

# Counter proposal by CIS to the draft IT (Intermediary Due Diligence and Information Removal) Rules 2012

*Centre for Internet and Society* | 2012-01-01

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## Draft Rules as Proposed by the Centre for Internet and Society

In exercise of the powers conferred by sub-section (1) of section 87 and clause (zg) of sub-section (2) of section 87 read with sub-section (2) of section 79 of the Information Technology Act, 2000 (Central Act XXI of 2000), the Central Government hereby prescribes the following rules, namely: —

### 1. Short title and commencement

- (1) These rules may be called the Information Technology (Intermediaries) Rules, 2012.
- (2) They shall come into force on the date of their publication in the Official Gazette.

### 2. Definitions

- (1) In these rules, unless the context otherwise requires, —
  - (a) “Act” means the Information Technology Act, 2000 (21 of 2000);
  - (b) “Communication link” means a uniform resource identifier;

- (c) “Host” with all its grammatical variations and cognate expressions means to store information or communication links and other activities allied to storage, including, but not limited to, appending programming language syntax, applying filters, adding interactive features, replicating and transmitting, but not including any function which modifies the information or communication link contained therein.

Provided that an intermediary that has most direct control over the use of or access to a uniform resource identifier shall be deemed to be the hosting service for such information or communication link, even if it subcontracts the hosting of the information or communication link reached by using that uniform resource identifier to another intermediary.

- (d) “Information” means information as defined in clause (v) of sub-section (1) of section 2 of the Act;
  - (e) “Intermediary” means an intermediary as defined in clause (w) of sub-section (1) of section 2 of the Act and, for the purposes of these rules only, intermediaries shall be of the classes set out in rule 3;
  - (f) “Modify” with all its grammatical variations and cognate expressions means to alter the integrity of information either by exercise of substantial human editorial control or, with respect to a legal proceeding or claim, if the alteration ipso facto causes an injury that is the subject matter of the legal proceeding or claim;
  - (g) “Intermediate”, in relation to storing of information, means the storing of information in the course of transmission;
  - (h) “Transient”, in relation to storing of information, means storing that is temporary and for a period that is not beyond the time that is reasonably necessary for transmission;
  - (i) “User” means any person who accesses or uses any computer resource of an intermediary if that intermediary, on behalf of that person, receives or stores or transmits an electronic record, or provides any service to that person with respect to an electronic record.
- (2) All other words and expressions used and not defined in these rules but defined in the Act shall have the meanings respectively assigned to them in the Act.

### **3. Classes of intermediaries**

- (1) In these rules, intermediaries shall be of the following classes —
  - (a) “Hosting services” that host information at the direction of a user, and include, but are not limited to, social networking websites that host user information at the direction of its users, video sharing websites that host videos at the direction of its users, blogging websites that host blogs at

the direction of a third party blogger, newspaper websites that host reader comments on news articles at the direction of the reader, e-commerce websites that host product or service details at the direction of the seller.

- (b) “Information location services” that make available or host communication links and any information incidental to such communication links for the sole purpose of locating information, and include, but are not limited to, search engines and directories.
- (c) “Caching services” that store information for the sole purpose of making the onward transmission of such information more efficient, on the condition that (i) such storing is automatic, intermediate and temporary; (ii) the intermediary does not modify the information contained therein; and (iii) the intermediary complies with conditions on access to the information.
- (d) “Access providers” that provide access to a computer network, or transmit information over a computer network at the direction of a user, if the intermediary does not > (i) initiate the transmission; > > (ii) select the receiver of the transmission; > > (iii) select or modify the information or communication link contained in the transmission; and > > (iv) store the information or communication link contained in the transmission with the exception of automatic, intermediate and transient storing for the sole purpose of such transmission and with the exception of storing as may be mandated under the Act.
- (e) “Residuals”, which are intermediaries that are not in the classes of hosting services, information location services, caching services, or access providers.

#### **4. Due diligence by intermediaries**

- (1) All intermediaries shall observe the following due diligence while discharging their duties, namely — > (a) The intermediary shall prominently display and publish a privacy policy, and terms and conditions of use of the intermediary’s computer resource by any person. > > (b) The intermediary shall prominently display and publish the name, address or other contact details of the person or authority to which a complaint made under rule 5 is to be preferred.
- (2) The intermediary shall not disclose information identifying a user to a third party who does not have access to such information unless required to do so by any law for the time being in force.
- (3) Without prejudice to the generality of the provisions of sub-rule (1) of this rule, an intermediary shall observe the following additional class-specific due diligence requirements while discharging its duties, namely — > (a) An information location service shall comply with robots exclusion standards and other similar industry standards pertaining to information location services; > > (b) A caching service shall comply with industry standards regarding periodic updating of information or communication links.

- (4) Notwithstanding the provisions of sub-rule (1) and sub-rule (2) of this rule, there shall not be any general obligation on the intermediary to monitor information or communication links, or to seek facts and circumstances indicating illegal activity on the intermediary's computer networks or computer resources.

## **5. Complaints**

Any person aggrieved by any information or communication link made available or hosted by an intermediary may prefer a complaint to that intermediary in the form and manner prescribed in Schedule I.

## **6. Removal of information by hosting services**

- (1) Upon receipt by hosting service of a complaint for removal of any information being used to commit an unlawful act, it shall immediately provide a copy of the complaint to the third party provider of the information to which the complaint pertains.
- (2) The third party provider of the information to which the complaint pertains may prefer a counter-notice in the form and manner prescribed in Schedule II within forty-eight hours of the receipt of a copy of the complaint where the complaint pertains to any information that was first hosted or last modified within a period of seven days immediately preceding the date of the complaint, and within fourteen days of the receipt of a copy of the complaint where the complaint pertains to any other information.
- (3) Upon receipt of a counter-notice by an intermediary under sub-rule (2) of this rule, the intermediary shall immediately provide a copy of the counter-notice to the person who preferred the complaint.
- (4) Subject to sub-rules (5) and (6) of this rule, a hosting service shall receive actual knowledge of the unlawfulness of the act only when — > (i) the third party provider of the information accepts the unlawfulness of the act to which the complaint pertains; or > > (ii) the intermediary does not receive a counter-notice in conformance with sub-rule (2) of this rule from the third party provider of the information.
- (5) Notwithstanding anything contained in this rule, the actual knowledge of the unlawfulness of any act shall lapse if the complainant under this rule fails to obtain, within a period of one hundred and eighty days, a determination of a court of competent jurisdiction as to the unlawful act to which the complaint pertains.
- (6) Notwithstanding anything contained in this rule, the actual knowledge of the unlawfulness of any act shall lapse if the third party provider of the information to which the complaint pertains prefers a counter-notice within sixty days of receipt of a copy of the complaint.

- (7) Upon receipt of actual knowledge of the unlawfulness of any act or upon receipt of a notification by the appropriate Government under clause (b) of sub-section (3) of section 79 of the Act, a hosting service shall remove the information to which such actual knowledge or notification pertains.

Provided that, in relation to the intermediary, if the actual knowledge of the unlawfulness of any act using any information lapses under sub-rules (5) and (6) of this rule, the intermediary shall immediately restore such removed information.

## **7. Removal of communication links by information location services**

- (1) An information location service shall receive actual knowledge of the commission of unlawful act using any communication link only upon receipt of a complaint accompanied by proof that the information to which the communication link points, has been removed under sub-rule (8) of rule 6, or has been ordered to be removed by a court of competent jurisdiction.
- (2) Upon receipt of actual knowledge of the commission of an unlawful act using any communication link or upon receipt of a notification by the appropriate Government under clause (b) of sub-section (3) of section 79 of the Act, an information location service shall remove the communication link and any incidental information to which such actual knowledge or notification pertains.

## **8. Removal of information by caching services**

- (1) A caching service shall receive actual knowledge of the commission of an unlawful act using any information only upon receipt of a complaint accompanied by a written notification that the information, for which transmission is sought to made more efficient, has been removed under sub-rule (8) of rule 6 or has been ordered to be removed by a court of competent jurisdiction.
- (2) Upon receipt of actual knowledge of the commission of an unlawful act using any information or upon the receipt of a notification by the appropriate Government under clause (b) of sub-section (3) of section 79 of the Act, a caching service shall remove the information to which such actual knowledge or notification pertains.

## **9. Removal of information by access providers**

- (1) An access providers shall receive actual knowledge of the commission of an unlawful act using any information or communication link only upon receipt of a complaint accompanied by an order by a court of competent jurisdiction for preventing access to such information.

- (2) Upon receipt of actual knowledge of the commission of an unlawful act using any information or communication link or upon receipt of a notification by the appropriate Government under clause (b) of sub-section (3) of section 79 of the Act, an access providers shall remove the information or communication link to which such actual knowledge or notification pertains.

## **10. Removal of information by residuals**

An intermediary of the class “residuals” shall be treated as a hosting service for the purpose of removal of any information or communication link being used to commit an unlawful act.

## **11. Removal of information due to complaint of violation of terms and conditions of use**

An intermediary of any class may, upon receipt of a complaint under rule 5 and without receipt of actual knowledge, remove any information that is made available or hosted by it if it feels in good faith that such information is in violation of its terms and conditions of use.

## **12. Transparency and record-preservation**

- (1) In all cases where any information is removed by an intermediary under rules 6, 7, 8, 9, 10, or 11 the intermediary shall notify the Designated Officer under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009, the complainant, if any, and the third party provider of the information that has been removed about the fact of removal of information, and provide them the URI of the removed information and a brief description of the removed information, and the complaint.
- (2) In the case where the information is removed under rule 11, the intermediary shall provide the Designated Officer under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009, the complainant, if any, and the third party provider of the information that has been removed, with reasons for holding such information to be in violation of its terms and conditions of use.
- (3) The Designated Officer under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009.
- (4) In all cases where any information is removed by an intermediary under rules 6, 7, 8, 9, 10, or 11 the intermediary shall preserve the removed information and associated records for at least one hundred and eighty days.

### **13. Relevance of due diligence on removal requirements**

For the purposes of any legal proceeding or claim against an intermediary for any third party information or communication link made available or hosted by such intermediary, the exemption from liability under section 79 of the Act shall not be waived for failure to observe any due diligence or removal requirements under rules 4, 6, 7, 8, 9 or 10 unless such failure bears a reasonable nexus to the prevention of an injury that is the subject matter, or the redressal, of such legal proceeding or claim.