

# Killing the Internet Softly with Its Rules

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*While regulation of the Internet is a necessity, the Department of IT, through recent Rules under the IT Act, is guilty of over-regulation. This over-regulation is not only a bad idea, but is unconstitutional, and gravely endangers freedom of speech and privacy online.*

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## **Over-regulation of the Internet**

Regulation of the Internet, as with regulation of any medium of speech and commerce, is a balancing act. Too little regulation and you ensure that criminal activities are carried on with impunity; too much regulation and you curb the utility of the medium. This is especially so with the Internet, as it has managed to be the impressively vibrant space it is due to a careful choice in most countries of eschewing over-regulation. India, however, seems to be taking a different turn with a three sets of new rules under the Information Technology Act.

These rules deal with the liability of intermediaries (i.e., a large, inclusive, group of entities and individuals, that transmit and allow access to third-party content), the safeguards that cybercafes need to follow if they are not to be held liable for their users' activities, and the practices that intermediaries need to follow to ensure security and privacy of customer data.

## **Effect of not following the rules**

By not observing any of the provisions of these Rules, the intermediary opens itself up for liability for actions of its users. Thus, if a third-party defames someone, then the intermediary can be held liable if he/she/it does not follow the stringent requirements of the Rules.

The problem, however is that, many of the provisions of the Rules have no rational nexus with the due diligence to be observed by the intermediary to absolve itself from liability.

## **What does the Act require?**

Section 79 of the IT Act states that intermediaries are generally not liable for third party information, data, or communication link made available or

hosted. It qualifies that by stating that they are not liable if they follow certain precautions (basically, to show that they are *real* intermediaries). They observe 'due diligence' and don't exercise an editorial role; they don't help or induce commission of the unlawful act; and upon receiving 'actual knowledge', or on being duly notified by the appropriate authority, the intermediary takes steps towards some kind of action.

So, rules were needed to clarify what 'due diligence' involves (i.e., to state that no active monitoring is required of ISPs), what 'actual knowledge' means, and to clarify what happens in case of conflicts between this provision and other parts of IT Act and other Acts.

### **Impact on freedom of speech and privacy**

However, that is not what the rules do. The rules instead propose standard terms of service to be notified by all intermediaries. This means everyone from Airtel to Hotmail to Facebook to Rediff Blogs to Youtube to organizations and people that allow others to post comments on their website. What kinds of terms of service? It will require intermediaries to bar users from engaging in speech that is disparaging', It doesn't cover only intermediaries that are public-facing. So this means that your forwarding a joke via e-mail, which "belongs to another person and to which the user does not have any right" will be deemed to be in violation of the new rules. While gambling (such as betting on horses) isn't banned in India and casino gambling is legal in Goa, for example, under these Rules, all speech 'promoting gambling' is prohibited.

The rules are very onerous on intermediaries, since they require them to act within 36 hours to disable access to any information that they receive a complaint about. Any 'affected person' can complain. Intermediaries will now play the role that judges have traditionally played. Any affected person can bring forth a complaint about issues as diverse as defamation, blasphemy, trademark infringement, threatening of integrity of India, 'disparaging speech', or the blanket 'in violation of any law'. It is not made mandatory to give the actual violator an opportunity to be heard, thus violating the cardinal principle of natural justice of 'hearing the other party' before denying them a fundamental right. Many parts of the Internet are in fact public spaces and constitute an online public sphere. A law requiring private parties to curb speech in such a public sphere is unconstitutional insofar as it doesn't fall within Art.19(2) of the Constitution.

Since intermediaries would lose protection from the law if they don't take down content, they have no incentives to uphold freedom of speech of their users. They instead have been provided incentives to take down all content about which they receive complaints without bothering to apply their minds and coming to an actual conclusion that the content violates the rules.

## Cybercafe rules

The cybercafe rules require all cybercafe customers be identified with supporting documents, their photographs taken, all their website visit history logged, and these logs maintained for a year. Compare this to the usage of public pay-phones. Anyone can use a pay-phone without their details being logged. Indeed, such logging allows for cybercafe owners to blackmail their users if they find some embarrassing websites in the history logs—which could be anything from medical diseases to sexual orientation to the fact that you're a whistleblower.

The cybercafe rules also require that all of them install "commercially available safety or filtering software" to prevent access to pornography. In two cases along these lines in the Madras High Court (*Karthikeyan R. v. Union of India*) and the Bombay High Court (*Janhit Manch v. Union of India*), the High Courts refused to direct the government to take proactive steps to curb access to Internet pornography stating that such matters require case-by-case analysis to be constitutionally valid under Art.19(1)(a) [Right to freedom of speech and expression].

Such software tends to be very ineffective—non-pornographic websites also get wrongly filtered, and not all pornographic websites get filtered—and the High Courts were right in being wary of any blanket ban. They preferred for individual cases to be registered. If the worry is that our children are getting corrupted, it is up to parents to provide supervision, and not for the government to insist that software do the parenting instead.

Given that all of these were pointed out by both civil society organizations, news media, and industry bodies, when the draft rules were released, it smacks of governmental high-handedness that almost none of the changes suggested by the public have been incorporated in the final rules.