



## STRICTER OBLIGATIONS ON SOCIAL MEDIA ESTABLISHMENTS

The Ministry of Electronics & Information Technology of the Government of India has, on December 24, 2018, issued draft of The Information Technology (Intermediaries Guidelines (Amendment)) Rules 2018, for public consultation. Intermediary means a person who on behalf of another receives, stores or transmits electronic records like internet service providers, search engines, online marketplaces, social media, network service providers, etc. This Draft Amendment widens the regulatory scope of Intermediaries, particularly social media entities.

Instances of misuse of social media by criminals or antinational elements such as inducing for recruitment of terrorists, circulation of obscene content, spread of disharmony, incitement of violence, public order, fake news, etc. are increasing each passing day. Few incidents of mob lynching have happened because of fake news/ rumours being circulated through WhatsApp and other social media sites. When these issues came under the purview of the Supreme Court of India, the Court directed the Government of India to provide a mechanism to curb dissemination of irresponsible and explosive messages on various social media platforms. Therefore, a law to make intermediary entities like WhatsApp, Facebook, Google, Twitter, etc. accountable for disseminating such information becomes necessary.

Several Social Media and other Intermediaries do significant amount of business in India without being accountable for the information that is generated, processed, stored, or transferred in their Computer Resource. They tend not to respond to the Government of India or to the Judicial Summons/Orders. While it is worthy to note that India has the second largest internet user base. Therefore, it becomes essential that adequate mechanisms are put in place wherein Computer Resource of the Intermediaries are not misused, and any potential law and order issue could be averted.

To this end, Government of India has formed an inter-ministerial consultation process with stakeholders including Social Media platforms/ messaging services platforms like Facebook, Google, Twitter, Yahoo, WhatsApp and other associations like IAMAI, COAI and ISPAI representing intermediaries.

Section 79 of the Information Technology Act, 2000, exempts intermediaries from liabilities in certain cases. Section 79(2)(c) mentions that intermediaries must observe due diligence while discharging their duties, and also observe such other guidelines as prescribed by the Central Government. The existing Information Technology (Intermediaries Guidelines) Rules, 2011 is inadequate to make social media accountable.

In this regard, in the case of **(A) Tehseen S. Poonawalla v UOI**, Writ Petition (Civil) No. 754 of 2016, the Supreme court on July 17, 2018, ordered that *“It shall be the duty of the Central Government as well as the State Governments to take steps to curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which have a tendency to incite mob violence and lynching of any kind”*.

In the case of (B) IN RE: PRAJWALA LETTER DATED 18.2.2015 VIDEOS OF SEXUAL VIOLENCE AND RECOMMENDATIONS, SMW (CrI.) No(s) 3/2015, where social media entities like Yahoo, Facebook, Microsoft, WhatsApp were parties, the Supreme Court of India in October 2018 fixed a deadline for Government of India to frame Standard Operating Procedure/guidelines for the Intermediaries. Again, on December 11, 2018, the Supreme Court benches of Justice MB Lokur and Justice UU Lalit ordered that, *“The Government of India may frame the necessary Guidelines / SOP and implement them within two weeks so as to eliminate child pornography, rape and gang rape imageries, videos and sites in content hosting platforms and other applications”*.

Consequently, the Government of India placed this draft of The Information Technology (Intermediaries Guidelines (Amendment)) Rules 2018, for public consultation. Certain prominent features of the Draft Information Technology (Intermediaries Guidelines (Amendment)) Rules 2018, and the respective issues involved are discussed hereunder:

- 1.** Social media entities having wide presence in India has to have a permanent establishment in India. Rule 7 states that an intermediary who has more than 50 lakh users in India or as notified by Government of India has to be a company incorporated in India having a permanent registered office in India and should appoint a nodal person for coordination with law enforcement agencies and compliances. This rule would ease regulatory authorities’ access when entities are registered within the territorial jurisdiction of India. Furthermore, this rule would enable bringing intermediaries into the Indian taxation system especially when they generate significant profits from Indian users.
- 2.** The intermediary should provide details about the person who sends, stores, generates or transmits electronic information when required by a lawful order. Rule 5 states that “the intermediary shall enable tracing out of such originator of information on its platform.” This rule has risen several eyebrows. For example, WhatsApp follows an end-to-end encryption mechanism. To follow this rule, to find the originator of information, decryption is required. This amendment has been criticised on the grounds of affecting privacy rights of individuals as this would become a surveillance tool in the hands of Government of India and would impact freedom of speech guaranteed under Article 19 of the Constitution of India. On the contrary, it is argued that government agencies can seek information only for limited instances like matters concerning security of state, investigation or detection or prosecution of offences, protective or cyber security. It looks as if government has made this amendment considering Article 19(2) of the Constitution of India. Rule 5 also states that any lawful information request should be responded by the intermediaries within 72 hours to avoid any undue delays.
- 3.** As per Rule 8, the intermediary should remove or disable access to such information when it concerns interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, all of which is within the scope of reasonable restrictions under Article 19(2) of the Indian Constitution. Removal or disabling access should be done immediately within 24 hours from the time of request. Further, such information and associated records should be preserved for 180 days for investigation purposes (earlier 90 days).
- 4.** For any information request for identification or removal requests from the Government, the Intermediary may use automated tools. Rule 9 states that “the Intermediary shall deploy technology-based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful information or content.” As the Intermediaries have to use only technology-based automated tools or mechanisms for acting on the orders of the Government or its agencies and it nullifies risks of human intervention, it could negate any privacy concerns.
- 5.** This Amendment mandates Intermediaries to not host, display, upload, modify, publish, transmit, update or share any information that threatens “critical information infrastructure”.

Critical Information Infrastructure means the computer resource, the incapacitation or destruction of which, shall have debilitating impact on national security, economy, public health or safety.

Also, Government of India has issued a notification S.O. 6227(E) on 20<sup>th</sup> December 2018 under Rule 4 of the Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Information) Rules 2009 identifying ten central government Security Intelligence Agencies who is authorized to intercept, monitor, decrypt any information generated, transmitted, received, or stored in any computer resource.

These measures would bring greater responsibility, accountability, and commitment, reduce spread of fake news in social media, and create a mechanism to keep in control the unlawful information or content processed and stored by the Intermediaries.

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