services' users. These principles thus reflect an appreciation and understanding between copyright owners and site owners and it is anticipated that effective adherence to the principles will create harmony and operating framework in the industry and effectively minimize litigation.

It is propounded that similar initiatives such as the UGC principles should be advanced in India for effective growth and stability of these ventures. Therefore, it is envisaged that a similar UGC India Principles Document, bearing in mind the needs of the Indian industry, be executed between the UGC service providers and the key content aggregators would serve as guiding principles and understanding between the stakeholders.

Rationale behind the UGC Principles – India

Most UGC sites have incorporated provisions in their terms which explicitly state that their site prohibits the uploading of illegal material or copyrighted material sans a license. Many sites have take down procedures or have measures such as filters in place to screen out illegal activity, indicating that even without being signatory to such principles, through their self-governance protocols, they may operationally already be in compliance with most of the requirements propounded in the Principles as they exist. However, it is critical that a universal procedure or standard be developed and adopted through which submissions on the internet be governed and

moderated in a uniform manner by all ISPs which would simultaneously take into account interest of all stakeholders. Thus, ratifying a set of guidelines would only give sanctity to their already existing practices and demonstrate a vocal respect for their respective counterparts.

A set of customized guidelines articulating best practices would help in minimizing risk litigation and would inherently create an optimal balance between the concerned parties thus building a harmonious healthy environment amongst all.

FICCI

FICCI has taken the initiative to bring together the key stakeholders and evolve industry consensus in India around the UGC principles.