

# Rebuttal of DIT's Misleading Statements on New Internet Rules

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*The press statement issued on May 11 by the Department of Information Technology (DIT) on the furore over the newly-issued rules on 'intermediary due diligence' is misleading and is, in places, plainly false. We are presenting a point-by-point rebuttal of the DIT's claims.*

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In its press release on Wednesday, May 11, 2011, the DIT stated:

The attention of Government has been drawn to news items in a section of media on certain aspects of the Rules notified under Section 79 pertaining to liability of intermediaries under the Information Technology Act, 2000. These items have raised two broad issues. One is that words used in Rules for objectionable content are broad and could be interpreted subjectively. Secondly, there is an apprehension that the Rules enable the Government to regulate content in a highly subjective and possibly arbitrary manner.

There are actually more issues than merely "subjective interpretation" and "arbitrary governmental regulation".

- The Indian Constitution limits how much the government can regulate citizens' fundamental right to freedom of speech and expression. Any measure afool of the constitution is invalid.
- Several portions of the rules are beyond the limited powers that Parliament had granted the Department of IT to create interpretive rules under the Information Technology Act. Parliament directed the Government to merely define what "due diligence" requirements an intermediary would have to follow in order to claim the qualified protection against liability that Section 79 of the Information Technology Act provides; these current rules have gone dangerously far beyond that, by framing rules that insist that intermediaries, without investigation, has to remove content within 36-hours of receipt of a complaint, keep records of a users' details and provide them to law enforcement officials.

The Department of Information Technology (DIT), Ministry of Communications & IT has clarified that the Intermediaries Guidelines Rules, 2011 prescribe that due diligence need to be observed by the Intermediaries to enjoy exemption from liability for hosting any third party information under Section 79 of the

Information Technology Act, 2000. These due diligence practices are the best practices followed internationally by well-known mega corporations operating on the Internet. The terms specified in the Rules are in accordance with the terms used by most of the Intermediaries as part of their existing practices, policies and terms of service which they have published on their website.

1. We are not aware of any country that actually goes to the extent of deciding what Internet-wide 'best practices' are and actually converting those 'best practices' into law by prescribing a universal terms of service that all Internet services, websites, and products should enforce.
2. The Rules require all intermediaries to include the government-prescribed terms in an agreement, no matter what services they provide. It is one thing for a company to choose the terms of its terms of service agreement, and completely another for the government to dictate those terms of service. As long as the terms of service of an intermediary are not unlawful or bring up issues of users' rights (such as the right to privacy), there is no reason for the government to jump in and dictate what the terms of service should or should not be.
3. The DIT has not offered any proof to back up its assertion that 'most' intermediaries already have such terms. Google, a 'mega corporation' which is an intermediary, does not have such an overarching policy. Indiatimes, another 'mega corporation' intermediary, does not either. Just because a company like Rediff and Blizzard's World of Warcraft have some of those terms does not mean a) that they should have all of those terms, nor that b) everyone else should as well. In attempting to take different terms of service from different Internet services and products—the very fact of which indicate the differing needs felt across varying online communities—the Department has put in place a one-size-fits-all approach. How can this be possible on the Internet, when we wouldn't regulate the post-office and a book publisher under the same rules of liability for, say, defamatory speech.
4. There is also a significant difference between the effect of those terms of service and that of these Rules. An intermediary-framed terms of service suggest that the intermediary *may* investigate and boot someone off a service for violation, while the Rules insist that the intermediary simply has to mandatorily remove content, keep records of users' details and provide them to law enforcement officials, else be subject to crippling legal liability.

So to equate the effect of these Rules to merely following 'existing practices' is plainly wrong. An intermediary—like the CIS website—should have the freedom to choose not to have terms of service agreements. We now don't." In case any issue arises concerning the interpretation of the terms used by the Intermediary, which is not agreed to by the user or affected person, the same can only be adjudicated by a Court of Law. The Government or any of its agencies have no power to intervene or even interpret. DIT has reiterated that there is no intention of the Government to acquire regulatory jurisdiction over content

under these Rules. It has categorically said that these rules do not provide for any regulation or control of content by the Government.”

The Rules are based on the presumption that all complaints (and resultant mandatory taking down of the content) are correct, and that the incorrectness of the take-downs can be disputed in court. Why not just invert that, and presume that all complaints need to be proven first, and the correctness of the complaints (instead of the take-downs) be disputed in court?

Indeed, the courts have insisted that presumption of validity is the only constitutional way of dealing with speech. (See, for instance, *Karthikeyan R. v. Union of India*, a 2010 Madras High Court judgment.)

Further, only constitutional courts (namely High Courts and the Supreme Court) can go into the question of the validity of a law. Other courts have to apply the law, even if the judge believes it is constitutionally invalid. So, most courts will be forced to apply this law of highly questionable constitutionality until a High Court or the Supreme Court strikes it down.

What the Department has in fact done is to explicitly open up the floodgates for increased liability claims and litigation - which runs exactly counter to the purpose behind the amendment of Section 79 by Parliament in 2008.

“The Government adopted a very transparent process for formulation of the Rules under the Information Technology Act. The draft Rules were published on the Department of Information Technology website for comments and were widely covered by the media. None of the Industry Associations and other stakeholders objected to the formulation which is now being cited in some section of media.”

This is a blatant lie.

Civil society voices, including CIS, Software Freedom Law Centre, and individual experts (such as the lawyer and published author Apar Gupta) sent in comments. Companies such as Google, E2E Networks, and others had apparently raised concerns as well. The press has published many a cautionary note, including editorials, op-ed and articles in the Hindu, the Hoot, Medianama.com, and Kafila.com, well before the new rules were notified. We at CIS even received a 'read notification' from the email account of the Group Coordinator of the DIT's Cyber Laws Division—Dr. Gulshan Rai—on Thursday, March 3, 2011 at 12:04 PM (we had sent the mail to Dr. Rai on Monday, February 28, 2011).

We never received any acknowledgement, though, not even after we made an express request for acknowledgement (and an offer to meet them in person to explain our concerns) on Tuesday, April 5, 2011 in an e-mail sent to Mr. Prafulla Kumar and Dr. Gulshan Rai of DIT.

The process can hardly be called 'transparent' when the replies received from 'industry associations and other stakeholders' have not been made public by

the DIT. Those comments which are public all indicate that serious concerns were raised as to the constitutionality of the Rules.

The Government has been forward looking to create a conducive environment for the Internet medium to catapult itself onto a different plane with the evolution of the Internet. The Government remains fully committed to freedom of speech and expression and the citizen's rights in this regard.

The DIT has limited this statement to the rules on intermediary due diligence, and has not spoken about the controversial new rules that stifle cybercafes, and restrict users' privacy and freedom to receive information.

If the government is serious about creating a conducive environment for innovation, privacy and free expression on the Internet, then it wouldn't be passing Rules that curb down on them, and it definitely will not be doing so in such a non-transparent fashion.