

**Comments / Inputs of Cyber Saathi Foundation
On The Proposed Amendments to the Intermediary
Guidelines of 2021 ©***

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On The Proposed Amendments to the Intermediary Guidelines of
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A. “Putting the Interests of Digital Nagriks First”¹

The vision behind the proposed amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**IT Rules, 2021**”), which were notified on February 25, 2021 by the Ministry of Electronics and Information Technology (“**MeitY**”) is commendable and a welcome position i.e., that Indian users are being placed in focus. The amendments have to reflect the same and ensure that mere law or regulations are not put in place but the means to enforce the same effectively. It is equally important that existing provisions for user protection and grievance redressal are not diluted or negated through these proposed amendments. There is reasonable apprehension to assume so and these are further enumerated hereunder.

The initiative also has to be backed by legal imprimatur to ensure that any proposed additions are not excessive or disproportionate, such that it will not be struck down upon judicial review. A balanced and rational

¹Extracted from the MeitY Consultation Paper dated June 6, 2022. Available at: <https://www.meity.gov.in/writereaddata/files/Press%20Note%20dated%206%20June%2022%20and%20Proposed%20draft%20amendment%20to%20IT%20Rules%202021.pdf>

approach therefore would be most beneficial to the “Digital Nagriks” or digital natives, as emphasized in MeitY’s Press Note of June 6, 2022, setting out the proposed amendments to the IT Rules, 2021 (“**Proposed Amendments**”).

With the above emphasis for a balanced approach, Cyber Saathi Foundation’s inputs and suggestions or recommendations to the proposals of MeitY for amending the IT Rules, 2021, are set out hereunder without further preamble.

B. Proposals & Recommendations: IT Rules, 2021 – Proposed Amendments:

Four broad heads have been listed in the Proposed Amendments, namely:

1. That Intermediaries are required to ensure Compliance with Rule 3(1)(a) and Rule 3(1)(b) of Intermediary Rules, 2021;
2. Addition of two rules under Rule 3 namely Rule 3(1)(m) and Rule 3(1)(n) mandating Intermediaries to ‘respect’ the Constitution of India;
3. Changes to Rule 3(2) with respect to the Grievance Redressal Mechanism;
4. Creation of a Grievance Appellate Committee to provide an appeal option to users against the outcome from the Grievance Redressal Mechanism;

Cyber Saathi Foundation's inputs with respect to the above proposed additions /modifications, their implications and Cyber Saathi's inputs and recommendations pertaining to each head are listed hereunder:

1. Proposed Amendments: Rule 3(1)(a) & Rule 3(1)(b):

The proposed additions to the above Rules, are extracted hereunder:

(3. (1). Due diligence by an intermediary: *An intermediary, including social media intermediary and significant social media intermediary, shall observe the following due diligence while discharging its duties, namely:—*

(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person and ensure compliance of the same.;

(b) the intermediary shall inform the rules and regulations, privacy policy or user agreement of the intermediary to the user and shall cause the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,—

...

Analysis – Cyber Saathi

With rules having been notified, it is indeed imperative and important that Intermediaries are called upon to comply with the same. However the additions proposed can have grave negative consequences, that may not have been intended by the authority exercising delegated powers. It is therefore imperative that clarity is ensured in the drafting of the proposed amendments such that it would not lead to misuse. This proposition is enumerated further, hereunder.

The additions to Rule 3(1) (b) and in particular the phrase “**shall cause the user**” would carry wide amplitude for misinterpretation. For instance, there is strong possibility of an Intermediary (and these rules pertain to both categories of Intermediaries and Social Media Intermediaries) being held personally liable for non – compliance by a user given the construction of the proposed amendments.

Further, Rule 7, which reads thus, is further reason to review the above Proposed Amendments. The said Rule is extracted hereunder for easy reference:

*“7. Non-observance of Rules.—Where an **intermediary fails to observe with these rules, the provisions of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the***

time being in force including the provisions of the Act and the Indian Penal Code:” (emphasis supplied).

The additions to Rule 3(1)(b) places the onus of compliance with the rules not only by the Intermediary itself but also for such compliance to encompass actions of users. In effect therefore, it could be argued that the entire protection or exemption under Section 79 of the Information Technology Act, 2000 (as amended) (“**IT Act**”) stands negated with the additions. For, an act, commission or omission by a user could result in the Intermediary not having complied with the Rules, as it is burdened with the responsibility not only to comply but to also to “cause” the user to comply. Given the heavy penalty of non – compliance under Rule 7 and also the very mandate of Section 79, it would be wise to drop / delete the Proposed Amendments at Rule 3(1)(b).

Further, whilst Rule 3(1)(a) appears to only refer to an Intermediary ensuring compliance with the Rules, there is possibility of misinterpretation due to the manner in which the rule is structured. Deletion of the Proposed Amendment at Rule 3(1)(a) i.e., of the phrase “*and ensure compliance of the same*” and instead introducing an overarching provision that would call upon intermediaries to ensure compliance with all rules pertaining to such Intermediaries may be the preferred alternative.

Recommendations of Cyber Saathi:

- 1. Deletion of the Proposed Amendments to Rule 3(1)(a) & Rule 3(1)(b);**
- 2. Insertion of the Proposed Amendment of Rule 3(1)(a) i.e., of the requirement for Intermediaries to comply with the Rules, as a separate overarching provision and not just under Rule 3;**
- 3. Addition, if deemed fit, of a best endeavour provision for Intermediaries to “cause” compliance by users.**
- 4. Alternative to (3) above, to provide for a mechanism for Intermediaries to either report non – compliance to a designated authority or propose specific action that Intermediaries would be required to undertake such as a cease and desist notice or takedown with the opportunity to the user to submit their grievance against such action to the Grievance Officer of Intermediary etc.,**

2. Proposed Amendments: Rule 3(1)(m) and Rule 3(1)(n):

Rule 3(1)(m) and Rule 3(1)(n) are additions to the existing list of compliances mandated under the IT Rules 2021. These are extracted hereunder for easy reference:

“(3. (1). *Due diligence by an intermediary: An intermediary, including social media intermediary and significant social media intermediary, shall observe the following due diligence while discharging its duties, namely:—*

(a) ...

...

(m) the intermediary shall take all reasonable measures to ensure accessibility of its services to users along with reasonable expectation of due diligence, privacy and transparency;

(n) the intermediary shall respect the rights accorded to the citizens under the Constitution of India.” (emphasis added)

Analysis – Cyber Saathi

Some background to buttress these additions, particularly under Rule 3(1)(m) may be relevant to ensure its sustainability and compliance.

In an ongoing tussle with respect to protection of privacy of Indian users, a chatapp has still refused to ensure *pari passu* or equal rights of privacy to Indian users, as is being extended to those in European Union (“EU”). An option to opt out of all forms of data collection or usage except those that are basic ought to be a right extended to all users without the threat of losing the usage of the service itself.

In the context therefore of ensuring parity to Indian users, the addition under Rule 3(1)(m) which mandates “*reasonable expectation of due diligence, privacy and transparency*” does not appear excessive or unreasonable. However, use of the word “**reasonable measures**” appears ambiguous and it may be imperative to specify what would amount to reasonable measures. Else, neither would the Government be able to ensure compliance by Intermediaries nor would users really benefit, as each Intermediary would then be left to decide what according to them are “reasonable measures”.

With respect to the addition of Rule 3(1)(n) however, there is imperative need for review. Apart from the same being open – ended and ambiguous, the requirement to “respect” the Constitution of India neither specifies the requirement from Intermediaries nor vests any specific rights on users.

If the intent of MeitY was to ensure that Intermediaries did not violate the rights of Indian citizens or users, laying down explicit provisions for protecting specific rights would be the right way forward. For this, merely ‘respecting’ the Constitution would not suffice but actual compliance through specific mandates is warranted.

Recommendations of Cyber Saathi:

- 1. Clarify the terms “reasonable expectations” and “reasonable measures” in Rule 3(1)(m);**
- 2. Delete Rule 3(1)(n) and instead provide specific rules to protect the rights of Indian users including their right of privacy and dignity and for safer online spaces.**

3. Amendments at Rule 3(2):

Amendments proposed at Rule 3(2)(a) in effect may result in dilution of the additions made particularly those that were intended to comply with the orders of the Supreme Court in *Re: Prajwala Letter Dated 18.2.2015. Violent Videos & Recommendations*² for takedown of certain types of nude imagery within 24 hours. Hence it is most urgent and imperative that the Proposed Amendments at Rule 3(2) be reviewed and the errors rectified.

The provision and proposed amendment is extracted hereunder for reference:

“(2) Grievance redressal mechanism of intermediary: (a)The intermediary shall prominently publish on its website, mobile based

² (2018) 15 SCC 551);

application or both, as the case may be, the name of the Grievance Officer and his contact details as well as mechanism by which a user or a victim may make complaint against violation of the provisions of this rule or any other matters pertaining to the computer resources made available by it, and the Grievance Officer shall –

(i) acknowledge the complaint, including suspension, removal or blocking of any user or user account or any complaint from its users in the nature of request for removal of information or communication link relating to sub-clauses (i) to (x) of the clause (b) under sub-rule (1) of rule 3, within twenty four hours and dispose of such complaint within a period of fifteen days from the date of its receipt;

Provided that the complaint in the nature of request for removal of information or communication link relating to sub-clauses (i) to (x) of the clause (b) under sub-rule (1) of rule 3, shall be acted upon expeditiously and redressed within 72 hours of reporting:

Provided further that appropriate safeguards may be developed by the intermediary to avoid any misuse by users.

(ii) receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.”

In addition to the above, it is imperative to read Rule 3(2)(b) to understand the inconsistency. Hence the said rule along with Rule 3(2)(c) are extracted hereunder for reference:

*“(b) The intermediary shall, **within twenty-four hours** from the receipt of a complaint made by an individual or any person on his behalf under this sub-rule, in relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it:*

*(c) The intermediary shall implement a mechanism for the receipt of complaints under clause (b) of this sub-rule which may enable the individual or person to provide details, as may be necessary, in relation to such content or communication link. **(emphasis added)**.*

Analysis – Cyber Saathi

Proposed Amendments to Rule 3(2) appear to be intended to create a mid-level slab of 72 hours for compliance with respect to complaints of violation of Rule 3(1)(b) sub clauses (i) to (x).

However, Rule 3(2)(b) explicitly mandates takedown of content upon even a user complaint where such complaint pertains to nudity, sexual acts or morphed pictures or even deep fakes. This was an important addition that helps users combat heinous crimes online such as uploading of Child Sexual Abuse Material (“CSAM”) or rape and gang rape (“RGR”) imagery or even cases of revenge porn etc., The need for a shorter timeline for such takedowns was already considered and an informed decision appeared to have been taken whilst introducing Rule 3(2)(b).

By providing 72 hours for takedown for ALL sub categories under Rule 3(1)(b) sub clauses (i) to (x), there is a clear inconsistency as these sub clauses also include content harmful to children, obscene content etc.,.

It is therefore most urgent and imperative that this inconsistency is removed and the 24 hour mandate for takedowns is retained for the specified categories in Rule 3(2)(b).

Recommendations of Cyber Saathi

- 1. Remove the inconsistency caused due to the proposed amendments and ensure that Rule 3(2)(b) is given primacy;**
- 2. This may be done through an explicit non -obstante clause being introduced into Rule 3(2)(b). Whilst at it, simplification**

through modification of Rule 3(2)(b) to ensure explicit takedowns within 24 hours may be undertaken.

4. Creating a new Grievance Appellate Committee to provide an appeal mechanism to users:

The Proposed Amendments provide for the addition of an appeal layer through the introduction of a “Grievance Appellate Committee”. The relevant additions in this regard are extracted hereunder:

“2(l) “Grievance Appellate Committee” means an appellate committee constituted to deal with appeals by users against the decision of the Grievance Officer;

3(3). Appeal to Grievance Appellate Committee(s): – (a) The Central Government shall constitute one or more Grievance Appellate Committees, which shall consist of a Chairperson and such other Members, as the Central Government may, by notification in the Official Gazette, appoint;¹

(b) Any person aggrieved by an order made by the Grievance Officer under clause (a) and clause (b) of sub-rule (2) of rule 3 may prefer an appeal to the Grievance Appellate committee having jurisdiction in the matter within a period of 30 days of receipt of communication from the Grievance Officer;

(c) The Grievance Appellate Committee shall deal with such appeal expeditiously and shall make an endeavour to dispose of the appeal finally within 30 calendar days from the date of receipt of the appeal;

(d) Every order passed by the Grievance Appellate Committee shall be complied by the concerned Intermediary.”

The explanatory note to the above additions, is as under:

“The Grievance Appellate Committee is set up to provide an alternative to a user to file an appeal against the decision of the Grievance Officer rather than directly going to the court of law. Hence, the user can appeal to the said committee in case of his dissatisfaction with the order of the Grievance Officer and seek an alternative redressal mechanism. However, the user has the right to seek judicial remedy at any time.”

In the stakeholder consultations, there was reference to substituting the above proposal with self - regulatory mechanisms if the same were proposed by Intermediaries.

Analysis of Cyber Saathi

The above proposal provides an appellate layer to users, who may not wish to litigate or initiate criminal prosecutions. In the context of providing a cost-effective and speedy remedy without burdening

Courts with further litigation, the above proposal may be a viable option.

However, as was pointed out in the Stakeholder Consultation, if Intermediaries are apprehensive about the volume of takedown requests or complaints that they would have to deal with it is only bound to be many fold multitudinous for the proposed Committee to deal with the appeals from such reverts from a Grievance Officer or even from omissions.

In no time, the Committee would be afflicted with the same malaise of backlogs and delays.

There is also reasonable apprehension that the proposal may not be supported by the parent enactment and this would have to be evaluated further.

Finally, Rules are meant to flesh out and provide granularity to laws. In this instance a new layer of appeal is proposed to be introduced but the modalities and detailing for such appellate committee are missing. Since this proposal emanates at the level of delegated legislation there cannot be another rule book to flesh out the modalities. Any and all details pertaining to the proposed ‘Grievance Appellate Committee’ would necessarily have to be included in the proposed Intermediary Rules itself.

Recommendations of Cyber Saathi

- 1. Undertake a reality check of the feasibility and functioning of the Grievance Appellate Committee;**
- 2. Evaluate alternatives including delegation to designated third – parties;**
- 3. Provide the detailed rules for the constitution and functioning of this proposed Committee;**

5. Other Proposed Amendments & Recommendations:

Apart from the above broad heads of amendments there is one that could be missed by a blink and that is at Rule 8 (b). This rule and proposed amendment are extracted hereunder:

“(8) Where a significant social media intermediary removes or disables access to any information, data or communication link, under clause (b) of sub-rule (1) of rule 3 on its own accord, such intermediary shall,—

(a) ensure that prior to the time at which such intermediary removes or disables access, it has provided the user who has created, uploaded, shared, disseminated, or modified information, data or

communication link using its services with a notification explaining the action being taken and the grounds or reasons for such action;

*(b) ensure that the user who has created, uploaded, shared, disseminated, or modified information using its services is provided with an adequate and reasonable opportunity to dispute the action being taken by such intermediary and request for the reinstatement of access to such information, data or communication link, which may be decided by the **Resident Grievance Officer** within a period of fifteen days/ *as per sub- rule (2) of rule 3;*”*

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The above modification relates the compliance with Rule 8 with Rule 3(2), which has also been amended, as set out above. The Proposed Amendments encompass within its fold the referral of user grievances to the Grievance Appellate Committee in the event of failure of the Grievance Officer’s inaction or refusal to act or rejection of the user complaint. It is imperative to therefore clarify if this appellate power is intended to be extended to non – compliance with the provisions of Rule 8(b) and if yes, these rules have to explain the modalities for such enforcement.

Further, there are multiple layers of compliance and timelines under Rule 3(2). The above addition at Rule 8(b) leaves it open for an Intermediary to interpret and comply with the applicable timelines. Since this rule pertains to user rights for review, it is imperative that there is clarity with respect to the timeline within which an Intermediary is required to respond or act on a user complaint. For, the urgency for a takedown may not be the same for reinstatement. Hence it is imperative to not merely reference to Rule 3(2) but to specifically lay down timelines under Rule 8 itself.

Finally, if the amendment to Rule 8 is being reversed it is still important to clarify if users would have the right to appeal against the outcome of the process envisaged under Rule 8. This right of appeal being an important right, it is important to ensure that the basis and grounds for such appeal are explicitly set out.

Recommendations of Cyber Saathi

- 1. Consider reinstatement of the specific timelines as was stipulated under Rule 8(b);**
- 2. Alternatively clarify timelines for action in relation to Rule 3(2) and how it is to be applied whilst dealing with user complaints under Rule 8;**

3. Lay down clear and precise rules for exercise of appeal rights against outcomes of Rule 8 processes;

C. Intermediary Guidelines – Other Provisions to be reviewed:

The inputs of Cyber Saathi are not limited only to the Proposed Amendments. The proposition that is being enumerated herein by Cyber Saathi is that if the IT Rules 2021 are being subjected to review, this process could also include a review of other provisions, which have already faced flak including those that are presently under judicial scrutiny.

Such robust review and corrective measures would ensure that precious judicial time is saved and also reflect well on the Government’s intent to take constructive criticism of actions taken in good faith.

In this regard special emphasis is drawn to Rule 4(4), Rule 7, Part III of the IT Rules 2021 including Rule 5.

Conclusion

MeitY in its vision statement enumerates the principles of “*Open, Safe & Trusted and Accountable...*” Internet, “*for ALL Indians using the Internet – our Digital Nagriks.*”

Each of the above visions mandate specificity in law and consequent effective enforcement of the laws and regulations by Government agencies including law enforcement agencies.

The concept of resorting to ambiguous provisions to provide wider amplitude to a Government agency to interpret and apply a provision as it deems fit is inconsistent with and contrary to first principles of jurisprudence particularly criminal jurisprudence.

It is therefore imperative that a balanced view to protect user / victim rights and to ensure cooperation by and from Intermediaries without resorting to excessive punitive measures would be the sought after utopian mean that would benefit all.

Hence in the light of the stated objectives and vision, and to enable users to assure and enforce their rights whilst ensuring transparency and specificity in compliance by Intermediaries, it would be imperative that the Government (MeitY) reviews the IT Rules 2021 and introduces amendments that will truly reflect and ensure the outcomes that it has set out as its objectives.
