

**Response to Draft Amendment to
the IT (Intermediary Guidelines
And Digital Media Ethics Code)
Rules, 2021**

**IT for Change
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Relating to due diligence by an intermediary under rule 3(1)(b)(v)

The object of the notified [draft Amendments to the Information Technology \(Intermediary Guidelines and Digital Media Ethics Code\) Rules, 2021](#) relating to due diligence under Rule 3(1)(b)(v) ('Draft Amendment') seems to be to curb the dissemination of fake news and misinformation on online platforms. As the Rule 3(1)(b)(v) originally stood, it required an intermediary, which now includes not only social media intermediaries and significant social media intermediaries, but also online gaming intermediaries, to inform users and cause them not to host, display, upload, modify, publish, transmit, store, update or share any information that deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature. The Draft Amendment makes an addition to this provision by requiring the intermediaries to also prevent users from posting any information that is identified as 'fake' or 'false' by the fact check unit at the Press Information Bureau (PIB) of the Ministry of Information and Broadcasting or other agencies or departments authorized by the Central Government for this purpose.

Contemporary digital tools and social media platforms have allowed maliciously incorrect information to spread widely, before false facts can be challenged and removed. While fake news has emerged as a global topic of concern, there is a risk that efforts to counter it could lead to censorship, the suppression of critical thinking and other approaches contrary to human rights law. Therefore, [a resolution adopted by the UN Human Rights Council](#) on April 1, 2022 rejected measures that rely on censorship and reaffirmed the essential role that the right to freedom of expression and the freedom to seek, receive and impart information play in countering disinformation. However, even this approach centered on freedom of expression is inadequate to counter fake news, misinformation and disinformation if the algorithms of online platforms, including social media, continue to amplify only certain viewpoints, and if the engagement rate rather than veracity, quality or trustworthiness determines the prioritization of content on social media. Consequently, today, whether one's speech gets heard in the online space depends on how well one can exploit platform affordances of virality and algorithmic amplification of content. For instance, it has been observed that sexist content is allowed to be highly visible since it finds high currency among users, but feminist content that may be unpopular is relegated to the back pages of social media platforms (Massanari, 2015).

Further, a recent investigation by [ProPublica documented how Google's automated digital ad operation placed ads from major brands on global websites that spread false claims](#) on topics such as vaccines, Covid-19, climate change, and elections, particularly in languages other than English (Silverman, 2022). Since a significant source of revenue for many digital content platforms is advertisements, such ad-placement practices that prioritize higher user engagement have made it profitable to host false, misleading and toxic content. Due to the complexity of considerations, fact-checking and removal alone will not solve the problem of online fake news; rather, what is of material significance is the effective oversight and regulation of platform algorithms. Approaches to addressing misinformation and fake news need to be reframed with due cognizance of the information economy and its technological mechanics.

Nevertheless, the Draft Amendment is an important step towards curbing online misinformation, and below we highlight some practical considerations that need to be addressed for its effective implementation:

1. Need to Define the Terms 'Fake' or 'False':

The Draft Amendment does not give any guidance on what constitutes 'fake' or 'false' information. This is in contrast to the legislations of many other countries that define the corresponding term used to denote fake news. For example, under [Singapore's Protection from Online Falsehoods and Manipulation Act \('POFMA'\)](#), a 'false statement of fact' is defined as a false or misleading statement which a reasonable person would consider to be a representation of fact. The [Australian Code of Practice on Disinformation and Misinformation \(the 'Code'\)](#), defines the term misinformation as (a) digital content (often legal) that is verifiably false or misleading or deceptive; (b) is propagated by users of digital platforms; and (c) the dissemination of which is reasonably likely (but may not be clearly intended) to cause harm.

Disinformation and misinformation are aspects of a wider, multifaceted social problem that involves a range of offline and online behaviors that propagate information threatening to undermine established democratic processes or public goods such as public health. Terms such as 'disinformation', 'misinformation', and 'fake news' mean different things to different people, and can become politically

charged when they are used by people to attack others who hold different opinions on value-laden political issues on which reasonable people may disagree.

In India, only the Indian Penal Code, 1860 provides for criminal provisions to curb the spread of fake news (Sections 153, 295, 499 & 500 IPC). Currently, there is no official legal definition of what can be considered as 'fake' or 'false' in the context of misinformation. Hence, without defining 'fake news', it will not be possible to determine whether the empowered government entity's decision to consider a piece of information as 'fake' or 'false' is within the reasonable restrictions under Article 19(2) of the Constitution of India.

Further, it is also necessary to be cognizant of gender-related considerations while creating legislative or regulatory approaches to tackling misinformation. There is gender-blindness in many of the responses to misinformation and disinformation, which risks missing the subtle differences in how false content often targets women and girls, and overlooking differences in the way people from different gender-based locations respond to the content concerned. It is important to note that established patterns of online behavior include gendered attacks online, ranging from abuse and threats of sexual violence to digital security and privacy breaches (Broadband Commission, 2020).

Recommendation: The Draft Amendment should clearly define what constitutes 'false' or 'fake' information. It is also important to lay down the criteria that will be used by PIB and other fact-checking agencies to determine something as 'fake' or 'false' information. Such clarity is important to enable those aggrieved by the decision of PIB and other agencies to challenge the same before a court or an appropriate authority. It would also help in assessing whether the order to remove a particular content amounts to a reasonable restriction and is based on any of the permissible grounds under Article 19(2) of the Constitution. Further, due to the differential impact of fake news, misinformation and disinformation on women and other gender minorities, the definition of 'fake' or 'false' information and criteria to determine the same should be sensitive to gender considerations.

2. Due Process of Law for Fact Checking

Article 19(1)(a) of the Constitution guarantees freedom of expression and the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. While freedom of opinion is absolute, freedom of expression may be restricted under certain circumstances as long as such restriction is reasonable. For a restriction to be reasonable, it should be backed by a law, necessary and proportionate for achieving a legitimate purpose, and not confer unfettered discretion in implementing the restriction ([Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly, A/HRC/23/40](#)). Currently, the Draft Amendment lacks several procedural safeguards in the process of fact-checking by agencies like PIB, thereby casting a shadow on the legitimacy and reasonableness of restriction of speech sought to be imposed by Rule 3(1)(b)(v).

There is no provision in the Draft Amendment by which a fact-checking unit like the PIB has to publish its decision and give reasons for adjudging a particular piece of information as 'false' or 'fake' and hence to be removed by internet intermediaries. This renders the restriction imposed on speech unreasonable by conferring an unfettered discretion on fact-checking agencies. This is not in tune with Article 19(2) of the Constitution, and therefore constitutes a direct threat to freedom of expression, which is a form of censorship. It also goes against the Supreme Court ruling in [Anuradha Bhasin v. Union of India](#) that any order that affects the liberty of people must be notified directly and reliably. Further, there is also no opportunity for the concerned parties to be heard by the fact-checking body or to present documents/evidence to prove the veracity of the information posted by them.

It is also concerning to note that the Draft Amendment does not provide any recourse for affected parties against the decisions made by fact-checking bodies, in terms of not removing the content pending a judicial determination or judicial review after action is taken. This, in effect, makes the government the final arbiter of truth which is not desirable in a democratic society. Several international human rights instruments require that States restrict content only pursuant to an order by an independent and impartial judicial authority. The absence of a provision for judicial determination and judicial review in the Draft Amendment is a clear violation of due process of law,

which implies that all established rules and procedures that provide safeguards for the protection of individual rights are actually available.

If the Draft Amendment comes into effect, there is a likelihood of unreasonable restriction on free speech and a consequent curtailment of media freedoms. Such concerns have also been echoed by several Indian news media organizations and by the Editors' Guild of India. Hence the Draft Amendment's effect on media freedom must be recognized and the fact checking system should have clear, transparent procedures in order to steer clear of over-regulation of online content by the state.

Recommendation: The Draft Amendment should require the decisions made by PIB and other fact checking agencies to be published, along with the reasons behind their decision. Such a transparency measure will help promote greater accountability as well as respect for human rights by both the government-appointed fact checking entity as well as the intermediary. With such information made public, users will also be able to understand what kind of content falls within the categories of misinformation, which will also inform their internet and social media usage.

It is also necessary to lay down a clear and transparent procedure for the fact checking process, including opportunity for any affected persons to be heard and to submit supporting documents or evidence before the fact checking body.

The Draft Amendment should have a clear provision allowing for a judicial review process of all government decisions to take down content deemed as 'false' or 'fake'. For instance, under Singapore's POFMA law, while a Minister of any government agency may assert, in his or her judgment, that a particular statement is a falsehood, the final decision on whether a statement is false or not, after assessing all the evidence put forward by the parties, is made by the court. Fact checking process instituted by the Draft Amendment should have procedural safeguards and grievance redressal steps for the user that tie back to the existing due diligence structures under Rule 4, as attempted for the online gaming counterparts under Rule 4A and Rule 4B.

3. Ensuring Fairness of Fact Checking Entities and their Independence

The International Fact Checking Network (IFCN) at Poynter, which is a non-profit media institute and newsroom, requires fact checkers to have ‘a commitment to non-partisanship and fairness’ and have introduced an application and vetting process so that they do not ‘unduly concentrate’ on one side. Such forms of commitment are essential for all fact checking bodies including the PIB and allied bodies that will be empowered under the Draft Amendment so as to ensure that facts are not unduly suppressed. This gains special importance in light of reports that have questioned the authenticity of fact checking done by PIB. Therefore, to ensure public confidence and legitimacy in the fact checking decisions made by PIB and other agencies designated by the Central Government, express provisions have to be made in the Draft Amendment about the measures and procedures to safeguard the independence and fairness of these bodies and their decisions.

Apart from ensuring independence and fairness, it is also necessary to ensure that PIB and other agencies that may be designated by the Central Government to undertake fact checking have the required expertise to do so. For instance, IFCN consists of a pool of assessors who are journalism and media experts who know the fact checking context in their countries and act as the first filter for each application received.

This point needs to be stressed in light of the recent notification by MeitY constituting three Grievance Appellate Committees (GAC) to decide appeals against decisions of social media intermediaries under Rule 3A, and the lack of expert members in these committees. None of the members of the three committees is a representative of civil society NGOs, or the journalism community. They are from unrelated backgrounds including banking, armed forces, railways etc. A similar situation should be avoided in case of the fact checking agencies designated by the Draft Amendment.

Recommendation: The Draft Amendment should incorporate procedural safeguards to secure the fairness and independence of members of the fact checking agencies like PIB. In the interest of fairness and independence, it is also not prudent to entrust government departments with fact checking of online content instead of independent authorities. Further, it should also make provision to ensure that the membership of the fact checking bodies, including PIB, is sufficiently representative and has adequate expertise to do effective fact checking. Particularly, it is important to have adequate gender representation in the membership to counter gender-based misinformation and disinformation. Such requirements are necessary to infuse public trust and integrity in the fact checking process.

