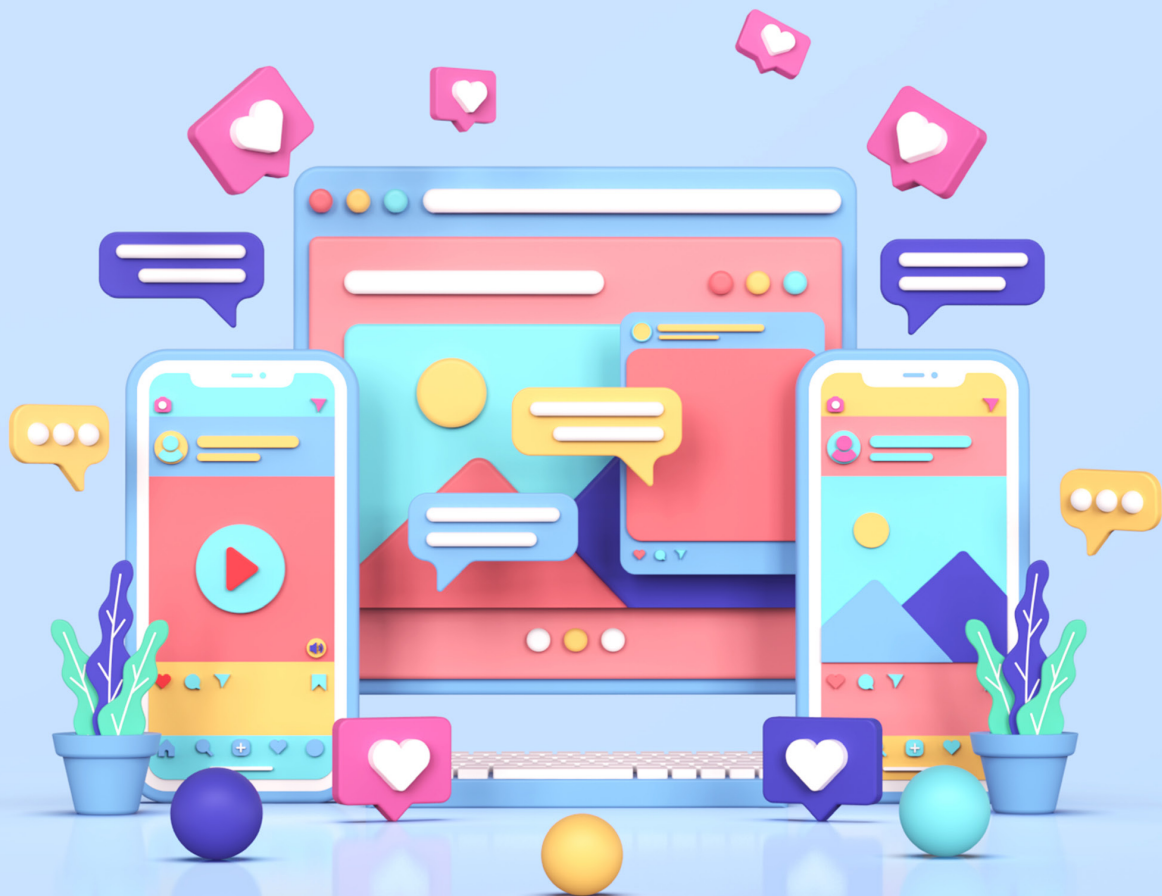


THE NEW INTERMEDIARY GUIDELINES

A TSUNAMI OF ISSUES



The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“Intermediary Rules”) were notified by the Ministry of Electronics and Information Technology on February 25th, 2021 (“Notification Date”). The Intermediary Rules will supersede the Information Technology (Intermediary Guidelines) Rules, 2011 (“2011 Rules”) and regulate social media intermediaries and publishers of digital news and online curated content. A shift from the 2011 Rules is the inclusion of digital media within the ambit of regulation of intermediaries.

Regulation of Social Media Intermediaries:

Section 79 of the Information Technology Act, 2000 (“IT Act”) exempts intermediaries from liability under any law arising out of content published on their platforms by users. In order to be protected under Section 79, intermediaries must now comply with certain due diligence requirements listed under Rule 3 of the Intermediary Rules. Rule 3 inter alia requires Intermediaries:

- To publish the rules and regulations, privacy policy and user agreement on their platforms (Rule 3(1)(a)); and
- Inform their users that in case of a user's non-compliance with such rules and regulations and the privacy policy and user agreement, the intermediary has the right to terminate the user's access to the platform (Rule 3(1)(c)).

Further, Rule 3(1)(d) requires an Intermediary to take down any information/content on receiving an order from a judicial body or appropriate government. Such an order may be passed if the information/content is prohibited by law in the interest of inter alia decency, morality, or the sovereignty and integrity of India. Intermediaries must comply with such orders within 36 hours. Such a short time frame leaves practically no scope for appeal. The wide ambit of this sub-rule coupled with the Government of India's (“GOI”) arbitrary use of laws to curb dissent, has caused fear that this provision may be misused to take down content that may be critical of the GOI.

Regulation of Significant Social Media Intermediaries:

The Rules have an additional layer of compliances — over and above those in Rule 3 — that come under Rule 4 for intermediaries classified as Significant Social Media Intermediaries (“SSMIs”). SSMIs are those intermediaries which have over 50 lakh registered Indian users. Major social media companies like Twitter, Facebook and WhatsApp fall under this classification.

Under Rule 4(1), SSMIs are required to appoint:

- A Chief Compliance Officer – who shall be responsible for ensuring compliance with the IT Act and Intermediary Rules;

- A Nodal Contact Person – who shall be available 24x7 for coordination with law enforcement agencies; and
- A Resident Grievance Officer – to whom users may bring any grievances.

The above officers must be residents of India.

Intermediaries were given 3 months from the Notification Date, to comply with all the due diligence requirements under the Intermediary Rules in order to retain their status.

Twitter failed to make the required appointments of officers in due time, which led to it losing its intermediary status. As a result, the Head of Twitter India was named in several police complaints and at least one court case relating to content published on the platform (since the platform was no longer an intermediary exempted from liability under Section 79), was filed. However, in August 2021, the Central Government stated that Twitter has made the required appointments and is now in compliance with the Intermediary Rules.

Another due diligence requirement under Rule 4(2) of the Intermediary Rules requires SSMLs that predominantly provide messaging services, to identify the first originator of any information on their platforms, as and when required by an order of a competent authority. While the Rule does have provisos which limit the power of the GOI from asking for such information, the limitations contained in the same are broad and leave room for interpretation.

Concerns surrounding Rule 4(2) caused Facebook-owned WhatsApp to file a petition before the Delhi High Court claiming that the Intermediary Rules threaten to breach their users' fundamental Right to Privacy.

The petition states that identifying the originator of one message would require WhatsApp to break end-to-end encryption of all of its roughly 400 million users in India. The encryption ensures that the conversations taking place between individuals on WhatsApp cannot be accessed by any third party — not even by WhatsApp. The GOI on the other hand, claims that since the Intermediary Rules state that such information will only be required from an intermediary when all other measures to identify the originator have failed, they conform to the test of necessity and proportionality laid down by the Supreme Court of India in Justice K.S. Puttaswamy (Retd.) v. Union of India. The matter is pending before the Delhi High Court and the decision of the Court is likely to significantly impact the subsequent application of the right to privacy in India.

Regulation of Digital Media:

Part III of the Intermediary Rules regulates digital media, by laying down a code of ethics and establishing a 3-tier grievance redressal mechanism.

While tier 1 and 2 of the mechanism entail self-regulation by publishers and a body of publishers, tier 3 is an Oversight Mechanism by the Central Government. Several news channels and journalists have expressed their concerns and claimed that this may lead to undue involvement of the GOI with news and media outlets.

The Intermediary Rules have currently been challenged in multiple High Courts in India, predominantly by journalists and news agencies who believe the Intermediary Rules will have a chilling effect on the freedom of expression and lead to self-censorship.

Conclusion

The notification of the Intermediary Rules caused substantial unease among users and intermediaries. The fear remains that the Intermediary Rules may lead to the GOI having increasing control over the content published and consumed by individuals. However, the GOI has maintained an unwavering stance that the Intermediary Rules are solely intended to regulate the digital space and make it safer for all.

At present, a cursory glance at most social media platforms will prove that there is a need for regulatory intervention to curb the hate and vitriol that is so rampant on these platforms. Only time will tell if the Intermediary Rules fulfil their intended purpose or are merely another tool of control in the hands of the GOI.

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