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Understanding the Impact of the IT Intermediary Guidelines on Digital News Agencies

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Abstract

In the recent past, the internet has become the most commonly used tool for communication and dissemination of information. With the convenience factor, there has also been an increase in the blatant misuse of the internet specifically with respect to the circulation of “fake news” and propaganda. The Indian government, having acknowledged the large-scale abuse of the internet to this extent, introduced new guidelines in 2021 to curtail the same. The legislature passed the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹ (“Intermediary Guidelines”). These intermediary guidelines are to supersede the existing Information Technology (IT) Act, 2008², which was possible via Section 87(2)³ of the original IT act. The intent of this framework was two fold, the first aspect was to increase the accountability of social media platforms for dissemination of false information, to curtail the misuse of such platforms and the second aspect was to establish a three-tier redressal mechanism for the consumers and users of such platforms in order to ensure effective grievance resolution. Needless to say, the impact of such a statutory framework would be adverse and would heavily reconstruct the way the market functions. This paper aims to analyze the impact of the new guidelines, laying a special emphasis on the effect of the said laws on news agencies conducting their business on the internet.

Introduction to intermediary guidelines

The new intermediary guidelines comprise of 3 parts. While part I includes definitions, part II deals with compliance requirements with respect to intermediaries. This includes messaging intermediaries like Whatsapp, Hike, We chat and Telegram, as well as social media intermediaries like Instagram, Facebook and Twitter. The regulatory body governing intermediaries mentioned in part II is the Ministry of Electronics and Information Technology or (MEITY). Part III on the other hand caters to the regulation of digital news media and other over the top (OTT) platforms that include popular streaming services like Hot Star, Netflix, and Amazon prime inter alia. All agencies that fall under the ambit of part III are governed by the Ministry of Information and Broadcasting⁴. In this paper, we shall focus on part III in order to understand and its bearing on various news agencies.

Section 7 of the Act prescribes that all publishers of news and current affairs content, as well as the intermediaries which primarily enable the transmission of news and current affairs content fall under the ambit of part III. This essentially means that news agencies like dailyhunt, as well as intermediary agencies like inshorts would have to comply with the robust three tier mechanism as required by Section 8 of the Act. The 3 tier mechanism includes:

(a) Level I - Self-regulation by the applicable entity;

¹ Information Technology (Guidelines For Intermediaries And Digital Media Ethics Code) Rules, 2021.

² The Information Technology (Intermediaries guidelines) Rules, 2011.

³ Information Technology Act 2000, s 87(2).

⁴ Information Technology (Guidelines For Intermediaries And Digital Media Ethics Code) Rules 2021, r 8(1).

(b) Level II — Self-regulation by the self-regulating bodies of the applicable entities

(c) Level III - Oversight mechanism by the Central Government.⁵

Implications of the intermediary guidelines on news agencies

The new intermediary guidelines deal with an important aspect that the previous legislation was silent about, i.e. the regulation of OTT platforms and digital news agencies while using other intermediary sites such as Facebook, Twitter or even Inshorts for that matter. These forums essentially use, disseminate and host news content on their forums that has been published by other media houses. This puts a large number of online portals under the ambit of this guideline. The guideline does not categorically make a distinction between large scale media houses, and any small publishing agency that might disseminate information on the internet. That is to say that the guideline does not embark upon a threshold in terms of the required number of readers or users, like has been the case under part II for social media intermediaries. This essentially means that any blog or small scale startup would also be required to comply with the said guidelines as long as they are publishing content related to news or current affairs as per Rule 2(m) of the guideline. Therefore even content producers operating at a very small scale like “yourstory” would have to comply with the robust mechanism being set, which is not very practical or feasible.

Further, Rule 7(2)(b) explicitly states that the Intermediaries Rules would be applicable to any enterprise that has a physical presence in India or even in the due course of their business make their content available in the Indian domain. This essentially means that despite the requirement of territorial presence existing, it is not mandatory in nature. Any media house that makes its content available to Indian consumers in a continued manner would therefore be required to set up their physical presence in India, with an Indian address for correspondences and appoint officers residing in India. The act does not explicitly state however the extent to which Indian authorities will be able to regulate media circulated by such foreign establishments.

Rule 8(1) mandates that all Digital News agencies must comply with the ‘Code of Ethics’ which have been provided for in the appendix of the guidelines. The Appendix however is insufficient and vague to the extent that lays out certain restrictions on the dissemination of news via the internet. Paragraph 1 of the appendix deals with news agencies and mandates that all media house establishments must comply with the Conduct of the Press Council⁶ of India and Programme Code.⁷ This would also heavily curtail the freedom of speech of online publishers, and the general public would face heavy restrictions while trying to access free and unfiltered information. True freedom of expression is a hallmark of a successful democracy, and this law enhances the restrictions under Article 19(2) of The Indian Constitution.

Understanding the 3 tier mechanism

As mentioned above, Rule 8(2) mandates a 3 tier mechanism that news agencies are expected to comply with. This has further been elucidated under Chapter 2,3 and 4 of Part III that. Rule 10 deals with the Self-Regulating Mechanism or the first tier. At the primary level, digital news agencies are expected to form an internal grievance redressal procedure and must appoint an Indian resident as the grievance officer. The second chapter goes on to explain the power and responsibilities the grievance officer is bestowed with. He/she must resolve any such grievance within 15 days of receiving any such complaint, failing which an appeal to second tier, i.e the i.e. the self-regulating body can be made.

The subsequent chapter specifies that news entities must establish a “self-regulating” body that would comprise publishers and/or publishing associations, that would be presided over by either a

⁵ Information Technology (Guidelines For Intermediaries And Digital Media Ethics Code) Rules 2021, r 8(3).

⁶ Press Council Act, 1978.

⁷ The Cable Television Networks regulation) Act 1995, s 5.

retired high court or supreme court judge, or an eminent activist from the media and broadcasting sector inter alia. This body has the power to warn/upbraid/punish a publisher for any violation, and may also request an apology from the publisher. They also have the power to censor content as per its discretion. This said independent body is further required to be registered with the MI&B making it a form of Meta Regulation in place. Despite being recognized as the second tier, in reality it is the first layer of government control. In case the publisher does not adhere to the directions of the said body, the central government constituting the third tier can adjudicate over the matter.

The third and final tier is the inter-departmental committee that would function as an oversight mechanism and would comprise representatives ranging from various ministries and government portfolios, as mentioned under Rule 13. The committee would be headed by a Joint Secretary of the Ministry of Information and Broadcasting who would be acting as the ex officio chairman. This essentially creates an adjudicating body that consists of only executive members of the government, thereby giving the executive judiciary functions. All pending or appealed matters from the lower tiers will be presided upon by the said committee, and Rule 13 also empowers the committee to delete or modify content as per its discretion in case they are of the opinion that it might propagate or incite the commission of offenses against public order.

Other compliance requirements

Media houses would now also have to maintain a record of the contents transmitted by it for a period of 60 days, that they would have to furnish when asked for by any government agency, the central government or the self-regulating body as per Rule 17(3). Rule 16 also makes it compulsory for every online news disseminating forum with a subscription of more than five lakh users or following more than fifty lakh must inform the Broadcast Seva of its operation in the Indian market, as long as it operates in India or provides news as a systematic business activity. The news agency or current affair forum would be required to do within 60 days of meeting the requisite of subscription or followers as may apply. On failing to do so rule 16(4) prescribes that the entity can continue functioning and carry on their business but must comply with rule 18, which in turn states that such companies would be penalized under Section 45 of the Information Technologies Act⁸. Further, if any entity violates any of the aforementioned compliance requirements, they would be liable to punitive action under Section 45, which would require them to pay a penalty not greater than Thirty Five Thousand Rupees, or a fine to the aggrieved person not exceeding Twenty Five Thousand Rupees.

Analysis of the guidelines

Firstly, as already established the original IT Act did not include news agencies under its ambit, which essentially means that the guideline lacks a legislative backing to regulate such media houses. These guidelines aim to include news agencies which is something that is not envisaged in the parent act, therefore in a way the guideline is exceeding the limits of the original act. Further in lieu of Section 79 of the IT act, which stipulates that such producers are given a 'safe harbor' as they are given immunity from liabilities in certain cases, these guidelines can be deemed ultra vires, as it contradicts the original intention envisaged by the legislature while forming the original statutory framework. In essence, the guidelines provide the executive with indirect regulation of the news curated on the internet and disregards the existing procedure of parliamentary scrutiny and potential subsequent adjudication by the judiciary.

Further the definition of "publisher of news and current affairs content" as per Rule 2(u) is rather vague and ambiguous, that can be misused by the executive arbitrarily. As per the definition, newspapers and e-papers that are replicas of newspapers are not included under the purview of these

⁸ Information Technology Act 2000, s 45.

guidelines. This essentially creates a loophole wherein large scale news agencies like The Times Of India and The Hindu inter alia would not have to comply with these guidelines. Not only does this create an additional burden on smaller scale publishers who operate only through the digital prints, but also creates a differentia that is not intangible in nature within the news publishing sector. The executive is now empowered to arbitrarily censure and restrict media being published on the internet which is ultra vires of Article 19(1)(a) ⁹and 19(1)(g)¹⁰, by creating restrictions on free speech and freedom to practice profession and carry on trade and business. There is no valid justification for treating e-paper copies and digital news agencies that solely use the internet as a medium to go about their business.

Moreover, the requirement under Rule 16 of notification to the Broadcast Seva by news agencies has been implemented without any reasoning or valid justification. In the past, when the news agencies were required to register themselves as per the Press and Registration of Books Act, 1867, it was done with the intention of preserving copies of publications. However, considering that now all the publications are on the internet, and there is an automatic record of the same, such notifications are counter-productive and futile in nature, that essentially just increases the burden on media house agencies. Therefore, the requirement under Rule 16 must be done away with or re-examined.

Conclusion

Therefore in conclusion, there are various socio-legal issues with the intermediary guidelines proposed by the government. Not only does it have impeding effects on the freedom of speech and expression and access to free information, but is also violative of various constitutional principles. The executive has bestowed itself with powers beyond its capacity by the setting up of the “inter-departmental committee” which is a camouflaged attempt to give itself judicial powers over the adjudication of matters concerning digital news and current affairs. Further, they have also undermined the legislature as previously the government was to bring about these changes through a legislation, which would have gone through proper parliamentary scrutiny. However, the executive has managed to implement such changes by bypassing legislative debate on the same.

⁹ The Constitution of India 1950, art 19(1)(a).

¹⁰ The Constitution of India 1950, art 19(1)(g).