

## The Conundrum over the legal status of search engines in India: Whether a Significant Social Media Intermediaries under IT Rules, 2021?

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### Introduction

On February 25<sup>th</sup> 2021, the government of India published the new [Information Technology \(Intermediary Guidelines and Digital Media Ethics Code\) Rules, 2021](#) (herein referred to as Rules) under the [Information Technology Act, 2000](#). The Rules primarily aim to control Over-The-Top Platforms, digital media, and social media. Many applicants have filed lawsuits in front of different High Courts and even the Supreme Court challenging the constitutionality of these Rules. Moreover, these courts are flooded with IT litigations against tech giants and digital media entities under the provisions of the Rules.

A single judge's ruling declaring Google LLC to be a significant social media intermediary" (hereafter referred to as SSMI) under the IT Rules, 2021, was [challenged by Google LLC in the High Court of Delhi on June 2, 2021](#). This case needs to be properly monitored because it is a powder keg that could have an impact on [India's 622 million internet users, who are estimated to exceed 900 million](#) by the end of the year. For the average person, search engines are similar to the entrance to the internet, and they use them virtually daily. The judgement was given by Single judge Anup Jairam Bhambhani J., in [X v. Union of India & Ors.](#), that has been discussed below.

### Case Background

A petition was filed before the Hon'ble Delhi High Court by the victim stating that a person going by the name of "Desi Collector" had posted some of her private pictures and images on the pornographic website [www.xhamster.com](http://www.xhamster.com). The pictures were taken from the petitioner's personal Instagram and Facebook accounts. They had been stolen without her knowledge or consent and had been posted illegally.

The single bench judge in this case used the new IT Rules, 2021 to [order that the infringing content be de-indexed and de-referenced globally within 24 hours](#), effective as of April 20. "Search engines Google Search, Yahoo Search, Microsoft Bing, and DuckDuckGo" were given the order. Our primary emphasis will be on the applicability of the IT Rules, even though the instructions' application on a global scale has also been contested. When rendering the decision, the judge primarily used Rules 3(2)(b), 3(1)(j), 4(8), and Rule 7. In essence, the decision treats Google as a "major social media middleman," setting the stage for their eventual inclusion in the scope of the IT Rules, 2021. In order to avoid this, [Google has referred to the Judge's interpretation and ruling](#) as having been "misinterpreted and misapplied under the IT Rules."

This entails adhering to the special due diligence requirements outlined in the IT Rules 2021, such as the requirement to keep user registration information on file for at least 180 days (Rule 3(h)) and the requirement to give law enforcement access to user and content information within 72 hours of a request (Rule 3(j)). Google would also be considered an SSMI because it has more than 50 lakh users. Even more rules must be followed by SSMIs than by SMIs, including the appointment of a Chief Compliance Officer (Rule 4(1)(a)), who may be criminally liable should Google fail to comply with the IT Rules 2021, and the designation of a nodal contact person (Rule 4(1)(b)), whose sole responsibility is to work with law enforcement to ensure compliance with government requests (content takedown, user data requests, etc.). This decision has several ramifications since, in addition to the regulatory burden that comes with being an intermediary, which Google currently carries, it now also has to bear as a social media middleman (herein after referred to as SMI).

Clearly, disregarding any of these regulations would result in the termination of the safe-harbour provision that all intermediaries had access to under the purview of IT Act. In accordance with Section 79(1), no intermediary can be held accountable for any third-party data or information housed by them, while bearing in mind the conditions provided out in Sections 79(2) and (3). As a result, Section 79(1) gives intermediaries a safe harbour and legal immunity. Therefore, if the safe-harbour provision were to be repealed, Google's legal status would change from one of an intermediary to one of a publisher, making them vulnerable to claims and legal action for information published or stored on their platform. [Safe-harbor clauses](#) are specifically regarded as necessary for the operation of any intermediary on a global scale. Let's look at their primary points now that we are familiar with the case's consequences and importance.

## **Arguments Submitted by Google**

Google views itself as an "aggregator," primarily distinct from SMIs, and as such, views itself as outside the scope of the IT Rules, 2021, applications. They have argued that while search engines operate autonomously thanks to "crawlers," they only play a little passive part in how well they actually work. These are programmes that run automatically and examine a website's content. They then arrange the websites' analysed data in a "index" that resembles a library catalogue. Similar content is grouped together by "crawlers," and the entire process is thought to be passive and fully automated.

It has been suggested that "Index" refers to a library catalogue. Being comparable to one, they do not include the information itself but merely the location of a certain piece of information. This is the key difference between them and "publishers," as the latter only categorise already published content, whereas "indexes" do the opposite. The key distinction between "search engines" and "publisher websites" is to how both entities handle their own content. The latter does not publish, host, or control it; it just indexes it. On the other hand, the latter hosts material on a digital platform under the control of the owner. In these circumstances, the website owner is regarded as the "publisher" of the content. [According to representatives of Google](#), search engines are merely a reflection of the data that is accessible online, and the Delhi High Court's judgement contains requirements that would cause Google to be designated as an SSMI.

## **Validity of Google's Appeal and Future Discourse**

Legal scholars concur that Google's argument has substance, but [these opinions are not without concern](#). The main issue is that, although not being a social media intermediary, Google is still one (as verified by them), and as was already established, it has more users than the required 50 lakhs to qualify as an SSMI as announced by the government under Rule 2. (v). Another issue is the fact that the [scope of the Rules has significantly expanded](#) as a result of the inclusion of the term "online engagement" in Rule 2(w). According to legal experts, they may even be applicable on any digital platform that promotes communication, including email, chat rooms, online games, search engines, etc. Google might be held possibly accountable if the IT Rules 2021 are applied broadly since it permits users to communicate with one another through ancillary functions like evaluating any establishment or book on Google. Consider the Google reviews tool to help explain. When searching for a book on Google, such as The Lord of the Rings, the sub-section "Audience Reviews" may be

seen on the right side of the page. Readers can interact with each other by leaving reviews under this topic, which serves as a heading. This is only one possible location where people might be able to converse with one another.

The Ministry of Electronics and Information Technology, in contrast to the aforementioned worry, released the "[Frequently Asked Questions on The Information Technology \(Intermediary Guidelines and Digital Media Ethics Code\) Rules, 2021](#)" (hereafter referred to as "FAQs"). According to FAQ 12, intermediaries involved in business transactions, like search engines, are normally outside the purview of SMIs. The operative phrase here is "usually," which implies that this exclusion is not unambiguous and may ultimately be subject to legislative and judicial interpretation. The High Court's ruling in the current case makes the same point clear.

As was previously noted, [Google had appealed the Judge's decision to the Delhi High Court](#) on June 2, 2021. They had used the majority of the previously mentioned defences; in addition, they had drawn attention to the stark distinction between a "aggregator" and a "significant social media intermediary," and they had requested an interim order to safeguard them from any potential coercive action under the IT Rules, 2021. The Center, Facebook, the plaintiff whose photographs were released, the Internet Service Providers' Association of India, the pornographic website where the images were leaked, and the Delhi government were the only parties to receive notice in the same matter after this motion was denied (parties involved in the first case). Despite being dismissed by the Court, the author thinks that Google's claims have a strong and secure legal foundation. They have validity and are supported by international jurisprudential precedents.

### **A glance over other jurisdictions**

For instance, British courts have not deemed Google to be a SMI and have observed that search engines are a "different kind of internet intermediary." The court rejected a defamation case brought against Google by accepting the defence that search engines are merely facilitators rather than publishers in [Metropolitan International Schools Limited](#). This ruling also observed that courts in Spain had taken a similar stance, holding in the [Palomo case](#) that search engines could not be held accountable for propagating third-party content. Even courts in the United States specifically in [Re. Perfect 10](#), acknowledged Google's function as an index when they ruled that they couldn't be held accountable for the alleged IP infringement

because they hadn't actually distributed the infringing information in question, only hosted links to other parties' infringement-related websites.

### **Way Forward**

It should be observed that the Indian government [retracted its request in a letter to Apple](#) to comply with the IT Rules, 2021, around July 15, 2021. This may be a sign that the government believes that the scope of SSMI should be limited to social media platforms and no other intermediaries, which is how the average person would initially understand them. Search engines and other comparable non-social media intermediaries, in the author's opinion, should be excluded from the definition of Significant Social Media Intermediaries as stated in the IT Rules 2021. The author agrees with this point of view.

Unfortunately, given the ambiguity of the IT Rules and the FAQs, the aforementioned cannot be determined in an absolute or definite manner. The IT Rules, 2021's ambiguity and misunderstanding serve as a reminder of the necessity for increased communication between the state and intermediaries. All eyes are currently focused on the Delhi High Court's ruling since it might determine whether Google qualifies as a "aggregator" or a "major social media middleman," as well as establish a key precedent for all other search engines in India.