

## **Internet Intermediaries in South Asia**

### **Content Regulation, Network Regulation, and Online Copyright Infringement in India, Singapore, and Bangladesh.**

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#### **Introduction**

This article focuses on net neutrality, online copyright infringement, and content regulation across South Asia, with case studies from India, Bangladesh and Singapore. The service providers reviewed in the case studies are Airtel (India), GrameenPhone (Bangladesh) and SingTel (Singapore). For each case study, we review the legal and political context, company policies, and company practice pertaining to the focus areas identified above.

#### **Overview of Service Providers**

##### **I. Airtel**

Bharti Airtel Limited is a global telecommunications company, incorporated in 1995 and based out of New Delhi. It has operations in 20 countries across Asia and Africa. Airtel is the largest ISP in India and ranks amongst the top four mobile service providers globally, with a subscriber base of 307 million, as of November 2014. In India, the company's product offerings include 2G, 3G and 4G wireless services, mobile commerce, fixed line services, high speed DSL broadband, IPTV, DTH, enterprise services including national and international long distance services to carriers. In other countries, it offers 2G, 3G wireless services and mobile commerce.<sup>1</sup>

##### **II. Grameen phone**

Grameenphone (GP) is the leading telecommunications network provider in Bangladesh, with a total subscriber base of more than 53 million (as of June 2015). Telenor Mobile Communications AS (TMC) owns 55.80% shares of Grameenphone Ltd., while Grameen Telecom, owns 34.20% of the shares. GrameenPhone is also the largest mobile data service provider in Bangladesh, with a subscriber base of 10.8 million users in 2014. GrameenPhone, in partnership with two Bangladeshi ISPs, Agi Systems and ADM Telecom Ltd., also provides wireless broadband access through WI-MAX, through Go Broadband.<sup>2</sup>

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<sup>1</sup> <http://www.medianama.com/2014/01/223-airtel-4g-connections-data-q3-fy14>.

<sup>2</sup> GrameenPhone Annual Report, 2014, available at [http://www.grameenphone.com/sites/default/files/investor\\_relations/annual\\_report/Full-Report-2014.pdf](http://www.grameenphone.com/sites/default/files/investor_relations/annual_report/Full-Report-2014.pdf).

### III. SingTel

Singapore Telecommunications Ltd. (SingTel) is the largest telecommunications service provider based in Singapore with a global subscriber base of 550 million, with operations in more than 25 countries. SingTel offers wireless and wired broadband internet services, including IPTV, WiFi and 4G services.<sup>3</sup>

#### **Net Neutrality and emerging intermediary business models across South Asia**

This section will focus on net neutrality, and will look at net neutrality regulation, company policy pertaining to network management, and examples of company practice in India, Bangladesh, and Singapore for Airtel, Grameenphone, and Singtel respectively.

The net neutrality debate across South Asia has largely focused on differential pricing and price discrimination. Price discrimination can be:

- Positive (sponsored data or zero rating) – for example: an internet service provider favors an application, service or platform over others for a fee assessed to the application, service or platform or for competitive advantage.<sup>4</sup>
- Negative - for example: an internet service provider discriminates against a service or platform and the end user is implicitly or explicitly assessed an additional fee to access certain services or platforms.<sup>5</sup>

Differential pricing is the practice of charging different consumers different prices for the same product and can be based on services, content, or application. A type of

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<sup>3</sup> SingTel Annual Report, 2015, available at [http://info.singtel.com/annualreport/2015/assets/files/Singtel\\_AR2015.pdf](http://info.singtel.com/annualreport/2015/assets/files/Singtel_AR2015.pdf).

<sup>4</sup> See: <https://edri.org/net-neutrality-freedom-also-means-banning-positive-discrimination/>, <https://helda.helsinki.fi/bitstream/handle/10138/16703/netneutr.pdf?sequence=1>, <http://www.twobirds.com/en/news/articles/2015/netherlands/net-neutrality-guidelines-in-the-netherlands-come-into-force>, [http://www.dfmonitor.eu/downloads/Net\\_neutrality\\_about\\_price\\_open\\_internet\\_access\\_Dec2014.pdf](http://www.dfmonitor.eu/downloads/Net_neutrality_about_price_open_internet_access_Dec2014.pdf)

<sup>5</sup> See: <https://edri.org/net-neutrality-freedom-also-means-banning-positive-discrimination/>, <https://helda.helsinki.fi/bitstream/handle/10138/16703/netneutr.pdf?sequence=1>, <http://www.twobirds.com/en/news/articles/2015/netherlands/net-neutrality-guidelines-in-the-netherlands-come-into-force>, [http://www.dfmonitor.eu/downloads/Net\\_neutrality\\_about\\_price\\_open\\_internet\\_access\\_Dec2014.pdf](http://www.dfmonitor.eu/downloads/Net_neutrality_about_price_open_internet_access_Dec2014.pdf)

differential pricing can also be seen in a 'zero rated' paradigm, i.e., the practice of offering a service or content either for free or at a lower cost or not counting data use towards a data plan, wherein other subscribers not in the zero rated ecosystem will have to pay for the same access.<sup>6</sup>

There are a number of arrangements for 'zero rated' services including:

- Subsidized: The user, the ISP, the content provider, the government or another third party pays for a service to be offered at a subsidized rate.
- Negotiated: A third party, such as a content provider, enters into an agreement with the ISP to have the service offered for free or at a lower rate.
- Mandated: The government mandates the 'zero rating' of a service.
- Self-imposed: the ISP selects which services to offer at lower rates and allows consumers to choose.

Such arrangements can 'zero rate' based on content (including applications and platforms), services, protocols, and carrier or can be content, service, and carrier agnostic.<sup>7</sup>

The impact of zero rated services can be both positive and negative and can be influenced by the size of an ISP, a contexts market structure, the service that is 'zero rated', whether a company is foreign or local, and the degree of internet penetration in a given context. For example, the Centre for Internet and Society and others have argued that when communication or publishing services are zero rated – it can positively enable freedom of expression. Zero rating can also enable the right to access by providing reduced costs to internet. If a small ISP zero rates certain services, this could give it a market advantage against larger ISPs. At the same time, if non-transparent and left unregulated, the impact of zero-rated services can be equally harmful. If a large ISP undertakes zero rated services it could lead to anticompetitive practices and create an environment where smaller ISPs cannot compete in the market unless they undertake zero rated services as well. A similar situation could arise amongst application developers - where if application developers do not zero rate their service – or promote the same through a zero rated platform, they cannot compete in the market – ultimately impacting

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6 [http://traf.gov.in/Comments\\_Data/Organisation/National\\_Law\\_School\\_Bangalore.pdf](http://traf.gov.in/Comments_Data/Organisation/National_Law_School_Bangalore.pdf)

7 <http://cis-india.org/internet-governance/blog/cis-position-on-net-neutrality>

innovation. This could impact users by limiting and defining the content that they can access as well as curtailing the broader diversity of online content.<sup>8</sup>

#### Company Practice and Emerging Business Models:

All of the service providers studied for this research have entered into partnerships with different companies to offer 'zero rated', increased data capacities, or reduced tariff services. Features of such models include: data limitations, browser requirements, content limitations, tiered data offers, data incentives. Examples of the different services that have been adopted by the studied service providers include:

- **Free Basics:** Free Basics by Facebook, a part of Facebook's internet.org, provides users free access to a select set of websites as long as the user browses through the Facebook browser. Free Basics also partners with Telecom Operators, allows application developers to launch their applications on the Free Basics platform, and allows organizations to host their websites on the Free Basics platform as long as it is approved by Facebook and the application or website complies with Free Basics participation guidelines which include technical guidelines<sup>9</sup>, legal terms<sup>10</sup>, and a platform policy<sup>11</sup>. Importantly, all data and information generated by a users, applications, or platforms belongs to Facebook. Free Basics is presently available in eleven Asia Pacific countries including Bangladesh through Grameenphone.<sup>12</sup> Free Basics has positioned itself to the public as providing access to the internet and enabling empowerment and positions itself to operators and application developers as tools to grow subscriber bases and increase commercial revenue.<sup>13</sup> Free Basics is also available in Bangladesh through the Robi Axiata network.<sup>14</sup> Free Basics has recently been banned in India and does not operate in Singapore.
- **Google Free Zone:** In 2013, Airtel implemented a scheme called “Google Free Zone”, where Google services were offered for free over its network.

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8 <http://cis-india.org/internet-governance/blog/cis-position-on-net-neutrality>

9 <https://developers.facebook.com/docs/internet-org/platform-technical-guidelines>

10 <https://www.facebook.com/legal/terms>

11 <https://developers.facebook.com/policy>

12 <https://info.internet.org/en/story/where-weve-launched/>

13 <https://info.internet.org/en/story/mobile-operator-partnership-program/>

14 <https://info.internet.org/en/story/where-weve-launched/>

These services included Google Search, Gmail and Google Plus.<sup>15</sup> The service was free of cost as long as usage did not exceed 1GB per month and it was accessed via the mobile phone through the link 'Airtel.in/freezone at all points of time. Users could only access content on the 'freezone' page i.e the first link was free, and any additional link users would have to pay for.<sup>16</sup>

- **Wiki zero:** In 2015 GrameenPhone introduced zero rating services for Wikipedia in partnership with the Wikimedia Foundation for the purpose of developing more content in BengaliWikimedia Bangladesh and Grameenphone have provided training to students on how to edit wikimedia.<sup>17</sup> In 2013, m.wikipedia and zero.wikipedia were offered through Banglalink in Bangladesh and in Kenya and Bangladesh through Airtel. The Banglalink and Grameenphone services are supported through Opera Mini<sup>18</sup>
- **'Equal Rating':** GrameenPhone has partnered with Mozilla in a collaborative effort to provide non-tiered and open access to the Internet. The model envisages that users can receive up to 20MB of unrestricted data per day, after watching a short ad in the phone's marketplace.<sup>19</sup> Mozilla's effort is a step towards offering free or discounted access to the internet without 'zero rating' a service. Arguing that zero rating fractures the internet and ultimately creates a 'poor man's internet', Mozilla is promoting service-agnostic / content-type agnostic zero-rating 'equal rating' where companies take on the cost of data in return for attribution and data is offered to the consumer at a discount or no charge.<sup>20</sup>
- **'Akhoni':** Through an 'exclusive partnership' with Akhoni.com, an e-commerce platform indigenous to Bangladesh, GrameenPhone allowed users to browse the akhoni website for free on their first purchase.<sup>21</sup> Akhoni.com browsing is only free through default mobile browsers and the Opera Mini

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<sup>15</sup> 'Airtel Partners Google To Offer Free Google Search, Gmail & Google+', *available at* <http://www.medianama.com/2013/06/223-airtel-partners-google-to-offer-free-google-search-gmail-google/>.

<sup>16</sup> <https://www.gogi.in/airtel-google-free-zone-access.html>

<sup>17</sup> Free Wikipedia for Grameenphone customers, *available at* <http://www.grameenphone.com/about/media-center/press-release/grameenphone-announces-free-wikipedia-access-network><http://www.telenor.com/media/articles/2013/free-wikipedia-for-grameenphone-customers/>; <http://www.grameenphone.com/personal/offers/facebook-zero>.

<sup>18</sup> [https://wikimediafoundation.org/wiki/Mobile\\_partnerships](https://wikimediafoundation.org/wiki/Mobile_partnerships)

<sup>19</sup> How To Make The Internet Truly Free In Developing Countries, TECHCRUNCH, *available at* <http://techcrunch.com/2015/06/01/how-to-make-the-internet-truly-free-in-developing-countries/>.

<sup>20</sup> <http://www.telecomtv.com/articles/telcos-and-service-providers/wow-that-s-how-to-use-zero-rating-to-stimulate-paid-traffic-12969/>

<sup>21</sup> Grameenphone joins hands with Akhoni.com, *available at* <http://prnewsbd.com/4746/grameenphone-join-hands-with-akhoni-com/>.

browser. Though browsing on Akhoni.com does not incur a charge, back end data consumption and charges will apply.<sup>22</sup>

- **'WowBox'**: GrameenPhone has also partnered with Telenor to launch its 'WowBox' application. The application allows Grameenphone users with an Android phone to access free content that is provided within the application. 'WowBox' is also linked to Grameenphone's regular tariffs and incentivizes use by providing WowBox users who register for the 'Bondhu' package 20MB free everyday as well as rewarding credits for the purchase of other services through 'WowBox'.<sup>23</sup> According to the 'WowBox' description, the application allows users to browse the content on the homepage, buy data packages, earn and spend tokens, play games and enter contests, purchase 'Wow Offers', and participate in competitions.<sup>24</sup>

Many of the above models run on the software 'Opera Mini', a software that runs on almost any data enabled mobile phone. Since 2013 Grameenphone has partnered with 'Opera Mini' to provide 'zero rated' access to websites such as Facebook and Wikipedia. To access Facebook and Wikimedia, users must use the campaign Speed Dial entries that were accessible only through the Opera Mini browser. This was part of a larger campaign by GrameenPhone which sought to engage 'reluctant data consumers with no risk'. Messages used in the campaign included 'say goodbye to loneliness and free Facebook Browsing!' and 'Wikipedia zero – knowledge is for free'. The campaign used full page print ads, leaflets and posters, SMS & USSD, social networking, and online & mobile advertising.<sup>25</sup> SingTel has also partnered with Opera Mini and has launched certain schemes whereby users can choose to increase their data capacity specifically for the use of the messaging service WhatsApp.<sup>26</sup>

In addition partnerships, Grameenphone and Airtel have adopted business models that 'zero rate' services or offer reduced or limited access to the internet. For example:

- **'Social Packs'**: GrameenPhone also offers users an 'unlimited social pack' for one week at the rate of 9TK. The offer includes unlimited access to Facebook, WhatsApp, and Comoyo. To use the offer customers need to

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22 <http://www.bmion.com/2014/11/Grameenphone-Browse-akhoni.com-Absolutely-Free.html>

23 <http://www.telecomtv.com/articles/telcos-and-service-providers/wow-that-s-how-to-use-zero-rating-to-stimulate-paid-traffic-12969/>

24 <https://play.google.com/store/apps/details?id=com.telenor.ads&hl=en>

25 <http://www.operasoftware.com/success-stories/grameenphone-opera-mini>

<sup>26</sup> SingTel teams up with WhatsApp and Opera to offer new mobile pre-paid plans, <http://www.straitstimes.com/singapore/singtel-teams-up-with-whatsapp-and-opera-to-offer-new-mobile-pre-paid-plans>.

access the platforms through Facebook applications (Java,iOS, Andriod), customers have to browse m.facebook.com and [www.facebook.com](http://www.facebook.com) as a default browser on their handsets, and any use accessing the platforms through a proxy based browser will be charged. The package is also subject to 15% VAT.<sup>27</sup>

- **'Easy Net'**: In 2015, GrameenPhone introduced its 'easy net' scheme. Under this scheme, video tutorials about the internet are provided for free as well as access to Facebook and Wikipedia on the GrameenPhone network. Consumers are also given the choice of purchasing small data packs without a subscription. The stated purpose of the scheme was to 'raise internet awareness' amongst users on its mobile network.<sup>28</sup>
- **Airtel Zero**: In 2015, Airtel introduced the platform Airtel Zero, which gave free access (zero rating) to a limited set of services curated by Airtel, including Flipkart and the Hike messaging service. A statement by an Airtel representative said that "Airtel Zero was an open and non-discriminatory marketing platform for all developers in India – irrespective of the size of their business." This was one of the factors prompting a public outcry around the necessity for introducing regulations for the type of data discrimination which companies may engage in. In the face of the outcry, some of the erstwhile 'partners' in Airtel Zero, including Flipkart, backed out of the scheme.<sup>29</sup> Airtel Zero functions in the following way: the Mobile application makers register with 'Airtel Zero' to give customers toll-free access to their applications and Airtel transfers the cost of the data to the application developer through a fee, allowing customers to download and access these applications at zero data charges – and enjoy their favorite online tasks (e.g. entertainment, shopping) for free – even at zero mobile balance.<sup>30</sup>

Beyond offering 'zero rated' services, Airtel has been criticized for adopting practices that affect network neutrality. According to a report by Measurement Lab, in 2011

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27 <http://www.grameenphone.com/classified-services/weekly-social-pack>

<sup>28</sup> Grameenphone introduces 'Easy Net' service in Bangladesh to raise internet awareness, available at <http://bdnews24.com/business/2015/08/16/grameenphone-introduces-easy-net-service-in-bangladesh-to-raise-internet-awareness> and GP offers EasyNet to build internet awareness. Dhaka Tribune. Available at: <http://www.dhakatribune.com/business/2015/aug/17/gp-offers-easynet-build-internet-awareness>

<sup>29</sup> Flipkart logs out of Airtel Zero after social media backlash, available at <http://indianexpress.com/article/business/business-others/flipkart-logs-out-of-airtel-zero-after-social-media-backlash/>.

<sup>30</sup> Airtel launches 'Airtel Zero': A win-win platform for customers and marketers, available at <http://www.airtel.in/about-bharti/media-centre/bharti-airtel-news/corporate/airtel+launches+-airtel+zero+-a+win-win+platform+for+customers+and+marketers>.

Airtel was throttling (restricting) up to a third of BitTorrent traffic on its network.<sup>31</sup> Airtel also admits to having partnered with certain content providers including YouTube and Akamai to cache content locally, in order to improve access to that content over their network.<sup>32</sup> The extent of their caching and peering arrangements, particularly with content delivery networks is unknown. As a note, though not currently practicing, SingTel has promoted the introduction of 'fast lanes' into their practice with the Singtel chief being covered as saying “ regulators should let carriers charge major Internet content providers for consumers to have faster access to their content.”<sup>33</sup> Reports from Singapore also note that it is common practice for service providers to restrict peer-to-peer traffic, though this appears to be within their right to optimize the use of network resources.<sup>34</sup>

### **Net Neutrality Regulation and the Regulation Formation Process:**

The presence of net neutrality regulation is varied across South Asia – some contexts have formalized provisions in place, some contexts are in the process of defining regulations for net neutrality, and some have no form of regulation for net neutrality in place, but may make relevant references in licensing regimes or other policy.

### **Singapore**

An example of a context with developed regulation is Singapore. In 2011 the Info-Communications Development Authority (IDA) of Singapore published a set of guidelines for ISP's with regard to network neutrality. The guidelines were developed after consultations starting in 2010 with industry.<sup>35</sup> Through the consultation, the IDA sought opinions on the current state of net neutrality developments in the local Internet access service market, possible developments in net neutrality in the future, IDA's policy approach towards net neutrality, and IDA's proposal to improve information transparency.<sup>36</sup> Through this consultation process, 18 companies responded to the the IDA including SingTel. In their submission to the consultation,

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<sup>31</sup> ISPs slam brakes on BitTorrent speeds, *available at* <http://www.thehindu.com/sci-tech/technology/internet/isps-slam-brakes-on-bittorrent-speeds/article3751310.ece>

<sup>32</sup> <http://www.airtel.in/Airtel3G/index.html>.

<sup>33</sup> <http://www.straitstimes.com/opinion/timely-for-singapore-to-strengthen-net-neutrality-rules>

<sup>34</sup> <http://www.straitstimes.com/opinion/obamas-call-for-net-neutrality-what-is-singapores-position-on-the-issue>

<sup>35</sup> Decision Issued By The Info-Communications Development Authority Of Singapore on Network Neutrality, (16<sup>th</sup> June, 2011), *available at* [https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111\\_Netneutrality/NetNeutralityExplanatoryMemo.pdf](https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111_Netneutrality/NetNeutralityExplanatoryMemo.pdf).

<sup>36</sup> <https://www.ida.gov.sg/Policies-and-Regulations/Consultation-Papers-and-Decisions/Store/Consultation-on-Policy-Framework-for-Net-Neutrality>



SingTel argued against the need for a Net Neutrality regulation in Singapore arguing that the country's present legal framework was sufficient and importantly Singapore's broadband service market is highly competitive, allowing the best outcome for Singapore consumers.

### **IDA's Decision on Net Neutrality**

Singapore's guidelines were developed with the objective of enabling access to content and balancing the needs of the consumer and the needs of the ISP and are applicable to fixed-line, wireless, and mobile internet services. The IDA refers to net neutrality as “a term generally used to refer to Internet service or network providers treating all sources of Internet content equally, and the right of a consumer to access content and services on the Internet on a non-discriminatory basis.”<sup>37</sup> In short, the decision put forward five basic standards: (1) no blocking of legitimate internet content so that it is inaccessible or unusable.<sup>38</sup> (2) comply with competition and interconnection rules (3) provide information transparency (4) meet minimum QoS standards (5) Niche or differentiated Internet services are allowed.

### **Telecommunication Competition Code**

As part of the decision on net neutrality, the IDA seeks to give service providers flexibility in the provision of services – allowing them to develop their own policies and practices around legitimate network management. Singapore also tries to ensure fair practices between ISPs and seeks to enable a competitive market for all ISP's. Towards this, the Telecommunication Competition Code published by the IDA comprehensively regulates competition in the Telecommunication market, including internet infrastructure and network service providers. The code stipulates the requirements for ensuring competition between network providers. The relevant provisions of the code mandate interconnection between Telecom licensees, and also protects against other unfair methods of competition such as degradation of service availability or quality without legitimate business, operational or technical justification.<sup>39</sup> IDA has also ensured that the TCC is in line with international

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[https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111\\_Neteutrality/NetNeutralityExplanatoryMemo.pdf](https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111_Neteutrality/NetNeutralityExplanatoryMemo.pdf)

38 Note: The unusable or usable standard has not been defined in the regulation – raising contentions over throttling and what is an acceptable quality of service  
<http://www.straitstimes.com/opinion/timely-for-singapore-to-strengthen-net-neutrality-rules>

<sup>39</sup> Chapter 23, SINGAPORE TELECOMMUNICATION COMPETITION CODE, *available at* [https://www.ida.gov.sg/~media/Files/PCDG/Practice%20Guidelines/Guidelines/IDA\\_Telecom\\_Competition\\_Guidelines.pdf](https://www.ida.gov.sg/~media/Files/PCDG/Practice%20Guidelines/Guidelines/IDA_Telecom_Competition_Guidelines.pdf).

competition law principles.<sup>40</sup> The requirement of legitimate justification seeks to balance the competing interests between network providers and competition and consumer interests.<sup>41</sup> ISP's are allowed reasonable network management, provided the QoS and transparency guidelines are met, and the management does not render any legitimate content effectively inaccessible. There is also a requirement for information transparency, where end users must be made aware of network practices that affect internet speeds, whether download or upload. Whether a particular form of network management is reasonable is to be judged on a case to case basis by the authority.

### **General Competition Law**

In addition to the TCC, Singapore has in place a general competition law governing internet content companies and 'edge providers' who are not IDA licensees.<sup>42</sup>

News items and experts in Singapore have raised concern that the current model of regulations will have a negative impact on innovation as they do not account for technological advances since 2011.<sup>43</sup>

### **India**

Though not as comprehensive as Singapore's regulations, in February 2016 the Telecom Regulatory Authority of India (TRAI) published the "Prohibition of Discriminatory Tariffs for Data Services, 2016".<sup>44</sup> The TRAI Regulations are narrow in scope and focus only on price discrimination for data services and ban the practice of price discrimination for data services on the basis of content and prevent service providers from charging different prices on the basis of a website, application, platform, or type of content being accessed with three exceptions: closed

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[https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111\\_NetNeutrality/NetNeutralityExplanatoryMemo.pdf](https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111_NetNeutrality/NetNeutralityExplanatoryMemo.pdf)

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Section 3.4.2., TELECOMMUNICATION COMPETITION CODE, - *"IDA will find that a Licensee has no legitimate business, operational or technical reasons for taking an action when: (i) the action was not a commercially reasonable means for the Licensee to reduce its costs, offer a new service or equipment, improve service or equipment quality or otherwise benefit its End Users; and (ii) the adverse impact of the Licensee's actions on other Licensees was grossly disproportionate to the benefit to the Licensee and its End Users."*

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[https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111\\_NetNeutrality/NetNeutralityExplanatoryMemo.pdf](https://www.ida.gov.sg/~media/Files/PCDG/Consultations/20101111_NetNeutrality/NetNeutralityExplanatoryMemo.pdf)

43 <http://www.straitstimes.com/opinion/timely-for-singapore-to-strengthen-net-neutrality-rules>

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[http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation\\_Data\\_Service.pdf](http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf)

communication networks , emergency services, or at times of grave public emergency. In the Regulation TRAI justified its decision to ban differential pricing practices for the following reasons:

- Price discrimination would undermine the basis on which the internet has been developed and allow for negative externalities on the rest of network.
- Price discrimination would allow service providers to shape a users internet experience and online behaviour. This is particularly dangerous in a context like India where the majority of the population has not accessed the internet and India is actively trying to close this digital divide.
- A complete ban on price discrimination is necessary as adoption of principles such as transparency and disclosure requirements will not be adequate given that consumers may not be able to understand such disclosures.
- The internet needs to be used in such a way to advance free speech and ensure a plurality and diversity of views, opinions, and ideas.

This makes India home to one of the most stringent regulations for differential pricing in the world and also sets the stage for more comprehensive engagement and regulation from TRAI.

Prior to the 2016 Regulations, in August 2014, TRAI, rejected a proposal that would allow ISP's to charge customers for using data-based messaging or phone services (such as WhatsApp or Viber) or to impose licensing obligations and costs upon these 'Over the Top' services.<sup>45</sup> The debate surrounding a re-evaluation of the legal rights, duties and liabilities of internet network infrastructure providers towards users really took off in India in December 2014, when Airtel announced for plans Airtel Zero while Facebook continued to roll out its at the time, 'internet.org' service.<sup>46</sup> In April 2015, Airtel publicly announced Airtel Zero on their website describing the service as an 'open and non-discriminatory marketing platform for all developers in India – irrespective of the size of their business." To use the platform, mobile application developers would register with 'Airtel Zero', Airtel would inform customers of the toll free applications, and customers would be able to access the applications at zero

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<sup>45</sup> *Trai Rejects Telcos' Proposal To Charge Fee On Popular Services Like Whatsapp, Viber And Skype*, ECONOMIC TIMES, (19<sup>TH</sup> August, 2014), available at [http://articles.economictimes.indiatimes.com/2014-08-19/news/52983474\\_1\\_data-revenue-whatsapp-voice-services](http://articles.economictimes.indiatimes.com/2014-08-19/news/52983474_1_data-revenue-whatsapp-voice-services).

<sup>46</sup> <http://www.gizmodo.in/indiamodo/Heres-ADetailed-Timeline-Of-Facebooks-Free-Basics-And-How-It-Originally-Started/articleshow/50947015.cms>

data charges.<sup>47</sup> Though Airtel itself never publicly clarified what 'register' entails, news items report that the cost of free applications would be transferred to application developers who would pay a fee to Airtel to register and have their applications provided at a 'zero' cost.<sup>48</sup> On March 27th 2015, TRAI released a Consultation Paper on the regulation of OTT's to better understand the various arguments surrounding the debate.<sup>49</sup>

In light of the consultation paper, there emerged perhaps the biggest public campaign focussed on internet policy that India has ever witnessed, led by the Save the Internet campaign.<sup>50</sup> Save the Internet called for the protection of network neutrality, which it defined as: "Net neutrality requires that the Internet be maintained as an open platform, on which network providers treat all content, applications and services equally, without discrimination. This includes ensuring that network providers do not supply any competitive advantage to specific apps/services, either through pricing or Quality of Service."<sup>51</sup> The Cellular Association of India and other industry bodies responded with a campaign of their own, titled "Sabka Internet, Sabka Vikas" which promoted the right to choose content on the internet, equality of rules, and affordable internet.<sup>52</sup> In the campaign, Indian Telecom Operators lobbied strongly for the ability to charge OTTs on the basis that 'free' data-using services including free messaging services and VoIP drastically reduce their revenues from traditional sources, such as SMS and calls – with the Cellular Operators Association of India estimating an annual loss of rs. 5,000 Crores in 2014.<sup>53</sup> This reduction in revenue is despite the potential revenue gain from data charges associated with using OTT's as individuals may use the services through a WiFi connection. As a note, Indian operators are not the only operators to raise concerns over revenue loss due to OTT's as Singtel's Chief, when defending fast lanes, has also stated "*content companies are making profits from using carriers'*

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47 <http://www.airtel.in/about-bharti/media-centre/bharti-airtel-news/corporate/airtel+launches+-+airtel+zero-+a+win-win+platform+for+customers+and+marketers>

48 <http://www.dailyo.in/politics/airtel-zero-net-neutrality-flipkart-savetheinternet-trai-/story/1/3164.html>

49 <http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/OTT-CP-27032015.pdf>

50 <https://www.savetheinternet.in/>

51 <http://blog.savetheinternet.in/what-is-net-neutrality/>

52 <http://sabkainternet.in/>

53 <http://telecomtalk.info/tag/trai-coai-regulation-policy-ott-teleco-isp/>

*infrastructure to reach customers, but not paying for it. Content companies such as Skype and WhatsApp have also eaten into carriers' voice and messaging revenues.”<sup>54</sup>*

As indication of the strength of public push back to both Airtel Zero and Free Basics Cleartrip and NDTV publicly announced that they would not engage their platform with internet.org and Flipkart left the Airtel Zero platform.<sup>55</sup> Following this, in May 2015 an Expert Committee on Network Neutrality in India was formed in the Department of Telecommunications. The Expert Group came out with a comprehensive report, broadly in support of network neutrality legislation, but calling for the regulation of internet telephony (VoIP) as well.<sup>56</sup> In December 2015, TRAI released a second consultation paper on discriminatory pricing.<sup>57</sup> In the Consultation Paper TRAI was primarily concerned with whether or not service providers should be allowed to apply 'differential pricing' practices for data usage for accessing different websites, applications, or platforms and other related issues.

During the TRAI consultation on differential pricing, Facebook launched a massive, and perhaps first of its kind campaign, promoting Free Basics. This campaign was met with just as massive a push back from the Indian public. In a move that clearly demonstrates the politically powerful position that ICT companies hold, the Free Basics campaign utilized newspapers, billboards, and social media to promote 'Free Basics' with slogans such as “A First Step Towards Digital Equality” and “Support Ganesh – Support Digital Equality”. Facebook also tried to influence the TRAI consultation process. This included initiating a campaign on Facebook whereby a message would automatically show up for users in India titled “Act Now to Save Free Basics in India”. The message stated:

*“Free Basics gives people access to vital services, such as communication, healthcare, education, job listings and farming information—all without data charges. It helps those who can't afford to pay for data, or who need a little help with getting started online. And it's open to all people, developers and mobile networks.*

*However, Free Basics is in danger in India. A small, vocal group of critics are lobbying to have Free Basics banned on the basis of net neutrality. Instead of giving people access to some basic Internet services for free, they demand that people pay equally*

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54 <http://www.straitstimes.com/opinion/timely-for-singapore-to-strengthen-net-neutrality-rules>

55 <http://tech.firstpost.com/news-analysis/dot-says-net-neutrality-will-facilitate-digital-india-plan-report-263572.html>

56 [http://www.dot.gov.in/sites/default/files/u10/Net\\_Neutrality\\_Committee\\_report%20\(1\).pdf](http://www.dot.gov.in/sites/default/files/u10/Net_Neutrality_Committee_report%20(1).pdf)

57 [https://mygov.in/sites/default/files/mygov\\_1449738907190667.pdf](https://mygov.in/sites/default/files/mygov_1449738907190667.pdf)

to access all Internet services, even if that means 1 billion people can't afford to access any services.

*The TRAI is holding a public debate that will affect whether free basic Internet services can be offered in India. Your voice is important for the 1 billion Indian people who are not yet connected and don't have a voice on the Internet. Unless you take action now, India could lose access to free basic Internet services, delaying progress toward digital equality for all Indians. Tell the TRAI that you support Free Basics and digital equality in India.”*<sup>58</sup>

When clicked by a user, a pre-written letter was sent to TRAI as a response to the consultation stating:

*“To the Telecom Regulatory Authority of India, I support digital equality for India. Free Basics provides free access to essential internet services like communication, education, health care, employment, farming and more. It helps those who can't afford to pay for data, or who need a little help getting started online. And it's open to all people developers and mobile operators. With one billion Indian people not yet connected, shutting down Free Basics would hurt our country's most vulnerable people. I support Free Basics – and digital equality for India.”*<sup>59</sup>

More than 11 million of these responses were sent to TRAI, who disallowed these responses on the grounds that they were invalid as they did not mention the consultation process nor did they address the topic of the consultation process or the questions asked.<sup>60</sup> Underscoring the importance of transparency and the right to submit an informed response, TRAI requested Facebook to share the four questions posed by the consultation paper verbatim with its users and extended the deadline for submission of comments. TRAI also critiqued Facebook on a number of grounds including the fact that the company did not take users consent to speak to TRAI on behalf of them stating only: *“By clicking Send Email, you agree to let Facebook send your name and this email to the TRAI”*. TRAI also accused Facebook of turning the consultation process into a *'crudely majoritarian and orchestrated opinion poll.'*<sup>61</sup>

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58 <http://techcrunch.com/2015/12/17/save-free-basics/>

59 [http://trai.gov.in/WriteReadData/Miscellaneous/Document/201601190319214139629TRAI\\_letter\\_to\\_FB\\_dated\\_18\\_01\\_2016.pdf](http://trai.gov.in/WriteReadData/Miscellaneous/Document/201601190319214139629TRAI_letter_to_FB_dated_18_01_2016.pdf)

60 [http://trai.gov.in/WriteReadData/Miscellaneous/Document/201601190319214139629TRAI\\_letter\\_to\\_FB\\_dated\\_18\\_01\\_2016.pdf](http://trai.gov.in/WriteReadData/Miscellaneous/Document/201601190319214139629TRAI_letter_to_FB_dated_18_01_2016.pdf)

61 [http://trai.gov.in/WriteReadData/Miscellaneous/Document/201601190319214139629TRAI\\_letter\\_to\\_FB\\_dated\\_18\\_01\\_2016.pdf](http://trai.gov.in/WriteReadData/Miscellaneous/Document/201601190319214139629TRAI_letter_to_FB_dated_18_01_2016.pdf)

Facebook's 'Save Free Basics' campaign and the response from the public and TRAI demonstrates that an ICT company's public and contextual engagement can be equally as important as platform engagement and should, just like company practice, be guided by the principles of transparency and accountability. Acting in a way that overlooks the importance of a democratic and informed consultation towards the development of regulations raises questions about corporate motives as opposed to individual rights. Furthermore, by Facebook deploying rights based language in their campaign and promising 'digital empowerment' as well as 'access' they promoted themselves as the gatekeepers of such rights – something that did not sit well with the Indian public. As per a quote in the Hindustantimes *“Just because they could have the Prime Minister visit their headquarters (town hall meeting) does not mean that the people in India could be pushed around. In that sense what TRAI has done is truly impressive.”* For many like Kothandaraman, Facebook’s media campaign proved to be the proverbial last straw on the camel’s back. *“That got me personally annoyed. I even Tweeted ASCI (Advertising Standards Council of India) to ask Facebook to explain the media miscommunication they were pushing.”*<sup>62</sup> Interestingly, Mozilla also weighed into the debates in India, sending a letter to Prime Minister Modi stating *“Zero rating is not the right solution ... we do recognize the need for new and alternative market solutions ....we are committed to doing our part alongside the other actors in the Internet community to address these challenges.”*<sup>63</sup>

Beyond the public campaigns being held in India, a number of public discussions emerged on the topic. For example, from a round table on Net Neutrality held by Centre for Internet and Society and the Observer Research Foundation in collaboration with the University of Pennsylvania, Annenberg School for Communications, it was discussed that the network neutrality debate must have a clear understanding of the relevant market, as in an oligopolistic, low penetration, large user base market, the debate is very different from those jurisdictions in which internet penetration is high. Access has formed a large part of the debate, with proponents of zero rating advocating walled gardens as the solution, however it has been pointed out that sustainable access cannot be achieved through zero rating as this would require onerous regulation to ensure fairness and competition. Zero rating is unsustainable for another reason - it has an adverse impact on diversity of content but these arguments are often countered by the suggestion that the network is designed to circumvent walled gardens and so they are not sustainable. As the internet is perceived as a public good, there are some network management

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62 <http://www.hindustantimes.com/business/how-mark-zuckerberg-s-free-basics-lost-to-net-neutrality-in-india/story-31LtjWflqgBarLhwAOWvK.html>

63 <https://blog.lizardwrangler.com/2015/05/06/zero-rating-and-the-open-internet/>

techniques that are necessarily required to ensure smooth functioning of the network and these are often referred to as "Reasonable Network Management Practices". The gold standard for this is suggested to be the Singapore model, where operators cannot block legitimate content, or render such content inaccessible due to discrimination in any form. In this model, minimum QoS and transparency work with a competition framework that is tailored to Telecom specifically. Another important point discussed is that there is a need for a single forum to deliberate on this problem as there is no coherence at the moment with multiple fora such as TRAI, DeitY, DoT, I&B Ministry all having some oversight. The only absolute consensus that emerged from the Round table discussion is the need for empirical data which would facilitate the creation of a comprehensive framework.<sup>64</sup>

## **Bangladesh**

In contrast to India and Singapore, Internet network providers in Bangladesh are governed by a licensing regime as well as the provisions of various statutes, primarily the Bangladesh Telecommunications Act, 2001. The Act mandates that ISP's must require licenses for provision of services.<sup>65</sup> Section 50 of the Act specifically prohibits operators, including ISP's from "...any discrimination or create any inconvenience to any person or group or class" as well giving "...any unfair or unreasonable preference to himself or any other person." Any ISP in contravention with this provision is liable to be fined 50,000 taka. There have also been instances of arbitrary restrictions on network capabilities, such as an order by the Bangladesh Telecommunication Regulatory Commission (BTRC) to cut the upload bandwidth to the international internet gateway by 75%, ostensibly to prevent illegal VoIP calls.<sup>66</sup> Apart from the general obligations stated above, network providers are also obligated to maintain fair, transparent and non-discriminatory interconnection agreements, and to promote and safeguard customer's interests with reasonable accessibility, as per the Interconnection Regulations released by the BTRC.<sup>67</sup>

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<sup>64</sup> <http://www.orfonline.org/research/south-asian-perspectives-on-net-neutrality/>  
<sup>65</sup> Section 3,

[http://www.btrc.gov.bd/sites/default/files/telecommunication\\_act\\_english\\_2001.pdf](http://www.btrc.gov.bd/sites/default/files/telecommunication_act_english_2001.pdf).

<sup>66</sup> *BTRC Cuts Upload Bandwidth*, (17<sup>th</sup> May 2013), available at

<http://bdnews24.com/technology/2013/05/17/btrc-cuts-upload-bandwidth>.

<sup>67</sup> Interconnection Regulations, 2004, Clause 3, *"Interconnection agreements-(a) shall be transparent, fair and reasonable, non-discriminatory in nature and debar any anti-competitive practice; (b) shall promote and safeguard the customers' interest with reasonable accessibility"*

[http://www.btrc.gov.bd/sites/default/files/interconnection\\_regulations\\_2004.pdf](http://www.btrc.gov.bd/sites/default/files/interconnection_regulations_2004.pdf)



## **Company Policies**

Across the board, the Terms of Services of the companies studied for this research do not have specific policies regarding the permissible extent of data discrimination which the company can engage in.

### **Airtel**

Airtel does not have any specific policy regarding the permissible extent of data discrimination which the company can engage in. Under the general terms and conditions set out under the Consumer Charter published by Airtel, Airtel explicitly reserves the right to “refuse, limit, suspend, vary or disconnect the services at its sole discretion, without notice and for any reasons which are found to be ‘reasonable’ by Bharti Airtel. These reasons include using the service in any manner which ‘violates any law, etc. (sic) or adversely affects or interferes in any manner’ Airtel’s service.”<sup>68</sup> Though Airtel has defended its Airtel Zero platform, no information on how companies and services are selected, or how they are priced, has been announced, making the programme highly obscure.

### **SingTel**

SingNet is mandated to submit Quality of Service and pricing information to the IDA under the law, which is made available to consumers through a transparent mechanism. The results of Quality of Service Performance for SingTel can be found on the IDA website.<sup>69</sup> Clause 7 of the Terms of Use of SingNet specify that “SingNet reserves the right to manage and control access to any computer or any Singtel System or any computer linked to any Singtel System and any data stored therein, in a manner deemed appropriate by Singtel.” Besides this, SingNet does not explicitly state the conditions under which it may alter service or pricing conditions for consumers.<sup>70</sup>

### **Grameenphone**

There is no explicit mention of the extent to which GrameenPhone is allowed to regulate or manage data or services over its network in its terms and conditions. As per GrameenPhone’s Fair Use Policy, GrameenPhone has taken ‘the responsibility to restrict the data transfer rates of ‘heavy users’ of internet data, including p2p

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68 [https://www.airtel.in/wps/wcm/connect/39d9a352-bf69-4489-955c-cbf4ef962d84/Telecom\\_Consumer\\_Charter\\_Airtel\\_English\\_2015.pdf?MOD=AJPERES](https://www.airtel.in/wps/wcm/connect/39d9a352-bf69-4489-955c-cbf4ef962d84/Telecom_Consumer_Charter_Airtel_English_2015.pdf?MOD=AJPERES)

69 <https://www.ida.gov.sg/Policies-and-Regulations/Industry-and-Licensees/Standards-and-Quality-of-Service/3G-Services/Quality-of-Service-Performance-Results-for-October-December-2015>

70 <http://www1.singtel.com/terms-broadband.html>

software or file sharing software users. If such a subscriber continues to use the services 'inappropriately' in violation of the standard conventions of use, GrameenPhone has the right to terminate the subscription agreement after due notice. On interpretation, this appears to imply that Grameenphone considers use of p2p or filesharing software as being in violation with its terms and reserves the right to terminate users accounts upon notice. The policy also notes that users most likely affected by the Fair Usage Policy are users of peer to peer networks, online continuous gamers, or other heavy downloader.<sup>71</sup> Instead of charging subscribers who wish to use 'unlimited' data packs, GrameenPhone's Fair Use Policy allows GP to place restrictions on the data transfer rates. There is no indication of whether the subscriber is made aware of these restrictions when they are placed.

## **Conclusions**

Lack of regulation around net neutrality or related issues such as zero rating and OTTs has led to emerging business models which in turn are pushing governments into forming relevant regulation. The debates that have emerged in India, Singapore, and Bangladesh demonstrate that the subject of net neutrality is not an isolated issue and speaks to a number of areas including access, privacy, competition, innovation, jurisdiction, and security – and is also raising larger questions about governance and rights and the role of the private sector in enabling, protecting, and being accountable for these and the expectations of stakeholders on the same. Indeed, Mark Zuckerberg himself (perhaps unintentionally) began to touch on this when justifying Free Basics in his open letter stating “We have collections of free basic books. They're called libraries. They don't contain every book, but they still provide a world of good. We have free basic healthcare. Public hospitals don't offer every treatment, but they still save lives. We have free basic education. Every child deserves to go to school. And in the 21st century, everyone also deserves access to the tools and information that can help them to achieve all those other public services, and all their fundamental social and economic rights.”<sup>72</sup> All of the services listed by Zuckerberg are services traditionally offered by the government, the state, or the municipality. As ICT companies begin to take on governance issues, questions about the duty of these companies to be responsible and accountable for the rights of users are more relevant and important to ask. Because of the growing involvement of ICT companies in the rights of users – more than ever companies need to be transparent and precise about their services and agreements – something

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71 <http://www.grameenphone.com/sites/default/files/Grameenphone-Fair-Usage-Policy-Updated-September-04-2013.pdf>

72 <http://blogs.timesofindia.indiatimes.com/toi-edit-page/free-basics-protects-net-neutrality/>

that is presently lacking on all three company's studied. Company's also need to be cognizant of contextual ethos's and willing to democratically engage with users and governments.

As other jurisdictions across South Asia and the world develop net neutrality regulation and begin to formalize country positions on services such as Free Basics, India's and Singapore's experience highlights the strength of the public's voice and the importance of consultative and democratic regulation formation. Equally important when forming regulation, as demonstrated by the IDA's net neutrality regulation, is the incorporation of transparency requirements, evidence based, targeted, and proportionate regulation, a clear market failure, and a commitment by the regulator to continue to investigate and monitor abuses that are key to the problem of net neutrality. Mozilla's Chair Mitchell Baker also raises a number of important flags to policy makers and companies across the world in her blog 'Zero Rating and the Open Internet' pointing out that :

1. Solutions are needed to address the challenge of how to make the Internet affordable to those who cannot afford data charges
2. Any solution must take into consideration the dynamics and realities of the target market
3. Though a regulatory ban would force the private sector to find a different solution, it is important to be cognizant of unintended consequences from legislation and the fact that a ban could result in exceptions being created – placing governments in a position of making decisions that impact freedom of expression.<sup>73</sup>

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73 <https://blog.lizardwrangler.com/2015/05/06/zero-rating-and-the-open-internet/>

## **Online Copyright Infringement**

The conflict between copyright – the rights of creators over original works of intellectual property – and the freedom of speech have been greatly exacerbated with the advent of digital media and the Internet, which makes the replication and distribution of such protected creations cheap, fast and difficult to control. The conflicts arises out of the paradigm shift in models of information control and distribution from the analogue to the networked, digital age. Whereas copyright was, to a large extent, easy to enforce and patrol in an analogue age where duplication and distribution involved significant costs and centres in the real world, digitization and communications technology, such as P2P file-sharing, have removed these traditional points of violation and therefore made enforcement a more complicated issue. The role of intermediaries in preventing copyright infringement has changed accordingly. Legal regimes have adapted copyright law to evolving technologies, both through legislation and via judicial analysis, from Sony’s famous “Betamax”,<sup>74</sup> to tube-sites on the World Wide Web and newer models of Torrent and P2P sharing, there has been a shift in the legal liabilities and responsibilities of intermediaries in response to copyright infringement. Copyright Infringement may be of two kinds – primary infringement and secondary infringement. While the former relates to the deliberate sharing and reproduction of copyrighted works in an infringing manner, secondary liability is concerned with liability for providing the means for infringing by the primary infringer. Intermediaries, as online service providers or network providers, are mostly concerned with liability for secondary infringement.

## **Regulatory Regimes**

### **India**

In India, the legal regime governing intermediary liability for copyright infringement, is unfortunately vague and uncertain, with seemingly conflicting legal provisions in separate statutes. Primarily two questions arise in this regard: Firstly, do the safe harbour provisions of the IT Act apply to secondary copyright infringement? Secondly, what is the scope of intermediary liability under the Copyright Act, 1957? As observed in the previous sections, Section 79 of the Information Technology Act generally governs liability and safe harbour provisions for intermediaries. However, there is a conflict between Section 79 and Section 81 of the IT Act, both of which are non obstante provisions, which implies that they have overriding effect – while Section 79 states specifically that the safe harbour provisions apply to every intermediary that fulfils the ingredients of that section, notwithstanding anything

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74 Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

contained in any law for the time being in force; Section 81 states that ‘nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957’. The High Courts of Delhi<sup>75</sup> and Madras,<sup>76</sup> having had an opportunity to examine these sections, have held that S. 81 overrides the safe-harbour provisions under S. 79 of the IT Act.<sup>77</sup>

Therefore, Courts have looked to the Copyright Act for the scheme of liability applicable to online intermediaries. The Copyright Act, 1957 in India, under S.51(a)(ii) deems as an infringer, “...any person who 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.”

Section 52(1) provides for exemptions from liability for infringement. The relevant part of S.52 states –

“(1) The following acts shall not constitute an infringement of copyright, namely:

(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access

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75 Super Cassettes Industries Ltd. v. Myspace Inc. & Another, Delhi High Court , CS(OS)2682/2008, *available at* <http://indiankanoon.org/doc/216257/>.

76 RK Productions v. BSNL, Madras High Court ,Civil Suit 208/2012, O.A No. 230 of 2012, *available at* <http://indiankanoon.org/doc/100370340/>.

77 This interpretation of the scheme of the Act has been criticized, see Ananth Padmanaban, *Give Me My Space and Take Down His*, 9 INDIAN JOURNAL OF LAW AND TECHNOLOGY, *available at* <http://www.ijlt.in/archive/volume9/Ananth%20Padmanabhan.pdf>; Amlan Mohanty, *Death of Safe Harbour for Intermediaries*, [http://spicyip.com/2011/08/death-of-safe-harbour-for\\_06.html](http://spicyip.com/2011/08/death-of-safe-harbour-for_06.html).

and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access;”

Section 51(a) has been interpreted to include online intermediaries such as content hosting websites like Myspace, making them liable for infringement under that Section, subject to S.52.<sup>78</sup> S. 52, which was amended by the Copyright (Amendment) Act, 2012, specifically provides for safe harbour for distinct categories of intermediaries – first, those who are involved in the ‘technical process of electronic transmission’, i.e. ‘mere conduit’ ISP’s, and secondly, those involved in providing ‘electronic links, access or integration’, such as file sharing or hosting websites. 52(1)(c) however, does not apply when the provider has ‘reasonable grounds for believing’ that storage is an infringing copy, similar to language used in 51(a)(ii), which has been broadly interpreted by high courts.<sup>79</sup> Moreover, it provides for a form of ‘notice and takedown’ of infringing content, which is clarified in the Copyright Rules.<sup>80</sup> Note that these sections provide a wider ground for liability than the IT Act, which requires ‘actual knowledge’ as opposed to ‘reasonable grounds for believing’.

Another problematic aspect of intermediary liability for infringement in India, has been the issuance of several ‘john doe’ or ex-parte orders against unknown defendants, being passed by Courts. Such blanket orders have placed the burden upon intermediaries, including ‘mere conduit’ ISP’s, to take proactive steps to ensure that they are not entangled in the web of secondary infringement. Unsurprisingly, this has led to collateral censorship by the ISP’s and blocking of legitimate websites and content. On the other hand, some cases have in fact even made intermediaries

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78 Super Cassettes Industries Ltd. v. Myspace Inc. & Another, Delhi High Court , CS(OS)2682/2008, *available at* <http://indiankanoon.org/doc/216257/>.

79 Super Cassettes Industries Ltd. v. Myspace Inc. & Another, Delhi High Court , CS(OS)2682/2008, *available at* <http://indiankanoon.org/doc/216257/>.

80 As per the Copyright Rules, the rights holder must give written notice to the intermediary, including details about the description of work for identification, proof of ownership of original work, proof of infringement by work sought to be removed, the location of the work, and details of the person who is responsible for uploading the potentially infringing work (if available). Upon receipt of such a notice, the intermediary must disable access to such content within 36 hours. Host intermediaries must also display reasons for disabling access to anyone trying to access the content. The intermediary is permitted, but not required, to restore the content after 21 days if no court order is received to endorse its removal. It is then not required to respond to further notices from the same complainant about the same content at the same location.

liable for overbroad blocking upon receiving court orders, further adding to the confusing state of affairs concerning intermediary liability.<sup>81</sup>

## **Bangladesh**

As mentioned above, Information and Communications Technology Act, 2006, (ICT Act) is the primary legislation governing online speech in Bangladesh, section 79 of which contains safe harbour provisions for intermediaries which seeks to protect them from liability for any third party contravention of the provisions of the ICT Act.<sup>82</sup> It must be noted that this safe harbour provision only protects them from liability under the ICT Act and does not refer to contravention of provisions of any other legislation. Bangladesh Telecommunications Regulation Act, 2001 (BTR Act) on the other hand allows the Bangladesh Telecom Regulatory Commission (the “BTRC”) to stop any signal, message or request from any subscriber (where it is expedient to do so), “in the interest of the sovereignty, ..... or for preventing incitement of a legally recognised offence.” This seems to imply that intermediaries can potentially be asked by the BTRC to prevent access to infringing material under the provisions of the BTR Act.

It must be noted that while ICT Act in Bangladesh does not have any takedown regime as can be seen in other jurisdictions such as India (and Singapore to be discussed below). It should also be noted that while the ICT Act does have safe harbour provisions, these provisions seem to be limited only to violations of the ICT Act and do not appear to extend to copyright infringement or contravention of any other laws. However, as discussed above, power is given to the BTRC under the BTR Act to potentially stop copyright infringement since the words used in the BTR Act are much wider and not limited to that particular legislation.

## **Singapore**

Liability under the Singapore Copyright Act overrides the safe-harbour provisions in the Electronic Transactions Act, which have been mentioned above. Secondary liability for infringement (authorizing infringement) has been interpreted by the Singapore Court of Appeal to include intermediaries who sanction, authorize or countenance the primary infringement, which would occur when the intermediary

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81 Juhi Gupta, *John Doe Copyright injunctions in India*, 18 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 351, (July 2013), available at [http://nopr.niscair.res.in/bitstream/123456789/20289/1/JIPR%2018\(4\)%20351-359.pdf](http://nopr.niscair.res.in/bitstream/123456789/20289/1/JIPR%2018(4)%20351-359.pdf).

82 It is interesting to note that the term used in section 79 is “network service provider” and that term is defined to mean an “intermediary”, however the term “intermediary” itself is not defined anywhere in the ICT Act.

“grants or to purportedly grants the right to do the act complained of.”<sup>83</sup> In *RecordTV Pte Ltd v. MediaCorp TV Singapore Pte Ltd.*, the Court of Appeals held that “where the Copyright Act is unclear as to how much copyright protection ought to be granted to a copyright owner, the courts should not be quick to construe a statutory provision so liberally as to deter or restrict technological innovations by preventing them from being applied in a manner which would benefit the public without harming the rights of the copyright owner.”, thereby limiting the scope for secondary liability for intermediaries.

The Copyright law was amended in 1999 and further in 2004 to include safe harbour provisions for network service providers. Section 193A of the Copyright Act states that the safe harbour defences are to apply to “network service providers,” which includes those intermediaries which provide services and connections for data transmission or routing, as well as those that provide or operate facilities for online services or network access.<sup>84</sup> This definition presumably covers both ‘mere conduit’ intermediaries as well as online hosting platforms. Section 193B, 193C and 193D, modelled on the exemptions in the US DMCA, outline the various conditions for safe harbour for Internet intermediaries. This includes copyright infringement that “occurs by reason of the transmission, routing, provision of connections or transient storage by the ISP of an electronic copy of the material”,<sup>85</sup> provided the transmission is not initiated by the ISP, and that ISP is not involved in the same by way of selection or modification. Section 193C indemnifies the “making, through an automatic process, a cached copy of a work on its network from the originating network, in response to a user’s action, in order to facilitate efficient access to the material by its users.”<sup>86</sup> Section 193D indemnifies the storage or linking of any infringing electronic copy by the network provider. In the both the above cases, the ISP must not receive financial benefit directly from the infringement. Further, Section 193C of the Act envisages a notice and takedown regime by the persons who own the copyright, whereby if the network service provider receives notice by or under the authority of the owner of the copyright stating the prescribed matters, the network service provider has to expeditiously take reasonable steps to remove or disable access to the cached copy of the material on the primary network. Section 193D does not operate when the intermediary has actual knowledge of, or the presence of

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83 Ong Seow Pheng v. Lotus Development Corporation, [1997] 3 SLR 137.

84 Daniel Seng, *Comparative Analysis Of The National Approaches To The Liability Of Internet Intermediaries*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf)

85 Section 193B.

86 Section 193C.



“circumstances which lead to the inevitable conclusion” that, infringement is being committed. Moreover, Section 193DA seeks to indemnify any network service provider for any liability arising from the take-down of content under a legal notice under the Act, provided certain measures, such as notice to the affected user, are fulfilled.<sup>87</sup> The above exemptions are only for monetary relief, and Section 193DB specifically allows the court to issue a number of other orders for relief, such as injunctions.

In 2014, the Act was substantially amended to allow Copyright holders to approach the Singapore High Court for an order to ISP’s for blocking websites, presumably torrent and p2p websites like ‘The Pirate Bay’ which “flagrantly commit or facilitate copyright infringement in materials”, a criteria to be determined on a case-to-case basis. Network service providers cannot avail of the safe harbour defence upon the service of such an order.<sup>88</sup>

The legal regime for both general intermediary liability as well as for copyright infringement in Singapore is much for complicated and tries to cover more ground than the regimes in India and Bangladesh. But it is clear that while Bangladesh lacks a take down regime for its copyright law, both India and Singapore have tried to strike a balance between protection of copyrights and protection of intermediaries for actions taken by third parties using their resources.

## **Company Policy**

### **India**

Airtel’s consumer charter specifies that “The customer shall ... indemnify Bharti Airtel Limited for any claim against Bharti Airtel Limited out of any infringement or violation of copyright by the Customer or by anyone else using the mobile connection of the Customer.” However there is no specific policy by Airtel regarding how rights holders must approach Airtel in cases of possible copyright infringement, what mechanism Airtel follows in restricting access to copyrighted material or how it informs affected users. The absence of any standardised mechanism for reporting copyright infringement in Airtel’s company policy has grave implications for the implementation of the take-down provisions contained in the Copyright Act and is something that should either be addressed by the ISPs themselves otherwise it may

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87 The Singapore Copyright Act, 1987.

88 Section 193DDA, Singapore Copyright Act, inserted vide the Copyright Amendment Bill, *available at* [http://www.parliament.gov.sg/sites/default/files/Copyright%20\(Amendment\)%20Bill%2016-2014.pdf](http://www.parliament.gov.sg/sites/default/files/Copyright%20(Amendment)%20Bill%2016-2014.pdf)

potentially result in it being enforced through regulations as in the case of privacy policies.<sup>89</sup>

## **Bangladesh**

As per the Terms and Conditions of GrameenPhone's Internet subscription, the subscriber has an obligation to not engage in "...sending, receiving, publishing, posting, distributing, disseminating, encouraging the receipt of, uploading, downloading, recording, reviewing, streaming or using any material which is... a breach of the copyright, trademark, intellectual property, confidence, privacy or any other rights of any person." Further, the terms and conditions prohibit "...activities that are in breach of any other third party's rights, including downloading, installation or distribution of pirated software or other inappropriately licensed software, deletion of any author attributions, legal notices or proprietary designations or labels in any file that is uploaded, falsification of the origin or source of any software or other material." Similar terms are reflected in the terms and conditions prescribed by GO Broadband. While not explicitly stated, presumably a breach of the terms and conditions would allow GrameenPhone to claim contractual damages as well as to terminate the contract of subscription. [Note: Do we have any examples that go beyond the terms of service? Have they ever acted on this, or interacted with the copyright rules in any way at all?]

It must be noted here that just like in the case of Airtel in India, even GrameenPhone's Terms and Conditions do not provide for any take down provisions, but that is perhaps expected since (as mentioned above) the copyright regime in Bangladesh does not have the concept of take down provisions for copyright infringement.

## **SingTel**

SingTel has a comparatively clear and comprehensive policy regarding copyright infringement. As per its Copyright Act Notification policy,<sup>90</sup> copyright holders may send a take down notice in the form prescribed by the Act, upon receipt of which SingNet will take 'reasonable steps' to disable the infringing content. As soon as the material is removed or disabled, SingTel will take reasonable steps to notify the person who has posted the material. The original poster may, in accordance with the Act, send a valid counter-notice to SingTel to restore the material. Singtel will then take reasonable steps to restore the material if it is technically and practically

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89 Regulation 3(1) of the Information Technology (Intermediaries guidelines) Rules, 2011 provides for compulsory publication of privacy policies by intermediaries.

90 <http://info.singtel.com/copyright>

feasible to do so unless the copyright owner commences court proceedings to prevent the restoration of the material and SingTel is informed of such proceedings.

Under the Network Service Provider Regulations in the Copyright Act, NSP's are not entitled to the safe harbour provisions unless the NSP has adopted and reasonably implemented a policy for termination of the accounts of 'repeat infringers'.<sup>91</sup> In accordance with the same, Clause 8.2 of SingTel's General Terms and Conditions prescribe that SingTel may suspend or terminate the services to a repeat infringers in circumstances which it deems appropriate, upon giving not less than 3 days notice.

SingTel's Acceptable Use Policy specifies that the service must not be used to infringe any copyright of any third party. Under the same policy, SingTel reserves the right to investigate any violation, and remove material deemed to violate the policy, or to suspend or terminate the services to the violator.

## **Company Practice**

### **India**

There have been several instances of ISP's and specifically Airtel and MTNL (being two of the largest ISP's), being required to take down copyright infringing content or even websites under a Court order. Mostly, such a requirement is in furtherance of John Doe or Ashok Kumar orders against unknown infringers, which require the ISPs to assist the Court and the Copyright holders in blocking identified URL's. This procedure, developed wholly by way of judicial inventiveness, due to lack of legislative framework for such order, has implicated online speech to some degree, often leading to wholesale banning of websites which were are unrelated to the case at hand since the ISPs prefer to play it safe and not err on the wrong side of a court order.<sup>92</sup>

- In 2011, Reliance Big Pictures obtained a John Doe injunction from the Delhi High Court to prevent infringement of its movie Singham. It then served notices to ISP's including Airtel and MTNL to block file-sharing and torrent websites, which they promptly complied with.<sup>93</sup> A similar order was obtained

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91 Although the term "repeat infringer" has not been defined in the NSP Regulations, however the SingTel Terms and Conditions seem to give SingTel the power to determine whether a customer is a repeat infringer.

92 Ananth Padmanabhan, *Give Me My Space and Take Down His*, 9INDIAN JOURNAL OF LAW AND TECHNOLOGY, (2013).

93 Reliance BIG Pictures Got A Court Order, *available at* <http://www.medianama.com/2011/07/223-files-sharing-sites-blocked-in-india-because-reliance-big-pictures-got-a-court-order/>.

for the movie *Bodyguard* in 2014.<sup>94</sup> What has been noticed in such John Doe orders is that, though a mixture of overenthusiastic plaintiffs and fearful ISPs, a number of time entire websites are blocked rather than just the specific infringing links. This practice has huge implications for freedom of expression and it can only be hoped that with greater awareness, both Courts and ISPs will take note of this problem and start acting in a more precise manner.

- In 2012, Airtel and MTNL along with other ISP's were asked to comply with a John Doe order for restricting the infringement of the Tamil Films 3 and Dammu. In response to a letter from Copyright Labs and in pursuance of the court order, Airtel and MTNL blocked entire websites for a period of months. These websites included video sharing site Vimeo and Dailymotion, bookmarking service xmarks.com as well as several major torrent downloading services.<sup>95</sup> It must be noticed here that the original order<sup>96</sup> granting the injunction did not contain any list of websites or infringing links and the Court granted a general order restraining the public in general from infringing the copyright of the petitioners, but the order itself did not have any list of links or websites. The issue of Airtel's liability was further compounded when it was fined Rs. 20,000 by a consumer forum in Karnataka for engaging in wholesale blocking instead of URL-specific blocking which the Court had specified.<sup>97</sup>
- In 2012, ISP's across the nation were asked by the Calcutta High Court to block a list of 104 music file-sharing websites, through any mechanism including DNS or IP-Based blocking or even Deep Packet Filtering.<sup>98</sup>
- In 2013, Yash Raj films obtained an injunction against illegal sharing of its film *Dhoom 3*, and the Delhi High Court ordered ISP's including Airtel and MTNL

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94 Reliance Entertainment Gets Order To Block Piracy Of "Bodyguard" On File Sharing Sites, available at <http://www.medianama.com/2011/08/223-bodyguard-bollywood-piracy-reliance/>.

95 Airtel Blocks Vimeo, DailyMotion & All Major Torrent Sites In India Following John Doe Order, available at <http://www.medianama.com/2012/05/223-airtel-blocks-vimeo-dailymotion-all-major-torrent-sites-in-india/>.

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<https://drive.google.com/file/d/0Bxi2TzVXuI5ZUI9EcIRQZXIRdVdUb3c2S3EwSk1Udw/view?pref=2&pli=1>

97 *Vinay B v. Airtel Authorized Representative*, CC 226/2012, District Consumer Forum at Shimoga.

98 Indian Music Industry Gets Court Orders For Blocking 104 Music Sites, available at <http://www.medianama.com/2012/03/223-india-music-block/>.

to remove websites within 48 hours of receiving written notice from the copyright holder.<sup>99</sup>

- In 2014, the Delhi High Court issued a John Doe injunction mandating ISP's to block 472 websites which were deemed to be infringing on MSM media's broadcasting rights for the FIFA 2014 World Cup.<sup>100</sup>
- In 2014, the Delhi High Court again passed an interim order against the DoT to issue orders to ISP's under the IT Act for blocking more than 100 websites on grounds that the websites infringed on broadcasting rights for a cricket series telecast.<sup>101</sup>

## Bangladesh

There is no evidence of ISP's being directly implicated under the existing legal regime for copyright protection in Bangladesh.

## Singapore

SingTel, as the largest ISP in Singapore, is central to the issue of securing copyright enforcement and balancing freedom of speech in Singapore. Under the legal regime in Singapore, conduit ISP's are granted safe harbour in most conditions and can only be obliged to take down content under a court order. Moreover, as per the recent amendments, ISP's are required to block access to 'flagrantly infringing' websites, where a copyright holder approaches the court for such an order.

There are few instances of SingTel blocking access to websites on the grounds of copyright violation, since there is no explicit obligation to do so in the absence of a court order. However, there has been a reported instance of SingTel having to disclose subscriber information to the Court to allow prosecution for primary copyright infringement, in April 2015.<sup>102</sup> As of the time of writing, most torrent and file-sharing websites including kickasstorrents and utorrent are accessible on the SingNet network.

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99 HC restrains cable operators from illegally showing Dhoom 3, *available at* [http://www.business-standard.com/article/pti-stories/hc-restrains-cable-operators-from-illegally-showing-dhoom-3-113120201327\\_1.html](http://www.business-standard.com/article/pti-stories/hc-restrains-cable-operators-from-illegally-showing-dhoom-3-113120201327_1.html).

100 Delhi High Court Orders Blocking of Websites after Sony Complains Infringement of 2014 FIFA World Cup Telecast Rights, THE CENTRE FOR INTERNET AND SOCIETY, *available at* <http://cis-india.org/internet-governance/blog/delhi-high-court-orders-blocking-of-websites-after-sony-complains-infringement-of-2014-fifa-world-cup-telecast-rights>.

101 Delhi High Court's John Doe Order in Favour of Star News: Need for a Third-Umpire Review of ISP Liability?, SPICY IP, *available at* <http://spicyip.com/2014/08/delhi-high-courts-john-doe-order-in-favour-of-star-news-need-for-a-third-umpire-review-of-isp-liability.html>.

102 Illegal downloads: Singtel provides subscriber details after court order, *available at* <http://www.todayonline.com/singapore/singtel-turn-over-details-over-100-subscribers-over-illegal-dallas-buyers-club-downloads>.

## **Conclusions**

The legal framework for copyright infringement in the context of intermediary liability is different in each context studied – with Bangladesh not having a clear regulation in place. Although GrameenPhone does not have a clear policy on how to deal with complaints of copyright infringement, they do mention in their terms and conditions that copyright infringement is a prohibited activity. This demonstrates the importance of the topic and the fact that Grameen Phone could potentially be held liable for copyright infringement by companies not located in Bangladesh. Both India and Singapore function on a dual system of take down notices as well as court orders, but India has also adopted the practice of 'John Doe' orders (or Ashok Kumar orders as they known locally). The problem with these John Doe orders, as mentioned above, is that in their eagerness to comply with court orders and avoid contempt of court proceedings, the ISPs very often indulge in extensive over-blocking which may go beyond the scope of what is required of them. In order to avoid this sort of overcompensation by the ISPs two things are required: i) the Courts of law need to be more specific when passing injunction orders by ensuring that only specific infringing links are blocked and not the whole website or other non-infringing links; ii) the ISPs also need to take a stronger stand in favour of freedom of expression and only take such actions as are required by the court orders.

Company policies around copyright infringement at SingTel are well documented with process and requirements laid out and there appear to be few cases of “over blocking” in response to copyright infringement. However even these policies leave some room for interpretation for the company such as the issue of determining whether a subscriber is a “repeat infringer”. Further the company policy of SingTel rightly provides that once the allegedly infringing material is blocked, the person who had uploaded the same shall be given notice of such blocking. This sort of a notice to the original uploader is not provided for in Airtel’s or MTNL’s terms and conditions (which anyways do not have any policy on copyright infringement and take down notices). Airtel and MTNL do not have clear policies around how to deal with copyright infringement and there are numerous cases of the ISPs “over blocking” and there are instances of indiscriminate blocking. This could be a reflection on the lack of a clear company policy combined with the use of 'John Doe' orders to stop copyright infringement which are often implemented beyond their actual scope. Besides SingTel, no company provided notice of content being blocked on the grounds of copyright infringement and no company provided a specific redress mechanism to individuals.

## **Content Regulation**

### **Legal and Political Context**

## India

Online content is regulated in India primarily through provisions of the (Indian) Information Technology Act, 2008 (IT Act) – specifically sections 69A and 79 and the corresponding rules framed under these provisions. Section 69A of the IT Act and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009,<sup>103</sup> provide a legal basis for the government to issue content blocking orders to service providers. Section 79 and the associated Information Technology (Intermediary Guidelines) Rules, 2011 establish a ‘liability’ regime for intermediaries, and establish a process by which intermediaries must take down content on receipt of a court order.<sup>104</sup> Additionally, the provisions under the (Indian) Copyright Act, 1957 enables rights’ holders to approach the courts for the issuance of orders blocking or taking down infringing content.

### Section 79

Under the IT Act, an Intermediary has a broad definition which includes social media platforms, cyber cafes and network infrastructure providers.<sup>105</sup> Section 79 of the IT Act provides for safe harbour provisions for intermediaries, exempting them from responsibility for any third party information, data, or communication link made available or hosted by them. The exemptions only apply if the activities performed by the intermediary are limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted, or where the intermediary does not initiate the transmission, modify it or select the receiver of the transmission. Further, the intermediaries are required to exercise due diligence and comply with guidelines prescribed. Significantly, the safe-harbour does not apply when the Intermediary has received actual knowledge, or has been notified by the appropriate government agency, about potentially unlawful material that the intermediary has control over, and fails to act on such knowledge by disabling access to the material.<sup>106</sup>

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<sup>103</sup> Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, *available at* <http://cis-india.org/internet-governance/resources/information-technology-procedure-and-safeguards-for-blocking-for-access-of-information-by-public-rules-2009>.

<sup>104</sup> Shreya Singhal and Ors. v Union of India and Ors., Writ Petition(Criminal) No.167 OF 2012, *available at* [http://supremecourtindia.nic.in/FileServer/2015-03-24\\_1427183283.pdf](http://supremecourtindia.nic.in/FileServer/2015-03-24_1427183283.pdf).

<sup>105</sup> Section 2(w) of the Information Technology Act, 2008.

<sup>106</sup> Section 79, Information Technology Act, 2000: *“Exemption from liability of intermediary in certain cases – “(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him. (corrected vide ITAA 2008)(2) The provisions of sub-section (1) shall apply if- (a) the*

Under Section 79(2)(c), the Central Government has notified Information Technology (Intermediary Guidelines) Rules, 2011. These rules provide for various measures to be adhered to by Intermediaries to avoid liability for content posted online. Rule 3, in particular, requires intermediaries to take down or disable content in numerous cases including where it is proprietary content of another person, or objectionable, infringing on another party's intellectual property, and threaten national interest. Intermediaries are required to frame terms and conditions for users to avoid posting the above categories of information. Rule 3(3) provides that Internet Intermediaries may not “knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information”.<sup>107</sup> The scope of this section is unclear, because it seems to provide for an offence outside of the IT Act, and also does not specify what the obligations or penalties under this rule are. Rule 3(4) provides that any intermediary, who hosts, publishes or stores information belonging to the above specified categories, within 36 hours of receiving ‘actual knowledge’ about such information by any ‘affected person’ (both terms that remain undefined and vague), shall disable such information. Apart from these provisions to regulate content, Rule 3(7) also requires intermediaries to provide “information or any such assistance” to an undefined and broad category of government agencies, upon receiving a written request.

The Intermediary Guidelines Rules have been heavily critiqued in India and studies have shown that the structure and vagueness of the framework encourages service providers to remove legitimate content due to uncertainty and the possibility of being held liable.<sup>108</sup> In 2015, the constitutional validity of Section 79 and the

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*function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or*

*(b) the intermediary does not-*

*(i) initiate the transmission,*

*(ii) select the receiver of the transmission, and*

*(iii) select or modify the information contained in the transmission*

*(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf*

*(3) The provisions of sub-section (1) shall not apply if-*

*(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act*

*(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable*

*access to that material on that resource without vitiating the evidence in any manner.*

*Explanation:- For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."*

<sup>107</sup> Information Technology (Intermediary Guidelines) Rules, 2011.

<sup>108</sup> <http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf>



Guidelines were considered by the Supreme Court in *Shreya Singhal v Union of India*.<sup>109</sup> While the court upheld the validity of Section 79 and the Guidelines framed under that section, the Court interpreted the requirement of ‘actual knowledge’ under both Section 79(3) and Rule 3(4) to require the actual knowledge of a court order which asks an Intermediary to disable information. Moreover, the Court held that any such order must conform to the restrictions laid down under Article 19(2) of the Constitution, detailing permissible restrictions on the freedom of speech. This clarifies the position of safe harbour to a large extent and prevents the Intermediaries from being forced to remove legitimate content in the absence of a court order.

### Section 69A

Section 69A of the IT Act enables the government to, under certain circumstances, order any intermediary to block access to any information.<sup>110</sup> Failure to comply with the order by the Intermediary may result in a fine or imprisonment for a term up to seven years. The Rules under Section 69A prescribe that only ministries and central and state government agencies, through specific representatives known as ‘nodal officers’, may request the blocking of access to content by any Intermediary. The process of blocking requires the examination of the request by a committee. Upon the committee’s recommendations, the ‘designated officer’, who is an officer of the Central Government not below the rank of the joint secretary, may issue blocking orders to the identified intermediary. The entire process is kept confidential. The only safeguard provided for is the requirement of ‘reasonable efforts’ by the designated officer to locate the user or intermediary who has hosted the content and allow for such person or intermediary to appear before the committee to submit

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<sup>109</sup> *Shreya Singhal and Ors. v Union of India and Ors.*, Writ Petition(Criminal) No.167 OF 2012, available at [http://supremecourtindia.nic.in/FileServer/2015-03-24\\_1427183283.pdf](http://supremecourtindia.nic.in/FileServer/2015-03-24_1427183283.pdf).

<sup>110</sup> Information Technology Act, 2000, Section 69A – “*Power to issue directions for blocking for public access of any information through any computer resource (1) Where the Central Government or any of its officer specially authorized by it in this behalf is satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-sections (2) for reasons to be recorded in writing, by order direct any agency of the Government or intermediary to block access by the public or cause to be blocked for access by public any information generated, transmitted, received, stored or hosted in any computer resource. (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out shall be such as may be prescribed. (3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.*”

their reply and clarifications. There are also procedures for blocking in case of emergencies, in which case procedural safeguards such as the committee deliberation or the hearing of the content provider are not required.<sup>111</sup>

The provisions for blocking of access by the Government were also challenged in *Shreya Singhal*, however, the Supreme Court upheld Section 69, holding that the law is narrowly drawn and contains appropriate safeguards. However, the law is vulnerable to abuse, particularly because of the inherent lack of transparency and public or judicial oversight within the current mechanism. As a result, several controversies have erupted over seemingly unjustified and unreasoned blocking of websites and content by the government, such as the 2015 (leaked) ban of pornographic sites,<sup>112</sup> or the inexplicable blocking of certain websites such as GitHub or Bleacher Report.<sup>113</sup>

Finally, the ISP licensing guidelines issued by the Department of Telecommunications have requirements for intermediaries providing network services and infrastructure to comply with. Under Clause 27 of the guidelines, ISPs are supposed to take measures to prevent the “flow of obscene, objectionable, unauthorised or any other content infringing copy-rights, intellectual property right and international & domestic Cyber laws in any form” over their network. Clause 34 notes that “The ISP licensee shall block Internet sites and individual subscribers, as identified by Licensor.” ISPs, which require a government license to operate, are expected to comply with these guidelines as a term of their license.<sup>114</sup>

The regulatory framework around content regulation in India, in part as a result of public pressure, is beginning to incorporate stronger safeguards — such as requiring judicial order for the removal of content and ensuring that no restriction goes beyond the constitutional limitations to freedom of expression. Despite this, there are still a number of areas where India could strengthen the regulatory framework for content removal including:

a. Allowing transparency of blocking orders

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<sup>111</sup> Rule 9 of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009

<sup>112</sup> *Government Goes After Porn, Makes ISPs Ban Sites*, available at <http://cis-india.org/news/times-of-india-javed-anwer-june-26-2013-govt-goes-after-porn-makes-isps-ban-sites>.

<sup>113</sup> *Government Wants 32 URL's including dailymotion, vimeo, banned in India*, INDIAN EXPRESS, (31<sup>ST</sup> December 2014), available at <http://indianexpress.com/article/technology/social/government-wants-32-urls-including-dailymotion-vimeo-banned-in-india/>.

<sup>114</sup> Internet Service Provider Guidelines, (24<sup>th</sup> August, 2007), available at <http://www.dot.gov.in/data-services/licensing-internet-services>.

- b. Recognizing that intermediaries play different functions and thus require different regulation by replacing the present definition of 'intermediary' which specifies each type of intermediary, with broad categories of intermediaries and tailoring the law
- c. Instituting proportionate penalties for non-compliance with orders or the law.
- d. Using precise, defined, and consistent language within the law.
- e. Instituting a specific redress mechanism for violations of freedom of expression.

## **Bangladesh**

The regulation of online speech in Bangladesh is modeled largely on the UNCITRAL rules and on the Indian IT Act.<sup>115</sup> The Information and Communications Technology Act, 2006, (ICT Act) is the primary legislation governing online speech in Bangladesh. The ICT Act has been heavily criticized for its use to stifle political speech and dissent.<sup>116</sup> Further, there have been instances of arbitrary website blocking by the government, through the Bangladesh Telecom Regulatory Commission (BTRC), such as the blocking of access to Facebook<sup>117</sup> and YouTube.<sup>118</sup> The authority under which these websites were blocked is unclear, and service providers have declared the orders as 'ad-hoc and arbitrary.'<sup>119</sup>

Section 35 of the BTRA requires every telecoms service provider to have a licence in order to operate, and its provisions apply to all such licence holders. There is no definition of a "telecoms service provider" in the BTRA. However, the definitions of "telecommunication" and "telecom service" are widely drawn, covering users and service providers in connection with telecommunication services and apparatus.

Under section 45 of the ICT Act, the ICT Controller may issue an order to a licence-holder under the ICT Act to take certain measures or cease certain activities as specified in such order, if necessary to ensure compliance with the provisions of the ICT Act, or rules and regulations made under it. There are no oversight mechanisms

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<sup>115</sup> Final Report On The Law Of Information Technology, LAW COMMISSION OF BANGLADESH, available at <http://www.lawcommissionbangladesh.org/wplit.pdf>.

<sup>116</sup> Global Voices, Bangladesh's ICT Act Stoops to New Lows, (18th Sep 2013) available at <https://advoc.globalvoices.org/2013/09/18/bangladeshs-ict-act-stoops-to-new-lows/>.

<sup>117</sup> BBC, *Bangladesh Blocks Facebook over 'Offensive Cartoons'*, (10<sup>th</sup> May, 2010), <http://www.bbc.co.uk/news/10192755>.

<sup>118</sup> Abdullah Mamun, *YouTube Blocked in Bangladesh*, THE DAILY STAR, (18<sup>th</sup> September, 2012) available at <http://bit.ly/1azjwHF>.

<sup>119</sup> Freedom House, *Freedom on the Net Report for Bangladesh*, available at <https://freedomhouse.org/sites/default/files/resources/Bangladesh.pdf>.

currently built into the powers granted to government authorities under the ICT Act. However, the BTRC may exercise some oversight.<sup>120</sup>

While the legislation prescribes harsh punishments for a number of offences relating to online speech, (similar to Section 66A of the IT Act, India), it also contains safe harbour provisions for intermediaries. Specifically, Section 79 of the the ICT Act articulates safe harbour provisions in cases where the Internet Intermediary proves that the offence or contravention was committed without his knowledge or that he had exercised due diligence to prevent the commission of such offence or contravention.

The Bangladesh Telecommunications Regulation Act (BTRA), 2001<sup>121</sup> allows the BTRC to stop any signal, message or request from any subscriber (where it is expedient to do so), “in the interest of the sovereignty, integrity, or security of Bangladesh, international relations, public order or for preventing incitement of a legally recognised offence.” Licensed operators are required to assist the government in the implementation of these orders. However, according to a study conducted by the Open Net Initiative on two major ISPs including GrameenPhone, there was no evidence of continuous governmental filtering of online speech.<sup>122</sup>

Section 57 of the ICT Act criminalizes publishing fake, obscene, defaming information or such information which could deteriorate law and order, prejudice the image of State or hurt religious sentiments, in electronic form. The broad language used in this provision gives the state wide powers to convict those exercising speech in criticism of the state’s policies or religious order. To make matters worse, offences under Sections 54, 56, 57 and 61 have been made non-bailable and cognizable<sup>123</sup>, and attract extremely severe punishment (minimum sentence of 7 years and maximum sentence of 14 years). What makes these provisions remarkable is that the quantum of punishment prescribed remains the same regardless of the nature of offences.

The regulatory framework around content regulation in Bangladesh could be strengthened in the following ways:

1. Recognizing that intermediaries play different functions and thus require different regulation by replacing the present definition of 'intermediary' which specifies each

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<sup>120</sup> [https://www.telenor.com/wp-content/uploads/2015/05/GOVERNMENT-ACCESS-REPORT\\_05.pdf](https://www.telenor.com/wp-content/uploads/2015/05/GOVERNMENT-ACCESS-REPORT_05.pdf)

<sup>121</sup> Bangladesh Telecommunication Regulation Act, 2001, *available at* [http://www.btrc.gov.bd/sites/default/files/telecommunication\\_act\\_english\\_2001.pdf](http://www.btrc.gov.bd/sites/default/files/telecommunication_act_english_2001.pdf).

<sup>122</sup> Bangladesh Profile, *available at* <https://opennet.net/research/profiles/bangladesh>.

<sup>123</sup> The police may arrest persons suspected of committing the offence without an arrest warrant if it is cognizable.

type of intermediary, with broad categories of intermediaries and tailoring the law to each type of intermediary

2. Rather than providing immunity to service providers for offences defined within the ICT Act, immunity should be given for content.

3. Define or establish a bar for what constitutes 'due diligence' to provide clarity to service providers on how to abide by the law.

4. Institute a specific redress mechanism for violations of freedom of expression.

#### Singapore

Online content is comprehensively regulated under the Singaporean legal framework. As per the terms of the Singapore Broadcasting Act, “a service whereby signs or signals transmitted... comprise... any [visual, sound or visual and sound] programme capable of being received”, comprises a broadcast, and any person providing such a broadcast is automatically licensed under the Act, and must adhere to the terms of the Broadcasting License.<sup>124</sup> The Broadcasting Class License Notification sets out the regulatory scheme for Internet broadcasting licensees. Unlike the laws in India and Bangladesh, the relevant part of the Class License makes a distinction between Internet Content Providers (ICPs),<sup>125</sup> and Internet Service Providers (ISPs), both of whom may constitute distinct categories of intermediaries. While the former would include web administrators and content curating platforms, the latter is concerned with network infrastructure providers.

As per the terms of the class license, ISPs must make provisions for optional filtering arrangements and provide such arrangements if requested by their subscribers.<sup>126</sup> These filtering arrangements would entail means of preventing access by children and other users to such content which is deemed undesirable, as selected by the subscriber. Moreover, the license envisages a ‘notice and takedown’ scheme for removal of content by the ISPs, if the Broadcasting Authority sends a written notice

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<sup>124</sup> Singapore Broadcasting Act, (15 of 1994), *available at* <http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?Compld:a2c01669-c3bb-40da-88c1-eea4cebdc2a9>.

<sup>125</sup> Broadcasting Class Licence Notification, G.N. NO. S 330/ 2013, (29<sup>th</sup> May 2013), “*Internet Content Provider*” means — (a) any individual in Singapore who provides any programme, for business, political or religious purposes, on the World Wide Web through the Internet; or (b) any corporation or group of individuals (including any association, business, club, company, society, organisation or partnership, whether registrable or incorporated under the laws of Singapore or not) who provides any programme on the World Wide Web through the Internet, and includes any web publisher and any web server administrator;” *available at* <http://www.mda.gov.sg/RegulationsAndLicensing/ContentStandardsAndClassification/Documents/Internet/Broadcast%20%28Class%20Licence%29%20Notification.pdf>.

<sup>126</sup> Cl. 2A, Class Licence Notification.

of any content on the World Wide Web which it deems 'undesirable, harmful or obscene'. In case of such notice, the ISPs must take reasonable steps to prevent users from accessing such content.

In terms of regulation of ICPs, the license requires the compulsory registration of certain classes of content providers, with a particular focus on religious and political news. While the distinction made for requiring compliance of certain ICPs with regulations is somewhat vague, the Singapore government assures that it maintains a 'light touch' approach towards content regulation, particularly by individual bloggers, etc.<sup>127</sup> However, it has been argued that this light-touch approach is a mere myth and there have been continued efforts by the government to monitor content on the Internet.<sup>128</sup> Moreover, the license lists some categories of illegal speech which licensees have the obligation to prevent access to, such as 'gambling' or 'fortune-telling'.

Both ICPs and ISPs are expected to use 'best efforts' to comply with the Code of Internet Practice which has been notified by the Broadcasting Authority. Such 'best efforts' are to be imputed when a licensee takes 'all reasonable efforts' to comply with the code. The Code itself requires ISPs to deny access to certain websites containing 'prohibited material' which the Authority may notify.<sup>129</sup> The terms of liability of ICPs extend only to those where the ICP extends editorial control. However, where such editorial control is exercised, the ICP must "deny access to any contributions that contain prohibited material that he discovers in the normal course of exercising his editorial duties, or is informed about."

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<sup>127</sup> Daniel Seng, *Regulation Of The Interactive Digital Media Industry In Singapore*, available at

[http://ses.library.usyd.edu.au/bitstream/2123/2350/1/CopyrightAsiaPacific\\_Ch5.pdf](http://ses.library.usyd.edu.au/bitstream/2123/2350/1/CopyrightAsiaPacific_Ch5.pdf).

<sup>128</sup> Yip Yee Hui Josephine, *Internet Regulation—A Myth in Singapore*, available at <http://www.singaporelawreview.com/juris-illuminiae-entries/2015/internet-regulation-a-myth-in-singapore>

<sup>129</sup> Clause 4(1) – "*Prohibited material is material that is objectionable on the grounds of public interest, public morality, public order, public security, national harmony, or is otherwise prohibited by applicable Singapore laws. (2) In considering what is prohibited material, the following factors should be taken into account:- (a) whether the material depicts nudity or genitalia in a manner calculated to titillate; (b) whether the material promotes sexual violence or sexual activity involving coercion or non-consent of any kind; (c) whether the material depicts a person or persons clearly engaged in explicit sexual activity; (d) whether the material depicts a person who is, or appears to be, under 16 years of age in sexual activity, in a sexually provocative manner or in any other offensive manner; (e) whether the material advocates homosexuality or lesbianism, or depicts or promotes incest, paedophilia, bestiality and necrophilia; (f) whether the material depicts detailed or relished acts of extreme violence or cruelty; (g) whether the material glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance. (3) A further consideration is whether the material has intrinsic medical, scientific, artistic or educational value.*"

Section 26 of the Electronic Transactions Act contains a safe-harbour provision for intermediary liability, extending only to network service providers which ‘merely provide access’ to electronic records by ‘third parties’. The scope of the network providers services have been defined as “the provision of the necessary technical means by which third-party material may be accessed and includes the automatic and temporary storage of the third-party material”, therefore, it operates only as a ‘mere conduit’ exemption from liability, similar to that found in other legislations across the world. The provisions however, make such safe harbor subject to specific obligations under other laws and court directions to remove or block content, and also does not extend the exemptions to liability under the Copyright Act.<sup>130</sup>

While there has been no significant evidence of misuse of content regulation in Singapore, or any legal disputes surrounding the above provisions, there is evidence to show that the licensing regime has resulted in discouraging intermediaries from operating ‘political or religious’ content, such as the case of Sintercom, a popular weblog, which was taken off the web after the registration requirement was imposed upon it.<sup>131</sup> Similarly, the independent Breakfast Network news website

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<sup>130</sup> Section 26, Electronic Transactions Act, 2012 – “*Liability of network service providers*1) Subject to subsection (2), a network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on — (a) the making, publication, dissemination or distribution of such materials or any statement made in such material; or (b) the infringement of any rights subsisting in or in relation to such material. (1A) Subject to subsection (2), a network service provider shall not be subject to any liability under the Personal Data Protection Act 2012 in respect of third-party material in the form of electronic records to which he merely provides access.

(2) Nothing in this section shall affect —

(a) any obligation founded on contract;

(b) the obligation of a network service provider as such under a licensing or other regulatory regime established under any written law;

(c) any obligation imposed under any written law or by a court to remove, block or deny access to any material; or

(d) any liability of a network service provider under the Copyright Act (Cap. 63) in respect of —

(i) the infringement of copyright in any work or other subject-matter in which copyright subsists; or

(ii) the unauthorised use of any performance, the protection period of which has not expired.

(3) In this section —

“performance” and “protection period” have the same meanings as in Part XII of the Copyright Act;

“provides access”, in relation to third-party material, means the provision of the necessary technical means by which third-party material may be accessed and includes the automatic and temporary storage of the third-party material for the purpose of providing access;

“third-party”, in relation to a network service provider, means a person over whom the provider has no effective control.”

<sup>131</sup> *Speaking Your Mind Online Without Fear*, COMPUTER TIMES, (Aug 22<sup>nd</sup>, 2001), available at <http://www.singapore-window.org/sw01/010822ct.htm>.

chose to shutdown after the registration requirements were imposed.<sup>132</sup> Indeed, it appears that the government controls content in Singapore by instituting burdensome regulation on intermediaries while going after individual users.

## **Company Policy**

### **Airtel**

Airtel's Consumer Charter is published in compliance with Clause 17 of The Telecom Consumers Protection Regulation, 2012, mandated by the TRAI. The charter contains terms and conditions informs the Customer of his/her rights and obligations of Airtel towards the Customer under various regulations, the quality of standards prescribed by the Authority and the modes for grievance redressal. The Terms and Conditions form a part of the Airtel Prepaid Enrollment Form, and apply to all postpaid services provided by Airtel.

The consumer charter details the responsibilities of consumers while using Airtel's services. It specifies that "the Customer shall not use the service for any improper, immoral, unlawful or abusive purpose, or for sending obscene, indecent, threatening, harassing, un-solicited messages or messages affecting/infringing upon national or social interest, nor create any damage or risk to Bharti Airtel Limited or its network or Customers or any other person natural or legal whomsoever." The terms such as indecent, harassing, and national or social interest are broad and vague, and are broader than the legal requirements imposed under Section 79 and associated rules. The terms further go on to state that the customer shall be responsible for indemnifying Airtel for any damage arising out of 'misuse' of the services, or out of libel or violation of copyright by the customer.

Airtel further prescribes conditions for use under its Customer Enrollment Form.<sup>133</sup> Clause 15 of the form states that the customer "shall not communicate, send, transmit, download or in any way deal with any objectionable or obscene or pornographic messages or communications, which are inconsistent with the established laws of the country, over the network offered and established under the said Broadband & Internet service." The conditions further state that Bharti Airtel Limited is entitled to discontinue any of the services if the customer indulges in any of the offences defined under the Information Technology Act, 2000 or breach of any of the terms and conditions. Moreover, the conditions express that the company may block sites or customers "as directed and identified by statutory authorities or security agencies."

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<sup>132</sup> <https://www.hrw.org/news/2014/01/21/singapore-escalating-restrictions-internet-expression>

<sup>133</sup> <https://cloud.airtel.in/ap4saasWeb/terms-conditionsForUserReg.html>



The Terms and Conditions do not adequately address the issue of transparency and accountability for restricting online content. The Terms also cover a broad category of speech i.e “...which are inconsistent with the established laws of the country..” rather than defining specific forms of speech that are not permitted. The terms also do not provide for any specific redressal mechanism for making representations against such takedowns. Thus, the affected persons avenues are limited to general grievance redressal mechanisms, which can be inadequate or slow. The Terms do not require Airtel to give notice to the affected persons, or to the public, as to the reasons why the block has been imposed, or for how long and under whose orders. In practice, there have been instances when Airtel has given notice when they have received a blocking order stating “This site has been blocked as per instructions from Department of Telecom”<sup>134</sup>

### **Grameen Phone**

GrameenPhone has published terms and conditions which apply to all agreements concerning the delivery of Grameenphone internet services to end customers of Grameenphone within Bangladesh.

According to the Terms and Conditions, GrameenPhone subscribers must not send, receive, publish, post, disseminate, encourage the receipt of, upload, download, record, review, stream or use any material which is “offensive, abusive, defamatory, indecent, obscene, unlawful, harassing or menacing or a breach of the copyright, trademark, intellectual property, confidence, privacy or any other rights of any person.” Subscribers must also refrain from activities which invade another’s privacy, causes annoyance, inconvenience or needless anxiety to any person. Further, the conditions proscribe the “collecting, streaming, distributing or accessing any material that cannot be legally collected, streamed, distributed or accessed.”

The Terms further contain an exclusion of liability clause, which states that GrameenPhone is not be responsible for any damages arising out of the use of a subscriber’s activity in contravention of the above mentioned activities.

The terms and conditions of GO Broadband, GrameenPhone’s Wi-MAX broadband venture, stipulate a different set of conditions for subscribers. The subscribers must undertake to not engage in “...sending, receiving, publishing, posting, distributing, disseminating, encouraging the receipt of, uploading, downloading, recording, reviewing, streaming or using any material which is offensive, abusive, defamatory, indecent, obscene, unlawful, harassing or menacing or a breach of the copyright, trademark, intellectual property, confidence, privacy or any other rights of any person.” Further, the subscriber must not engage in activities that “invade another’s

privacy, cause annoyance, inconvenience or needless anxiety to any person.” Or, activities that are “in breach of any other third party’s rights, including downloading, installation or distribution of pirated software or other inappropriately license software, deletion of any author attributions, legal notices or proprietary designations or labels in any file that is uploaded, falsification of the origin or source of any software or other material.”

Trends in the policy include:

- The use of broad language that goes beyond the ambit of the law.
- Exemption of liability for damages that might arise out of use of the network.
- Though the policy details what the customer is prohibited from doing, it contains no information on the action and rights that the company holds with regard to content or access to the service.
- The policy does not contain a redress or grievance mechanism

## **SingTel**

In compliance with the regulations outlined above, SingNet provides for content filtering to all its subscribers on an opt-in basis. The procedure for setting up the content filter and its operation is prescribed in the Internet Filter User Guide.

The relevant terms and conditions with respect to online content, which subscribers to the SingTel network must comply with are set out in three documents. The general terms and conditions of services specify in Clause 8.4 that SingTel may suspend or terminate any services of the consumer without giving prior notice, where a consumer, in the opinion of the Service Provider, “has used, attempted to use or is likely to use any Service or Singtel Equipment subscribed by the Customer (whether with or without the authorisation and/or permission of the Customer) in contravention of any Law (subject to any requirements of the Code) or any Customer Agreement or in any manner or in connection with or for the purposes of any activities which would or may cause any irritation, annoyance, embarrassment, harassment, disturbance or nuisance of any kind whatsoever to or otherwise be prejudicial to the interests of any person (including any Singtel Group Corporation) or which would disrupt the provision or operation of any telecommunications service or broadcasting service by the Service Provider or other licensees of IDA or of MDA; or where the Customer has breached any material obligation in any agreement with the Service Provider or any Singtel Group Corporation.” It further states that the customer must indemnify SingTel at all times for all legal actions and claims arising out of any content published or circulated by the customer over its network. The

SingNet terms and conditions state that SingNet reserves the right to delete any data stored in any computer or computer system, whether or not belonging to or stored by the customer, in a manner deemed appropriate by SingTel, notwithstanding that such access or storage of data is a requirement of the data. Finally, the SingTel Mobile Acceptable Use Policy (AUP) states that the customer must not use the services of SingTel to publish or communicate material that is obscene, pornographic, inflammatory, harassing, threatening, tortious, abusive, harmful to minors, defamatory, libelous or otherwise objectionable or offensive. Under this policy, SingTel reserves the discretion to determine on a case-to-case basis how to respond to any actual or alleged violation of the AUP, and to remove or refuse to post material which is considered in violation of the AUP, or even suspend or terminate the service.

The terms and conditions prescribed by SingTel once again allow scope for blocking of content and subscribers on a wider basis than prescribed under Singaporean law. Moreover, the framework for takedown and blocking remains problematic, since it does not provide for any method for rectification or grievance redressal and does not prescribe a transparent mechanism for public notice.

## **Company Practice**

### **India**

As detailed above, under Indian law, service providers are mandated to comply with blocking orders by the government under Section 69 of the IT Act, as well as court orders under the notice and takedown mechanism under Section 79. Though the law prescribes procedures that must be adhered to – as a result of legal regulation, government interpretation of the law, and service provider practice - content blocking in practice in India is opaque and, at times, arbitrary.

Several examples serve to highlight the how company practice has resulted in the over (or under) restriction of content.

Over (or under) restriction because of technical technique

- In August 2012, it was noticed that Airtel was implementing keyword based filtering for blocking online content. Keyword filtering, as opposed to specific blocking of URL's allows ISPs to block webpages across the Internet based on specific keywords in the URL, irrespective of the site and the context in which the word is used. In this case, Airtel employed keyword filtering to block the phrase 'youtu.be'. This was seemingly done in order to comply with Department of Telecommunications orders which specified certain URL's on social networking sites such as Twitter and Facebook, as well as YouTube and online media websites, on the pretext of 'inflammatory and hateful

content'.<sup>135</sup> However, even though the order only mentioned specific URL's the effect of the keyword filtering by Airtel went beyond what was actually asked them rendered legitimate content inaccessible as well. It is unclear if this was a result of Airtel being overly cautious or careless.

- A 2012 study by Citizenlab concluded that filtering on the Airtel India network was having upstream effects on content over the Omantel network in Oman, due to a peering arrangement between the networks resulting in content that was restricted in India, was also restricted in Oman. The content filtered included news sites, political blogs, and file sharing sites. For example, the site IndyBay.org was blocked in Oman stating "This website/URL has been blocked until further notice either pursuant to Court orders or on the Directions issued by the Department of Telecommunications."<sup>136</sup>

Over (or under) restriction because of practice

- In 2012, Airtel had blocked mobile internet access in the Jammu and Kashmir region "in compliance with an advisory from the Jammu and Kashmir Police." However, the State Government clarified that it had only issued an order for the blocking of certain websites and URL's rather than all access to mobile internet.<sup>137</sup>
- In 2011, the blog hosting site Typepad was blocked on the Airtel network, displaying the boilerplate message "This site has been blocked as per the orders of the Department of Telecom".<sup>138</sup> Other websites such as Clickatell and Mobango were also blocked on MTNL and on Airtel's network. The DoT itself later clarified that it had not issued any order for blocking of the above websites, raising questions of whether Airtel misunderstood the order, made a mistake while complying with the order, or undertook the blocking on their own initiative .

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<sup>135</sup> [http://articles.economictimes.indiatimes.com/2012-08-23/news/33342537\\_1\\_twitter-accounts-twitter-users-block-six-fake-accounts](http://articles.economictimes.indiatimes.com/2012-08-23/news/33342537_1_twitter-accounts-twitter-users-block-six-fake-accounts)

<sup>136</sup> Routing Gone Wild: Documenting upstream filtering in Oman via India, CITIZEN LAB, *available at* <https://citizenlab.org/2012/07/routing-gone-wild/>.

<sup>137</sup> Telecom Services Blocked to Curb Protests in Kashmir, THE NEW YORK TIMES, *available at* <http://india.blogs.nytimes.com/2012/09/21/telecom-services-blocked-to-curb-protests-in-kashmir/>

<sup>138</sup> DoT clarifies on blocking of websites, THE HINDU, *available at* <http://www.thehindu.com/news/national/article1574444.ece>.

- In 2015, Indian ISPs were asked to block a list of 857 websites on grounds of containing pornographic material. However, users were able to access the websites on Airtel’s mobile network.<sup>139</sup>
- The consumer complaints website Ripoff Report was blocked on both the MTNL and Airtel networks in 2013, with the page displaying the message ‘access denied’. This message is different from the typical ‘this site has been blocked on orders from the DoT’ and it was unclear if the website was blocked on the basis of orders from a court or the DoT. The media outlet, Medianama, suggested that because the same website was blocked on multiple ISPs – all with the same message – the blocking could have been carried out from a common node.<sup>140</sup>
- In 2014, the whistle-blower website Suvakku.net was blocked by MTNL, despite a notice by the Madras High Court to the Union Department of electronics and information technology (DeitY) asking it to rescind any blocking order.<sup>141</sup>

#### Lack of clarity because of notice

- In 2014, the domain ndtv.com was redirected to a page declaring “The page you have requested has been blocked, because the URL is banned.” On MTNL Delhi and Airtel 2G networks.<sup>142</sup>

The inconsistencies in the above examples as well as the fact that the majority of information about blocked content originates from leaked documents or ‘tests’ documented by people following blocked pages, illustrates that first and foremost the government and service providers are not transparent about the process and implementation for content takedown in India. This can be seen through unclear notices of blocked content and unclear policies around practices and techniques adopted by companies. The practice of non-transparency is in part a result of the restriction on transparency of content blocking orders that service providers must comply with and thus logically there is perhaps a trickle down effect – with transparency prohibited in the law, resulting in minimal transparency in company policy, resulting in minimal transparency in company and government practice.

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<sup>139</sup> Indian ISPs Blocking Porn Websites, TIMES OF INDIA, *available at* <http://timesofindia.indiatimes.com/tech/tech-news/Indian-ISPs-blocking-porn-websites/articleshow/48315769.cms>.

<sup>140</sup> <http://www.medianama.com/2013/07/223-ripoffreport-block-india/>

<sup>141</sup> <http://www.medianama.com/2014/03/223-savukku-pil/>

<sup>142</sup> NDTV.com Blocked on MTNL Delhi, *available at* <http://www.medianama.com/2014/11/223-ndtv-com-blocked-on-mtnl-delhi/>.

The above examples also demonstrate an element of arbitrariness in content removals in India. There are instances of when it is unclear if content was removed because of government orders or on the service providers' own initiative. There are also instances of when it is unclear why a website was included in a blocking order. The arbitrariness of content removals could be a result of service providers misinterpreting orders and requests, over complying with orders and requests, or the government misinterpreting the law or misunderstanding a website. The broadness of language used in law to describe illegal content could also contribute to arbitrary removals as well as the development of company policy that actually defines illegal content beyond the scope of the law.

### **Bangladesh**

There have been a few reported incidences of online censorship in Bangladesh, to which ISPs were required to comply, including blocking of foreign social media websites like Facebook and media sharing websites like YouTube, as well as wholesale blocking of messaging apps like WhatsApp.<sup>143</sup> The blocking was done in the pretext of preventing disparaging speech and preserving communal harmony. However, a study by the Open Net Initiative concluded that GrameenPhone does not engage in ongoing or suo moto blocking.<sup>144</sup> In another example of blocking, on March 6, 2009, the government blocked access to YouTube for hosting a recording of a conversation between Prime Minister Hasina and Bangladesh army officers in the aftermath of the BDR mutiny. In the conversation, army officials yelled angrily while the prime minister defended her decision to negotiate with the BDR during the course of the mutiny.<sup>145</sup> Some of the most popular news websites such as ProthomAlo and Banglanews24 have not faced any targeted blocking, however they have been regularly subject to government censorship.<sup>146</sup> In 2015, a number of social media applications like Viber, WhatsApp, LINE, Tango, and mypeople were blocked or disrupted for four days. These disruption were a result of Mobile service providers being ordered to block services on grounds that terrorists were using the platforms. However, these services which are also used by opposition activists and other internet users.<sup>147</sup> The Freedom House reported that there are around 300 cases being investigated under the Information and Communications Technology Act and 21 cases pending with the Cyber Tribunal, mostly dealing with issues related to

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<sup>143</sup> Facebook Blocked, *available at* <http://archive.thedailystar.net/newDesign/news-details.php?nid=140613%3B>.

<sup>144</sup> Open Net Initiative, <https://opennet.net/research/profiles/bangladesh>.

<sup>145</sup> *Id.*

<sup>146</sup> <https://freedomhouse.org/report/freedom-net/2015/bangladesh>

<sup>147</sup> Viber, Tango blocked in Bangladesh, *available at* <http://www.dhakatribune.com/bangladesh/2015/jan/18/govt-shuts-down-viber>

social media postings. In the harshest ruling, a local court sentenced Tonmoy Mollick, a twenty five year old to seven years imprisonment for making parody songs mocking the prime minister and the father of the nation and distributing them with his mobile phone.<sup>148</sup>

It is interesting though that unlike India, there are few media reports on inconsistencies, arbitrariness, or lack of transparency in blocking. This could indicate that internal practice for blocking is well established, this is a topic the public is not engaged in as of yet, or that groups are more concerned with the actual blocks issued by the government rather than the specifics of how they are implemented.

### **Singapore**

As per the regime under Singaporean Law, the government is said to maintain a list of 100 websites containing unsuitable content, which is conveyed to ISPs for blocking. Besides this, ISPs may be asked to comply with blocking orders on a case by case basis. Therefore a study by the Open Net Initiative of SingTel's network concluded that the blocking of high-profile websites which display pornography or objectionable content remains highly symbolic, and ISPs do not engage in widespread blocking of content.<sup>149</sup> Mr Lui Tuck Yew, the Minister for Information, Communications and the Arts, stated that the ban was likely to be toothless as "the technologically savvy among us will be able to circumvent this ban, and that there are many more than 100 such websites out there."<sup>150</sup>

In May 2005, A\*STAR, a state-funded agency accused Jiahao Chen, a doctoral student in United States of Singaporean origin, of posting "untrue and serious accusations against A\*STAR, its officers and other parties."<sup>151</sup> A\*STAR threatened Chen with legal proceedings consequences unless the objectionable statements were removed and an apology was tendered. Facing legal action, Chen duly removed the content and posted an apology.

Since June, 2013, online news sites which, over a period of two months, report an average of at least one article per week on Singapore's news and current affairs and are visited by at least 50,000 unique IP addresses from Singapore each month, are required to be individually licensed. Upon license, they will be liable to remove objectionable content as notified to them by the Media Development Authority,

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<sup>148</sup> <https://freedomhouse.org/report/freedom-net/2015/bangladesh>

<sup>149</sup> OpenNet Initiative. Singapore, available at <https://opennet.net/sites/opennet.net/files/singapore.pdf>

<sup>150</sup> Yip Yee Hui Josephine, Internet Regulation—A Myth in Singapore, available at <http://www.singaporelawreview.com/juris-illuminae-entries/2015/internet-regulation-a-myth-in-singapore>

<sup>151</sup> <http://www.escapefromparadise.com/NewFiles/Chen.html>

within twenty four hours.<sup>152</sup> Further, the government has commented in its press release that commentary driven blogs would not be subject to these requirements. However, this point was reflected in the actual regulation has created great unease about the scope of the regulations and its possible misuse and arbitrary application.<sup>153</sup>

In May 2015, the Media Development Authority took the unprecedented step of ordering a political website to shut down, citing the website's content as being objectionable to state interests and that it undermined public interest, public order and public harmony.<sup>154</sup> The editors of the website were provided six hours to disable access to its site, and seven days to present arguments as to why their class license should not be canceled. Two editors were also charged with sedition.

In January 2006, a twenty-one-year-old blogger was also charged with violation of the Sedition Act. The blogger had posted four cartoons of Jesus on his blog. The charges were eventually dropped, but not before his computer had been confiscated by the Singaporean authorities and the cartoon had been removed from his blog.<sup>155</sup>

## Conclusions

As is apparent from our analysis of the company policies, all three companies could improve the transparency and communication of blocking practices to the general public and directly impacted individuals. An important feature of such transparency enhancements would be not only the information being provided in the form of a notice but also the consistency in which notices are issued. In order to create an environment more conducive to greater freedom of expression, it is important to have more consistent and clearer processes in place. Currently, there is a lack of clarity about who is initiating the blocking, the process for the same and the redress available.

All three companies (though with some variation) prohibit similar types of content. These types on content fall largely within the categories of pornographic or obscene, infringing on a third party's rights and harmful to national interest. However, the

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<sup>152</sup> Fact Sheet - Online news sites to be placed on a more consistent licensing framework as traditional news platforms available at <http://www.mda.gov.sg/AboutMDA/NewsReleasesSpeechesAndAnnouncements/Pages/NewsDetail.aspx?news=4#sthash.lkA8FxFYq.dpuf>

<sup>153</sup> <https://freedomhouse.org/report/freedom-net/2015/singapore>

<sup>154</sup> Singaporean authorities shut down The Real Singapore news website, available at <https://cpj.org/2015/05/singaporean-authorities-shut-down-the-real-singapo.php>

<sup>155</sup> <http://en.rsf.org/singapore-government-drops-charges-against-20-07-2006,18106.html>



rights granted to the companies are extremely broad and discretionary without adequate oversight frameworks and mechanisms for redressal. For example, basic natural rights like right to a fair hearing are not provided for. None of the companies provide redress mechanisms for individuals wishing to bring issue a complaint or grievance specifically related to the blocking of content. Another issues is the difference between the policy and the ground realities. For example in India, Public Interest Litigation as a tool have been successful in changing regulatory frameworks around the blocking of content. However, these changes are yet to be reflected in company policies as presented in the Terms of Service.