

# Rules & Regulations Review

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

### Key Features of the Rules

- ◆ The Intermediary Guidelines Rules, 2011 require intermediaries to prohibit users from hosting certain content on its platform (e.g. obscene content). The Draft Rules prohibit a new category of information, i.e., content which threatens 'public health or safety'.
- ◆ Intermediaries must, within 72 hours, provide assistance to any government agency. Further, they must enable tracing of the originator of the information on their platform.
- ◆ Intermediaries must deploy technology-based automated tools to identify and remove public access to unlawful information. Further, intermediaries with more than fifty lakh users must incorporate a company in India.

### Key Issues and Analysis

- ◆ Intermediaries are required to prohibit publication of content that threatens public health or safety. This may violate the right to free speech under Article 19(1).
- ◆ Intermediaries are required to deploy automated tools for removing access to unlawful content. This may be contrary to the reasoning of a recent Supreme Court judgement.
- ◆ Intermediaries with more than fifty lakh users must incorporate a company in India. It is unclear as to how this number will be calculated. Therefore, an intermediary will find it difficult to determine if it is required to set up a company in India under this provision.

Intermediaries are entities that store or transmit data on behalf of other persons, and include internet or telecom service providers, and online market places. The Information Technology Act was amended in 2008 to provide exemption to intermediaries from liability for any third party information, among others. Following this, the IT (Intermediary Guidelines) Rules, 2011 were framed under Section 79(2) of the Act to specify the due diligence requirements for intermediaries to claim such exemption.<sup>1</sup>

In 2018, a discussion was raised in Parliament on incidents of violence due to misuse of social media platforms.<sup>2</sup> The Minister of Electronics and Information Technology responded that the Ministry plans to revise the intermediary guidelines to respond to emerging challenges. The Ministry has now released draft amendments to the 2011 Rules, which amend the due diligence requirements for intermediaries.<sup>3</sup>

### KEY FEATURES

- **Prohibited Categories:** The Rules require each intermediary to publish terms of use. These terms of use are required to prohibit the user from hosting certain content, including content that is grossly harmful or obscene. The Draft Rules prohibit a new category of information which threatens 'public health or safety', and includes promotion of cigarettes or tobacco products or consumption of intoxicants including alcohol and nicotine.
- **Removal of content:** Any intermediary must, on receipt of a court order or on being notified by the government, remove access to unlawful content. These are acts related to the sovereignty of India, security,

and public order, among others. Such removal must be done by the intermediary within 24 hours. Further, intermediaries must also deploy automated tools to identify and remove public access to unlawful content.

- **Assistance:** Intermediaries must provide assistance to government agencies (based on a lawful order), within 72 hours. Further, they must enable tracing of the originator of the information on its platform.
- **Registered physical presence:** Certain intermediaries must be incorporated in India, under the Companies Act, 2013. These are those with more than fifty lakh users or as notified by the government. They must also have a permanent office in India, and designate persons for coordination with government agencies.

## KEY ISSUES AND ANALYSIS

### Bar on content threatening public safety may violate the right to free speech

Rule 3(2)(j) The Rules provide that the intermediary must prohibit publication of certain types of content in its user agreements. The Draft Rules prohibit a new category of information which threatens ‘public health or safety’. This may violate Article 19(1)(a) of the Constitution which guarantees the right to free speech and expression. Article 19(2) permits this right to be restricted on six grounds, including in the interest of public order, or national security.

The new category of information which threatens ‘public health or safety’ may not meet the requirement of Article 19(2). The Supreme Court has clarified that threat to public safety (which has been read to include public health) cannot be a ground to restrict the freedom of speech. The Court stated that any restriction placed on the freedom of speech must relate to the grounds specified under Article 19(2).<sup>4</sup> In another judgement, the Supreme Court has clarified that a restriction on speech, in order to be reasonable, must be narrowly tailored so as to restrict only what is absolutely necessary.<sup>5</sup>

### Requiring intermediaries to identify and remove content may be unreasonable

Rule 3(9) The Draft Rules provide that intermediaries must deploy technology based automated tools for identifying and removing access to unlawful information or content. This provision may be contrary to the reasoning of the Supreme Court in a recent judgement.<sup>5</sup>

In 2015, the Supreme Court examined Section 79(3)(b) of the Information Technology Act, 2000. This provision required intermediaries to remove or disable access to certain types of content on the basis of user requests. The Supreme Court stated that it would be difficult for intermediaries to judge the legitimacy of each item given high volumes of content. It read down the provision to say that content needs to be removed or disabled only if: (i) it is done on the basis of the order of a court or government, and (ii) the order relates to one of the restrictions under Article 19(2) of the Constitution (such as national security and public order).<sup>5</sup>

The Draft Rules require intermediaries to develop automated tools to identify and remove access to ‘unlawful content’. This requirement is similar to the above provision which was read down by the Supreme Court.

### Requiring intermediaries to register if they have more than fifty lakh users

Rule 3(7) The Draft Rules provide that certain intermediaries must be incorporated in India, under the Companies Act, 2013. These are intermediaries with more than fifty lakh users or those notified by the government. The rule does not clarify how the number of users will be calculated. For example, the number of users of an intermediary may be calculated through different methods such as the number of registered users on the intermediary’s platform, the number of daily active users, or the number of installations. In the absence of a clear methodology to determine the number of users, it may be difficult for an intermediary to judge whether it has crossed the fifty lakh threshold, and is therefore required to set up a company in India.

1. G.S.R. 314(E), The Gazette of India, April 11, 2011, [http://meity.gov.in/writereaddata/files/GSR314E\\_10511%281%29\\_0.pdf](http://meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf).
2. Official Debates, Rajya Sabha, July 26, 2018, [http://164.100.47.5/official\\_debate\\_hindi/Floor/246/F26.07.2018.pdf](http://164.100.47.5/official_debate_hindi/Floor/246/F26.07.2018.pdf).
3. The draft IT (Intermediary Guidelines (Amendment) Rules) dated December 24, 2018, [http://meity.gov.in/writereaddata/files/Draft\\_Intermediary\\_Amendment\\_24122018.pdf](http://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf).
4. Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal 1995 AIR 1236.
5. Shreya Singhal vs. Union of India AIR 2015 SC 1523.

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