

**CUTS Comments on the Proposed  
Amendments to the Information  
Technology (Intermediary Guidelines and  
Digital Media Ethics Code) Rules, 2021**

**July 2022**

**CUTS Comments on the Proposed Amendments to the  
Information Technology (Intermediary Guidelines and Digital Media  
Ethics Code) Rules, 2021**

**Index**

<b>S. No.</b>	<b>Particulars</b>	<b>Page No.</b>
1	Background	2
2	About CUTS	3
3	CUTS Submission	5
3.1	Comments on Proposed Amendments to the IT Rules	5
A	Grievance Redress for Consumers	5
B	Accountability of Intermediaries	11
3.2	Suggestions on other Sections of the IT Rules	17
4	Way Forward	22
5	List of Annexures	22

## 1. Background

India has the second highest number of social media users in the world.<sup>1</sup> Social media and instant messaging services have enabled Person to Person (P2P) communication and encouraged transparent Person to Government (P2G) and G2P information exchange. While the popularity of such platforms has the potential for turning them into a vehicle for inclusive, democratic and free expression for consumers, their misuse has caused much harm to consumers through the spread of various kinds of problematic content. These include incorrect, sensational, provocative, divisive and hateful content, Child Sexual Abuse Material (CSAM), woman abuse, etc.

In light of the above, the Government of India (GoI), through the Ministry of Electronics and Information Technology (MeitY) notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules),<sup>2</sup> on 25<sup>th</sup> February, 2021,<sup>3</sup> by exercise of its powers under Section 87,<sup>4</sup> of the Information Technology Act, 2000 (IT Act),<sup>5</sup> which replaced the previous rules – Information Technology (Intermediaries guidelines) Rules, 2011.<sup>6</sup>

While the rules were considered to be a step in the right direction, they also raised eyebrows of all stakeholders, due to various lacunas present in them. These included: risk of infringement of consumers fundamental right to privacy, hindering free speech of consumers, reducing the Ease of Doing Digital Business (EoDDB) for intermediaries (on account of excessive compliance burden and providing for criminal liability), as well as arbitrary/excessive delegation of power to the executive for ordering intermediaries to take down content, and compel them to provide information and assistance for various purposes. The rules were challenged in court by various intermediaries.

Subsequently, MeitY released a document containing Frequently Asked Questions on the Part-II of the IT Rules, titled ‘Open Safe & Trusted and Accountable Internet’ (FAQ),<sup>7</sup> on 1<sup>st</sup> November, 2021.<sup>8</sup> Notably, the document is not a legal document, and does not replace or amend the IT Rules, or the IT Act.

---

<sup>1</sup> Statista, available at:

<https://www.statista.com/statistics/278341/number-of-social-network-users-in-selected-countries/>

<sup>2</sup> IT Rules available at:

[https://www.meity.gov.in/writereaddata/files/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf)

<sup>3</sup> Notification available at:

<https://www.meity.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary>

<sup>4</sup> Section 87 of the IT Act pertains to Power of the Central Government to make rules.

<sup>5</sup> IT Act, available at: <https://www.meity.gov.in/writereaddata/files/itbill2000.pdf>

<sup>6</sup> Previous Rules, available at: [https://www.meity.gov.in/writereaddata/files/GSR314E\\_10511%281%29\\_0.pdf](https://www.meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf)

<sup>7</sup> FAQ, available at: [https://www.meity.gov.in/writereaddata/files/FAQ\\_Intermediary\\_Rules\\_2021.pdf](https://www.meity.gov.in/writereaddata/files/FAQ_Intermediary_Rules_2021.pdf)

<sup>8</sup> Ministry of Electronics & IT releases FAQs to address queries on IT Rules, 2021 (Part II), available at:

<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1768601>

Intermediaries began to comply with the IT Rules, and filled their monthly compliance reports. In light of the same compliances, a social media platform has sued the government on orders for blocking content. With these recent developments, it is important to state that MeitY had proposed amendments to the IT Rules,<sup>9</sup> and had invited comments on them.<sup>10</sup> Consumer Unity & Trust Society (CUTS) is grateful to MeitY for inviting comments, and is pleased to submit the same.

## 2. About CUTS

In its 39 years of existence, CUTS has come a long way from being a grassroots consumer centric organisation based in Jaipur,<sup>11</sup> to opening overseas Resource Centres in Vietnam,<sup>12</sup> Africa,<sup>13</sup> Switzerland,<sup>14</sup> and most recently in the United States of America.<sup>15</sup> It continues to remain an independent, nonpartisan, and non-profit economic policy think tank, while opening various programme centres, namely: Centre for International Trade, Economics & Environment (CITEE);<sup>16</sup> Centre for Consumer Action, Research & Training (CART);<sup>17</sup> Centre for Human Development (CHD);<sup>18</sup> and Centre for Competition, Investment & Economic Regulation (CCIER).<sup>19</sup>

CUTS has been working towards enhancing the optimal regulatory environment through evidence-backed policy and governance-related interventions across various sectors and national boundaries. Having conducted various studies and events, pertaining to encryption,<sup>20</sup> and data protection,<sup>21</sup> CUTS has observed a few critical issues in the proposed amendments, which may have an unintended adverse impact on consumers and intermediaries alike. These have been discussed in subsequent sections, along with recommendations to address them.

---

<sup>9</sup> Proposed amendments available at:

<https://www.meity.gov.in/writereaddata/files/Press%20Note%20dated%206%20June%202022%20and%20Proposed%20draft%20amendment%20to%20IT%20Rules%202021.pdf>

<sup>10</sup> Invitation available at:

<https://www.meity.gov.in/content/seeking-public-comments-proposed-draft-amendment-part-i-and-part-ii-information-technology-0>

<sup>11</sup> CUTS International website: <https://cuts-international.org/>

<sup>12</sup> CUTS Hanoi Research Centre website: <https://cuts-hrc.org/>

<sup>13</sup> CUTS Africa Resource Centres – Nairobi website: <https://cuts-nairobi.org/>; Accra website: <https://cuts-accra.org/>; and Lusaka website: <https://cuts-lusaka.org/>

<sup>14</sup> CUTS Geneva Resource Centre website: <https://www.cuts-geneva.org/>

<sup>15</sup> CUTS Washington Resource Centre website: <https://cuts-wdc.org/>

<sup>16</sup> CUTS CITEE website: <https://cuts-citee.org/>

<sup>17</sup> CUTS CART website: <https://cuts-cart.org/>

<sup>18</sup> CUTS CHD website: <https://cuts-chd.org/>

<sup>19</sup> CUTS CCIER website: <https://cuts-ccier.org/>

<sup>20</sup> Understanding Consumers' Perspective on Encryption, details available at:

<https://cuts-ccier.org/understanding-consumers-perspective-on-encryption/>

<sup>21</sup> Consumer Impact Assessment of Data Localisation, details available at:

<https://cuts-ccier.org/consumer-impact-assessment-on-cross-border-data-flow/>; and Data Privacy and User Welfare in India: User Perception Analysis, available at: <https://cuts-ccier.org/cdpp/>

### 3. CUTS Submission

CUTS is submitting its comments in three sections. The first deals with overall comment, second deals with concerns surrounding the proposed amendments, while the third highlights unaddressed concerns in other parts of the IT Rules.

#### 3.1 General Comments on the IT Rules

- Since the role of intermediaries is critical in everyday socio-economic activities, it is important to assess how much proposed regulatory mechanisms are aligned with intended aims of facilitating a conducive environment of doing digital business as well as protecting consumers' interests. To this end, a Regulatory Impact Assessment (RIA) of IT Rules and proposed amendments can be done which is a systemic approach to critically evaluate the positive and negative effects and ways to achieve intended aims with least cost.

The RIA should include all stakeholders operating within the ecosystem including small start-ups, consumer organisations, constitutional experts and foreign business. For instance, the government of the United Kingdom published an Online Harms White Paper to assess the impact of regulating social media platforms.<sup>22</sup> Also, since the rules have been in force since early 2021 and most intermediaries have been submitting monthly compliance reports to MeitY and also releasing the same in public domain. There is a large amount of data available in these compliance reports on content moderation activities undertaken by intermediaries.

For instance, world's largest tech-corporation owning maximum social media platforms releases transparency report<sup>23</sup> as mandated by IT Rules. By using these transparency reports, conducting ex-post evaluation might be helpful in achieving intended aims with minimum socio-economic harms.

---

<sup>22</sup> HM Government, 2019, Online Harms White Paper, available at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/973939/Online\\_Harms\\_White\\_Paper\\_V2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973939/Online_Harms_White_Paper_V2.pdf)

<sup>23</sup> <https://transparency.fb.com/data/>

### 3.2 Comments on the Proposed Amendments to the IT Rules

The proposed amendments have largely been made on two fronts – grievance redress for consumers, and accountability of intermediaries. These have been dealt with below.

#### A. Grievance Redress for Consumers

Given in the table below, are the proposed amendments (written in **bold**) pertaining to grievance redress for consumers, along with suggestions on the same.

Rule No.	Proposed Amendments	CUTS Comments
2(l)	<b>“Grievance Appellate Committee” means an appellate committee constituted to deal with appeals by users against the decision of the Grievance Officer;</b>	<ul style="list-style-type: none"><li>• Inclusion of <b>Grievance Appellate Committee (GAC)</b> in the draft rules is being proposed in response to a call for attention on inadequate grievance redressal mechanisms for consumers.<sup>24</sup> Committee would have power to overrule any grievance decision made by resident Grievance Officers of intermediaries, including blocking or removal of any user or user account on social media platforms. This is an important step to stop growing discontent. However, it is unclear how GAC would be operationalised. Social media platforms receive complaints of consumers in millions and even if one percent of these make it to the GAC, it may need to deal with at least thousands of appeals a month.<sup>25</sup> Three-tier grievance redressal mechanism with governmental oversight to handle complaints if the Code of Ethics is not complied with has already been challenged in the Madras High Court and the court has stated that governmental oversight in grievance redressal threatens the independence of the media.<sup>26</sup></li></ul>

<sup>24</sup> The New Indian Express, 2022, ‘Home Nation ‘Open to suggestions on grievance redressal mechanism for social media users’: IT minister’, available at <https://www.newindianexpress.com/nation/2022/jun/07/open-to-suggestions-on-grievance-redressal-mechanism-for-social-media-users-it-minister-2462842.html>

<sup>25</sup> Waghre, P., Singh, T, 2022, ‘Amendment Proposals for IT Rules Miss the Main Points’, Live Mint, <https://www.livemint.com/opinion/online-views/amendment-proposals-for-it-rules-miss-the-main-point-11656606256347.html>

<sup>26</sup> Indian Express, 2021, ‘Madras HC stays key clause: ‘May rob media of its independence’’, available at <https://indianexpress.com/article/india/information-technology-rules-madras-high-court-stays-key-clause-may-rob-media-of-its-independence-7513901/>

Rule No.	Proposed Amendments	CUTS Comments
		<ul style="list-style-type: none"> <li>It is important to have redressal mechanisms that are easily accessible to all and grievance officers should deal and resolve user grievances in a fair and equitable manner. If the composition of GAC would be disproportionality distributed in favour of one stakeholder, it might raise the question over constitutional validity<sup>27</sup> of content moderation and grievance redressal as one view may act as an arbiter in adjudication of any appeals against the decision of social media platforms to remove or not remove the content. Fear of losing safer harbours may push the intermediaries to act in accordance with the governmental orders.<sup>28</sup> <b>Governmental and platform power needs to be balanced by ensuring adequate representation of stakeholders including consumer organisations in the composition of GAC.</b></li> </ul>
3(2)(a)(i)	<p>the Grievance Officer shall -</p> <p>(i) acknowledge the complaint, <b>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,</b> within twenty-four hours and dispose of such complaint within a period of fifteen days from the date of its receipt;</p>	<ul style="list-style-type: none"> <li>The government revealed during the public consultation that the number of grievance related issues has gone up under MeitY over the last few months, which shows that there is no adequate grievance redress for consumers, and only checkbox compliance is being made to current provisions of the rules. However, transparency reports of social media platforms shows that only a minuscule number of users of social media actually lodged grievances. Not having adequate and accessible grievance redressal mechanisms might be a reason for not going ahead with the grievances.</li> <li><b>The grievance redressal mechanism needs to be simplified and easily accessible for the aggrieved consumers, residing across locations of the country. This can be done by spreading out grievance centres across districts. In addition to this, there should be consumer assistance</b></li> </ul>

<sup>27</sup> Waghre, Prateek and Singh, Tanmay, ‘Amendment proposals for IT rules miss the main point’, 30 June 2022, Live Mint, available at <https://www.livemint.com/opinion/online-views/amendment-proposals-for-it-rules-miss-the-main-point-11656606256347.html>

<sup>28</sup> Purnell, N., & Horwitz, J. 2020, ‘Facebook’s Hate-Speech Rules Collide with Indian Politics’, Wall Street Journal, available at <https://www.wsj.com/articles/facebook-hate-speech-india-politics-muslim-hindu-modi-zuckerberg-11597423346>

Rule No.	Proposed Amendments	CUTS Comments
	<p>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:</p> <p>Provided further that appropriate safeguards may be developed by the intermediary to avoid any misuse by users.</p>	<p>centres in each district, tasked with raising awareness, building capacity and facilitating processes for grievance redressal of consumers. <i>Grahak Sahayata Kendra</i> (Consumer Support Centre) of Consumer Unity &amp; Trust Society can be a good example in creating consumer assistance centres across districts.<sup>29</sup> The National Consumer Disputes Redressal Commission can also serve as an example in developing GAC with respect to setting up quasi-judicial committee(s) at district, state and central level.<sup>30</sup></p> <ul style="list-style-type: none"> <li>• Need clear distinctions between content removal deadlines of 72/24 hours, based on type of content and intermediary. It is important to acknowledge grievances quickly but in order to address them adequately, platforms should be given reasonable time. Mandating quick redressal mechanisms is a welcome step but it should not compel platforms to compromise on the process of grievance redressal in order to just comply with the rules in the absence of a reasonable timeframe. Inadequate redressal mechanism might have an unsatisfactory and adverse effect on online consumers participation. <b>To this end, provision for mandating reasoned orders by grievance officers and appellate committee(s) may be inserted in regards to complaints registered by aggrieved consumers as well as opportunity of hearing should be provided.</b></li> <li>• Intermediaries should periodically disclose complaints received, disposed, time taken, and details. This can act as a quality of service provided by intermediaries and they can compete to perform better. Telecom Regulatory Authority of India' The Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations 2017 can serve as an example for</li> </ul>

<sup>29</sup> Consumer Support Centre (Grahak Sahayata Kendra), Available At <https://Cuts-Cart.Org/Consumer-Support-Centre-Grahak-Sahayta-Kendra/>

<sup>30</sup> The Consumer Protection Act, 2019, available at <https://egazette.nic.in/WriteReadData/2019/210422.pdf>



Rule No.	Proposed Amendments	CUTS Comments
		<p>developing such an ecosystem.<sup>31</sup> This arrangement would be critical in protecting constitutionally guaranteed fundamental rights of consumers as it will provide understanding around evaluative decisions restricting consumers' activities in digital spaces.</p>
<p>3(3)(a), 3(3)(b), 3(3)(c) and 3(3)(d)</p>	<p><b>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;<sup>32</sup></b></p> <p><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;</b></p> <p><b>The Grievance Appellate Committee shall deal with such appeal expeditiously and shall make an endeavour to dispose of the</b></p>	<ul style="list-style-type: none"> <li>• Details regarding the composition, powers, enforceability etc. of the appellate committee are amiss in current draft. While GoI has indicated that further details could be expected in due course and the same will be brought for stakeholder consultation separately. Independence of the GAC must be ensured by establishing adequate representation of stakeholders as it has been empowered to overrule intermediaries' decisions related to grievance redressal. <b>To this end, while forming the committee, the government must ensure the representation of stakeholders such as technologists, constitutional experts, members of judiciary and consumer rights organisations. This would be necessary to centre the voice of aggrieved consumers and to protect the sovereignty of the GAC by ensuring diverse and essential viewpoints from relevant stakeholders.</b></li> <li>• Given that India is a large country, we may need to move towards Online Dispute Resolution (ODR) mechanisms, specifically with respect to the grievance appellate committee. ODR should be multilingual and sensitive towards all social groups and locations to ensure its equitable access. All online intermediaries should be obliged to provide an easily accessible link to the ODR platform. The dispute resolution bodies should meet the highest quality of standards and independence which will help consumers and intermediaries redress disputes in a non-confrontational way. Awareness</li> </ul>

<sup>31</sup> Telecom Regulatory Authority of India, The Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations 2017, available at [https://www.trai.gov.in/sites/default/files/Draft\\_Regulation\\_09082019.pdf](https://www.trai.gov.in/sites/default/files/Draft_Regulation_09082019.pdf)

<sup>32</sup> 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.

Rule No.	Proposed Amendments	CUTS Comments
	<p><b>appeal finally within 30 calendar days from the date of receipt of the appeal;</b></p> <p><b>Every order passed by the Grievance Appellate Committee shall be complied by the concerned Intermediary.</b></p>	<p>around it may be built around it in partnership with consumer groups. <b>Further, there should be a provision of two-way communication, i.e., a provision of having a feedback mechanism by consumers should be created. For this purpose, inspiration can be taken from the Spandana public grievance redressal portal by Government of Andhra Pradesh<sup>33</sup> wherein citizens can register their grievances with the government through multiple channels like through the web portal, mobile application, toll-free numbers among others, and if citizens are not satisfied with the redressal, they may reopen the grievance.</b></p>
4(8)(b)	<p>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, — 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 <b>Resident Grievance Officer</b> <del>within a period of fifteen days</del> <b>as per sub rule (2) of rule 3;</b></p>	<ul style="list-style-type: none"> <li>● This is ex-post action, whereas consumers should be given an ex-ante opportunity to be heard in order to address the issue in terms of its causal and enabling factors. Sustained effort in engaging with the root causes of the problem would be critical to enhance the digital ecosystem for digital nagriks. Ex-post actions may undermine the expanded democratic potential and agency that digital media had offered to ordinary online consumers. <b>Thus, it is recommended that ex-ante evaluation is done. However, ex-post evaluation may prove to be beneficial in emergency situations.</b></li> <li>● <b>Penalty/ compensatory provisions may be inserted for consumers whose profile/ content has been disabled, but reinstated subsequently in order to enforce the trust among consumers that they have not been unfairly targeted. However, this should along with a participatory process of empowering and building consumer capacity in order to achieve desired aims.</b></li> <li>● CUTS recognises the vital need to curb the misuse of social media in spreading harmful content which is harming socio-economic interests of consumers as well as businesses. However, these amendments have a broad</li> </ul>

<sup>33</sup> Spandana Portal, Government of Andhra Pradesh, available at: <https://www.spandana.ap.gov.in/>

Rule No.	Proposed Amendments	CUTS Comments
		mandate which cater to a wide range of intermediaries working in the digital space which has been used for the propagation of unlawful content. <b>In this context, it is important to carefully assess the causal, incidental, and eventual relationship between the stated aim of the regulations, the strategy, and the potential unforeseen implications and their effects on current civic and economic practices in the digital space. This can be established through RIA.</b>

### B. Accountability of Intermediaries

Given in the table below, are the proposed amendments (written in **bold**) pertaining to accountability of intermediaries.

Rule No.	Proposed Amendments	CUTS Comments
3(1)(a) and 3(1)(b)	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 <b>and ensure compliance of the same.</b> ;	<ul style="list-style-type: none"> <li>The insertion to the phrase ‘and ensure compliance of the same’ has added to the confusion of intermediaries. The provision under rule 3 applies to all intermediaries and the current definition of intermediary<sup>34</sup> fits into its ambit almost all digital and traditional businesses. If all intermediaries are to ensure compliance of the same, it is not possible in terms of intermediaries’ varying number of active users. Instead, the publication of rules and regulations, privacy policy and user agreements should be done in a user-friendly manner. <b>To this end, easy to comprehend language must be utilised by ensuring availability of the same in multiple languages keeping in mind the diversity of India.</b></li> </ul>

<sup>34</sup> Under 2(w) of [Information Technology Act, 2000](#) states that 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, web-housing service providers, search engines, online payment sites, online auction sites, online marketplaces and cyber cafes.

Rule No.	Proposed Amendments	CUTS Comments
		<p>Also, the requisite of compliance from all businesses cannot be the same, as each business and category of businesses are different. A <i>one-size-fits-all</i> approach is not likely to work. Therefore, a graded compliance approach which distinguishes compliances on the basis of size of the business (in capital and number of active users), function of the business and capacity of the business. This graded approach will ensure that smaller businesses do not suffer entry barriers in form of additional costs of compliances.</p> <p>For the entirety of digital businesses, a model of scale-based regulation can be utilised on grounds of Reserve Bank of India's Framework for Scale Based Regulation for Non-Banking Financial Companies (SBR-NBFC).<sup>35</sup> The SBR-NBFC comprises four layers based on their size, activity and perceived riskiness.<sup>36</sup> Similarly, in the global context, Brazil adopts a <i>one-size-does-not-fit-all</i> approach and distinguishes actors in order to place liability.<sup>37</sup> <b>The most noticeable distinction is to categories intermediaries into financial, internet, etc intermediaries. The internet intermediaries are then divided on the basis of interest, firstly, content producers who are publishers of content and secondly, infrastructure providers who are not expected to detect or remove potentially illegal material.</b><sup>38</sup></p>

<sup>35</sup> Framework for Scale Based Regulation for Non-Banking Financial Companies (SBR-NBFC), 22 October 2021 available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12179&Mode=0>

<sup>36</sup> *Ibid.*

<sup>37</sup> Zingales, Nicolo, 'The Brazilian approach to internet intermediary liability: blueprint for a global regime?', 28 December 2015, Internet Policy Review, DOI: 10.14763/2015.4.395, available at <https://policyreview.info/articles/analysis/brazilian-approach-internet-intermediary-liability-blueprint-global-regime>

<sup>38</sup> Sharma, Neelanjana, 'Impact of Criminalising Provisions on Ease of Doing Digital Business in India', March 2022, CUTS CCIER, available at <https://cuts-ccier.org/pdf/dp-impact-of-criminalising-provisions-on-ease-of-doing-digital-business-in-india.pdf>

Rule No.	Proposed Amendments	CUTS Comments
		<ul style="list-style-type: none"> <li>GoI has emphasised that domestic and foreign intermediaries have to comply with Indian laws, to make digital space open, secure and accountable for its digital <i>nagriks</i>.<sup>39</sup> In placing such responsibility on the intermediary, the government has taken a step in the right direction, and such responsibility will need to be supplemented with laws that make our digital space open, secure and accountable. The government has been of the opinion that social media platforms, particularly Significant Social Media Intermediaries (SSMI), are not doing enough. This has been witnessed in recent instances where several big platforms have either refused to comply or made significant delays in compliance.<sup>40</sup> However, this clause will only add to the uncertainty of intermediaries if left without explanation it would lead to more compliance delays and non-compliances. <b>Thus, we recommend that the definition of intermediary be more distinguishable and compliances be approached in a graded manner. There is also a need for more clarity on what would constitute ‘compliance.’ Thus, the IT Rules should define compliance in the definition section of the rules or the IT Act, 2000.</b></li> </ul>
	<p>the intermediary <b>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</b> not to host, display, upload, modify, publish, transmit, store, update or share any information that, — .....</p>	<ul style="list-style-type: none"> <li>The addition of <u>‘cause the user of its computer resource’</u> is contentious in two respects. <b>Firstly</b>, the addition does not clearly lay out the scope of obligation that might be attached to this requirement. The law fails to establish the ‘how’ of these requirements meaning what actions can be taken by the intermediary to meet this expectation.<sup>41</sup> This reflects a difficulty for platforms whose content are not visible for public viewing such as messaging apps and video conferencing platforms. There usually</li> </ul>

<sup>39</sup> Press Note, Intermediary Amendment Rules 2021.

<sup>40</sup> ‘Twitter India gets ‘one last chance’ to comply with Centre’s new IT rules??’, 29 June 2022, Business Standard, available at [https://www.business-standard.com/article/companies/twitter-india-gets-one-last-chance-to-comply-with-centre-s-new-it-rules-122062900314\\_1.html](https://www.business-standard.com/article/companies/twitter-india-gets-one-last-chance-to-comply-with-centre-s-new-it-rules-122062900314_1.html)

<sup>41</sup> Srivastava, Aviral, ‘AN INTRICATE REVIEW OF THE DRAFT INFORMATION TECHNOLOGY AMENDMENT RULES’, 3 July 2022, IPRMENT LAW, available at <https://iprmentlaw.com/2022/07/03/an-intricate-review-of-the-draft-information-technology-amendment-rules/>

Rule No.	Proposed Amendments	CUTS Comments
		<p>isn't any control of the intermediary on the purpose for which their services are utilised. <b>For instance, a video conference meeting through a host intermediary can be organised for the purpose of education, community interaction or other acts which might not be legal in the eyes of law. There is no way for an intermediary to know the purpose for which their services might be utilised, therefore more clarity needs to be afforded to the phrase 'cause the user.'</b><sup>42</sup> Secondly, if the intermediaries were to determine the 'how' of this obligation by themselves they would be required to (i) ex-ante monitor content in addition to their already existing measures, for instance during the pandemic, a picture and video content platform added link to credible sources of information to each posts mentioning specific words and hashtags<sup>43</sup> and also (ii) determine the legality of the content. It is important here to note that ex-ante monitoring of content might not be possible for intermediaries as the current volume of content that goes out on intermediary platforms is too large, which helps in making the algorithm of these intermediaries better. This was also supported by a recent Madras High Court decision where it was stated that social media intermediaries are bound to regulate content and remove the same if it contravenes their guidelines and policies.<sup>44</sup> The intermediaries have relied upon the newly developed technology and have been doing ex-ante content moderation to a certain extent. <b>To this end, various stakeholder groups should come together to collaborate and support in developing models which can curb the content on hate speech, terrorism, reduce misinformation etc. The use of machine learning</b></p>

<sup>42</sup> Khanna Tanisha, et. al, 'MEITY SEEKS PUBLIC COMMENTS ON AMENDMENTS TO INTERMEDIARY RULES', 13 June 2022, Nishith Desai Associates, available at <https://www.nishithdesai.com/generateHTML/6164/4>

<sup>43</sup> <https://help.instagram.com/234606571236360>

<sup>44</sup> 'Social media intermediaries duty bound to regulate content: Madras High Court', 8 June 2022, The New Indian Express, available at <https://www.newindianexpress.com/states/tamil-nadu/2022/jun/08/social-media-intermediaries-duty-bound-to-regulate-content-madras-high-court-2463009.html>

Rule No.	Proposed Amendments	CUTS Comments
		<p><b>and algorithms can be made more effective by use of simple keywords and feeding more ‘keywords’ into the system.<sup>45</sup></b></p> <p>The requirement of having in place filters and pre-censorship might be in contravention of the newly added clause 3(1)(m) where reasonable measures are required to ensure accessibility. <b>Thus, all reasonable restrictions must be necessarily proportionate<sup>46</sup> and it must be required for the government to show evidence of harm before applying reasonable restrictions.<sup>47</sup></b></p> <ul style="list-style-type: none"> <li>• Having a requirement of having filters in place is potentially violative of the principle laid down in the landmark judgement <i>Shreya Singhal v. Union of India</i>.<sup>48</sup> As per Shreya Singhal, the Supreme Court ruled that online user-generated content cannot be censored until there is a direct incitement to violence.<sup>49</sup> The contravention or non-compliance of the IT rules 2021 takes away the safe-harbour protection granted to intermediaries under Section 79 of IT Act. Thus, in order to save their intermediary status, platforms might end up over-complying.<sup>50</sup> Further, if the intermediaries are given the responsibility of judging the validity of the content that they disallow from posting as per internal policies then it might be likely that it ends up violating the fundamental right of freedom of speech and expression under Article 19(1) (a) of the Indian</li> </ul>

<sup>45</sup> Ashwathappa, Amulya et al, ‘ALGORITHMIC ACCOUNTABILITY IN THE JUDICIARY’, Daksh, February 2022, available at <https://www.dakshindia.org/wp-content/uploads/2022/02/DAKSH-Algorithmic-Accountability-in-the-Judiciary.pdf>

<sup>46</sup> Internet And Mobile Association of India v. Reserve Bank Of India, available at <https://indiankanoon.org/doc/12397485/>

<sup>47</sup> All India Gaming Federation v. State of Karnataka, available at [https://www.livelaw.in/pdf\\_upload/all-india-gaming-federation-v-state-of-karnataka-409739.pdf](https://www.livelaw.in/pdf_upload/all-india-gaming-federation-v-state-of-karnataka-409739.pdf)

<sup>48</sup> <https://indiankanoon.org/doc/110813550/>

<sup>49</sup> Hasan, Md Tasnimul, ‘Rules to regulate digital content undermine freedom of expression as well as the right to privacy’, 5 March 2021, National Herald, available at <https://www.nationalheraldindia.com/opinion/rules-to-regulate-digital-content-undermine-freedom-of-expression-as-well-as-the-right-to-privacy>

<sup>50</sup> Ganesan, Aarathi, ‘How Will the Proposed Amendments to The IT Rules Affect Free Speech and Intermediaries?’, 22 June 2022, Medianama, available at <https://www.medianama.com/2022/06/223-it-rules-amendments-india-free-speech-big-tech/>



Rule No.	Proposed Amendments	CUTS Comments
		<p>Constitution. Though, Article 19(1)(a) is not an absolute right and is subject to reasonable restrictions under Article 19(2) however, these reasonable restrictions can be placed by the State only as defined under Article 12 of the Indian Constitution.<sup>51</sup> <b>It is uncertain as to how the state can vest its powers in private entities, as though the rights can't be enforced against private bodies, it is the duty of the government to make laws which facilitate such protection of these rights and ensure no laws facilitate any violation in the name of compliance.</b></p> <p>The pre-censorship however has been received in the affirmative by the copyright owners as these rules would benefit them so that pirated content is not uploaded. For instance, currently short video format applications have no filtrations in place for copywriter content.<sup>52</sup></p> <p><b>Thus, we recommend that all forms of content removal be subjected to the requirement of either being sanctioned by a reasoned order in case of ex-post or be done after reasons are recorded in writing in case of ex-ante removal while making the same available in public domain to ensure transparency and accountability.</b></p>
3(1)(m)	<p><b>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;</b></p>	<ul style="list-style-type: none"> <li>● As stated above, Rule 3 applies to intermediaries as per the language used. There is more clarification needed on application of this rule on all intermediaries and or only on SSIMs.</li> <li>● The inserted provision is drafted in an ambiguous manner and can be read firstly, by breaking the provision into two parts where the intermediary must first ensure 'Accessibility' of its services and then also</li> </ul>

<sup>51</sup> Agrahari, Pragma, 'What is the right to freedom', 29 June 2022, Ipleaders, available at <https://blog.ipleaders.in/what-is-the-right-to-freedom/>

<sup>52</sup> Srivastava, Aviral, 'AN INTRICATE REVIEW OF THE DRAFT INFORMATION TECHNOLOGY AMENDMENT RULES', 3 July 2022, IPRMENT LAW, available at <https://iprmentlaw.com/2022/07/03/an-intricate-review-of-the-draft-information-technology-amendment-rules/>



Rule No.	Proposed Amendments	CUTS Comments
		<p>meet the expectation of due diligence, privacy and transparency. If read in this manner, there may be a need to define or explain ‘accessibility’ appropriately in the definitions section. This ‘accessibility of services’ can mean ensuring (i) sufficient infrastructure, (ii) ensuring ‘accessibility of services’ to disabled persons and (iii) to ensure ‘accessibility of services’ to all persons. The requirement if it aligns in meaning with (i) or (iii) then it sets a disproportionate expectation on intermediaries. Intermediaries cannot be responsible for duties of the state to ensure adequate digital infrastructure to ensure accessibility across the territory of India, which is also the vision of the government through the Digital India initiative.<sup>53</sup> The only reasonable expectation that can be associated with this phrase which is also supported by use of this phrase in Code of Ethics where publishers are given the responsibility of making content more accessible for disabled persons.<sup>54</sup> Thus, we recommend that clarity be assigned to the aforementioned phrase keeping in view the meaning provided in Code of Ethics addendum to the IT Rules 2021.</p> <ul style="list-style-type: none"> <li>● <b>In light of the above, more value needs to be assigned to ‘reasonable measures’ by making a graded matrix where distinction between various intermediaries is made and the reasonable measures expected from them is highlighted. For instance, the provision should be linked with the Government of India’s Accessible India Campaign, which intends to, within a set period of time, make access to public websites, online services and platforms accessible to persons with disabilities<sup>55</sup>, though this must be done in collaboration with all stakeholder groups and beneficiaries.</b></li> </ul>

<sup>53</sup> Iqubbal, Asheef, ‘Impact of Inadequate Digital Infrastructure on Ease of Doing Digital Business in India’, May 2022, CUTS CCIER, *available at* [https://cuts-ccier.org/pdf/discussion-paper-on\\_impact\\_of\\_inadequate\\_digital\\_infrastructure\\_on\\_ease\\_of\\_doing\\_digital\\_business\\_in\\_india.pdf](https://cuts-ccier.org/pdf/discussion-paper-on_impact_of_inadequate_digital_infrastructure_on_ease_of_doing_digital_business_in_india.pdf)

<sup>54</sup> <https://prsindia.org/billtrack/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021>

<sup>55</sup> Accessible India Campaign, 29 September 2021, *available at* [https://disabilityaffairs.gov.in/upload/uploadfiles/files/accessible%20india12\\_290921\\_lowres.pdf](https://disabilityaffairs.gov.in/upload/uploadfiles/files/accessible%20india12_290921_lowres.pdf)

Rule No.	Proposed Amendments	CUTS Comments
3(1)(n)	the intermediary shall respect the rights accorded to the citizens under the Constitution of India.	<ul style="list-style-type: none"> <li>• The Rights of citizens under the Indian Constitution are protected naturally and citizens can also seek remedies under Article 32 and 226 respectively. Thus, the intention of including them in these rules isn't clear. <b>We do not think that there is any need to mention this in the rules. This might end up making the compliance requirements too broad and thus impact businesses negatively.</b></li> <li>• <b>Keeping in mind the above, if the rule is retained then more explanation to the rule might be required in terms of scope and the action that might be levied in contravention of the same.</b></li> </ul>

### 3.2 Suggestions on other sections of the IT Rules

Suggestions for making further amendments to the IT Rules have been given in the table below.

Rule No.	Existing Provision	CUTS Comments
4(1)(a), 4(1)(b) and 4(1)(c)	In addition to the due diligence observed under rule 3, a significant social media intermediary shall, within three months from the date of notification of the threshold under clause (v) of sub-rule (1) of rule 2, observe the following additional due diligence while discharging its duties, namely: — appoint a Chief Compliance Officer ....; appoint a nodal contact person .....; appoint a Resident Grievance Officer .....	<ul style="list-style-type: none"> <li>• <b>Intermediaries should have the option of appointing a single person as the compliance, grievance and nodal officers and under that same appointee, multiple people may have their own roles and responsibilities.</b> This would reduce the compliance cost and would help in seamless integration into the mechanism as there will only be one person who will be responsible for handling everything from ensuring compliance, addressing grievances to coordinating with different authorities.</li> </ul>
4(2)	A significant social media intermediary providing services primarily in the nature of messaging shall enable the identification of the first originator of the information on its computer resource as may be	<ul style="list-style-type: none"> <li>• Risk of breaking encryption is likely to have a detrimental effect on consumer welfare, on parameters of privacy and data protection. Notably, a CUTS study revealed that one of the critical benefits</li> </ul>

	<p>required by a judicial order passed by a court of competent jurisdiction or an order passed under section 69 by the Competent Authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009, which shall be supported with a copy of such information in electronic form</p>	<p>perceived by consumers of instant messaging services is the privacy of their chats.<sup>56</sup></p> <ul style="list-style-type: none"> <li>● It is to be noted that the objective of traceability of originators of problematic content is to curb the spread of problematic information. However, the CUTS study<sup>57</sup> reveals that consumers’ exposure to problematic information is mostly through un-encrypted platforms like social media and search engines. This signifies that the relationship between encryption and curbing the spread of problematic information is not mutually exclusive, i.e., retaining encryption would not hamper the government’s valid objective of curbing problematic information, especially those circulating through unencrypted platforms. The study also found that consumers give equal importance to curbing the spread of problematic content and privacy and were unwilling to trade the latter for the former. Accordingly, it may be unwise to risk user’s privacy while striving to achieve the valid regulatory objective of curbing the spread of problematic content.</li> <li>● Consumers fear unauthorised access to their chats by government agencies, service providers, other private entities (advertisers), and suspicious third parties or malicious actors (cyber-criminals), etc. If encryption is removed, such perceived fears towards unauthorised access were found to increase, especially with respect to advertisers and cyber criminals.<sup>58</sup> Furthermore, such perceived fears may result in reduction of usage of instant messaging services by users., i.e., users claimed to reduce or completely stop exchanging certain kinds of information with different stakeholders like family, friends, office colleagues etc. on</li> </ul>
--	---	--

<sup>56</sup> Narayan, Sidharth and Kulkarni Amol, ‘Understanding intermediary guidelines wrt encryption from the lens of consumer welfare’, 16 October 2021, CSIT (September 2021) 9(3):159–164, DOI: <https://doi.org/10.1007/s40012-021-00339-2>

<sup>57</sup> <https://cuts-ccier.org/pdf/survey-finding-understanding-consumers-perspective-on-encryption.pdf>

<sup>58</sup> *Ibid.*

		<p>instant messengers, if privacy is compromised or even perceived to be at risk (i.e., in case encryption is removed).</p> <ul style="list-style-type: none"> <li>• There is currently a lack of provisions in the IT Act and these rules which require mandatory judicial oversight in the executive order for such identification. The IT rules provide that such orders should be passed by a competent authority under Section 69 of the IT Act. This does not offer adequate procedural safeguards against arbitrary executive discretion. As the orders for identification of originators are not available in public domain, thus leading to a lack in transparency and accountability. <b>Thus, any orders that are passed for identification of originator must be reasoned orders available periodically in public domain in line with the principles of legality, necessity and proportionality.</b><sup>59</sup></li> </ul>
4(8)(c)	<p>ensure that the Resident Grievance Officer of such intermediary maintains appropriate oversight over the mechanism for resolution of any disputes raised by the user under clause (b).</p>	<ul style="list-style-type: none"> <li>• <b>In a way of promoting best practices across platforms a set of guidelines which requires intermediaries to adopt practices that enhance the understanding around content moderation practices, promote transparency and can act as a check and balance against governmental orders as well as future GAC decisions.</b> For instance, a prominent social media platform voluntarily submits takedown notices along with other legal removal requests and demands to Lumen Database, an independent research organisation.<sup>60</sup> This is critical in analysing governmental requests to remove material from the social media platform and helps in facilitating research and discussion about the different kinds of complaints and requests for removal of both legitimate and questionable content. <b>Also, it would encourage consumer participation in understanding the nuances of content take-down and moderation while creating more accountability.</b></li> </ul>

<sup>59</sup> Justice K.S.Puttaswamy(Retd) vs Union Of India on 26 September, 2018, available at <https://indiankanoon.org/doc/127517806/>

<sup>60</sup> Lumen Database, available at <https://www.lumendatabase.org/>

7	<p>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.</p>	<ul style="list-style-type: none"> <li>• Under the IT Rules 2021, SSIMs are required to appoint a chief compliance officer (CCO)<sup>61</sup>, a nodal contact officer<sup>62</sup> and a resident grievance officer<sup>63</sup>, all must be residents of India. The chief compliance officer is responsible for ensuring compliance with the IT Act and Rules, and will be held liable in any proceedings in instances<sup>64</sup> of non-compliance with the IT Act and Intermediary Rules.<sup>65</sup></li> <li>• According to Rule 7, non-observance of Rules may take away of the protection of Section 79 of IT Act and non-observance shall be punishable under any law, including IPC (Indian Penal Code) where criminal charges can be determined and sentence for jail is also possible for the CCO as per Rule 4(1) (a).<sup>66</sup></li> <li>• The rules jump into criminal liability straightaway which is harmful for the business environment of the country. CUTS in its discussion paper on Criminalising Provisions<sup>67</sup> has outlined various best practices across the globe where before initiating a criminal liability the nature of offence, distinction of intermediaries based on their functions and</li> </ul>
---	--	--

<sup>61</sup> To ensure compliance with the Information Technology Act, 2000 and Intermediary Rules.

<sup>62</sup> To ensure 24x7 coordination with law enforcement agencies to ensure compliance with orders made in accordance with law.

<sup>63</sup> To enforce redressal grievance mechanism as per Rule 3(2) of the Intermediary Rules.

<sup>64</sup> Under Rule 4(a) it is stated that The Chief Compliance officer can be made liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that intermediary where he fails to ensure that such intermediary observes due diligence while discharging its duties under the Act and rules made thereunder. This is subject to an opportunity of being heard.

<sup>65</sup> 'Platforms with over 50 lakh users to be 'significant social media intermediaries'', February 28, 2021, The Indian Express, *available at* [Platforms with over 50 lakh users to be 'significant social media intermediaries' | Technology News, The Indian Express](#)

<sup>66</sup> Saraswathy, M and Swathi Moorthy, 'Fat salary but bigger risks: Is this a tech job that nobody wants?', 6 July, 2021, Money Control, *available at* [Fat salary but bigger risks: Is this a tech job that nobody wants?](#)

<sup>67</sup> Sharma, Neelanjana, 'Impact of Criminalising Provisions on Ease of Doing Digital Business in India', March 2022, CUTS CCIER, *available at* <https://cuts-ccier.org/pdf/dp-impact-of-criminalising-provisions-on-ease-of-doing-digital-business-in-india.pdf>

		<p>capabilities. Such as some intermediaries that provide content hosting services, internet service providers, video conferencing platforms which are utilised on user discretion etc.<sup>68</sup> <b>We recommend an overhaul of the criminalising provisions for intermediaries especially for minor economic offences and non-compliances which impose personal employee liability. In order to do so the government can explore the Civil liability framework for intermediaries.</b><sup>69</sup> Each case should be evaluated on a subjective basis on merit, and before such evaluation, no imprisonment of an employee or ascertaining of liability should be done.<sup>70</sup></p>
--	--	---

---

<sup>68</sup> *Ibid*

<sup>69</sup> *Ibid*

<sup>70</sup> *Ibid*

#### 4. Way Forward

We congratulate MeitY on the amendments to IT Rules 2021 and on the stakeholder consultation process undertaken by them to encourage optimal regulation along with effective stakeholder participation.

CUTS has continued to work towards optimal regulations with consumer interests and a balanced treatment of all involved stakeholders. CUTS intends to continue its work towards conducting cost- benefit analysis involving all stakeholders while institutionalising RIA in Indian Regulatory Framework.

CUTS' looks forward to MeitY accepting the comments and suggestions given above, and to assist MeitY in its endeavour of enhancing the interests of digital India, For any clarifications/further details, please feel free to contact Sidharth Narayan ([sid@cuts.org](mailto:sid@cuts.org)), Neelanjana Sharma ([njs@cuts.org](mailto:njs@cuts.org)) and Asheef Iqubbal ([aql@cuts.org](mailto:aql@cuts.org)).

#### 5. List of Annexures

The following documents may be read as a part of our submission.

1. Survey Findings: Understanding Consumers Perspective on Encryption, available [here](#);
2. Research Paper: Understanding intermediary guidelines *wrt* encryption from the lens of consumer welfare, available [here](#);
3. Press Release: The new Information Technology Rules must promote consumer welfare: Pradeep Mehta, CUTS, available [here](#);
4. Press Release: The govt' has no intention of breaking encryption: Rakesh Maheshwari, MeitY, available [here](#);
5. Op-ed: IT Rules shy away from preserving encryption, available [here](#);
6. Op-ed: Did encryption fail Bollywood? available [here](#);
7. Discussion Paper: Impact of Unnecessary Compliances on Ease of Doing Digital Business in India, available [here](#);
8. Discussion Paper: Impact of Regulatory Uncertainty on Ease of Doing Digital Business in India, available [here](#); and
9. Discussion Paper: Impact of Criminalising Provisions on Ease of Doing Digital Business in India, available [here](#).

\*\*\*\*\*