

# Comments on MeitY Draft of The Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018

by

The Bachchao Project<sup>1</sup>

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## I. Preliminary

1. This submission presents comments by The Bachchao Project (“TBP”) on the draft of The Information Technology Intermediaries Guidelines (Amendment) Rules (“draft guidelines”), dated 24 December 2018, released by the Ministry of Electronics and Information Technology (“MeitY”), Government of India.
2. TBP commends the MeitY for its efforts at seeking inputs from various stakeholders on this important and timely issue. TBP is thankful for the opportunity to put forth its views.
3. This submission is divided into three main parts. The first part, ‘Preliminary’, introduces the document; the second part, ‘About The Bachchao Project’, is an overview of the organization; and the third part, ‘Submissions on the issues’, contains our comments on the amendments proposed in the draft intermediary guidelines.

## II. About The Bachchao Project

4. The Bachchao Project is a techno-feminist collective that undertakes community-centric efforts to develop and support open source technologies and technical frameworks with the goals of mitigating gender-based violence. TBP works towards securing equal rights for women, LGBTQIA+ and gender non-conforming persons. We conduct research and advocacy in all the above areas and guide communities in determining appropriate technological interventions for themselves.

## III. Submissions on the issues

We understand that the MeitY seeks to replace the **Information Technology [Intermediaries Guidelines] Rules, 2011** (“current guidelines”) on account of, *inter alia*, disinformation and ensuing threats to public order and public safety, copyright infringement, and the circulation of content displaying sexual assault, sexual violence and child pornography. We appreciate that the Government of India is taking steps for curbing these and other harms and we agree that social media services need to assume greater

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<sup>1</sup> This submission has been authored by Rohini Lakshané on behalf of The Bachchao Project, India. <http://thebachchaoproject.org>

responsibility for the safety of their users in India. However, we believe that the draft guidelines are onerous, arbitrarily conceived and deeply concerning. The guidelines do not achieve a balance between regulating harmful content and the fundamental rights of citizens such as privacy and the freedom of speech and expression. Here, we would like to make six observations:

1. **Fighting misinformation with information:** The issue of malicious rumour-mongering with the intent of causing violence against one demographic or another has existed in India for much longer than telecommunication services, the Internet or popular messaging applications such as WhatsApp. While the proliferation of the Internet has brought with it numerous advantages, it also enables the spread of disinformation faster than other modes of communication. A generally prudent approach in this regard would be for law enforcement authorities to fight misinformation with information. Across the world, government bodies, security agencies and persons who hold public office maintain a social media presence and communicate with citizens in times of distress and emergencies. For example, the Bengaluru Police Department did a commendable job of using popular social media channels to help them control violence, arson and public unrest that immediately followed a Supreme Court verdict in September 2016<sup>2</sup>.
2. **Chilling effect on legitimate speech:** The draft guidelines disproportionately put the onus of determining “unlawfulness” content on intermediaries, thus overturning the existing set of checks and balances laid down by the Supreme Court in *Shreya Singhal vs Union of India* (with reference to S. 79 and Rule 3(4) of the Intermediaries Guidelines, under the Information Technology Act). Numerous studies and precedents show that intermediaries already tend to err on the side of caution. Intermediaries tend to comply with takedown requests, even when requests are made by entities other than a court of law or a legitimate owner of intellectual property rights. Intermediaries have also been known to over-comply with such requests and to take down more content than necessary<sup>3</sup>. A chilling effect on free speech that results from such arbitrary censorship does not augur well for the health of a democracy.
3. **Chilling effect because of the subjectivity of the term “unlawful content”:** It is unclear what would constitute “unlawful content”, “incitement to violence” or “public order” because these terms are nebulous when open to interpretation and are not strictly defined in the law. **“Pornography” and “hate speech” are not well-defined either.**
  - a. S. 67A of the Information Technology Act, 2008 (“IT Act”) refers to “material containing sexually explicit act, etc”. The term “**obscenity**”, via which **pornography** has come to be viewed is housed in S. 292 of the Indian Penal Code 1860, which does not clearly define what constitutes an obscene act. (“...shall be deemed to be obscene if it is lascivious or appeals to the prurient

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<sup>2</sup> Bose, Adrija. “How Bengaluru City Police came on social media during the Cauvery crisis” [https://www.huffingtonpost.in/2016/09/15/how-bengaluru-policed-helped-through-social-media-in-time-s-of-cr\\_a\\_21472497](https://www.huffingtonpost.in/2016/09/15/how-bengaluru-policed-helped-through-social-media-in-time-s-of-cr_a_21472497), 15 September 2016, *Huffington Post*. Last accessed 31 January 2019.

<sup>3</sup> Dara, Rishabh. “Intermediary Liability in India” <http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf> (PDF), 2011, *Centre for Internet and Society*. Last accessed 31 January 2019.

*interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person...”) Whether or not certain content may be considered pornographic is thus open to a wide variety of legal and non-legal interpretations. In such a scenario the draft guidelines are likely to aggravate the **chilling effect on the sexual expression of women and LGBTQIA+ persons** while we already live in a milieu of several sexual taboos. Open-ended exceptions for censoring “pornography” or “obscenity” have been known to jeopardise access to **information related to sexual and reproductive health, relief from sexual violence, abortion, women’s rights, and rights of gender diverse individuals.***

- b. It may be tricky to determine if certain images contain **child pornography**. S. 67B of the IT Act, 2008 refers to material “depicting children engaged in sexually explicit act”. However, images of children taken out of context and images meant to be used to specific purposes also end up being used as “child pornography”.
- c. A 2016 research report of the Berkman Klein Center<sup>4</sup> that discusses online hate speech and the law in India notes, *“It is clear that **hate speech law is outdated and affects a wider range of speech than is necessary [emphasis ours]. The law often fails to prevent violence resulting from incitement, and powerful speakers with the capacity to do so are able to avoid punishment. This is in part due to remedies and strategies enabled by the law, and in part because of institutional failure in the implementation of the law. The law has a detrimental impact on the freedom of expression, since it is often misused by the state or used by third parties to intimidate speakers”.*** In such a scenario, it is unreasonable to expect intermediaries to be suited to uphold freedom of speech while facing liability for determining content that may qualify as “hate speech”, “incitement to violence”, a threat to “public order” or “public health and safety”, and so on.

**4. Privacy concerns:** Women, minors and LGBTQ+ persons are generally at higher risk of harm resulting from violations of their privacy. The draft guidelines require intermediaries to surveil their users and retain their data without providing safeguards for their privacy. Additionally, India **lacks a separate law for safeguarding privacy of personal data and information**<sup>5</sup>.

**5. Effects on communities and small businesses** The Bachchao Project undertakes interventions to empower women and LGBTQ+ persons in communities, especially those that are marginalised and/ or at risk. We also value and place an emphasis on using FLOSS (free, libre and open source software), sources of open knowledge such as Wikipedia and its sister projects, and other avenues of open culture. The requirement of proactively finding and censoring content would be **extraordinarily**

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<sup>4</sup> Arun, Chinmayi; and Nayak, Nakul. “Preliminary Findings on Online Hate Speech and the Law in India” [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2882238](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882238), 9 December 2016, *Berkman Klein Center Research Publication No. 2016-19/ SSRN*. Last accessed January 31, 2019.

<sup>5</sup> ENS Economic Bureau. “Data protection bill may miss winter session introduction” <https://indianexpress.com/article/india/data-protection-bill-winter-session-parliament-5473540>, 1 December 2018, *The Indian Express*. Last accessed January 31, 2019.

burdensome and expensive for communities and private individuals who are harnessing the availability of the Internet for knowledge production, economic development or other constructive activities. The definition of the term “intermediary” in the draft guidelines is overbroad and, unfortunately, brings these entities under its dragnet.

6. **Use on artificial intelligence and automation:** Rule 9 of the draft guidelines states, “The Intermediary shall deploy technology based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful information or content”. Artificial intelligence (AI), especially in the context of human interactions and language processing, is still in a relatively early stage. Such technology is also resource-intensive and prohibitively expensive for entities other than, arguably, large corporations and affluent individuals. In a diverse country with 448 living languages<sup>6</sup> and numerous scripts and dialects, we do not support the **indiscriminate use of automation, AI or machine-learning (ML) software for identifying and filtering content that could be considered unlawful**. Nor do we consider that the use of automation is a sound primary strategy to combat unlawful content.

YouTube, which is owned by Google, deploys an automated tool called Content ID<sup>7</sup> for early detection and filtering of copyright infringing content on its service. Likewise, Facebook implements a copyright management tool called Rights Manager<sup>8</sup>. Facebook also deploys PhotoDNA<sup>9</sup>, another automated tool to detect images uploaded by its users, which may display child sexual abuse<sup>10</sup> or non-consensual sexually explicit acts by adults<sup>11</sup>. The presence of automated tools such as PhotoDNA for legal compliance and the safety of especially vulnerable individuals is far more preferable than the existing redressal mechanisms (or lack thereof) in many countries. However, automated tools meant for removing potential instances of copyright infringement have been known to have led to large numbers of removals of legitimate content<sup>12</sup><sup>13</sup><sup>14</sup>. Making it mandatory for all intermediaries to set up automated

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<sup>6</sup> “India” <https://www.ethnologue.com/country/IN>, *Ethnologue*. Last accessed 31 January 2019.

<sup>7</sup> “How Content ID works” <https://support.google.com/youtube/answer/2797370?hl=en>, *Google Support*. Last accessed 31 January 2019.

<sup>8</sup> “Rights Manager” <https://rightsmanager.fb.com>, *Facebook*. Last accessed 31 January 2019.

<sup>9</sup> Mlot, Stephanie. “‘Hash List’ to Help Google, Facebook, More Remove Child Porn” <https://www.pcmag.com/article2/0,2817,2489399,00.asp>, 11 August 2015, *PC Mag*. Last accessed 31 January 2019.

<sup>10</sup> Carnevale, Charlotte. “Meet the safety team” <https://www.facebook.com/notes/facebook-safety/meet-the-safety-team/248332788520844>, 9 August 2011, *Facebook*. Last accessed 31 January 2019.

<sup>11</sup> Broadly called “non-consensual intimate images” (NCII)

<sup>12</sup> Kaiser, Ulrich. “Can Beethoven send takedown requests? A first-hand account of one German professor’s experience with overly broad upload filters” <https://wikimediafoundation.org/2018/08/27/can-beethoven-send-takedown-requests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters>, 27 August 2018, *Wikimedia Foundation*. Last accessed 31 January 2019.

<sup>13</sup> Baraniuk, Chris. “White noise video on YouTube hit by five copyright claims” <https://www.bbc.com/news/technology-42580523>, 5 January 2018, *BBC News*. Last accessed 31 January 2019.

systems for filtering content will **deprive citizens of access to knowledge and information.**

In addition to the above concerns, unintended consequences of enforcing the draft guidelines are likely to undermine ambitious efforts of the government such as the Digital India<sup>15</sup> programme and the push for a cashless economy. We urge the MeitY to withdraw the draft guidelines in order to reconsider their basic framework and engage in public dialogue with stakeholders on the issue of intermediary liability.

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<sup>14</sup> Gerken, Tom; BBC UGC; and Social News team. "YouTuber in row over copyright infringement of his own song" <https://www.bbc.com/news/technology-44726296>, 5 July 2018, *BBC News*. Last accessed 31 January 2019.

<sup>15</sup> Ministry of Electronics and Information Technology, Government of India. "Digital India" <https://digitalindia.gov.in>. Last accessed 31 January 2019.