

“Critical Analysis of Intermediary Guidelines and Digital Media Ethics Code”

Pooja Gautam¹
UPES, Dehradun

Introduction

Social media has become an important part of people's lives. According to figures from 2021, WhatsApp has *53 Crore* users in the country, making it the world's largest subscriber base. Facebook has *41 Crore* users, Twitter has *1.75 Crore*, YouTube has *44.8 Crore*, and Instagram has *21 Crore*.² The proliferation of social media, although empowering citizens, has also given rise to certain major problems such as the persistent spread of fake news, hate speech, libelous & obscene content, attack on women's dignity & security, flagrant disregard for national & religious sentiments and so on. India being world's largest open Internet society these concerns cannot be overlooked. However, in absence of a systematic complaint procedure, grievances of social media users have been left to the whims and fancies of social media intermediaries or governmental authorities³.

The quick escalation of the problem, notably during the lockdown, sparked a series of debates in public forum and in Rajya Sabha, urging the government to take immediate measures to strengthen the existing law and hold internet platforms accountable. As a result, an ad hoc committee was formed to investigate the concerning problem of *pornography on social media and its effect on children and society*. On February 3, 2020, the committee submitted its report.⁴

Prior to the Ad-hoc Committee report, the Supreme Court of India (hereinafter "The SC") had already directed the central government in the judgments of *Re Prajwala*⁵ and *Tehseen S. Poonawala*⁶ to implement mechanisms for removing images and videos of child pornography and rape from content hosting platforms, as well as to prohibit the spread of explosive texts and films with the potential to incite mob violence and lynching of any kind from those platforms.

In response to Ad-hoc committee report and SC's directives, the Indian government, on February 25, 2021, adopted '*The Information Technology (Intermediary Guidelines and Digital Media*

¹ Assistant Professor, UPES, School of Law and PhD Candidate NALSAR, Hyderabad.

² Government notifies Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, 25 FEB 2021 2:44PM by PIB Delhi, available at <https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1700749> (last visited on 1st Feb 2022)

³ Tulip De and Nishtha Das, "Bois Locker Room' Controversy and the issue of Intermediary Liability, may 14, 2020 available at <https://ssrana.in/articles/bois-locker-room-issue-of-intermediary-liability/> (last visited on 1st Feb 2022)

⁴ The Adhoc Committee Of The Rajya Sabha , Report of The Adhoc Committee Of The Rajya Sabha To Study The Alarming Issue Of Pornography On Social Media And Its Effect On Children And Society As A Whole, available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/71/140/0_2020_2_16.pdf (last visited on 1st Feb 2022)

⁵ In Re: Prajwala Letter 18.2.2015 Videos of sexual Violence and recommendations' , Supreme Court of India, October 23, 2017, https://main.sci.gov.in/supremecourt/2015/6818/6818_2015_Order_23-Oct-2017.pdf

⁶ Tehseen S. Poonawalla Vs. Union of India, Writ Petition (Civil) No. 754 of 2016 Supreme Court of India, July 17, 2018.

*Ethics Code) Rules 2021*⁷ (hereinafter ‘The Rules’) under the Information Technology Act 2000. The Rules are developed to i) Address issues of transparency, accountability, and digital media user rights, ii) Make intermediaries and digital media platform more accountable and iii) Establish a systematic grievance redressal mechanism for users of social media and over-the-top platforms.

However, the disapproval shown by the actors who are affected by the Rules have made it a topic of media attention and public dialogue. These policies have also been challenged before three Indian HCs. Given the uproar about these restrictions, this chapter aims to interpret them and provide a critical assessment of them. This chapter is divided into four parts. Part I of this chapter aims to provide a deep understanding of the extent of liability of intermediaries prior to the Rules; Part II of the chapter sheds light on key features of the Rules; Part III of the chapter critically examines the Rules; and Part IV provides a conclusion and recommendations.

Position prior to the Rules

To understand the Rules, it is necessary to trace the evolution of liability of intermediaries. Initially only network service providers were exempt from liability under IT Act, that to only from the offences listed under the IT Act and not under any other law⁸. The need to widen the scope of the safe harbour provision was first emphasized in 2004 in *Avinash Baja Case*⁹, when a CD containing obscene clip was uploaded on an e-auction website *baazee.com*. CEO of website was charged under the IPC¹⁰ and the IT Act¹¹. This case highlighted a legal loophole in which an intermediary might be held liable for something it did not create but only offered a platform to publish/circulate. The fear of such liability jeopardized the growth of the e-commerce ecosystem.

Accordingly, the IT Act was amended in 2008 to broadened the scope of safe harbour by exempting intermediaries severing only as platforms for information transmission from liability for any crimes committed without their knowledge . In addition the definition of an intermediary was also expanded and now service providers in telecom sector, internet /network sector, web-hosting, search engines, online portals such as payment sites, auction sites, market places, cyber

⁷ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, available at <https://mib.gov.in/sites/default/files/IT%20Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf> (last visited on 1st Feb 2022)

⁸ Previous text of Section 79 of the IT Act was :- "Section79 : Network service providers not to be liable in certain cases:- For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

⁹ Avinash Bajaj v. State (NCT of Delhi), 2005 (79) DRJ 576.

¹⁰ The Indian Penal Code, s. 292 .

¹¹ The Information Technology Act, s. 67.

cafes and *interactive websites* such as Facebook, Twitter, and WordPress are all considered intermediaries.¹² Now exemption is avail against any liability arising under 'any law'.

Following the 2008 amendment, the applicability of safe harbor exemption was evaluated on two component: i) *actual knowledge of the illegal act* and ii) *adherence to statutory due diligence requirements*. A third component was introduced in 2011¹³ that required an *intermediary to delete illegal content* from its platform as soon as it became aware of it, either directly or through an aggrieved individual. The term 'actual knowledge' is of a vague nature giving the intermediary a lot of leeway in deciding on it. However, the SC in *Shreya Singh v. Union of India*¹⁴ explained what construed 'actual knowledge'. The SC held that intermediary's actual knowledge could be attributed only when a court order or notification from an appropriate government authority informs the intermediary of illegal content on its platform. Otherwise, it would be impossible for intermediaries to act when millions of requests are made and the intermediary is then to decide which are legitimate and which are not. Furthermore, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2)¹⁵.

It is worth mentioning that the preceding ruling applies to the unamended Section 79, as the offence was committed in 2004 and the amendment went into effect in 2009. *Myspace Inc. v Super Cassettes Industries Ltd*¹⁶ is the first authoritative decision on 'intermediary liability,' pertaining to the execution of the amended Section 79. Following the SC judgment in the Shreya Singhal case, the Delhi HC stated that, unlike in 'real space', it is impossible to identify infringing content in the 'virtual world,' and thus it is mandatory for the complainant to provide the URL of the actual content that is being questioned. The ruling was reiterated by the Delhi HC in the matter of *Kent Ro Systems Ltd. & Anr v Amit Kotak & Ors*¹⁷. The Court concluded that IT Rules require the intermediary to remove or disable information hosted on the portal only upon receipt of a complaint. Hosting of information on portals such as eBay is automatic, with no human intervention, and if intermediaries are asked to verify IPR ownership before hosting any material on their computer resources, this will result in an intermediary being transformed into a body to determine whether there is any infringement of IPR. Such a directive would constitute an unreasonable interference with the intermediary's right to carry on its business.

While focusing on the diverse responsibilities of e-commerce platforms, the court held in *Christian Louboutin v. Nakul Bajaj and Ors.*¹⁸ that an intermediary that actively selects

¹² The Information Technology Act, s. 2(w).

¹³ The Information Technology (Intermediaries Guidelines) Rules, 2011

¹⁴ (2015) 5 SCC 1.

¹⁵ *Id.* At Para 117,

¹⁶ 236 (2017) DLT 478

¹⁷ 2017 (69) PTC 551 (Del)

¹⁸ Available at <https://indiankanoon.org/doc/99622088/>

suppliers, actively supports sellers, promotes them, and sells products is not qualified for safe harbour exemption. The court based its conclusion on the European Court's decision in **Google Inc. v. Louis Vuitton Malletier SA & Ors**- According to the court, “Exemptions from liability of intermediaries are limited to the technical process of operating and giving access to a communication network. Such an exemption is needed for the purposes of making the transmission more efficient. The intermediary gets the benefit of the exemption for being a “mere conduit” and for “caching”, when it is not involved in the information which is transmitted/translated. If any service provider deliberately collaborates with the recipient of a service, the exemption no longer applies.”¹⁹

In **Google India Private Ltd vs M/S. Visakha Industries**²⁰ the SC held that whether an entity is or not an intermediary, is a question of fact and that the IT (amendment) Act 2008 has no retrospective effect. In the matter of Swami **Ramdev and Anr. vs. Facebook Inc. & Ors**²¹, the Delhi HC has opined that take-down of an unlawful content uploaded from India must be understood as global take down of that.

Prior to the implementation of the new regulation, the preceding judicial pronouncements demonstrate that the courts used a highly pragmatic and balanced approach, rather than a negative attitude toward intermediaries in terms of their responsibilities. From upholding the law of 'actual knowledge' in **Shreya Singhal**²² to not putting excessive obligations on intermediaries for completing excessive due diligence in **My Space**²³ and **Kent Ro**²⁴, the courts have carefully studied the nature of these businesses before issuing judicial declarations. However, several judgments reflect the inability of court to comprehend and appreciate the technicalities of various forms of internet platforms. Like in **Christian Louboutin SAS**²⁵ the classification of active and passive intermediary is unduly harsh. Especially for e-commerce, intermediaries deal in new area wherein the sellers may lack the technological skills/knowledge to optimize the display of the information relating to their products. Moreover, in **Swami Ramdev**²⁶ mandating intermediaries to take down unlawful content globally, neglecting the fact that most intermediaries operate on a global scale and what is considered illegal in one jurisdiction may not be considered illegal in another.

¹⁹ *Id*, Para 22

²⁰ 2019 SCC OnLine SC 1587

²¹ CS(OS) 27/2019

²² *Supra* 13

²³ *Supra* 15

²⁴ *Supra* 16

²⁵ *Supra* 19

²⁶ *Supra* 20

Key Features of the Rules:

As discussed above, the main purpose of the Rules is to improve the privacy and accessibility of users of social media. Based on application the Rules are divided into two parts. Part II of the rules regulates social media intermediaries and Part III deal the regulation of digital media including an intermediary, publishers of news and current affairs or publishers of online-curated material. Key features of rules as follows:

Salient Features of the Rules:

As already mentioned, the Rules' primary goal is to increase the privacy and accessibility of social media users. The Rules are divided into two parts based on application. Part II of the rules regulates social media intermediaries. Part III of the rules deals with the regulation of digital media, including an intermediary, publishers of news and current affairs, or publishers of online-curated content. Salient features of the Rules' are furnished below:

1. **Types of Intermediaries and digital Medial Platforms** - the Rules for the purpose of regulation categorizes the entities as follows:
 - a. Intermediaries with less than 50 lacks Indian users are to be categorized as *Social media intermediaries*²⁷
 - b. Intermediaries with more than 50 lacks Indian users are to be categorized as *Significant social media intermediaries*²⁸
 - c. *Publisher of news and current affairs*²⁹ content including news aggregators³⁰,
 - d. *Publisher of online-curated content*³¹, which covers all online streaming platforms including Over-the-Top ('OTT') platforms.
2. **Due Diligence by Intermediaries under Rule 3** – According to the rule, all intermediaries must follow the following guidelines:
 - a. *Must display* the rules and user agreement for access or usage of its computer resource.³²
 - b. *Must notify* to its user not to do anything that causes copyright violation, defamation, privacy invasion, obscenity and pornography³³.

²⁷ *Supra* 7, Rule 2(w)

²⁸ *Supra* 7, Rule 2(v)

²⁹ *Supra* 7, Rule 2(i) (ii), 2(m)

³⁰ *Supra* 7, Rule 2(o)

³¹ *Supra* 7, Rule 2(i) (ii)

³² *Supra* 7, Rule 3 (1) (a)

³³ *Supra* 7, Rule 3(1) (b)

- a. Must the remove or disable access to content³⁴ upon obtaining '*actual knowledge*' of information that is prohibited by law³⁵ through a court order or notification from the Appropriate Government.
- b. In case of noncompliance of rules by user, platform has *right to immediately terminate* the defaulting user's access or usage privileges, or to remove the non-compliant content, or both, if necessary³⁶.
- c. Appoint a *Grievance Officer* and publish the details (name and contact information) of same along with the mechanism via which a user or victim can file a complaint on its computer resource. The grievance officer is obligated to acknowledge the complaint within *twenty-four hours* of receipt and to resolve it within *fifteen days* of receipt³⁷.
- d. *To ensure online safety and dignity of users, especially women users*, intermediaries shall remove or disable access to content, within 24 hours of receiving complaints, that exposes individuals 'private areas, depicts such individuals in full or partial nakedness or performing sexual acts, or is in the nature of impersonation, including morphed images,.'³⁸ A complaint of this nature may be brought by the individual or by another person on his or her behalf.

3. Additional Due Diligence for SSMI under Rule 4:

- a. Appoint key managerial personnel or a senior employee of the company who is a resident in India as a *Chief Compliance Officer*. To ensure the company's compliance with the IT Act and the rules thereunder, and shall be liable in any proceedings relating to any relevant third-party information made available or hosted by that intermediary if he fails to ensure that such intermediary.
- b. The SSMI shall also appoint a *Nodal Contact Person* who is not the chief compliance officer and is a resident of India. The nodal contact person will be responsible maintain 24x7 coordination with law enforcement officers to ensure that their orders are followed.
- c. The person designated as the resident *Grievance Officer* is responsible for ensuring that the intermediary complies with the Rules' due diligence requirements.
- d. The SSMI must produce *Monthly Compliance Reports*, detailing the complaints received, actions done, and the amount of links or information removed while using proactive monitoring via automated systems.

³⁴ *Supra* 7, Rule 3 (1)(d)

³⁵ In connection with the "interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above"

³⁶ *Supra* 7, Rule 3(1) (c)

³⁷ *Supra* 7, Rule 3 (2) (a)

³⁸ *Supra* 7, Rule 3 (2) (b)

- e. An intermediary that provides messaging services shall enable the **Identification of The First Originator** of the information and provide the same to Competent Authority if required by a judicial order or an order made passed under section 69 of the IT Act.³⁹
 - f. The SSMI must additionally use **Technology-Based Measures** such as automated tools or other processes for proactively identifying information that (i) depicts rape, child sexual abuse, whether explicit or implicit, or (ii) is identical in content to previously removed information. Such measures: (i) must be proportionate to interests of free speech and privacy of users, and (ii) have a human oversight and be reviewed periodically.
 - g. User-centric requirements: SSIMs must provide users with: (i) a voluntary identity verification mechanism, (ii) a mechanism to check the status of grievances, (iii) an explanation if no action is taken on a complaint, and (iv) a notice where the SSMI blocks the user's content on its own accord, with a dispute resolution mechanism.
4. Any intermediary who fails to comply with the appropriate due diligence and the Rule is not entitled to **safe harbour** protection under Section 79 of the Information Technology Act.
5. **Code of Ethics**⁴⁰
- a. **For publishers of news and current affairs** : (i) norms of journalistic conduct formulated by the Press Council of India, and (ii) programme code under the Cable Television Networks Regulation Act, 1995.
 - b. **For online publishers of curated content**:
 - i. classify content in specified age-appropriate categories⁴¹, restrict access of age-inappropriate content by children, implement an age verification mechanism,⁴² and must prominently display the classification rating specific to each content.
 - ii. exercise due discretion in featuring content affecting the sovereignty and integrity of India, national security, and likely to disturb public order,
 - iii. consider India's multiple races and religions before featuring their beliefs and practices, and
 - iv. make content more accessible to disabled persons.
6. **Observance and Adherence to the Code by Online Publishers**: the Rule institute a three-tier structure in place to ensure of observance and adherence to the Code by the online publishers and digital media:

³⁹ *Supra* 7, Rule 4 (2)

⁴⁰ *Supra* 7, Rule at Appendix to the Rules

⁴¹ U (Universal), U/A 7+, U/A 13+, U/A 16+, and A (Adult)

⁴² Platforms would be required to implement parental locks for content classified as U/A 13+ or higher and reliable age verification mechanisms for content classified as "A".

1. **Level I – Self-regulation by the publishers** - Publisher shall appoint a Grievance Redressal Officer based in India who shall be responsible for the redressal of grievances received by it. The officer shall take decision on every grievance received by it within 15 days. If the conflict is not addressed within fifteen days, it will be referred to the self-regulating body at level two of the three-tier grievance redressal mechanism.
2. **Level II – Self-regulation by the self-regulating bodies of the publishers** - There may be one or more self-regulatory bodies of publishers. Such a body shall be headed by a retired judge of the Supreme Court, a High Court or independent eminent person and have not more than six members. Such a body will have to register with the Ministry of Information and Broadcasting. This body will oversee the adherence by the publisher to the Code of Ethics and address grievances that have not been resolved by the publisher within 15 days.
3. **Level III – Oversight mechanism by the Central Government** - Ministry of Information and Broadcasting shall formulate an oversight mechanism. It shall publish a charter for self-regulating bodies, including Codes of Practices. It shall establish an Inter-Departmental Committee for hearing grievances.

Analysis of the Rules:

As previously stated, the Rules aims to strengthen the accountability of intermediaries and digital media while also empowering social media users by establishing a systematic redressal mechanism for effective grievance resolution. However, since its notification, the Rules have been a source of criticism not only by intermediaries or digital media houses but also by the public at large.

Firstly, the rules is criticized on the ground of ***Flawed Consultation***. While preparing the draft, the Ministry of Electronics and Information Technology solicited public input via a notification dated December 24, 2018, but only 171 responses were received. 171 is a dismal figure in a country with one of the greatest populations and stakeholders counted in crores. The Ministry received 80 counter-comments in response to these remarks. The government can be faulted for poor participation because it must have worked hard and taken other actions to increase awareness and involvement.

Secondly, it is argued that Rule 4's ***Traceability Clause*** would result in a new type of mass surveillance as it requires messaging applications to identify and submit the details of the first originator of the information upon receiving a court order. In order to track one message, the intermediaries would have to trace the entire chain involve in it. This would set a dangerous precedent for fake cases and investigations of all kinds, because even if you sent a message or shared an image to verify its legitimacy or for another reason, you would still be identified as the communication's originator.

Thirdly, the rule is also challenged for being **outside the scope and ambit of the IT Act**. According to settled legal principles ‘*executive actions must derive their power or legitimacy from legislation, or laws passed by parliament*’⁴³, but here, the executive has changed an important component of the parent statute by widening the scope to include digital media, making the executive action ultra-vires.

Furthermore, ‘subordinate legislation is regarded excessive when the legislature has provided it unrestricted discretionary power’⁴⁴, as we can see in this situation, because there are no checks-and-balances, regulations, or standards to advise the executive on how it should exercise its power. As a result, the executive's discretion is unchecked. For example, the Centre wielded enormous authority in determining the number of users who would be subject to additional due diligence. Furthermore, the ambiguity of the terms "public order" and "substantial risk of harm," as well as the government's enormous powers under Rules 3, 4, and 6 to "order any intermediary" under the IT Rules, give the government far too much discretion⁴⁵.

Lastly, At least 17 different cases claiming that the Rules are *Ultra-vires to the Constitution* have filled before various HCs in India. One of which was filled by *LiveLaw*⁴⁶ before the Kerala HC, where the Union of India was restrained from taking coercive action against LiveLaw under Part III of the Rules⁴⁷. Later in August 2021, in *Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors., vs. Union of India*⁴⁸ the rule 9 of the Rules was challenged before the Bombay HC on the ground of being “*ex facie draconian, arbitrary and patently ultra vires*”. While assessing the constitutionality of same HC decided that prima facie, it suffers from two illegalities. “*Firstly; it imposes an obligation on the publishers of news and current affairs content and publishers of online curated content to observe the Code of Ethics under a completely different statutory regime alien to the IT Act*”⁴⁹. Further, Section 87 does not confer any power on the Central Government to frame rules contemplating such provisions under clauses (z) and (zg) of sub section (2).” Therefore, court stayed the Rule 9 of going beyond the ambit of provisions of the IT Act as restricted under Article 19(1)(a). The court stated that “People would be starved of the liberty of thought and feel suffocated to exercise their right of freedom of speech and expression, if they are made to live in present times of content regulation on the internet with the Code of Ethics hanging over their head as the Sword of Damocles.” Similarly, in September

⁴³ Dr Ashwini Kumar vs Union Of India Ministry Of Home, available at <https://indiankanoon.org/doc/19090773/?type=print>

⁴⁴ Gwalior Rayon Silk Mfg. (Wvg.) Co. vs The Asstt. Commissioner Of Sales, 1974 SCR (2) 879

⁴⁵ Ayushi Srivastava, IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021: Critical Analysis available at <https://www.sndlegalassociates.com/post/it-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-critical-analysis>

⁴⁶ Live Law Media (P) Ltd. v. Union of India, WP(C) No.6272 of 2021, 10-03-2021

⁴⁷ Case Briefs high Courts, OTT Platforms, available at <https://www.sconline.com/blog/post/tag/ott-platforms/>

⁴⁸ W.P. (L.) No. 14172 of 2021

⁴⁹ Journalistic Conduct of the Press Council of India under the Press Council Act, 1978 and Programme Code under Section 5 of the Cable TV (Network) Regulation Act, 1995

2021 Madras HC in *Digital News Publishers Association and Mukund Padmanabhan vs. Union of India and Other Connected Matters*⁵⁰ also stayed the enforcement of IT Rules against digital media observing that the oversight mechanism robs media of its independence. Digital news portals "The Wire" & "The Quint" and social media intermediary Facebook have approached the Delhi High Court challenging the Rules.

Ultimately, on behalf of the Union of India, Solicitor General **Tushar Mehta** has filed four transfer petitions before the SC of India, requesting to consider all of the challenges pending before the various HCs concurrently. The bench comprising Justices A.M. Khanwilkar and Abhay S. Oka stated that all tagged matters must be properly classified, and that the matters challenging the Rules will be considered together, but separately from the other unrelated matters. Further ordered a stay on all proceedings currently pending the High Courts, and any new matters that may be filed. However, the interim orders that have secured protections against specific provisions of the Rules have not been stayed, and continue to be operational⁵¹. The upcoming hearings before the Supreme Court will be crucial since these orders will be put to the test.

Conclusion

It is evident from the above discussion that the fundamental issue with these new rules is that it violate users' fundamental rights especially right to privacy that are guaranteed by the constitution. Privacy has fundamental as well as instrumental value, and the gradual increase in censorship will result in a commensurate reduction in user privacy.

The middle-men will have no choice but to comply because their immunity will be available only if they follow these regulations. Because this legislation would alter how millions of Indian internet users access the internet, increased surveillance is a major source of concern for everyone.

As a result, the government's current strategy, which appears to be an appealing venture based on its objectives, but a deeper examination at these guidelines reveals the overreach that is being done and can have quite negative consequences on how we regard our virtual life.

⁵⁰ Madras High Court stays two clauses of India IT Rules 2021 Available at [https://economictimes.in/Digital News Publishers Association and Mukund Padmanabhan vs. Union of India and Other Connected Matters diatimes.com/tech/technology/madras-high-court-stays-certain-sub-clauses-of-new-it-rules/articleshow/86265232.cms](https://economictimes.in/Digital%20News%20Publishers%20Association%20and%20Mukund%20Padmanabhan%20vs.%20Union%20of%20India%20and%20Other%20Connected%20Matters%20diatimes.com/tech/technology/madras-high-court-stays-certain-sub-clauses-of-new-it-rules/articleshow/86265232.cms)

⁵¹ *Supra* Note 46