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The Ministry of Electronics and Information Technology
New Delhi, India

Provision on misinformation and “fake or false” content proposed in the draft amendments to India’s IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

About Access Now

Access Now is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence and expertise in more than 18 countries around the world, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet’s continued openness and the protection of fundamental rights.

Access Now has consistently engaged with multiple stakeholders around the world, including governments on various issues, including the creation of an effective and rights-respecting content governance regime.¹ We write to you to provide our comments based on our expertise working on digital rights in various regions across the world, including the Asia Pacific.

We welcome this opportunity to provide feedback on the draft amendments to the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Our comments focus specifically on the proposed Rule 3(1)(b)(v).

¹ See for example, Access Now, *Protecting Our Data*, <https://www.accessnow.org/issue/data-protection/page/2/> ; Access Now, *Three Years Under the GDPR: An Implementation Progress Report*, <https://www.accessnow.org/cms/assets/uploads/2021/05/Three-Years-Under-GDPR-report.pdf> ; Access Now, *India’s data protection bill: Further work needed in order to ensure true privacy for the next billion users*, <https://www.accessnow.org/cms/assets/uploads/2020/02/Access-Now-Analysis-Indias-Personal-Data-Protection-Bill-2019.pdf> ; Access Now, *The Right to Privacy in Indonesia*, <https://www.accessnow.org/cms/assets/uploads/2022/04/ELSAM-and-Access-Now-UPR-Joint-Submission-on-the-Right-to-Privacy-in-Indonesia.pdf>.

Consultation process and timeline

Misinformation is an important challenge in today's digital age, and we appreciate the desire of governmental authorities to see if more can be done. However, we humbly submit that the proposed amendment requires to be revisited, in respect of both process and substance.

With respect to the process, the proposed amendment was introduced on January 17, 2023, which would have been the last day of a consultation that commenced on January 2, 2023, on draft amendments to the Rules, with provisions specifically on online gaming. The proposed Rule 3(1)(b)(v) pertains to issues far beyond the ambit of online gaming, constitutes an additional due diligence requirement for intermediaries, and adds an entirely distinct layer to the existing, and controversial, framework for content governance under the IT Rules 2021.

The introduction of such a consequential proposal for online freedoms and the right to free expression at the eleventh hour of an ongoing consultation on online gaming – a potentially related but otherwise separate topic – without any prior public consultation, which is necessary given the complexity of the issue, contravenes the requirement of open deliberation as part of democratic processes. Moreover, the short deadline of January 25, 2023, with only one-week for stakeholders to submit feedback precludes meaningful engagement.

Any proposal pertaining to content governance and moderation would have a direct impact on fundamental rights protected under India's constitution and international human rights law. Sustained and in-depth feedback from all stakeholders is integral to the development of such proposals. We appreciate the Ministry's initiative to address and bring attention to the issue. However, we respectfully submit that the present period for public consultation of one week, is inadequate and will not enable wider participation which is essential to an inclusive, democratic and constructive process.

In addition to the importance of engaging with people, communities and organisations in India – in light of shared experiences in respect of misinformation across regions, and efforts to combat the same, as well as the cross-border implications of a legal provision on the issue – feedback from the international community, including experts on the subject, would also contribute towards the development of an effective framework.

Access Now recommends that the consultation period be extended to enable sustained, multi-faceted engagement and contributions from the full range of stakeholders, including civil society organisations, security experts, private sector, industry associations.

Comments on Rule 3(1)(b)(v)

This proposal requires intermediaries to remove, or take specified action against, content that has been identified as “fake or false” by the Press Information Bureau or other agencies authorised by the government. It also applies to content that “knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature”.

The Press Information Bureau is not an independent fact checking agency - it services the executive branch’s press relations and information distribution needs - and is not included in the list of accredited India based fact checkers maintained by the International Fact-Checking Network (IFCN). But more important, the main issue is with the provision itself in how it empowers the government to unilaterally direct blocking of content and restrict free expression on vague and undefined grounds including “fake”, “false”, and “misleading”, which can be subjectively interpreted, misused and applied arbitrarily, with a direct adverse effect on free expression. The entire proposal is devoid of any objective standard to serve as a limitation, including on how an assessment of whether information was “knowingly and intentionally” communicated.

The proposed Rule 3(1)(b)(v), jeopardizes the fundamental right to speech and expression, protected by the Constitution of India, and under international human rights law, including the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. The IT Rules have consistently been criticized since their notification in 2021, and over subsequent amendments, for the manner in which its content governance framework confers excessive powers on the government to determine what stays online; and allows for ambiguous and overbroad terms such as “insulting” to be invoked to block content. The grievance redressal mechanism under the IT Rules, including the grievance appellate committee, enables unprecedented government control over online content, without adequate safeguards and independent judicial oversight. These issues of ambiguity, scope for misuse and arbitrary application, and lack of oversight and limitations on the government’s powers are further aggravated by the proposed Rule 3(1)(b)(v), thereby exacerbating the threat to people’s right to free expression.

Rule 3(1)(b)(v) also threatens press freedoms in the country by creating scope for informative content to be blocked or removed through an opaque process on the ground that it is “false” –

implying that there is a singular truth, and the government is the sole arbiter of what it is. News pieces are often a combination of fact and opinion, and it is not possible, or advisable, to segregate the two. Such reporting by news media, or even sharing of information and ideas by individuals and communities – frequently constituting a legitimate exercise of the right to free speech, and contributes to open debate in a democracy – would be jeopardized by the proposal. In the absence of narrow definitions, strict limitations, independent oversight and avenues for redressal for affected parties, the proposal risks shrinking spaces for dissent, criticism and dialogue, without which a democracy cannot thrive.

In accordance with international human rights standards, any restriction on the right to freedom of expression must pass the test of (i) legality; (ii) legitimacy; and (iii) necessity and proportionality. Further, in order to be valid and effective, a law must necessarily have “sufficient precision” to enable narrow application and predictability of outcomes by those affected – in this case, that would include the public and all intermediaries. We respectfully submit that the proposal would fail on all these counts.

First, any restriction can be imposed only by law in its strict sense; that is, it must be adopted through legislation, aimed at limiting government discretion through parliamentary deliberation and public participation. As has been pointed out by several stakeholders and experts, the scope of the IT Rules extends far beyond the executive’s rule-making powers, and the content governance framework with impact on fundamental rights cannot be implemented through such rules. Rule 3(1)(b)(v) suffers from the same deficiency.

Second, the provision does not comply with the requirement of “sufficient precision”, explained in General Comment No. 34 of the UN Human Rights Committee on Article 19 of the ICCPR on free expression. Terms such as “false”, “fake” and “misleading”, are vague and may lead to overly broad interpretations and manipulation. As has been noted by the 2021 report on “Disinformation and freedom of Opinion and Expression” by the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN report of 2021): *“Finding appropriate responses to disinformation is difficult, not least because the concept is undefined and open to abuse, and because the size and nature of the problem is contested in the absence of sufficient data and research. State responses have often been problematic and heavy handed and had a detrimental impact on human rights. Companies play a major role in spreading disinformation but their efforts to address the problem have been woefully inadequate.”*

This requirement is also linked with the predictability of law. Given the undefined nature of terms in the proposed Rule 3(1)(b)(v), there is no clarity on the types of content that would fall

within its purview. As a result, in order to avoid liability, intermediaries will be compelled to over-censor and people will be compelled to self-censor.

With respect to legitimacy, it is not clear, and has not been demonstrated, what legitimate purpose would be achieved by the proposed provision. In considering if a law meets the requirement of “legitimate purpose”, it is important to consider that the right to freedom of expression is broad in its scope, encompassing “even expression that may be regarded as deeply offensive”. When restricting broad categories of content, the government, and policymakers, must consider the likelihood that speech that is controversial but protected will be impacted, which is extremely high in the context of the proposed Rule 3(1)(b)(v).

Necessity and proportionality are crucial tests to ascertain the validity of any restriction on free speech. In practice, the restrictions on freedom of expression imposed by the proposed provision, as well others in the IT Rules, would also be considered illegitimate for failing to comply with the requirement of necessity, given the extensive grounds for content control beyond those recognized in international human rights law [ICCPR Article 19 (3)], and beyond what is strictly required to achieve the stated outcomes. Further, in order to satisfy the proportionality test to assess validity under the Indian Constitution, the restriction must not be excessive, or must be demonstrably the least-restrictive measure to achieve the government’s aim. The proposal fails to make these demonstrations.

If the goal is to control the spread of dis/mis-information, protection of human rights must remain the central focus. As observed in the UN report of 2021 mentioned above: *“There is growing evidence that disinformation tends to thrive where human rights are constrained, where the public information regime is not robust and where media quality, diversity and independence is weak. Conversely, where freedom of opinion and expression is protected, civil society, journalists and others are able to challenge falsehoods and present alternative viewpoints. That makes international human rights a powerful and appropriate framework for addressing disinformation.”*

We recognize how challenging it is to develop an effective, rights-respecting content governance framework, and in particular, to tackle the question of how dis/mis-information can be addressed, and remain available to engage and assist the government in this important process. Our respectful submission is that the current framework under the IT Act, and the IT Rules of 2021, including the proposed Rule 3(1)(b)(v), will cause more harm than good, and must be reviewed. Our initial recommendations are below:

Access Now recommends:

- Withdrawal of the proposed Rule 3(1)(b)(v), and initiation of a sustained, multi-faceted and multi-stakeholder consultation on content governance, including questions pertaining to mis/dis-information.
- Any attempt to address the challenges stemming from the spread of mis/dis-information must focus on the protection of human rights, given the increasing evidence, also cited in the UN report on 2021, that such content thrives in environments where free expression is restricted, and the ability to engage in free and open dialogue, and present alternative perspectives is limited – such freedom, and ability to access and express pluralistic and diverse views without, in fact helps control mis/dis-information.
- Engaging with stakeholders and experts publicly on the development of proposals, even before they are proposed as amendments, in order to incorporate feedback and best practices, and enable meaningful engagement.
- Public engagement must necessarily include discussion on alternative proposals and ideas to control the spread of dis/mis-information through digital literacy, and fact-checking and user-empowering tools, rather than removal/blocking of content.
- Incorporation of adequate limitations, safeguards, and oversight mechanisms, over the government’s ability to control content under the IT Rules; and embedding the principles of necessity and proportionality within any provision restricting fundamental rights.
- On a broader level, the IT Rules must be entirely reviewed to limit provisions to what is permissible under the executive’s rule-making powers; and ensure strict limitations and safeguards to strengthen fundamental rights, as well as oversight and redressal mechanisms, in accordance with international human rights law and the Indian Constitution.

Thank you for the opportunity to participate in this consultation. We remain available for any clarification or queries in relation to this feedback, and hope to be of further assistance in this important process.

Yours sincerely,

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