

## **Bringing IT Act 2000 in Alignment with the Constitution**

*In response to input sought by the Law Commission of India on media and privacy*

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### **EXECUTIVE SUMMARY**

Section 66A of the Information Technology Act, 2000, when enforced, places unreasonable restrictions on the freedoms of speech and expression of Indian citizens, thereby contravening guaranteed constitutional rights. It is recommended that Section 66A in its entirety be repealed in order to prevent the misuse of indefinite and ambiguous terms for political or personal gain. However, if this is infeasible, it is recommended that clear and narrow definitions of what constitutes grossly offensive, insulting, annoying or inconveniencing content be defined.

Further, beyond the concerns pertaining to the rights to free speech and expression, the verbiage in Section 66A imposes technical limitations that perhaps were not intended. Technical challenges involving anonymity on the Internet and allowing for the repudiation of the origin of digital content, limitations in jurisdiction and inconsistencies between the IT Act and the Indian Penal Code (IPC) may render Section 66A ineffective. In addition, it is also recommended that India not constitute a regulatory authority to regulate "objectionable" content on the Internet at this time. Bringing in yet another statutory body to regulate content in India would only add to the list of institutions with overlapping mandate.

Ultimately, India needs common-sense legislation that embraces the spirit of the constitutional rights guaranteed to citizens as well as taking cognisance of the technical challenges that new and emerging media of mass communication present.

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## Social Media and Section 66A of the Information Technology Act, 2000

### 1. Should the existing law be amended to define what constitutes “objectionable content”?

The 2008 amendment of India’s Information Technology (IT) Act, 2000 introduced Section 66A, which reads:

Any person who sends, by means of a computer resource or a communication device,

- a) any information that is grossly offensive or has menacing character; or
- b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,
- c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to two to three years and with fine.

It is recommended that Section 66A in its entirety be repealed in order to prevent the misuse of indefinite and ambiguous terms for political or personal gain. However, if this is infeasible, it is recommended that clear and narrow definitions of what constitutes grossly offensive, insulting, annoying or inconveniencing content be defined. In order to protect, in letter and spirit, constitutionally-guaranteed rights of free speech and expression, it is further recommended that the nature of these limitations be restricted only to words or expressions that present an imminent threat to the security and integrity of India, or the security of its citizens and communities.

It is our opinion that this Section, when enforced, places unreasonable restrictions on the freedoms of speech and expression of Indian citizens, thereby contravening, in letter and spirit, their constitutional rights guaranteed under Article 19. In particular, the terms “grossly offensive,” “insult,” “causing annoyance,” and “inconvenience,” which are ambiguous at best, were left undefined in the amended Act and are therefore subject to the individual interpretations of the complainant and the enforcing authority.

In the years since the amendment has come into effect, the Act has been used to prosecute those who were alleged to have expressed views on the Internet that did not appear to pose an imminent threat to India, its citizens or society. Citizens [engaging in political satire](#), [criticizing politicians](#), or merely [expressing an opinion](#) have variously been booked under Section 66A. Thus, the Section in its current form, increases the likelihood of misuse in order to suppress contesting political or ideological positions and provides a legal mechanism for overreaching censorship.

Indeed, is due to the potential implications of this lack of clarity in the definition of these terms that has led to multiple public interest litigation cases challenging the constitutionality of Section 66A, including *Rajeev Chandrasekhar vs. Union of India*, *People's Union for Civil Liberties vs. Union of India* and *Shreya Singhal vs. Union of India*.

In the United States, the concept of “fighting words” was introduced in the landmark [\*Chaplinsky vs. New Hampshire\*](#) case in 1942, which provides limitations to constitutionally guaranteed free speech and expression. These words form a narrowly limited class of speech by varying jurisdiction, which, by their utterance “inflict injury or tend to incite an immediate breach of the peace...”

## **2. Should Section 66A of the IT Act be retained in its present form or should it be modified / repealed?**

As detailed above, it is recommended that Section 66A of the IT Act be repealed in its entirety. Beyond the concerns pertaining to the rights to free speech and expression, the Section also fails to recognise the limited capacity of the Indian government in the digital space.

Firstly, the Section imposes restrictions on the transmission of digital content via electronic mail, but no restrictions on other popular means to disseminate information over the Internet to an unspecified set of audiences, including via websites, blogs, social media, web forums, point-to-point (P2P) technologies, or multi-media sharing websites.

Secondly, individuals on the Internet have the ability to operate with relative anonymity by adopting freely-available, open-source technologies that conceal their identities. Although India has attempted to establish an apparatus to intercept and monitor Internet traffic via the Central Monitoring System (CMS), there is no evidence that it can do so when dealing with encrypted Internet traffic. Thus, the Indian government may be reliant on third-party service providers (e.g., Google or Facebook) to trace and provide information on potentially malicious acts that violate Section 66A.

As the government of India would be reliant on these third-party service providers and would thus have no way to validate the accuracy and integrity of the data provided by these third-party service providers, it will likely encounter significant challenges in successfully prosecuting such cases.

Further, individuals disseminating content threatening the security of India and its citizens may also reside in foreign countries. For example, it was learned that hoax images of atrocities against Rohingya Muslims in Myanmar that led to threats of violence against Indian citizens from the north-east residing in Bangalore originated from Pakistan.

Government of India websites are also under constant threat of defacement from hackers based in China and Pakistan. Although these acts present a credible threat to India's national security, India's ability to prosecute these individuals under Section 66A and under the IT Act in general may be limited.

Third and finally, inconsistencies also exist between the Indian Penal Code (IPC) and the IT Act that must be addressed. For example, [IPC 507](#) prescribes a maximum sentence of two years for "criminal intimidation using an anonymous communication," while the IT Act effectively prescribes a sentence of three years, if such criminal intimidation occurs through electronic means.

**3. Is there a need for a regulatory authority with powers to ban/suspend coverage of objectionable material? If yes, should the regulatory authority be self-regulatory or should it have statutory powers?**

It is recommended that a regulatory authority to ban or suspend coverage of objectionable material not be constituted in India at this time. As articulated above, there are significant technical limitations that would render such a body effectively incapable of fulfilling its obligations. Additionally, bringing in another statutory body to regulate content in India would only add to the list of institutions with overlapping mandate on the subject with little enforcement capacity.

Ultimately, India needs common-sense legislation that embraces the spirit of the constitutional rights guaranteed to citizens as well as taking cognisance of the technical challenges that new and emerging media of mass communication present. Evolving legislation that either impinges on citizens' fundamental rights or curtails the practical enforcement of such legislation are best repealed to make way for more practical and effective legislation.