



INDIA'S NEW IT RULES 2021: LITIGATION BRIEF

APRIL 2021

INDIA'S NEW IT RULES: 2021

WHAT ARE YOUR OPTIONS?

Analyse

- What are the real pain points that affect the business model or create unacceptable liability?
- Start with the position that the New Rules are here to stay, and will not be struck down en masse.
- You can access more resources to understand and analyze the New Rules [here](#) and [here](#).

Comply

- Identify provisions that will demonstrate compliance, comply with them, and record the fact of the compliance.
- Note that arguments of 'inconvenience' and 'burden' will likely not be successful.
- We have identified some generic provisions in our [Compliance Matrix](#) as guidance.

Clarify

- There may be regulations that you need clarity on because they are unclear, contradictory, or vague.
- Identify these and engage with the regulator for clarifications, or wait for clarifications to be issued (as often happens with over arching regulations). Note that these clarifications may take some time to be issued.
- We have identified some provisions that ought to be clarified in the column 'Clarity' below as guidance.

Contest

- Identify a finite set of critical obligations that affects your business model to the extent of making it unviable, negatively affects the core of your business philosophy, or creates unacceptable liability.
- Map these obligations to possible legal arguments as to why these should not apply to you or more generally, why these should not apply.
- If there are strong business reasons supported by equally strong legal arguments, consider contesting these provisions. We have identified some of these in the column 'Contest' below.

Act

- Depending on your choice of action - (i) initiate compliance immediately; AND/OR (ii) choose the forum to contest smartly; AND/OR (iii) design fall back options if legal challenge is unsuccessful.
- Strategy to comply or clarify or contest should be carefully developed keeping in mind business risks, regulatory oversight, and suitability of the forum. This will be different for different companies.

Clarify or Contest

Rule	Requirement	Action	
		Clarify	Contest
Applicable to all social media intermediaries			
<p>Significant Social Media Intermediaries Categorization</p> <p>2(1)(v), 6</p> <p>Contest to remove</p>	<p>A social media intermediary, i.e., 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, having at least five million registered users in India</p>		<ol style="list-style-type: none"> 1.The IT Act does not define or identify social media as a category of intermediaries that require additional regulation. The Rules attempt to create a new category outside the scope or intention of the IT Act. Any attempt to do so will require an amendment in the parent law by the Parliament and sans that it is a case of excess delegation. 2.There is no nexus between the number of users and the type of content carried. The rules ought to target intermediaries based on content, not mere user base. 3.The Rules may facilitate 'pick and choose' social media targets in an arbitrary manner. This is made reiterated by Rule 6, that merely allows the Ministry to require compliance of a non-significant intermediary too. Unless detailed criteria are published on what constitute 'registered' users, no punitive action should be taken against intermediaries alleged to be covered.
<p>Local Presence</p> <p>4(1)(a) 4(1)(b) 4(1)(c)</p> <p>Contest to remove</p>	<p>Appoint a Chief Compliance Officer, Grievance Officer, Nodal Officer, and have an office in India.</p>	<p>Clarify why these Indian entities and officers are required and what will be the nature of requests from the regulators.</p> <p>OR</p> <p>Modify residence of these officers in India to regional offices, since most intermediaries already employ public policy experts at regional level.</p> <p>Clarify that this requirement will not affect an enterprises' tax liability, and that no coercive action will be taken against employees in India.</p> <p>In addition, protection of actions taken in good faith should be provided. A number of government offices have similar protections. Since these offices are, in essence, 'representative offices', a personal "safe harbour" should be provided.</p>	<ol style="list-style-type: none"> 1. There is no reasonable nexus between what the law seeks to achieve and creation of these posts with a requirement to be present in India. 2. This is more so, because existing international conventions and procedures (MLAT and others) are sufficient to achieve compliance. If need be, government can strengthen these procedures instead of seeking to bypass them by forcing businesses to open operations in India. 3. Indian courts will have jurisdiction over entities wherever they operate from and companies will not risk their business by risking contempt by not complying with orders of the Court (irrespective of where they are situated). Procedures for enforcement in foreign jurisdictions exist too and these rules seek to bypass those procedures. 4. Such measures may also be counted as a "non-tariff barrier" to free trade under bilateral and multilateral trade agreements. Any specialized liability devolving on officers of a foreign company, where none devolves on an Indian counterpart, may not lead to a level playing field. 5. Compliance, law enforcement coordination, and reporting can be done from outside India too. Having an address and employees in India can be interpreted as an unnecessary and draconian provision susceptible to misuse and as leverage, when required. 6. This may be in violation of Article 14 of the Constitution of India since it singles out select posts of select social media companies to have local presence. On the flip side, (say) makers of life saving drugs and medical devices are not required to have employees or offices in India, irrespective of market size. There is no justification for asking this of social media companies, and not any other 'critical' industry. 7. This has the additional, 'unintended' effect of making the social media intermediary's business susceptible to local tax claims. A 'permanent establishment' presence cannot be levied by the back door here. 8. To direct appointment of officers, and mandating residence in India, in a company is beyond the scope of powers of the Government under the IT Act. While the Companies Act permits appointment of 'key managerial personnel', a provision such as this will require either amendment of the Companies Act or a notification under the Companies Act.

<p>Identify First Originator of Content</p> <p>4(2)</p> <p>Contest but be prepared to use the fall back option of Clarify</p>	<p>Intermediary to identify the 'first originator' of a message or content when required to do so by a court order or Government order.</p>	<p>Define select and clear instances where such requests can be made – i.e. in the course of a criminal investigation on the order passed by a Court or national security on the basis of an order passed by a Court or issued by a Secretary of the Government.</p>	<ol style="list-style-type: none"> 1. An ask such as this may be unconstitutional in the absence of a specialized personal data protection law. This may lead to social intermediaries infringing upon Right to Privacy of individuals in violation of the judgment of the Supreme Court in Puttuswamy. Providing personal data to Government should be as per the exceptions outlined in the final form of the draft Personal Data Protection Bill, 2019. 2. These orders must be circumscribed by the principles against surveillance and phone-tapping set out in the judgment of the Supreme Court in PUCL v Union of India. Such orders should be passed when all other alternatives of obtaining information have been exhausted, for example.
<p>Applicable to all publishers of (i) news and current affairs content, and (ii) online curated content, w.e.f. February 25, 2021</p>			
<p>Code of Ethics</p> <p>9, 13, 14</p>	<p>Publishers are required to adhere to the code of ethics attached to the New Rules. The code specifies standards applicable to news and online curated content, content classification, etc.</p> <p>Publisher must comply with directions issued by industry self-regulating bodies and Ministry of Information and Broadcasting ("MIB") in appeals arising from violations of the code of ethics.</p>	<p>Level II mechanism:</p> <p>The involvement of the Government in 'registering' the self-regulatory body may constitute interference, and should be done away with. So long the prescribed criteria are met, the self-regulating body should be allowed to function.</p> <p>OR</p> <p>The registration of self-regulating bodies should be a one-time interaction with the Government. Any future or continuing communications, etc., between the body and the Government should be placed in the public domain.</p>	<ol style="list-style-type: none"> 1. Self-classification under the IT Act, as against a dedicated law such as the Cinematograph Act, is beyond the scope of the IT Act. The IT Act is restricted to provide legal recognition for electronic transactions and communication, and cannot set up a self-regulatory mechanism for content without expressly defining what such content is, etc. 2. Online content and streaming providers may be regulated under extant Cable TV laws, or the Convergence Bill. The IT Act is not intended to regulate publishers of news under a separate code that is more onerous than that applicable to Cable TV, etc. 3. The Government's Inter Departmental Committee has the power to intervene irrespective of the decision of the self-regulating body. This has to be removed, since this militates against the principal of self-regulation.
<p>Local Presence</p> <p>10 (1), 11 (a), (c), 19</p>	<p>Publisher to establish a grievance redressal mechanism and appoint a grievance officer based in India to redress comments regarding content published by a publisher.</p>	<p>Same as 'Local presence' above.</p>	<p>Same as 'Local presence' above.</p>
<p>Applicable to all intermediaries</p>			
<p>Content Take Down</p> <p>3(2)(b),(c)</p> <p>Clarify and dilute with obligation to act in accordance with guidelines.</p>	<p>Content which exposes the private area of an individual or impersonates them, etc., must be taken down within 24 hours of receiving a complaint.</p>	<ol style="list-style-type: none"> 1. Enable a government body or a self-monitoring body to issue orders for takedown or modification post which the 24 hour timeline triggers. 2. Declare that actions taken in good faith (removal or refusal to remove) will not lead to liability, if these are done consistently in accordance with published guidelines. 3. Publish guidelines that intermediaries can use as the benchmark for decision. These would include guidelines on who can make a complaint (locus standi), and relevant definitions. <p>OR</p> <p>Refer all takedown requests under this provision to an industry body constituted for this purpose, to avoid delay and inconsistencies in practice among intermediaries.</p>	<ol style="list-style-type: none"> 1. This will likely qualify as a case of 'private delegation', where the Government has delegated its obligation to identify crimes and maintain law and order to private parties, i.e., online intermediaries. 2. This may require the platforms to apply a piece-meal approach to take down content. The court should step in and specify a process of either a regulatory or industry body that issues orders based on a set of criteria. 3. In the alternative, the delegation itself may be fine, but this should be subject to Government prescribed guidelines etc. These are important, as this ensures that the intermediary will not convert to an adjudicator or have to apply its discretion in determining content, etc.

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Vikram Jeet Singh is a partner in the Technology, Media and Communications practice group of BTG Legal. He has advised Indian and global strategic investors, banks, private equity investors, angel investors, family offices and startup incubators in their acquisition and investment transactions. His experience includes advisory and transaction support work ranging from buyouts of controlling stakes in public listed companies to investments in early-stage investments in startups.

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“ BTG has played the role of a reliable advisor and trusted legal counsel. The team provides a rather refreshing approach to dealing with our eclectic requirements.

- Leading Animation Company

“ The team at BTG understands the requirement/issue at hand with ease and is able to analyse it in business context. They look at it not only from a legal perspective but also practicality perspective. Excellent deliverables and closures with most accuracy which saves a lot of time and effort of the in-house stakeholders.

- Online Education company

“ We received tremendous service. I was very impressed with the knowledge of their lawyers, the quality of their advice, and their efforts to assist us with a difficult acquisition. I would highly recommend BTG to anyone seeking legal service in India.

- Listed US Media Company

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