New Intermediary Rules 2021

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Introduction

The Government of India issued new rules applicable to Intermediaries ("Rules") under section 79 of India's Information Technology Act, 2000 ("IT Act"). For most part, the Rules come into force immediately. The Rules are perhaps the most far-reaching attempt by a constitutional democracy to regulate the internet and more specifically, internet user generated content that is circulated through "intermediaries" such as social media, online news media and online video streaming services. This article analyses the new Rules and provide our analysis of how they work.

Understanding intermediaries and section 79

Under the Rules, an "intermediary" is defined as:

"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 service providers, search engines, online payment sites, online auction sites, online-market places and cyber cafes".

Thus, intermediaries are essentially organizations that may transmit or store information of others. The best examples of intermediaries are web hosts and social media platforms. Most countries provide a "safe harbour" to intermediaries from liability for content of others because the content is provided by someone else and not the intermediaries. In India, section 79 of the Information Technology Act, 2000 protects an intermediary from liability, subject to conditions that the intermediary should not have been involved in the creation of the content, and that the intermediary must have exercised "due diligence" as defined by the government. By stipulating what constitutes due diligence, the new Rules have far reaching and comprehensive effect.

General rules for intermediaries

The Rules require intermediaries to provide notice to users on content that is prohibited, terms of use, privacy policy, etc, and a warning that violation of the terms of use could lead to termination or removal of content. The Rules also contain provisions on assisting the government in exercise of its already existing power to block or remove content. They also provide for the appointment of a grievance officer, publication of his name and contact details and publication of a grievance procedure. Overall, these provisions mostly reiterate the existing rules but with a few additional provisions introduced to create procedure and safeguards. Viewed within the paradigm of the existing Indian regulatory environment, there is little that is new in the Rules on intermediaries to be concerned about. It is important to note that under Section 69 of the IT Act, the Government already has the power to block or remove content. The Rules essentially create an ecosystem for intermediaries to co-ordinate with the government in this regard.

Rules relating to significant social media intermediaries

A social media intermediary is defined to mean:

"An intermediary 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."

This largely relates to the likes of Facebook and Twitter. The government also notified that a Significant Social Media Intermediary (SSMI) is a social media intermediary which has a minimum of 50 lakh/5 million registered users in India.

With respect to SSMIs, in addition to the protections and procedures applying for "intermediaries" (set out above), the new Rules require SSMIs to have a grievance officer, with his or her name, contact details and grievance procedure to be published. An SSMI needs to appoint a Chief Compliance Officer who is responsible for ensuring compliance of the SSMI with these Rules, and a Nodal Officer (who cannot be the chief compliance officer) whose responsibility is to co-ordinate with the government agencies on takedown of content. One key concern of the security agencies relates to lack of control over foreign SSMI's since international social media platforms are actually owned by a foreign parent entity. The Indian entity generally only engages in sourcing content and marketing and has no control over content on the platform. To tackle this, the rules require all three officers referred to above to be resident in India and for the SSMI to have a physical address in India.

One main concern relates to the provision that the Chief Compliance Officer would be responsible for the failure of the SSMI to comply with these Rules, attributing personal

liability to the Chief Compliance Officer even when he may not be responsible for implementing decisions.

There is a requirement of a monthly report to be published mentioning details about the complaints received and the actions taken. This seems some what excessive regulatory control.

There are some interesting provisions such as the requirement that an SSMI enable verified users – a user can opt to have his identity verified and thereafter, there would be a mark indicating that the user's identity is verified. Paid advertisements also need to be properly identified so that users can differentiate between paid for content and content which is genuinely user generated. There is also a requirement to implement technology measures to identify content relating to rape, sexual abuse and other illegal content that has already been taken down.

Another key requirement is a notice and takedown procedure for complaints, other than orders from the government and courts. This includes sending notice to the content owner, giving him an opportunity to be heard and then deciding whether to take down the content or not. This repairs the damage caused by the much-praised Shreya Singhal judgment where the courts ruled that notice means only notice of courts or government, thereby shutting out and forcing individuals to approach courts for redressal, which is a daunting prospect in any country especially India. It should have instead prescribed a notice and take down procedure. Many countries have notice and take down procedures, the most well-known of which is under the USA's DMCA.

Perhaps the most controversial of the provisions is the requirement that a SSMI engaged primarily in messaging identify the "first originator" of a particular message. This applies mainly to Whatsapp and its competitors, but it could theoretically also apply to Telco's who carry SMS. This means that if a person sends unlawful content on Whatsapp and the same is widely distributed, then Whatsapp would have to identify who sent the message first and inform the security agencies when called upon to do so. Whatsapp would however not be required to provide the contents of any message or any other information re-lated to the originator, or any information related to its other users.

A key issue here is with implementation. Whatsapp messages are end to end encrypted and Whatsapp claims it has no access to the content. So, would it be possible to do this without knowing the contents of the message and relying only on metadata to figure out the first originator of the content? Whatsapp and its competitors would have to clarify whether that is possible. This provision is controversial. On one hand, it can be argued-if content is actually illegal, then law enforcement needs to find out who created the content and who sent out the message first. On the other hand, given our plethora of content related criminal provisions, a message meant only for a confidant could find its way to many people and could result in criminal liability which would have a significant chilling effect.

We are also concerned about a provision which states that if the first originator is outside India, then the first originator would be the first originator in India. We are not sure why a person who happens to be the first person in India to forward something is relevant.

Rules applicable to publishers

The third section of these rules relates to publishers, who are of two kinds (a) those who publish news and current affairs content; and (b) those who publish online curated content, which is defined to cover only audio-visual content. The latter essentially deals with podcasts and video streaming services but also social media sites that curate content.

The Rules apply to a publisher who is physically present in India as well as a publisher who "conducts systematic business activity of making its content available in India". The language is somewhat vague and should have referred instead to "systematically targeting Indian users". It may inadvertently cover online content not particularly focused on Indian users but available in India.

Here also, there is a requirement for appointment of a Grievance Officer and establishing a grievance mechanism with acknowledgement of a complaint within 24 hours and a decision on the complaint within 15 days. There is an appellate procedure, first to a self-regulatory body and then to the Government run Oversight Mechanism. We are not disputing the need for a grievance mechanism and the concept is clearly well conceived.

We have to face the reality that there is a plethora of outrightly false content as well as content which is biased and misleading. It can be reasonably contended that the ugly side of the internet and social media have reached a point where some action needs to be taken and it is necessary to empower users to call out bad content and insist it be removed. The key issue here is whether the process will be fair. A biased content provider is unlikely to be fair since he has an agenda tied to his content.

We have to recognize that in India, just as in the US and some other countries, there is a clear divide between the so called right and the so called left (I say so called because I have my reservations on whether either side deserve their titles of right or left!)! There can be one or more self-regulatory bodies so very likely the Right will form one self-regulatory body and the Left will form another. Will the government agree to register both? And appeals go to the government oversight mechanism which consists of bureaucrats from different ministries. Matters of free speech, accuracy of content, etc. are best decided by a group of well-regarded individuals in different areas, including law, media, and journalism rather than be left to bureaucrats. Here lies the biggest concern–that the government will use this mechanism to remove content that it does not like and retain content that is positive towards it.

There are other provisions that are somewhat troubling. A publisher is required to send notice to the Ministry of Information and Broadcasting ("Ministry") within 30 days of the effective date of these rules or within 30 days of setting up of the publisher. Would the Ministry refuse to register the publisher? It does not appear to be a registration at all – the publisher simply has to send the information and relevant documents. Further, it does not state that if the publisher does not do so, then the publisher cannot do business. If a publisher is sure its content does not violate Indian law, it need not actually be concerned about intermediary liability. Further, a publisher who has an editorial team that reviews content may not be able to use the safe harbour under section 79 anyway. The definition of a news and current affairs publisher is broad enough to cover a large amount of content which is not primarily journalistic. For example, a law firm that reviews laws (or carries an article such as this one!) would also be covered and would need to notify the Ministry.

Conclusion

The rules have been heavily criticized for infringing on the right to free speech and a further descent of India away from democracy. Our view is that the Rules present a mixed bag. The Rules present the first and meaningful manner of regulating the internet – that is allowing users to complain about bad content and requiring content or platform owners to act on such complaints and if they do not do so, be dealt with by a self-regulatory body. The US and Europe are already discussing how to do this, and it is well recognized that bad content on the internet is threatening the fabric of democracies. In fact, the rules are path breaking in the way they deal with the internet and try to strike a balance between free speech and the need to regulate with bad content. More importantly, they deliver power to the people, who can complain about content and have their complaints be heard and resolved.

There are undoubtedly ways by which the rules can be circumvented and used in a way to favour one side and attack the other side. The current enforcement and judicial environment in India does not inspire much confidence. Only time will tell how the rules will be implemented and whether courts will insist they be interpreted and implemented in a fair and balanced manner.

One unfortunate aspect about the rules is that by and large they come into force immediately with no notice to anyone. Further, no draft was released in advance for public comment. The rules provide for a fairly collaborative manner of regulating content on the internet. In that spirit, the rules should have been released in advance, been subject to several months of comments and feedback before being finalized and there should have been a preparatory period for organizations to become compliant.

It should be noted that most social media sites already have taken down policies so this should not affect them very much. One concern though, especially with news sites, is that they could be at the receiving end of "complaint carpet bombing" from people opposed to their ideology thereby requiring huge resources to deal with each and every complaint.

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