BSA Submission
on
Draft Information Technology
[Intermediary Guidelines (Amendment) Rules] 2018

January 31, 2019

Dear Sir,

Subject: BSA Submission on Draft Information Technology [Intermediary Guidelines (Amendment) Rules] 2018

BSA | The Software Alliance ("BSA")[1] welcomes the opportunity to provide its views on the Draft Information Technology [Intermediary Guidelines (Amendment) Rules], 2018 (**Draft Guidelines**) released by the Ministry of Electronics and Information Technology (**MeitY**).[2] BSA recognizes that online content platforms have important responsibilities to aid in the fight against unlawful content online by removing such content in a timely manner. However, we are concerned that the Draft Guidelines adopts a "one-size-fits-all" approach which disregards key technical distinctions between the range of service providers that fall within the IT Act's definition of "intermediary". As a result, the Draft Guidelines may unintentionally impose obligations that are technically infeasible for many enterprise cloud services.

In this context, we respectfully submit that not all online service providers are alike, and that it would undermine the objectives of the Draft Guidelines to ignore the technical characteristics

[1] BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA's members include: Adobe, Akamai, Amazon Web Services, Apple, Autodesk, AVEVA, Bentley Systems, Box, Cadence, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, Siemens PLM Software, Slack, Splunk, Symantec, Synopsys, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday..

[2] *The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 – Draft* available at:http://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf

Le-Meridien
15th Floor, Room 1529
Windsor Place, Janpath
New Delhi 110001
India

P (91 11) 4978 9066
W bsa.org

that distinguish online content platforms that are the rightful focus of this inquiry. An Intermediary Guidelines framework with overbroad applicability and no distinction between online content platforms and enterprise cloud services represents a horizontal approach that risks negatively impacting the growing Indian enterprise cloud economy. Consequently, we encourage MeitY to consider a risk-based approach that is focused on the specific subset of online intermediaries that both make available content to the general public and have the technical capabilities necessary to block the dissemination of unlawful content.

More specifically, and in relation to the provisions of the Draft Guidelines, we would like to bring to your attention the following issue-specific points:

1. **Overbroad Definition of Intermediaries**

Pursuant to the definition of "intermediary" in the IT Act, the Draft Guidelines will apply to any entity "who on behalf of another person receives, stores or transmits" or "provides any service" with respect to an online communication. This broad definition would seemingly extend to virtually every online entity, from the infrastructure level (e.g., Internet Service Providers, Domain Name System providers, and Infrastructure-as-a-Service providers) to the application level (e.g., social media platforms, video sharing sites, and search engines). The Draft Guidelines makes no distinction between these different types of service providers or their role in the Internet ecosystem. In its current form, the regulation would apply uniformly to all intermediaries irrespective of their technical capabilities. To ensure that the proposed Draft Guidelines create an effective set of rules that are necessary, proportionate, and fully respect civil rights, we suggest that the scope of the Draft Guidelines should generally exclude providers of enterprise cloud services.

Many of the Draft Guidelines' obligations are predicated on the assumption that all intermediaries make content directly available to the public and that they can unilaterally intervene to identify and remove unlawful content. For instance, the proposed amendments are aimed at addressing the spread of unlawful content by requiring intermediaries to: (1) assist law enforcement personnel in the identification of the particular users who posted such content [Rule 3(5)], (2) remove such content in response to a court order or Government request [Rule 3(8)], and (3) prevent the posting of such content through the use of automated filtering tools [Rule 3(9)]. As a practical matter, however, enterprise cloud service providers will be unable to comply with these requirements. For instance, cloud Infrastructure-as-a-Service providers offer computing power and database storage upon which their enterprise customers can build and run their own public-facing Internet services. Because such enterprise cloud service providers do not have unfettered access to the data stored by their enterprise customers, a cloud infrastructure provider would be unable to comply with a request to remove specific unlawful content. Consequently, if an enterprise cloud service provider received an order requiring it to remove unlawful content from one of its enterprise customers, the service provider would have no other option than to shut down the entire service of the customer. An enterprise cloud service provider would likewise lack access to the log information that would be needed to identify an individual who posted content on an enterprise customers' public-facing Internet service.

Le-Meridien
15th Floor, Room 1529
Windsor Place, Janpath
New Delhi 110001
India

P (91 11) 4978 9066
W bsa.org

2. Filtering Obligations Undermine Constitutional Protections

In *Shreya Singhal v Union of India*, the Supreme Court concluded that legislation that restricts the constitutional right to free expression must both be necessary to achieve a legitimate state interest and narrowly tailored to avoid unnecessarily chilling legitimate speech.[3] The requirement for all intermediaries to implement automated filtering tools "for proactively identifying and removing or disabling public access to unlawful information or content" is inconsistent with these core constitutional principles. By conditioning the availability of the IT Act's safe harbor for online intermediaries on their implementation of automated filters to preemptively block any potentially "unlawful information or content", the Draft Guidelines would create perverse incentives that would result in the systematic over-blocking of lawful content.

In addition to undermining Indian users' free speech interests, the automated filtering requirement will create significant privacy and data protection concerns as laid down by the Supreme Court in *K. Puttaswamy v. Union of India*.[4] Filtering the content stored and/or processed by intermediaries would potentially require them to go against contractual privacy commitments and oblige them to filter, for example, the personal, corporate, medical, or financial data of millions of persons, businesses, or governments. Accordingly, in order to ensure privacy and data protection for their customers, we urge MeitY to eliminate the proposed filtering requirement from the Draft Guidelines.

Recommendations

For the reasons set out above, we urge MeitY to specifically exclude enterprise cloud service providers from the scope of the Draft Guidelines' new obligations. Furthermore, we request you to eliminate the filtering obligations imposed on businesses in Rules 3(9).

Yours sincerely

Venkatesh Krishnamoorthy
Country Manager
BSA | The Software Alliance

[3] W.P. (Criminal) No. 167 of 2012

[4] W.P. (Civil) No. 494 of 2012

Le-Meridien
15th Floor, Room 1529
Windsor Place, Janpath
New Delhi 110001
India

P (91 11) 4978 9066
W bsa.org