

**EVOLUTION & SHIFTS IN REGULATORY  
PARADIGM  
FOR  
INTERMEDIARIES UNDER  
INFORMATION & TECHNOLOGY ACT 2000**

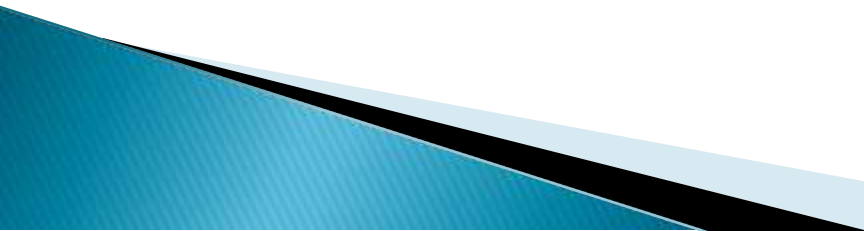
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**ADV. KUNAL TANDON**



# BIRTH OF INFORMATION TECHNOLOGY ACT IN INDIA

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- ❑ With the advent of technological advancements and growing digital fraud, a need was felt to regulate and prevent offences and contraventions arising out of and linked to technology.
  - ❑ Accordingly, Information Technology Act, 2000 was enacted on 9th June 2000.
  - ❑ IT Act draws its inspiration from Model Law in Electronic Commerce adopted by the UNCITRAL, the object of both legislations being legal recognition of electronic records, and strengthening the business
  - ❑ The purpose of the Act is to provide legal recognition to electronic records, e-commerce and e-transaction, facilitate e-governance, and prevent computer-based crimes.
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# EVOLUTION OF INTERMEDIARY RULES AND ITS BACKGROUND

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- ❑ Until 2008, there was nothing in the IT Act to protect the intermediaries from the content posted by its users.
- ❑ Hon'ble Delhi High Court in *Avinash Bajaj vs. State [2008 (105) DRJ 721]*, M.D. of the Company was charged with criminal provisions under IPC as well as IT Act. In this case, the Hon'ble Court also observed that there is a requirement for widening the scope of protection to be given to the intermediaries.
- ❑ The amendments introduced after the *Avinash Bajaj* (supra) provided wider protection to the Intermediaries.
- ❑ Post *Avinash Bajaj* case, Intermediary is not liable for any third party information, data made available or hosted by him, except for conditions stipulated in Section 79(2) and 79(3) of IT Act. ["Safe Harbor"]

# THE INFORMATION TECHNOLOGY (INTERMEDIARIES GUIDELINES) RULES 2011

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- ❑ Mandatory for all intermediaries to follow the rules for claiming Safe Harbor protection.
- ❑ Intermediaries mandated to carry out the Due Diligence as prescribed under Rule 3 of Intermediary Rules of 2011
  - publish on its website rules and regulations privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.
  - To put up appropriate disclaimer/ caution for users of computer resource from hosting/ displaying, etc. any illegal/unlawful content as prescribed under the Rules.
  - Intermediary to act within 36 hours of complaint in respect of any harmful, defamatory, obscene, ethically, objectionable content, etc., and preserve such information for at least 90 days for investigation purpose.
  - Intermediary has a right to terminate the access or usage rights of the users in case of non-complaint of the rules and regulations.
  - Shall take all reasonable measures to secure its computer resource and information.
  - Shall report cyber security incidents and also share cyber security incidents related information.

# THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021

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Considering the advancement of technologies, on 25<sup>th</sup> February 2021, Govt. notified the Information Technology (Intermediary Guidelines and Digital Media Ethics code) Rules 2021, superseding the Information Technology (Intermediaries Guidelines) Rules 2011.

## **Objectives aimed at by the amendment:**

- Need to ensure that the interests and constitutional rights of netizens are not being contravened by big tech platforms;
- To strengthen the grievance redressal framework in the Rules;
- There should not be any ambiguity in prohibited content;
- Intermediaries should not make any forced decisions;
- Check on fake news, financial frauds which were being committed and to curtail the anti national elements activities.

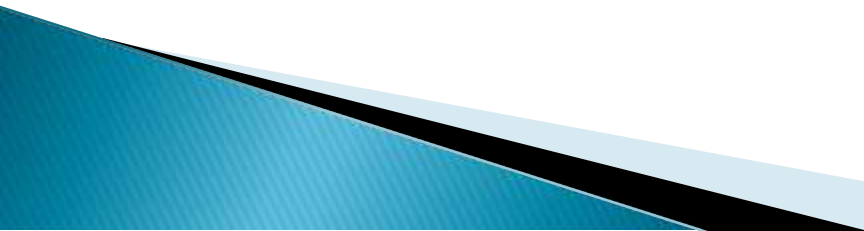
# DUE DILIGENCE BY INTERMEDIARIES AND GRIEVANCE REDRESSAL MECHANISM

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- ❑ What is “Social Media Intermediaries”?
  - Rule 2(2)(w): ‘social media intermediary’ means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services
- ❑ Due diligence to be observed by the social media intermediaries:
  - Publish on its website rules and regulations, privacy policy and user agreement and shall periodically inform its user about the same.

# DUE DILIGENCE BY INTERMEDIARIES AND GRIEVANCE REDRESSAL MECHANISM

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- Inform user not to host display upload transmit or share any information which is harmful to child, infringes IPR, is defamatory, obscene, violates any law, threatens the security of India, contains software virus etc.
  - Shall insure online safety and dignity of users especially women users.
  - Intermediary shall remove or disable access within 24 hrs of receiving the complaint.
  - Upon receiving actual knowledge in the form of a Court order or notification by appropriate govt. platforms, should not host or publish any information and remove unlawful information.
  - Shall retain information for a period of 180 days after any cancellation or withdrawal of registration on a computer resource by a user.
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# ADDITIONAL DUE DILIGENCE TO BE OBSERVED BY SIGNIFICANT SOCIAL MEDIA INTERMEDIARY

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- ❑ **What is “Significant Social Media Intermediary”?**
  - Rule 2(2)(2)(v): “Significant Social Media Intermediary” means a Social Media Intermediary having number of registered users in India above such threshold as notified by the Central Government.
- ❑ **Additional due diligence to be observed are as follows:**
  - Appoint a Chief Compliance Officer who shall be responsible for insuring compliance with the Act and Rules.
  - Appoint Nodal Contact Person for 24X7 coordination with law enforcement agencies.
  - Appoint a Resident Grievance Officer who shall perform the function mentioned in Grievance Redressal Mechanism. All these officers should be resident of India.
  - Intermediary shall enable the identification of the first originator of the information.
  - Publish a monthly compliance report mentioning the details of complaints received and action taken on the complaints.



# DEVELOPMENTS IN 2022

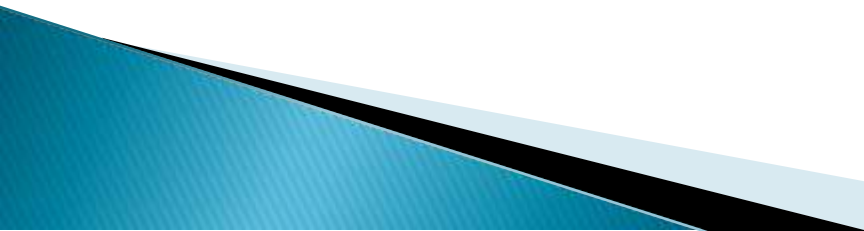
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On 28th October 2022, MEITY updated the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

- ❑ **Changes incorporated in Rule 3 of Rules 2021 (as updated on 28.10.2022)**
- Intermediaries to publish the rules in English, or any language specified in the Eighth Schedule of the Constitution of India.
- Imposes legal obligation on intermediaries to inform users of its rules and regulations and also to inform the users to not host, display, upload, publish, transmit, store any obscene, illegal information.
- Changes in the nature of prohibited content where words “defamatory” and “libelous” have been deleted so that intermediary does not determine the said words and the same shall be kept for determination through judicial review.

# DEVELOPMENTS IN 2022

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- Intermediary not permitted to intentionally communicate any misinformation to its users.
  - Intermediaries to take responsibility to ensure accessibility of its services to users.
  - Intermediaries to respect the constitutional rights of the citizens of India guaranteed under Article 14, 19 & 21 of Constitution of India.
  - Intermediaries to acknowledge complaints within 24 hours and resolve such complaint within 15 days from the date of receipt of complaint.
  - Complaints set out in Rule 3(1)(b), except sub-clauses (i), (iv) and (ix) are to be resolved within 72 hours of receiving the complaint.
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# DEVELOPMENTS IN 2022

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## □ Rule 3A - Introduction of Grievance Appellate Committee

- Initially decisions of the Grievance Officer appointed by the intermediaries were considered final. Amendment allows the users to appeal the decisions of the Grievance Officer.
- Appellate body, namely ‘Grievance Appellate Committee’ (“GAC“) has been formed.
- Establishment of one or more GACs by the Central Government, provides users with an opportunity to appeal against the order of a Grievance Officer.
- Order to be challenged within 30 days of receipt of such order. Intermediaries are to be bound by the order of the committee.
- This mechanism does not preclude the user from reaching out to judicial courts separately for addressing their grievance.

# DEVELOPMENTS IN 2023

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- ❑ On 6th April 2023, MEITY updated the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 on the aspect of “Online Gaming”.
- ❑ By introducing the Rules 2023 the following aspects have come forthwith:
  - **Obligation/due diligence of Intermediaries in Rule 2023**
    - No platform can allow the harmful un-approved online games and their advertisements.
    - Should not share false information about Indian Government, as confirmed by a fact checking unit.

# DEVELOPMENTS IN 2023

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## ➤ **Self-Regulated Bodies**

- Platforms providing online gaming will have to register with a Self-Regulatory Body (SRB).
- SRB to decide whether the game is permissible or not.
- Platform should ensure that online games do not involve any gambling or betting elements.

## ➤ **Losing Safe Harbor:**

- Any information marked as fake by fact checking unit, intermediaries to take it down;
- Intermediaries risk losing Safe Harbor, if failed to take down such fake information.
- Social media sites to take down such fake posts.
- Internet service providers will have to block URLs of such content.

## ❑ **Changes incorporated in the Rules 2021 (as updated on 06.04.2023)**

- Sec.2(qa) introduces the definition of “online game” means a game that is offered on the Internet and is accessible by a user through a computer resource or an intermediary.

# DEVELOPMENTS IN 2023

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- Sec. 2(qb) introduces the definition of “Online Gaming Intermediary” means any intermediary that enables the users of its computer resource to access one or more online games.
- If the online game that can cause harm to the user, then it is the duty of the Intermediary and grievance redressal mechanism to inform the user of its computer resource not to host/display/upload/modify/publish/transmit/store/update/share any information of that harmful online game.
- If an online gaming intermediary has enabled the users to access any permissible online real money game, it will have to inform its users of such change as soon as possible, but not later than 24 hours after the change is affected.
- Online gaming intermediaries have to display a demonstrable and visible mark of verification of such online game by an online gaming self-regulatory body on such permissible online real money game.
- Online gaming intermediary will not itself finance or enable financing to be offered by 3rd party.

# DEVELOPMENTS IN 2023

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- ❑ **Rule 4 - Due diligence by Significant Social Media Intermediary.**
  - Have to display a demonstrable and visible mark of verification of such permissible online real money game.
  - Will not itself finance or enable financing to be offered by 3<sup>rd</sup> party.
- ❑ **Rule 4A : “Verification Of Online Real Game”**
  - Central Govt. to designate as many online gaming self regulatory bodies for verifying an online real money game.
  - Regulatory Authority, on their website/mobile based app, have to maintain the details of the applicants, details of suspension/revocation.
  - Self-regulatory body have to publish on its website, the framework for redressal of grievances and the contact details of the Grievance Officer.
  - Self-regulatory body after conducting inquiry, if satisfied, that there is no involvement of wagering and provisions relating to the age of an individual is verified, It can declare the online real money game as a permissible online game.

# IMPACT OF INTERMEDIARY RULES ON INDIA ECONOMIC GROWTH AND GLOBALLY

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- ▶ Social media platforms- *Facebook, WhatsApp and Twitter* - to comply with the government's new Information Technology Rules, 2021. If they fail to fall in line, they risk losing 'intermediary' status and loss of legal immunity.
- ▶ If *Facebook, WhatsApp and Twitter* lose their immunity as intermediaries, they will be equally responsible for any unlawful content.
- ▶ **New IT Rules, regulations strictly to be followed by social media platforms:**
  - Appoint a Chief Compliance Officer who shall be responsible for ensuring compliance within the Act and Rules.
  - Appoint a Nodal contact person for 24 x 7 co-ordination with law enforcement agencies.
  - Appoint a resident Grievance Officer.
  - Publish monthly compliance report mentioning the details of complaints received and action taken on the complaints.



# INTERMEDIARIES LIABILITIES –LIMITS ACROSS THE WORLD

COUNTRY	POSITION
UNITED STATES	The Communications Decency Act does not hold online services liable for any third party content on their platforms.
CHINA	If intermediaries having knowledge of infringing activity, but still fails to take necessary measures will be held jointly and severally liable along with the publisher.
JAPAN	Japan Parliament ( <i>National Diet</i> ) passed the Provider Liability Limitation Act contemplates that intermediaries liability shall be limited in the event it is technically feasible to prevent the transmission of infringing information.
EUROPE	Contemplates 'Safe Harbor' principle, protecting online intermediaries from any liability unless they are aware of the illegality and are not acting adequately to stop it. Online intermediaries are subject to 'duties of care' and 'notice and take down' obligations to remove illegal online content.

**THANK YOU**