

Intermediary Liability & The Media Rules, 2021

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Introduction

On February 25, 2021, the Ministry of Electronics and Information Technology (hereinafter, 'Meity') notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹ (hereinafter, "the Media Rules 2021"). Multiple requests for regulation of digital content platforms, including social media intermediaries, OTT platforms, and digital news services, have resulted in enactment of these rules.² These rules have been framed in the exercise of powers conferred under Section 87 (2)³ of the Information Technology Act, 2000 (hereinafter, "the IT Act, 2000") and supersede the decade-old Information Technology (Intermediary Guidelines) Rules 2011.⁴

The treatment of intermediary liability has been controversial since the passage of the IT Act in 2000. The Media Rules, 2021, are the most significant reforms for intermediaries in terms of increased due diligence responsibilities and liability in non-compliance cases. Social media

¹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Available at <https://mib.gov.in/sites/default/files/IT%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf> (last accessed on December 21, 2021).

² Archana Sivasubramanian, *Unpacking the IT Rules, 2021*, CRPINDIA (April, 23 2021) <https://cprindia.org/news/9646> (last accessed on December 21, 2021).

³ Section 87 empowers the Central Government to make rules to carry the provisions of the Information Technology Act, 2000.

⁴ Information Technology (Intermediaries Guidelines) Rules, 2011. Available at https://www.meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf (last accessed on December 21, 2021).

intermediaries are divided into two groups under the rules: "social media intermediaries"⁵ and "significant social media intermediaries"⁶. These rules explain the due diligence that all intermediaries must perform, as well as additional due diligence that significant social media intermediaries must fulfil. The Media Rules, 2021 also established a regulatory framework for online curated content publishers⁷ as well as news and current affairs content publishers.⁸

The Media Rules 2021 are divided into three parts. Part-I of the 2021 Rules provides for the definition clause. Part-II provides for due diligence by an intermediary and grievance redressal mechanism. Part-III of the rules provides for "Code of Ethics and Procedure and Safeguards in Relation to Digital Media". Part-III apply to two categories of entities, namely: - (a) publishers of news and current affairs content; and (b) publishers of online curated content who shall be administered by the Ministry of Information and Broadcasting, Government of India.⁹

Intermediaries and Safe Harbour Protection

The Intermediaries are entities that provide services enabling the delivery of online content to the end user. This includes internet service providers, search engines, DNS providers, social media platforms, cyber cafes. The IT Act, 2000 defines an intermediary as: "intermediary with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes Telecom service providers, network service providers, internet service providers, web-hosting providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafe."¹⁰

Intermediaries such as ISPs, social media websites, and search engines play a significant role in information transmission, yet they have no editorial control over the content that is distributed on their platform. They merely serve as a channel for the transmission of information. As a result, they are protected by a safe harbour provision from any legal liability stemming from third-party material.

In India, the safe harbour clause is provided in Section 79 of the IT Act, 2000. The online intermediary liability is based on Section 79, which grants immunity to intermediaries for third-party content if they do not initiate the transmission, modify its contents, select its recipients, or exercise due diligence in carrying out their functions. The government can require

⁵ Social Media Intermediaries are the intermediaries which "primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services. See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(w).

⁶ Significant Social Media Intermediaries is a social media intermediary with a certain user threshold, as would be notified by the Central Government. See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(v).

⁷ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule, 2(u).

⁸ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(t) and 2(o).

⁹ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 8.

¹⁰ Information Technology Act, 2000, Section 2(w).

intermediaries to take down or prevent access to particular information under Section 69A of the IT Act. In India, the safe harbour provision is conditional, meaning that intermediaries can only take advantage of it if they meet the qualifications outlined in the preceding section, as well as the due diligence requirements outlined in the guidelines established under S. 79. When unlawful conduct related to Article 19(2) of the Constitution of India is committed, a court or the authorised government body can order an intermediary to take down the content, failing which an intermediary can be held responsible.¹¹

Due diligence obligations under the 2021 Rules

Part II of the Media Rules, 2021 has introduced significant due diligence requirements which need to be followed by an intermediary, a significant social media intermediary, and a news and current affairs content intermediary. These rules seem to deprive intermediaries of their safe-harbour protection under Section 79 of the IT Act. When an intermediary fails to observe the requirements of the Media Rules, 2021, the provisions of subsection (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code.¹²

The Media Rules 2021 requires internet intermediaries, especially “significant social media intermediaries” to earn the privilege of legal immunity under Section 79 of IT Act, 2000 by discharging certain duties and responsibilities.¹³ Under the rules the intermediaries are required to prominently publish rules and regulation on their website informing its users about the type of information which must not be stored or transmitted on the intermediary’s computer resource (“prohibited information”).¹⁴ The users must be informed about types of information that are ‘objectionable’ which they shall not share, display, upload, etc.

The Rules require intermediaries to preserve, maintain, and/or store the following information for 180 days: (a) any information that has been removed or access to which has been disabled under certain provisions of the Rules; and (b) user’s information regarding registration, after cancellation or withdrawal of such registration.¹⁵

Intermediaries, upon receiving actual knowledge in the form of an order from a court or notification from an appropriate government authority that certain information hosted by it is prohibited information, must remove or disable access to such information within 36 hours of the receipt of such order or notification.¹⁶ However on receiving the complaint from individual about sexual imagery the intermediary must take down such content within 24 hours.¹⁷ The

¹¹ Shreya Singhal v. Union of India, (2015) 5 SCC 1.

¹² See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 7.

¹³ <https://thewire.in/tech/new-it-rules-the-great-stretching-of-due-diligence-requirements-under-section-79>

¹⁴ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule (3)(1)(b).

¹⁵ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule (3)(1)(h).

¹⁶ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(1)(d)

¹⁷ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2)(b).

Rules require intermediaries to prominently display (a) the name and contact details of the grievance officer and (b) the complaint mechanism on their website, mobile application, or both.¹⁸ The grievance officer must acknowledge the complaint within 24 hours and resolve it within 15 days, giving reasons for any action or inaction to the complainant.

Additional Due Diligence Requirements for Significant Social Media Intermediaries (SSMI)

Significant social media intermediaries (SSMIs) were expected to comply with additional due diligence obligations under Rule 4 of the Rules within three months of the Rules entering into force, in addition to the aforementioned due diligence, which is mandatory for all intermediaries. SSMI having fifty lakh (five million) or more¹⁹ registered users are subject to additional due diligence obligations, which include the establishment of a chief compliance officer (CCO), a nodal contact person, and a resident grievance officer, among other things.²⁰ If an intermediary fails to follow due diligence, the chief compliance officer will be held accountable. The CCO should be a full-time director, MD, CEO, or other senior executive who will be responsible for ensuring that the IT Act, 2000 and the Rules are followed. The CCO will also be accountable in court if it fails to comply with the law while performing its obligations, provided that no liability can be imposed without a hearing.²¹ The nodal contact person for ensuring compliance with court orders and coordinating with law enforcement authorities, as well as the grievance officer in charge of resolving user grievances. the Chief Compliance Officer and the nodal contact person cannot be the same person, whereas the roles of the nodal contact person and the Resident Grievance Officer (RGO) may be performed by the same person. The RGO shall acknowledge complaints within 24 hours and dispose it off within 15 days.²² The Media Rules, 2021 also necessitate the SSMI to have a physical contact address in India published on its website or mobile application or both.

Significant social media intermediaries must utilise technology-based methods, such as automated tools, to identify content that portrays rape, child sexual abuse or conduct, or content that has been removed previously. The Rules also stipulate that proper human oversight be maintained and that automated tools be reviewed on a regular basis.

Significant social media intermediaries must publish a monthly report containing details of (a) complaints received; (b) actions taken; and (c) the number of links/information removed or to which access is disabled, as well as any other relevant information as may be specified, as a

¹⁸See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2)(a).

¹⁹ As of the time of writing this, the government has notified this threshold to be 50 lakhs, or 5 million registered users. See Ministry of Electronics and Information Technology, Notification S.O. 942(E.), 25 February 2021.

²⁰ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(1).

²¹ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(a).

²² *Frequently Asked Questions (FAQs) The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*

<https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/nov/doc202111171.pdf>

result of any proactive monitoring by automated tools.²³ Meit Y does not require the intermediary to present a tangible copy of the compliance report. The Rules do not provide a precise format for a monthly compliance report. The monthly compliance report should, however, incorporate the important elements that are already listed in the Rules. Other aspects of the report will be decided at the SSMI's discretion. In terms of the measures taken by an SSMI in response to user complaints, the report should ideally provide brief details of the complaints received, such as the subject under which the complaint was received (e.g., copyright) and the actions done under these various headings. This information might be released in an aggregated form, without revealing the specifics of each case. They also need to ensure that it does not impinge upon the privacy and safety of its users while publishing such details.²⁴

Rule 4(6) requires the intermediary to inform the complainant with explanations for any action taken or not done, to the degree that this is reasonable. The dissatisfied user is expected to receive a reasonable explanation from the middleman. The nature of the complaint can be stated as the justification for any action not taken in the case of a frivolous complaint. The guidelines provide intermediaries the freedom to choose the appropriate manner to deliver an explanation and due process to the user while also protecting the reporting party's safety.

Rule 4(8) requires a substantial social media intermediary to notify a user whose information is removed or rendered inaccessible by the intermediary on its own initiative, as well as provide an adequate opportunity to contest the action.

Meit Y can only request information pertaining to their grievance redressal mechanism that is in the power and possession of SSMI, which may include compliance reports in relation to complaints received and actions taken thereon, as well as any other information that Meit Y is empowered to seek under the IT Act for effective implementation of Part II of the IT Rules, 2021. Any commercially sensitive, trade secret, or otherwise confidential information held by the intermediaries would normally be excluded.

Significant social media intermediaries are required by the Rules to allow users who register for or use their services in India to verify their accounts by using any appropriate mechanism, including the users' active Indian mobile number, to verify their accounts and provide a visible mark of verification. However, the user's approval is required before the verification can be utilised for any other reason.

Conclusion

The key concern with the Media Rules, 2021 however, is whether they will withstand legal examination when the government attempts to pass them through delegated legislation rather than parliamentary legislation. The legal question is whether Section 79 of the IT Act grants the government the authority to impose these new duties on internet intermediaries as a

²³ See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(1)(d).

²⁴ *Supra* 22.

condition of retaining the legal protection provided by the same provision.²⁵ The Rules establish a severe and thorough grievance redress system. Given the broad outreach and access of users to the SSMI platforms, and the large number of complaints/ grievances that the RGO of an SSMI would get as a result, the timescales assigned to an SSMI to recognise and rectify the complaints appear to be unfair.

The additional due diligence requirements and the timeline mentioned in the Media Rules, 2021, place an additional burden on the intermediaries. If the regulations and timetables are not followed, the intermediaries will lose their safe harbour protection under Section 79(1) of the Act. In the absence of such safeguards, intermediaries will be held accountable for the content posted by third-party users under the Act, read in conjunction with the Indian Penal Code, 1860. The practical challenge of complying with the additional due diligence rules for intermediaries, given the stringent compliance requirements and the short timeframe of three months, took over certain intermediaries.

The intermediary, or the social media platform, is under tremendous pressure so far as the removal of content posted by users or blocking of access to users, such as the petitioner, is concerned. Such pressure is further increased by the fact that the rules are vague and without any necessary guidelines. Removal of content pursuant to the rules nevertheless creates a room for suspension of legitimate speech, over-regulation by intermediaries, out of caution on the erring side, thereby resulting in a chilling effect. The Media Rules, 2021 have been challenged and the writ petitions are currently pending in several high courts.²⁶ The courts will only give their final judgement on the rules' legitimacy with the passage of time. Until then, intermediaries and SSMIs are without recourse and must abide by the rules in order to benefit from the safe harbour protection.

²⁵ Prashant Reddy, *New IT Rules: The Great Stretching of 'Due Diligence' Requirements Under Section 79*, The Wire, (February 27, 2021)

<https://thewire.in/tech/new-it-rules-the-great-stretching-of-due-diligence-requirements-under-section-79> (last accessed on December 5, 2021).

²⁶ LiveLaw Media Private Ltd. v Union of India , WP(C) 6272/2021 (High Court of Kerela 2021); Foundation for Independent Journalism and others v Union of India , WP(C) 3125/2021 (High Court of Delhi 2021); Sanjay Kumar Singh v Union of India , WP(C) 3483/2021 (The High Court of Delhi); Quint Digital Media Limited v Union of India , WP(C)11097/2021 (High Court of Delhi).