

Intermediary Liability & Freedom of Expression

This document provides a critique of “**The Information Technology (Intermediaries Guidelines) Rules 2011**” and proposes an alternate set of Rules.

What is the purpose of the Rules notified in 2011?

To provide guidelines for the ‘post-publication redressal mechanism’ for removal of user generated content that violates reasonable restrictions to the right to freedom of expression as envisioned in the Constitution of India.

Guiding principles for ‘post-publication redressal mechanism’

Principles	Current Rules	Proposed Rules
The redressal mechanism shall be quick.	Yes	Yes
The redressal mechanism shall be cheap.	Yes	Yes
The redressal mechanism shall provide safeguards to prevent abuse of such mechanism for suppressing legitimate expressions.	No	Yes
The redressal mechanism shall conform to all forms of natural justice.	No	Yes
The redressal mechanism shall conform to all principles of freedom of expression.	No	Yes
The redressal mechanism shall not result in a chilling effect on freedom of expression.	No	Yes
The redressal mechanism shall recognise the different functions performed by different classes of intermediaries.	No	Yes

Media reactions to the Current Rules

The New York Times

“India Puts Tight Leash on Internet Free Speech”

The Washington Post

“India and China anger webizens with new Internet laws and government censorship”

THE ECONOMIC TIMES

“New internet rules open to arbitrary interpretation”

THE TIMES OF INDIA

“Online gag: Existing rules give little freedom”

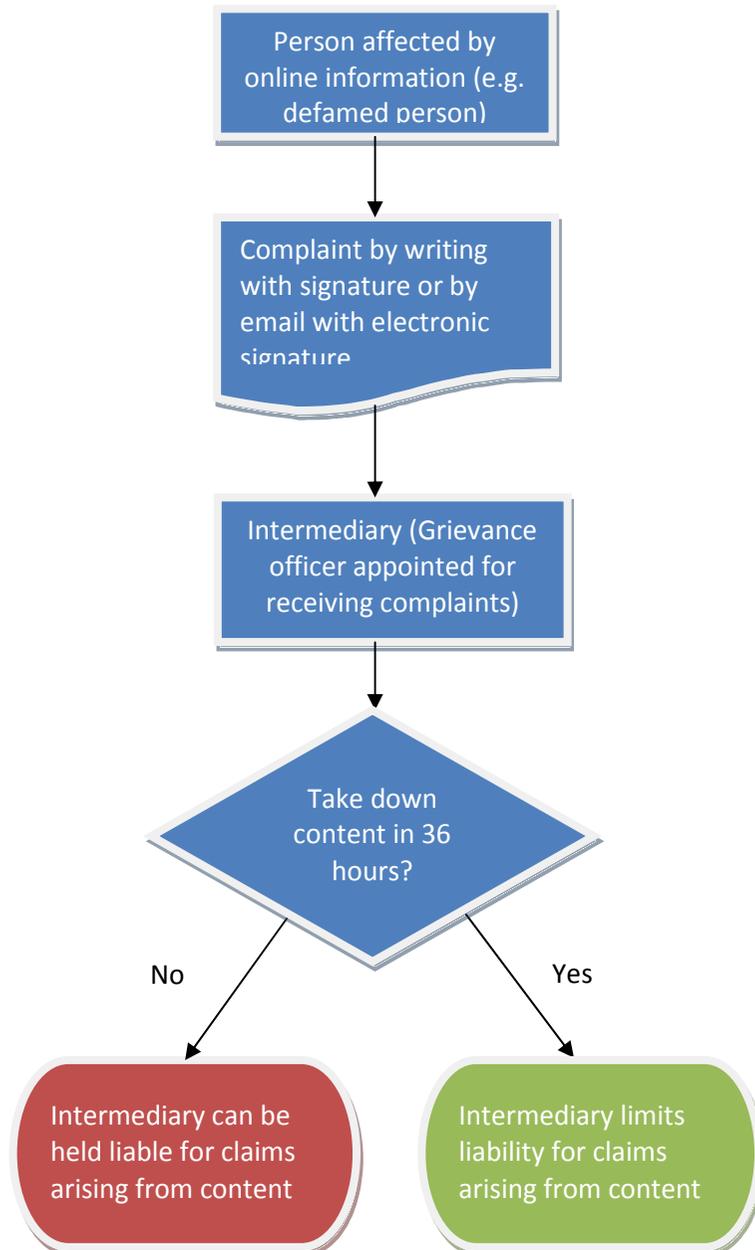
OUTLOOK
group

“E-Books Are Easier To Ban Than Books”

NDTV

“Chilling’ impact of India’s April internet rules”

Current redressal mechanism



Criticisms of the current mechanism

- **No natural justice**
 - The third party provider/creator of information is not given a chance to be heard by the intermediary.
 - There is no requirement to give a reasoned decision.
 - There is no procedure to have the removed information restored by filing a counter notice or by appealing to a higher authority.
- **Different classes of intermediaries are all treated alike**
 - Fails to recognise that different classes of intermediaries perform different functions and therefore should have different roles and responsibilities; e.g. BSNL is treated at par with YouTube.
 - Removal of content by upstream intermediaries will result in undue over-blocking.
- **No safeguards to prevent abuse**
 - The complainant may send frivolous complaints and suppress legitimate expressions without any fear of repercussions.
- **Uncertainty in content criteria**
 - The content criteria for removal of content includes terms like “disparaging” and “objectionable” which are not defined and go beyond the reasonable restrictions envisioned by the Constitution of India.
- **Private censorship**
 - Censorship, which was previously the exclusive domain of the judiciary or the executive, has now been delegated to private intermediaries as a result of this redressal mechanism.
 - Incentive to remove expressions in order to limit liability
 - Private intermediaries do not have sufficient legal resources to subjectively determine the legitimacy of a legal claim as a result of which they err on the side of caution.

Why should a private intermediary determine what is right or wrong, especially when it doesn't have the legal competence to do so? Ideally, the intermediary should continue performing the role of an intermediary and ask the creator of expression whether he is willing to defend his expression in court... and remove the expression only if he refuses to defend his expression.

Proposed redressal mechanism

