

intermediary Liability & Freedom of Expression

A critique of
“The Information Technology (Intermediaries Guidelines) Rules 2011”
and a proposal for an alternate set of Rules.

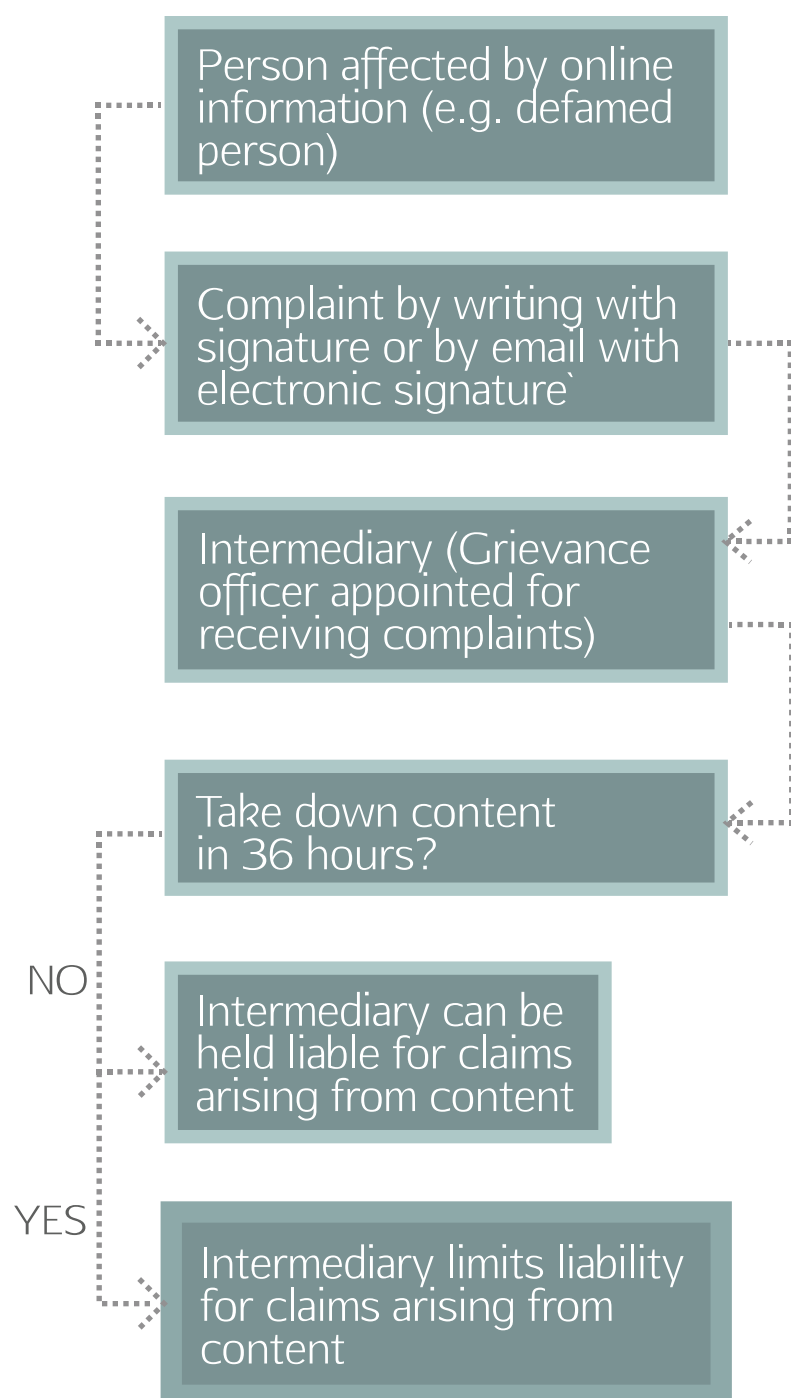
What is the purpose of the Rules notified in 2011?

To provide guidelines for the ‘post-publication redressal mechanism’ for removal of user generated content that violates reasonable restrictions to the right to freedom of expression as envisioned in the Constitution of India.

Guiding principles for ‘post-publication redressal mechanism’

PRINCIPLES	CURRENT RULES	PROPOSED RULES
The redressal mechanism shall be quick.	YES	YES
The redressal mechanism shall be cheap.	YES	YES
The redressal mechanism shall provide safeguards to prevent abuse of such mechanism for suppressing legitimate expressions.	NO	YES
The redressal mechanism shall conform to all forms of natural justice.	NO	YES
The redressal mechanism shall conform to all principles of freedom of expression.	NO	YES
The redressal mechanism shall not result in a chilling effect on freedom of expression.	NO	YES
The redressal mechanism shall recognise the different functions performed by different classes of intermediaries.	NO	YES

Current redressal mechanism



Criticisms of the current mechanism

No Natural Justice

- The third party provider/creator of information is not given a chance to be heard by the intermediary.
- There is no requirement to give a reasoned decision.
- There is no procedure to have the removed information restored by filing a counter notice or by appealing to a higher authority.

Different classes of intermediaries are all treated alike

- Fails to recognise that different classes of intermediaries perform different functions and therefore should have different roles and responsibilities; e.g. BSNL is treated at par with YouTube.
- Removal of content by upstream intermediaries will result in undue over-blocking.

No safeguards to prevent abuse

- The complainant may send frivolous complaints and suppress legitimate expressions without any fear of repercussions.

Uncertainty in content criteria

- The content criteria for removal of content includes terms like “disparaging” and “objectionable” which are not defined and go beyond the reasonable restrictions envisioned by the Constitution of India.

Private censorship

- Censorship, which was previously the exclusive domain of the judiciary or the executive, has now been delegated to private intermediaries as a result of this redressal mechanism.
- Incentive to remove expressions in order to limit liability.
- Private intermediaries do not have sufficient legal resources to subjectively determine the legitimacy of a legal claim as a result of which they err on the side of caution.

Why should a private intermediary determine what is right or wrong, especially when it doesn't have the legal competence to do so? Ideally, the intermediary should continue performing the role of an intermediary and ask the creator of expression whether he is willing to defend his expression in court and remove the expression only if he refuses to defend his expression.

Proposed redressal mechanism

Information Location Tool

- within 48 hours of receiving a complaint, the intermediary determines whether the information hosted at the other end of the communication link has been instructed to be removed pursuant to a court order or any direction under the Act. If the complaint is accompanied with a copy of any such order or direction then the communication link should be removed, else it should be retained.

Caching Services

- within 48 hours of receiving a complaint, the intermediary determines whether the information for which the transmission is sought to be made more efficient has been removed at its source. If it has been removed then the cached information should also be removed, else it should be retained.

Access Providers

- redressal mechanism should not be applicable, other than by court order, to prevent upstream over-blocking.

Hosting Services

- immediately after receiving a complaint, the intermediary issues a “notice” to the user who provided the information along with a copy of the complaint
- the user may choose to contest the notice by filing a “counter-notice” within 48 hours
 - if the user chooses to contest the notice by responding with a counter-notice then the intermediary is required to continue hosting the information and share the counter-notice with the complainant, so that the complainant may directly approach the court against the user. However, the intermediary may voluntarily remove the information under contention if, in its good faith, it feels the expression is not legitimate despite the counter-notice of the user.
 - if the user chooses to accept the allegations in the complaint, the intermediary is required to remove the information under contention.
 - if the user fails to reply within the counter-notice deadline, the intermediary is required to remove the information under contention and replace such removed information with a general notification about the removal. However, in such a case, the complainant is required to get a court order to back the complaint within 180 days, the failure of which will render the original complaint redundant and require the intermediary to restore the removed information.
- regardless of the counter-notice deadline, the user may contest the notice by responding with a counter-notice within a period of 60 days of receiving the notice. If the information has already been removed by the intermediary, then the information is required to be restored and the complainant is required to be provided with the counter notice.

