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CHALLEGE BEFORE INDIAN NEW MEDIA: ASPIRATION FOR NETWORK NEUTRALITY – A STUDY OF NALGONDA DISTRICT

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Abstract: *New Media is the latest addition in the arena of Indian media scenario. In the turn of 21st Century, New Media has changed our lives radically by turning our physical world into a virtual one. Despite of all the potentials of New media, it is also threatened time and often with numerous factors. Ensuring net neutrality is the most important challenge of the day before Indian New Media.Net neutrality is the term used to refer to the network that is open for all to have an equal access. The very definition of net neutrality suggests that internet service providers and government should treat all data equally by not discriminating or charging differentially. Despite this theoretical description, in Indian context there is virtually no parity between the charges and services provided by various internet providers. This paper shall seek to do a study of the current state of net neutrality which lies in the very essence of democracy with reference to different laws of internet service providers and the role they play in the Indian context.*

Key words: *Digital Divide, Internet Service Providers, Internet, Network, Net Neutrality.*

"The neutral communications medium is essential to our society. It is the basis of a fair competitive market economy. It is the basis of democracy, by which a community should decide what to do. It is the basis of science, by which humankind should decide what is true. Let us protect the neutrality of the net." ***- Tim Berners-Lee, inventor of the World Wide Web, from his blog in 2006.***

The most significant aspect of information and communication technology may be is the fact of digitisation. Internet is undoubtedly the most remarkable bequest of technological revolution which is made possible by the process of digitisation. The internet is the fabric of our lives. Internet has the

ability to distribute the power of information throughout the entire realm of human activity. Furthermore, as new technologies of energy generation and distribution made possible the factory and the large corporation as the organizational foundations of industrial society, the internet is the technological basis for the organizational form of the Information Age: the network. Networks have extraordinary advantages as organizing tools because of their inherent flexibility and adaptability, critical features in order to survive and prosper in the fast changing environment (Castells, 2001).

Just as automobile radically changed people's lives at the beginning of the 20th Century, so too has the revolution in online services changes our lives at the turn of 21st century. In the increasingly mediated world, social media, a part and parcel of new media technology, attracts lot of attention by opening up wide scope to interact with people staying thousand miles away from others. Social media in the contemporary world has also seen as a major game changer. The well known cases of popular protests in Tunisia, Egypt, Turkey can be cited in this context. 2011 was marked as a year of protests, revolutions and political change. It was a year where people all over the world tried to make their dreams of a different society into reality. According to Wael Ghonim, marketing executive of Google and the administrator of the facebook page "We are all Khaled Said". All forms of social media were crucial for the Egyptian revolution. On the other hand, Technology analyst Evgeny Morozov, giving an opposite view says that social media do not bring about revolutions. Terms such as Twitter Revolution or Facebook Revolution are a naïve belief in the emancipatory nature of online communication that rests on the stubborn refusal to acknowledge its downside. Morosov adds pointing, clicking, uploading, liking and befriending on facebook would be "slacktivism"- "feel-good online activism that has zero political or social impact. Regardless of the contrasting opinions, 2011 was also regarded as a year in which various Occupy movements emerged in North America, Greece, Spain, the United Kingdom and other countries (Fuchs, 2013). Social media has also played an important role in mobilizing the mass in India. It has always posed a threat for the government in power voicing against its misdeeds.

As challenge always goes hand in hand with more or less all success stories, several factors have also challenged New Media. Ensuring 'network neutrality', promoting 'digital literacy' are the contemporary prime challenges before the internet world.

The concept of "net neutrality" has stirred up hot debate among internet users, posing the most pertinent question on how internet should be regulated in the time when democratization of information is the buzzword. Net neutrality, in the simplest sense of the term, refers to the principle that all internet traffic should be treated equally. It advocates for free and open internet. Net neutrality is such a network design paradigm which argues that no bit of information should be prioritized over another. For instance the growing popularity of online shopping in India may be taken as an example. If we are shopping for some new appliance online the user should have the freedom to choose any online shopping site. The Internet Service Provider (ISP) cannot influence its user with a preferred business relationship. The user has also the freedom to use high speed internet connection of his choice and Internet Service Provider should not be able to block the user's right to do so. The term "net neutrality" was coined by **Tim Wu**, media law professor at Columbia Law School in his paper *Network Neutrality, Broadband Discrimination.* He is a leading authority in the field of telecommunications and coined the term "net neutrality" -the idea that internet should be free from any type of discrimination by the internet providers.

Network:

Although the concept of network is mostly related to computer science, it has now made its presence felt in social science where it has marked the beginning of new era of societal change. It has accelerated mobility of people, commodities, information across the globe. A 'network' is a set of related, remotely connected device and communication facility including more than one computer system with the capability to transmit data among them through the communications facilities on the server. It is a logical extension of a data communication system. Manuel Castells outlines network as an emergent structure made up of number of interconnected nodes. He adds that the character of network may vary depending on the system with which it is part of. Internet constitutes the life-force of this network structure.

Since the very essence of internet based communication system reflects free flow of information to every section of society barring geographical boundaries, the most pressing need of the day is to implement an environment of network neutrality enshrining the vision of democratic internet system.

Internet:

In the simplest sense of the term, internet is the global network connecting millions of computers around the globe. It is a highway for worldwide data and information on innumerable servers on the net. The internet is more a concept than actual tangible entity and it relies on physical infrastructure that connects network to other networks. The numbers of internet users are increasing day by day. According to Euromonitor, by 2020 43.7% of the world's population will be users of the Internet.

Role of Internet in upholding democracy

With the ushering in of globalisation, because of the use of technology the concept of democracy is going through a change, giving birth to e democracy which fosters direct participation of citizen in the proposal, development and legislation of laws. Internet works as a tool of information for society and increase democratic demands. Social media makes it possible through its role in relevancy of participation, flexibility in participation and social construction of inclusiveness. E-Democracy relies on citizens to take their own initiative to influence decision that will affect them. All around the world digital democracy has started to prove its potentiality. Abundant examples round the corner of the globe shows the emancipatory role played by social media by posing threat to dictatorial regimes. During the Lok Sabha election of 2014 in India, digital media has been used vehemently for political campaigns. It has made and marred the images of different political parties as well as political leaders, which was very well reflected in the election result. With the internet becoming the major platform for democratic participation in the process of decision making of the nation, guarantying the users a free and open internet system is the most important requisite.

Current status of Net Neutrality

Chile was the first country to approve its net neutrality law that restricts an Internet Service Provider (ISP) from blocking, interfering, discriminating, hindering or restricting the right of any Internet user of using, sending, receiving or offering any content, application, or any other service through Internet. Denmark also, passed its new net neutrality law that prohibits the Internet service providers from charging higher fees, impeding or slowing down applications and websites available on the Internet. The Dutch law has taken care of the privacy concerns of the user and has provided that an ISP needs to get consent of the user before placing cookies- a small piece of information that is sent by a web

server and can be stored on web browser on the user's computer, thereby protecting the data of the user.

The Federal Communications Commission headed by Chairman Juius Genachowski, on 21st December, 2010 approved the most recent rules related to net neutrality. The new set of rules made it mandatory for the internet service providers to release their net work management practices to customers. It also differentiates between wireline and mobile based broadband providers, prohibiting the former from discriminating against web traffic unreasonably. The new set of rules called for mixed reactions.

However, it should be noted that the buzz of discrimination by internet service providers is not hypothetical. The chart below enlists some of cases net neutrality violations in recent years. The data has been collected by Jay Stanley of the American Civil Liberties Union (ACLU).

Year	Company	Violations
2006	AOL/Time Warner's	Censored emails referencing a blog entry critical of AOL
2006	Bell South	Blocked customers in Florida and Tennessee from MySpace and YouTube
2006	Cingular	Blocked PayPal after contracting with another online payment service
2007	AT&T	Censored political comments against President George W. Bush during the streaming of a rock concert
2007	AT&T	Revised its customer Terms of Service agreement in order to empower itself to terminate service for any activity that it considered "damaging" to its reputation
2007	Comcast	Blocked file transfers from customers using peer-to-peer networks such as BitTorrent, eDonkey, and Gnutella.
2007	Verizon	Blocked access a pro-abortion-rights group's access to a text-messaging program that it used to send messages to its supporters

(Source: Lapin, 2011)

Digital Divide: Indian Scenario

Digital divide simply refers to the inequality of access to the internet. Before concentrating on the scenario of the current status of net neutrality in India, it is apt to look on the percentage of internet access in India. India is one of the developing countries where telecommunication development has gained momentum. According to Telecom Regulatory Authority of India (TRAI) report, the number of internet subscribers in India as of March 31, 2013 is 164.81 million. Still, various studies showed that the problem of digital divide is starker in India. The gap of rural and urban India in context of

digital divide is significant. While in rural area only 1.2% people have digital access, in urban India it is 12%. 30.3 million people use internet in urban India in regular basis while it is only 5 million in rural India (Singh, 2010).

In India numerous question are haunting us every day.

While internet in India has crossed the tipping point of 100 mn users in 2011 (IAMAI report 2012), still only a modest 20 percent of urban Indians are connected. Worse only three percent of rural Indians are connected -as only 38 mn users in rural India have accessed internet to date (of the total 833 mn rural population)

Computers (PCs) penetration is under 10% in urban India (vs. +80% in North America or UK) and in rural India this is a scaring 1%.

As Indians, we have the second highest number of facebook users (more than population of Europe), but yet internet penetration across entire population is only 10% (Rao, 2013).

The sheer presence of digital divide in India again opens the debate, if there is huge imparity in the question of internet access then what is the status of maintaining net neutrality on either basis of speed or of content.

Network Neutrality in India

In India there is no such law that secures net neutrality. Telecom Regulatory Authority of India (TRAI), which regulates the telecom industry, in its guidelines for issuing access service license for providing Unified Access Service which includes internet, promotes principle of non-discrimination by prescribing an obligation on licensee to provide services to subscribers without discrimination. ISPs are also required to provide other licensees access to their services without any discrimination. However, the Information Technology Act in India does not provide regulatory provisions relating to access to the Internet, and it does not expressly prohibit an ISP from controlling the Internet to suit his business interest (Shruti, 2011).

According to Bhatia (2014), to achieve net neutrality the broadband companies and other forms of internet service providers needs to follow a non-discriminatory to all its providers. He admits that although net neutrality is a highly controversial issue with a number of opponents and proponents but intentional manipulation of information to achieve a particular political goal is not welcomed at all.

According to Sunil Abraham, Director of Centre for Internet and Society in Bangalore, TRAI has tried to come up with some rules regarding net neutrality several times. For example it invited comments on the concept of net neutrality from industry bodies and stakeholders in 2006. But no formal rules have been formed to uphold and enforce net neutrality. However, despite lack of formal rules, ISPs in India mostly adhere to the principal of net neutrality. There have been some incidents where Indian ISPs have ignored net neutrality but these are few and far between (TNN, 2014).

Internet Service Providers (ISP)

A Network Service Provider means any person who provides access to information service in an electronic form.[1] They are the entities that provide individual and institutional subscribers with access to Internet.[2]

Section 79 of the Information Technology Act, 2000 (I.T. Act, 2000) deals with the liability of the Network Service Providers. The explanation to this section provides that 'Network Service Providers' means an 'Intermediary'. According to Section 2 (w) 'Intermediary', with respect to any particular electronic message "means any person who on behalf of another receives stores or transmits that message or provides any service with respect to that message."[3]

Looking at the definition, it appears that any person providing any service with respect to electronic messages including receiving, storing, transmitting it would qualify as an Intermediary. Since receiving and transmitting includes connectivity, any person providing connectivity such as an ISP or a Cyber Cafe also falls under this definition of Intermediary.[4] But it does not mean that all intermediaries are ISPs. For e.g. a search engine like google.com is not an ISP.

Any company registered in India, is entitled to apply for the license to provide Internet services. These licenses are granted for an initial period of fifteen years which is extendable for further periods of five years or more.[5]

ISPs perform the following tasks:

- Provides access[6] to the network.
- Website building and hosting.
- Hosting mailing list, e-mail services.
- Act as an intermediary with respect to any particular electronic message between an originator[7] and an addressee[8] but is himself none of them.
- Offer electronic news, storage space, games and other entertainment; or
- Simply receive data, convert that data into a form consistent with the IP protocol and forward the results to independent computers that in turn provide richer services and interactions.

They control the point at which information residing on a privately owned computer network first comes in contact with the public network. They control the gateway through which every legal and

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[1]. Vakul Sharma., *"Information Technology Law and Practice"*, 2005, Universal Law Publishing Co.Pvt.Ltd, Delhi, p. 186.

[2]. Mark. F. Grady and Francesco Parisi., *"The Law of Economics of Cyber Security"*, 1st Edition, 2006, Cambridge University Press, New York, p. 226.

[3]. Proposed to be amended by the I.T Amendment Act. The new section runs like this, Sec 2(w): "Intermediary with respect to any particular electronic record means any person who on behalf of another person receives/stores/transmits that record or provides any service with respect to that electronic record."

[4]. Examples of NSP are ISPs, Cellular Mobile Services, Customer Access Services (Call Centres), Mobile Satellite Services, Band Width Services, Cable Operators. Reliance, Tata Indicom, BSNL, Airtel, VSNL Networks, Satyam Infoway, ERNet are some of the ISPs in India.

[5]. Rahul Matthan., *"The Law Relating to Computers and the Internet"*, 2000, Butterworths India, Delhi, pp. 428-429.

[6]. means gaining entry into, instructing or communicating with the logical, arithmetical or memory function resources of a computer, computer system or computer network. - Section 2 (a) I.T. Act, 2000.

[7]. means a person who sends, generates, stores or transmits any electronic message, or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary. - Section 2 (za) I.T. Act, 2000.

[8]. means a person who is intended by the originator to receive the electronic record but does not include any intermediary. - Section 2 (b) I.T. Act, 2000.

illegal act and information enters and re-enters the public network. It can be said that ISP may act as an 'information carrier'[9] or as 'information publisher'[10] depending upon the nature of its functions (Jyothi Vishwanath, 2012).

Internet Service Provider's Liability in India

The Internet Service Providers Association of India in their code of ethics have clearly stated four principles on which their objective is to enunciate and maintain high standards of Ethical and Professional Practices in the field of Internet Services. These are as follows- Technology neutral, Fair to all concerned, Protection of Users' Data and Responsibility for contents on the Internet rests with the relevant Content Provider (Internet Service Providers Association of India, 2014). In India, the approach of the law with respect to ISP liability is vertical. This means that the liability of an alleged infringer would depend on the area of law applicable for the particular type of infringement. This approach has led to the establishment of liability of ISPs under Copyright Right Act and Information Technology Act.

The Indian Copyright Act was drafted at a time when the importance of internet was not anticipated. Thus, it has no mention of liabilities of internet service providers in Copyright infringement act of 1957. Though the Act has been amended in 1994 and 1999, it still does not contain any express provision for determining or limiting ISP liability. Even so, the careful choice of language has allowed it to be technologically neutral, as well as open to interpretation. This shall be clear from the following provisions, which could be interpreted to have bearing on the liability of ISPs to a certain extent,

As per Section 51(a) (ii) of the Copyright Act;

"Copyright in a work shall be deemed to be infringed, when any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright."

Now ISPs allow their servers and other telecommunication devices to store and transmit their users' data across the network. These servers and devices however are physically present in the business premises of the Service Provider. Hence they would come under the expression "any place" as mentioned in the Act and be held liable for storing and transmitting infringed third party data if the other requirements are fulfilled. Moreover the expression "permits for profit" is also of much importance. Hence to be liable the ISP must be benefitting financially from the infringing activities. ISPs earn from not only their service charges but also from advertising. Now if they offer some service for free, say illegal copyrighted material, they still profit from it through the advertisements that are bundled along with it.

[9]. A network service provider, which merely acts as a carrier of information transmitting 'electronic message' from one place to another, without examining its content— *Supra* note 15 at p. 187.

[10]. A network service provider whose primary function is to publish and transmit the information and to take reasonable care in relation to its publication - *Ibid*., at p. 187.

Hence if the ISPs do transmit and store infringed material, they could still be liable if they fulfil the above two requirements. Moreover, if the mentioned requirements are fulfilled they may also be liable criminally under Section 63 of the Copyright Act, which states;

"Any person who knowingly infringes or abets the infringement of,

(a) the copyright in a work, or

(b) any other right conferred by this Act,

shall be punishable with imprisonment which may extend to one year, or with fine, or with both."

Finally the expression, 'unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright'. This expression is crucial in the sense that the liability is constituted only if the ISPs have the knowledge of the infringing material stored or being transmitted through their servers. Hence the only exception to this liability is for the ISPs to prove that they did not know that their activities were causing harm to the copyright owner.

2. Information Technology Act, 2000

In India the provisions relating to the ISPs are to an extent legislated in the IT Act, 2000 where an Internet Service Provider is referred to as "Network service provider". According to Section 79 (a) of the Act a Network Service Provider means an "Intermediary". An Intermediary again has been defined under Section 2(w) as "any person who on behalf of another person receives, stores, or transmits that message or provides any service with respect to that message."

Further, Section 79 in Chapter XII of the Act, which deals with cases where Network Service Providers are not to be liable states:

"For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made there under for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention".

Section 79 thus absolves the liability of the ISP if it can prove that firstly, there was no knowledge of the alleged infringement, and secondly, due diligence was taken to prevent such infringement. It can be well construed that the intention of this piece of legislation in this section is aimed at providing immunity to ISPs. This immunity is absolute if the ISP can prove any of the above, namely lack of knowledge and due diligence. If the ISP has notice of the fact that the data passed through its servers or stored in them likely infringes the copyright of another, he is deemed to have 'knowledge' about it and is under obligation to employ appropriate measures to prevent the same. Further the expression 'due diligence' is also included in the section. The degree of diligence would be judged by reasonable standards expected of a person who is aware of an illegal activity taking place or likely to take place. This has left the concept of liability in India a very vague and limited.

Therefore, to put it in a nutshell, the major limitations of the Indian law when it comes to address the problem of online copyright infringement are;

(a) The vague provisions of section 79 of the IT Act, which leave enough scope for authorities to harass ISPs in matters where their liability comes into question.

(b) The expression "due diligence" is pivotal in deciding the liability of ISPs. Unfortunately the term has not been defined in the entire Act. This creates confusion and ambiguity among the ISPs as to the exact interpretation of 'due diligence'.

(c) Neither the Copyright Act nor the IT Act classifies or defines an ISP. ISP liability, if included within the IT Act, is erroneously same for one who acts as a mere communication carrier such as telephone network operators, and one who is responsible for transfer of data via the internet. It is therefore imperative that the difference is made clear and that these two entities (Network Providers & Internet Service Providers) are classified accordingly (Sagar, 2014).

The law relating to ISP liability is vague and undefined, and is facilitating an unjust shift in the liability of wrongful users on ISP's, making them the scapegoat of inadequate legal framework. There is therefore an urgent necessity to incorporate express provisions in the Indian Copyright Act or the Information Technology Act regarding ISPs.

Current status of Net Neutrality in India

From the functions of Internet Service Providers, it is quite evident that the notion of network neutrality is invariably linked to the role played by Internet Service Providers in ensuring the neutrality of a network mechanism.

In the Indian context, the public service enterprise Bharat Sanchar Nigam Limited was the only Internet Service Provider initially. However, with the liberalization of the broadcasting services, the private players have emerged as the dominant market influencers. These include companies such as Vodafone, Airtel, Tata, Reliance, MTS. However, what started off as an endeavour to liberalize the network distribution mechanism in Indian context has actually turned out to be the customer's nightmare.

While it is true that the monopoly of the public service provider was a deterrent to the democratization of the internet, the fact remains that the tag of Liberalization, Privatization and Globalisation (LPG) has done little good to improve the situation. The private players now rule the roost despite the fact that some of them harp on rental services taken from the public service provider itself. Moreover, the private players provide internet speed and content based on the strategy of competitor's stand. For instance, if one particular service provider gives a certain amount of data at a certain speed, the rival company is likely to place its offer based on the former's bid rather than what may actually be given to the customers. This in itself puts the interests of the service providers way above the interest of customers.

In 2012, Airtel and BSNL throttled 9% of all BitTorrent data in the country. That is an astoundingly large amount of data. It's also a cheap shot, considering that P2P traffic like in BitTorrent is easier for an ISP to distinguish from web traffic.

There is also another way in which they have violated net neutrality: free domain access and app usage. Some mobile carriers offer websites like Google and Facebook along with services like WhatsApp for free. This is usually for a limited amount of data, or as a part of a larger data package. This is a violation of net neutrality not from the speed perspective, but the cost perspective. Free access to certain domains and internet apps makes consumers more willing to subscribe to providers

who have this free access. This pushes out competition that web conglomerates don't see as worthy enough to have a free-access agreement with.

It is worth mentioning here that the role of ISP is of paramount importance in ensuring network neutrality in a country. Since the ISPs are entrusted with the responsibility of providing a free and balanced internet system, it becomes very important that they perform their duties in a sincere and unbiased manner. In the Indian context, the TRAI keeps track of the working mechanism of the Internet Service Providers. However, the role of TRAI is difficult indeed given the fact that there are no specific laws available in India to take any punitive measures against defaulters as far as network neutrality is concerned. This is precisely the reason the concept of ethics gains considerable significance as far as the practise of network neutrality by ISPs is concerned.

Need for Network Neutrality in India

With the growth Internet users in India, there is now a higher chance of network clogging. In such a scenario ISPs may impose a certain type of premium rent on download or surfing thus endangering net neutrality. It is important to ensure neutrality of the Internet, if we want to promote fair competition and give chance to small and medium enterprises operating on Internet to grow, as these small entrepreneurs will not be able to pay higher rent to get its content prioritized. Slowing down of websites on the basic of content and price will also have an effect on speed of global traffic and will act as an impediment against increasing Internet usage.

If there is no net neutrality, ISPs will have the power (and inclination) to shape internet traffic so that they can derive extra benefit from it. For example, several ISPs believe that they should be allowed to charge companies for services like YouTube and Netflix because these services consume more bandwidth compared to a normal website. Basically, these ISPs want a share in the money that YouTube or Netflix make. Without net neutrality, the internet as we know it will not exist. Instead of free access, there could be "package plans" for consumers. Lack of net neutrality, will also spell doom for innovation on the web. It is possible that ISPs will charge web companies to enable faster access to their websites. Those who don't pay may see that their websites will open slowly.

Today freedom of speech and expression is understood as a multi-faceted right that includes not only the right to express or disseminate information and ideas but also the right to seek, receive and impart information or ideas, regardless of the medium used (S.Jacob, 2011).

Internet has changed the traditional ways of receiving information. News is just ‘one click’ away from us. It’s a well known fact that before any election all the political parties try to persuade voters in their favours. Political parties and leaders nowadays are using internet for it. Voters can check for online posts, profile of candidates and their agenda. All these guide the voters to make a right choice which is the very essence of democracy in India as well as other countries. In such a scenario ensuring net neutrality becomes doubly essential. As the famous quote says- “with great power comes great responsibility” Internet Service Providers should also abide by the notion of maintaining net neutrality.

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