Comments to the proposed amendments to The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

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Preliminary

This note presents comments by the Centre for Internet and Society (CIS), India, on the proposed amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("proposed amendments"). In these comments, we examine the constitutional validity of the proposed amendments, as well as whether the language of the amendments provide sufficient clarity for its intended recipients. This commentary is in-line with CIS' previous engagement with other iterations of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

General Comments

Ultra vires the parent act

Section 79(1) of the Information Technology (IT) Act states that the intermediary will not be held liable for any third-party information if the intermediary complies with the conditions laid out in Section 79(2). One of these conditions is that the intermediary observe "*due diligence while discharging his duties under this Act and also observe such other guidelines as the Central Government may prescribe in this behalf.*" Further, Section 87(2)(zg) empowers the central government to prescribe "*guidelines to be observed by the intermediaries under sub-section (2) of section 79.*"

A combined reading of Section 79(2) read with Section 89(2)(zg) makes it clear that the power of the Central Government is limited to prescribing guidelines related to the due diligence to be observed by the intermediaries while discharging its duties under the IT Act. However, the proposed amendments extend the original scope of the provisions within the IT Act.

In particular, the IT Act does not prescribe for any classification of intermediaries. Section 2(1)(w) of the Act defines intermediaries as "*with respect to any particular electronic records, means 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*". Intermediaries are treated and regarded as a single monolithic entity with the same responsibilities and obligations.

The proposed amendments have now established a new category of intermediaries, namely online gaming intermediary. This classification comes with additional obligations, codified within Rule 4A of the proposed amendments, including enabling the verification of user-identity and setting up grievance redressal mechanisms. The additional obligations

placed on online gaming intermediaries find no basis in the IT Act, which does not specify or demarcate between different categories of intermediaries.

The 2021 Rules have been prescribed under Section 87(1) and Section 87(2)(z) and (zg) of the IT Act. These provisions do not empower the Central Government to make any amendment to Section 2(w) or create any classification of intermediaries. As has been held by the Supreme Court in *State of Karnataka and Another v. Ganesh Kamath & Ors* that: "*It is a well settled principle of interpretation of statutes that conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.*" In this light, we argue that the proposed amendment cannot go beyond the parent act or prescribe policies in the absence of any law/regulation authorising them to do so.

Recommendation

We recommend that a regulatory intervention seeking to classify intermediaries and prescribe regulations specific to the unique nature of specific intermediaries should happen through an amendment to the parent act. The amendment should prescribe additional responsibilities and obligations of online gaming intermediaries.

A note on the following sections

Since the legality of classifying intermediaries into further categories is under question, our subsequent discussions on the language of the provisions related to online gaming intermediary are recommended to be taken into account for formulating any new legislations relating to these entities.

Specific comments

Fact checking amendment

Amendment to Rule 3(1)(b)(v) states that intermediaries are obligated to ask their users to not host any content that is, *inter alia*, "*identified as fake or false by the fact check unit at the Press Information Bureau of the Ministry of Information and Broadcasting or other agency authorised by the Central Government for fact checking*".

Read together with Rule 3(1)(c), which gives intermediaries the prerogative to terminate user access to their resources on non-compliance with their rules and regulations, Rule 3(1)(b)(v) essentially affirms the intermediary's right to remove content that the Central government deems to be 'fake'. However, in the larger context of the intermediary liability framework of India, where intermediaries found to be not complying with the legal framework of section 79

lose their immunity, provisions such as Rule 3(1)(b)(v) compel intermediaries to actively censor content, on the apprehension of legal sanctions.

In this light, we argue that Rule 3(1)(b)(v) is constitutionally invalid, inasmuch that Article 19(2), which prescribes grounds under which the government restrict the right to free speech, does not permit restricting speech on the ground that it is ostensibly "*fake or false*". In addition, the net effect of this rule would be that the government would be the ultimate arbiter of what is considered 'truth', and every contradictions to this narrative would be deemed to be false. In a democratic system like India's, this cannot be a tenable position, and would go against a rich jurisprudence of constitutional history on the need for plurality.

For instance, in *Indian Express Newspapers v Union of India,* the Supreme Court had held that *'the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'* Applying this interpretation to the present case, it could be said that the government's monopoly on directing what constitutes "*fake or false*" in the online space would prevent citizens from accessing dissenting voices and counterpoints to government policies .

This is problematic when one considers that in the Indian context, freedom of speech and expression has always been valued for its instrumental role in ensuring a healthy democracy, and its power to influence public opinion. In the present case, the government, far from facilitating any such condition, is instead actively indulging in guardianship of the public mind (Sarkar et al, 2019).

Other provisions in the IT Act which permit for censorship of content, including section 69A, permit the government to only do so when content is relatable to grounds enumerated in Article 19(2) of the Constitution. In addition, in the case of *Shreya Singhal vs Union of India*, where, the constitutionality of section 69A was challenged, the Supreme Court upheld the provision because of the legal safeguards inherent in the provision, including offering a hearing to the originator of the impugned content and reasons for censoring content to be recorded in writing.

In contrast, a fact check by the Press Information Bureau or by another authorised agency provides no such safeguards, and does not relate to any constitutionally recognized ground for restricting speech.

Recommendation

The proposed amendment to Rule 3(1)(b)(v) is unconstitutional, and should be removed from the final draft of the law.

Clarifications are needed for online games rules definitions

The definitions of an "online game" and "online gaming intermediary" are currently extremely unclear and require further clarification.

As the proposed amendments stand, online games are characterised by the user's "*deposit with the expectation of earning winnings*". Both deposit and winnings can be "*cash*" or "*in kind*", which does not adequately draw a boundary on the type of games this amendment seeks to cover. Can the time invested by the player in playing a game be answered under the "in kind" definition of deposit? If the game provides a virtual in-game currency that can be exchanged for internal power ups, even if there are no cash or gift cards used as payout, is that considered to be an "in kind" winnings? The rules, as currently drafted, are vague in their reference towards "in kind" deposits and payouts.

This definition of online games also does not differentiate between single or multiplayer games, and traditional games like chess which have found an audience online such as Candy Crush (single player), Minecraft (multiplayer collaborative) or chess (traditional). It is unclear whether these games were intended to fall within the purview of these amendments to the rules, and if they are all subjected to the same due diligence requirements as pay-to-play games. This, in conjunction with the proposed rule 6A which allows the Ministry to term any other game as an online game for the purposes of the rules, also provides them with broad, unpredictable powers . This ambiguity hinders clear comprehension of the expectations among the target stakeholders, thus affecting the consistency and predictability of the implementation of the rules.

Similarly, "online gaming intermediaries" are also defined very broadly as "*intermediary that offers one or more than one online game*". As defined, any intermediary that even hosts a link to a game is classified as an online gaming intermediary since the game is now "offered" through the intermediary. As drafted, there does not seem to be a material distinction between an "intermediary" as defined by the act and "online gaming intermediary" as specified by these rules.

Recommendation

We recommend further clarification on the definitions of these terms, especially for "in kind" and "offers" which are currently extremely vague terms that provide overbroad powers to the Ministry.

Intermediaries and Games

"Online gaming intermediaries" are defined very broadly as "*intermediary that offers one or more than one online game*". Intermediaries are defined in the Act as "*any person who on*

behalf of another person receives, stores or transmits that message or provides any service with respect to that message".

According to the media coverage (Barik, 2023) around these amendments, it seems that there is an effort to classify gaming companies as "online gaming intermediaries" but the language of the drafted amendments do not support this. An “intermediary” status is given to a company due to its functional role in primarily offering third party content. It is not a classification for different types of internet companies that exist and thus must not be used to make rules for entities that do not perform this function.

Not all gaming companies present a collection of games for their users to play. According to the drafted definition multiple platforms where games might be present like, an app stores where multiple game developers can publish their games for access by users, a website that lists links to online games, a social media platform that acts as an intermediary between two users exchanging links to games, as well as websites that host games for users to directly access may all be classified as an "online gaming intermediary" since they "offer" games to users. These are a rather broad range of companies and functions to be singularly classified an "online gaming intermediary".

Recommendation

We recommend a thoroughly researched legislative solution to regulating gaming companies that operate online rather than through amendments to intermediary rules. If some companies are indeed to be classified as “online gaming intermediaries”, there is a need for further reasoning on which type of gaming companies and their functions are intermediary functions for the purposes of these Rules.

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