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**LIABILITY OF THE INTERMEDIARIES**- Ankit<sup>1</sup>**Abstract –**

Imposing legal liability on intermediaries will result in the suppression of aspects of Fundamental Rights under Articles 19, and 21 of the Indian Constitution. Further, the monitoring and take-down provisions will provide the intermediaries with a safe-harbour regulation. Furthermore, this paper discusses the perspectives of intermediary users and the industry, the importance of content creator rights, and what causes them operational issues in expressing their honest opinions about reviewing products and services. Also, rule 3(7) of the intermediary guideline is an overbroad clause since it may result in a violation of the user's privacy rights by a formal request from an investigative agency that may be obliged to divulge the user's private information.

**Keywords –** rights, adjudicatory role, safe-harbour, take-down, immunity

**1. Introduction**

Recently the Government of India passed the rule named [Information Technology Act, Guidelines for Intermediaries and Digital Media Ethics Code, 2021] which focuses the question on imposing legal liability on the intermediaries i.e., particularly on the social media companies which led to suppress the aspect of Fundamental Rights Guaranteed under Art. 19 and Art. 21... Freedom of Speech and Expression and Right to Privacy respectively. Before proceeding further, let us understand the meaning of Intermediary. So, as per Section 2(1)(w) of the Information Technology Act, 2000 defines an intermediary as any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record. Further, the definition of intermediary includes –

- i. telecom service providers,

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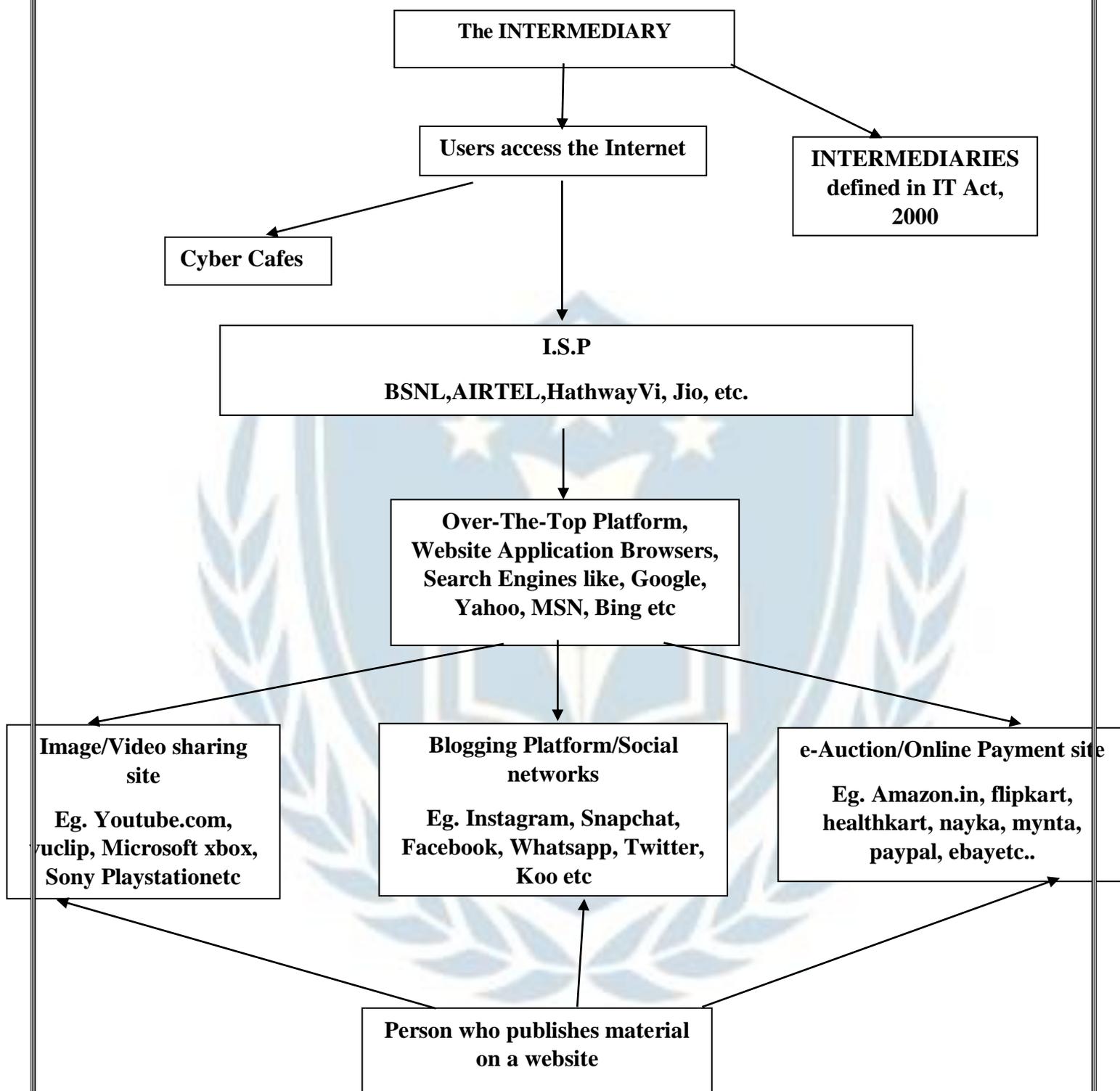
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- ii. network service providers,
- iii. internet service providers,
- iv. web-hosting service providers,
- v. search engines,
- vi. online payment sites,
- vii. online-auction sites,
- viii. online-market places, and
- ix. cyber cafes.

Furthermore, the new definition of intermediary covers anyone who helps a recipient and a content supplier to connect. In order to understand this, let us take *an example* –*Suppose there is a toothpaste manufacturing company, that delivers its product to a local store and when you want to buy the toothpaste, you go to the local store. The local shop or the shopkeeper has neither made the toothpaste from the company and selling it to you. In such case, that store is an intermediary. A third party that enables the execution of the deal between two parties it is because of them that there is a deal between the two parties.*

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Which mean in the legal term intermediaries have some immunities. For example, in the controversial case<sup>2</sup> in which Avnish Bajaj the CEO of BAAZEE.com [an auction portal], in which the student of IIT KGP had put an obscene MMS on sale from outside, it was

<sup>2</sup> Avnish Bajaj v. State, 2004 SCC Del 1160.

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not appeared that it was an MMS video until you click on it. When someone pointed it out, BAAZEE.com removed it from their website but the crime branch of the Delhi police took cognizance of this matter and filed a charged-sheet against the IIT KGP student who listed the video on the website. However, website owner did not even know that it was on objectionable content and where they did find out, they removed it. Regardless the website is still considering an accused. *Similarly, if your local shopkeeper sells a toothpaste which has some harmful chemicals, but the shopkeeper has no idea that the toothpaste has any deficiencies or that harmful chemicals are in the product. Should the police arrest the local shopkeeper? Or should the blame be solely on the toothpaste manufacturing company?*

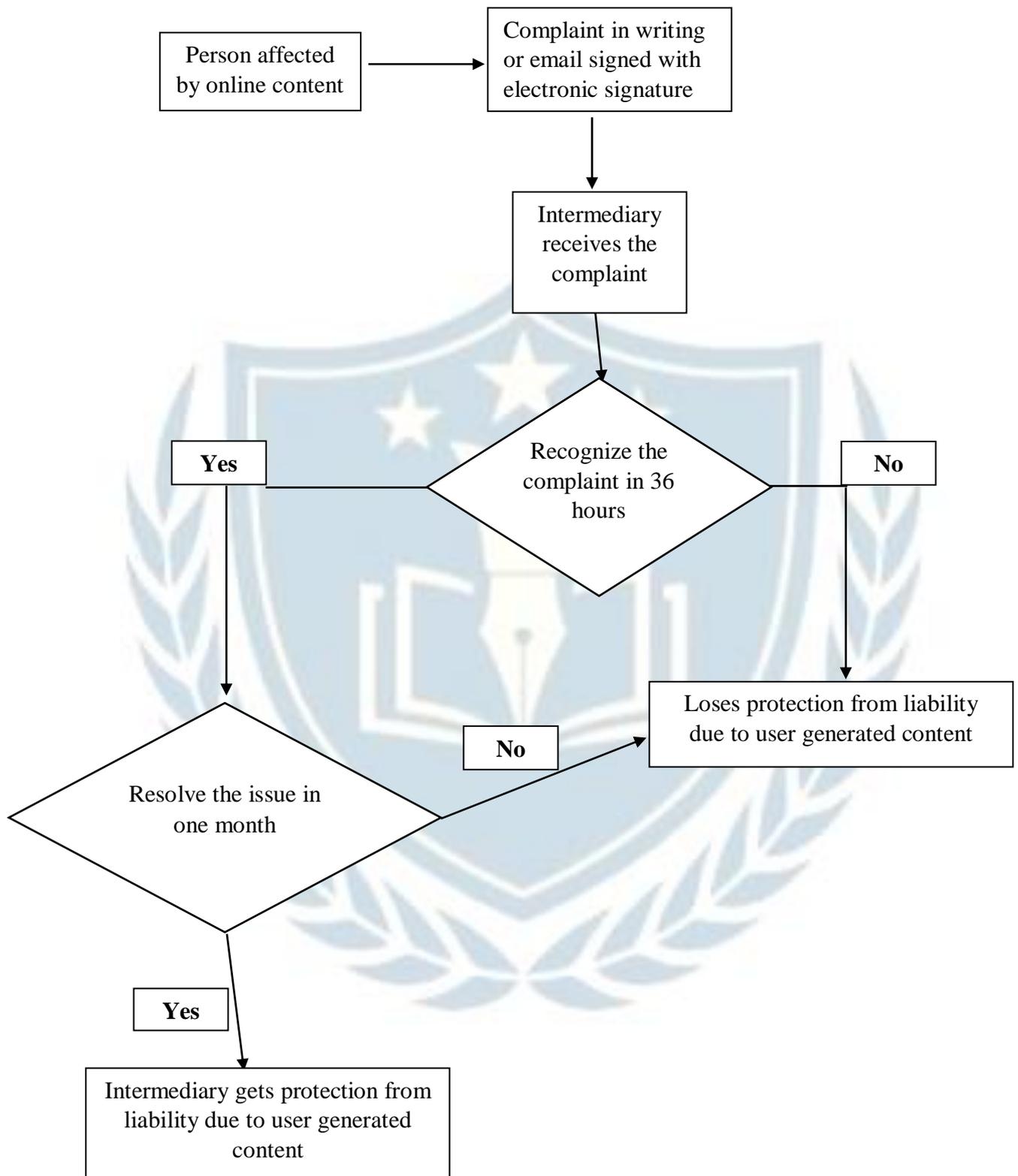
Similarly, the courts stated in the BAAZEE.com...the store owner of the website cannot be blamed and it was unfair to arrest the owner in that case and for this reason the intermediaries have some immunities. It is not the fault of platform if users put some objectionable content on it. It is the sole responsibility of the user. If we talk about the new social media rules that the government has passed recently. According to this, the immunities of intermediaries seeking to monitor as well as take-down content posted.

**According to the Information Technology Rule, 2021, Guidelines for Intermediaries and Digital Media Ethics Code –**

[i]. **Safe Harbour Rule** – Rule 3(2) of the Guidelines lists the categories of the information which posted online and considered as an illegal. According to the Rule 3(4) affected person writes to the intermediary for removing any content which is unlawful as mentioned under Rule 3(2), after this intermediary have to act within 36 hours to remove the content. However, if intermediary fails to do so then cannot avail the safe harbour. Further, the Rule 3(4) criticised by the intermediaries stated that it is not easy to take down content or take action within 36 hours of the complaint. After this, clarification issued by the government on march 18<sup>th</sup>, 2013 that intermediary have to acknowledge or respond the complaint within 36 hours. Thereafter, intermediary has 30 days to redress the complaints filed by the affected person. Which create an unclear doubt.

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**[ii]. Opinions of intermediary users and intermediary industries** – the rules affect the freedom of speech and expression of the ability of business and citizens to operate online

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platform content as well as right to privacy. Raison d'être, uncertainty regarding the prohibited content, as it is difficult for the users and the intermediaries to determine which type of content will be classified as objectionable. Further, words and phrases like grossly harmful, harassing, blasphemous, disparaging and harm minors in any way are not defined in these rules or in the Act or in any other legislation

**[iii]. Content Creator's Rights** – When a user files a complaint, the Rules' takedown method gives no remedy for content creators.

**[iv]. Intermediary's Adjudicatory Role** – Obliging to take a final decision on the lawful nature of the content posted also, no provision for the judicial scrutiny.

**[v]. Intermediary's operational difficulties** – the model is factually based on these websites for the freedom of users to express their honest view point, reviewing the product and services. However, frequent takedown of content makes the intermediary user customer more reluctant to use their services which affect their business model and also, freedom of speech and expression as well as right to privacy of the both User customers and the intermediaries.

**[vi]. Users' Privacy** – Rule 3(7) of the, Guidelines for Intermediaries and Digital Media Ethics Code 2021, a formal request from an investigating agency, where intermediaries may be required to expose users' private information, and this overbroad clause [if not properly safeguarded], could result in a violation of users' right to privacy. It was also affirmed by the High Court of Delhi<sup>3</sup> in Yahoo India Pvt. Ltd., where Yahoo... contested the Controller's decision to punish Yahoo for not disclosing user data under Rule 3(7) of these Rules. Despite the Controller's order, the Hon'ble High Court approved the writ petition, leaving open the question of whether Rule 3(7) should be challenged.

It would be best if the court could declare the new rules unconstitutional or if the law passed by the legislature could be overturned by a judge. If this doesn't happen in a reasonable amount of time, then how can privacy be kept safe? Thus, connecting to a VPN server and using end-to-end encryption [the use of a VPN] or using an eSIM number that was made online from a country that doesn't keep track of this rule will keep your IP address safe.

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<sup>3</sup> Yahoo India Pvt. Ltd. V Union of India & Another, W.P.(C).No. 6654/2011

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Further, in the rules it has been mandated that a chief compliance officer, nodal contest person and resident grievance officer be constituted for social media sites within the next three months. The chief compliance officer is responsible for ensuring that these social media platforms adhere to new IT regulations. The nodal point of contact will be available 24 hours a day, 7 days a week, to work with law enforcement. The user's concerns about these regulations shall be handled by the residence grievance officer. Within 24 hours of receiving a complaint, the grievance officer must acknowledge it and respond to it within 15 days. Because of this, social media networks in India will be less likely to operate due to the increased responsibility they face. In addition, these intermediaries must inform their users at least once a year that their accounts would be cancelled if they engage in any illegal activity. A monthly compliance report detailing the specifics of complaints received and the steps taken to address them must be published by these intermediaries.

Nevertheless, a months of data retention have been doubled for an investigation. Because the government permits social media platforms to store user data for up to six months after account creation, even if you cancel your social media account, your data will be retained by the platform. However, there is no strong data protection law in our nation. On the other hand, the digital news and OTT platform has the devastating impact that regulating OTT and digital news can lead to the democracy of our country and our freedom. The new rules are trying to do exactly that to regulate but, there are some good things about these new rules such as OTT platforms must self-categorize their content into 5 age groups... U/7+/13+/16+/ and A category. Which I believe to be a good thing. When you go to watch any content on the Netflix or amazon prime, you should know how age-appropriate it is. Parental lock has been introduced. Age verification mechanism has also been introduced. As a result, OTT platforms and digital news platforms must be following a code of ethics that prohibits uploading information that harms India's relations with other countries, threatens the country's sovereignty and integrity, or incites violence.

The intermediaries will be compelled to allow tracking back to the source of material on their platform, if requested, in my opinion is the scariest part of these new laws. In other words, these platforms will be required to divulge the identity of the original creator upon request from the government. Because of this, when the government requests the

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information of the first originator, these platforms will have to comply. *An illustration, if information is extensively distributed via WhatsApp, the social media site must provide the information to the authorities upon request. Likewise with Facebook or Twitter post.* Technically, it is not possible to do this in WhatsApp and signal because WhatsApp and signal have end-to-end encryption, they themselves don't know the content and origin of the message. So, if the new rules have to comply with applications like WhatsApp and signal then they are told to breach their end-to-end encryption and this is a threat to the privacy. Reason being, in the end-to-end encryption third parties cannot read the messages what if this privacy setting breached?

Despite this, the new rules provide a variety of reasons why the government can utilise these social media platforms to take action against them. Some of the causes are clear, such as the posting of sexually explicit or child-abuse-related information. For an instant, "public order" can mean anything from portraying farmers protesting to criticising the government, so long as the administration says so. The government could readily misinterpret broad terms. *Illustration- the government has asked twitter to ban some twitter account in India. Twitter banned some of them but refused to ban the others because there wasn't a legit reason behind banning them. Those were the accounts that were starting to criticise the government and supporting the farmers' protest. Because of this reason only, the government wanted to ban those account however, twitter refused to do this.*

### **Conclusion**

As per the above discussion, the Intermediaries Guidelines Rules and Digital Media Ethic Code, 2021 are unconstitutional, extremely difficult to follow, and receive no support from the people who use them. The Information Technology Act, 2000 gives the government, the authority to block any information that it deems to be detrimental to national security or public order. As a result, private censorship efforts such as those outlined in the current Rules are rendered controversial. Also, *Mr. Arun Jaitley, Union Minister of Finance and Defense, Government of India, stated in 2012 that there are too many restrictions on the permissibility of online content, and that this is a threat to free expression. He requested that the language of these Rules be changed to reflect this. For the Rules to be amended in order to protect content creators' rights, it is necessary to*

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*remove unconstitutional restrictions on free speech and to add a counter-notice and put back provision, among other things.* However, when it comes to determining whether something is illegal, a judge should make the final decision. It is not necessary to include in these rules a provision that allows law enforcement agencies to obtain access to users' data, because this type of provision already exists in other laws.



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