FREEDOM OF SPEECH & GOOGLE SEARCH: PRELIMINARY NOTES FOR INDIA

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INTRODUCTION

As the Internet progressively becomes a key means by which information is communicated and exchanged, there is a growing need to examine how the applications that facilitate access to these troves of information operate. Given the medium's storied capacities for openness and equality and the tension that services offered by non-state and for-profit entities can introduce to that narrative, the need for institutionalizing user-centered, freedom and fairness maximizing approaches to delivering services online has never been greater. A crucial area in which this is necessary has been in the preservation of the right to free speech and in the allied right to receive information.

The search engine has come to play a critical role in the digital information landscape of the present.[1] Search engines mediate the relationship between Internet users and the vast repository of information available online, so there is a reasonable expectation that providers of these services should ensure that the most effective results are delivered. Internet search is populated by a small number of dominant (profit maximising) players, with each able to exert disproportionate degrees of control over the websites that they list and the users they serve. With Google holding a significant portion of the market for search, allegations of abuses of its power *vis à vis* (smaller) competitors have arisen, and have taken the shape of antitrust investigations (since concluded) in the US[2] and Europe.[3] In India as well, the question of search is now the subject of investigation by the Competition Commission of India on the basis of a complaints by Consumer Unity & Trust Society.[4] More recently, and in a newer form, the question of what search engines can list in their results has arisen at the Supreme Court.[5]

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[1] Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, THE INFORMATION SOCIETY, 16:169–185, 2000.

[2] *See e.g.,* Steve Lohr, *Drafting Antitrust Case, F.T.C. Raises Pressure on Google*, NEW YORK TIMES, October 12, 2012, *available at* http://www.nytimes.com/2012/10/13/technology/ftc-staff-prepares-antitrust-case-against-google-over-search.html?pagewanted=all&_r=0.

[3] *See, e.g.,* Foo Yun Chee and Bate Felix, *EU Launches Google Investigation after Compliants*, REUTERS, November 30, 2012.

[4] ET Bureau, *Competition panel CCI investigates Google's 'monopoly' in India*, THE ECONOMIC TIMES August 14, 2012, *availabe* at http://articles.economictimes.indiatimes.com/2012-08-14/news/33182709_1_adwords-bharatmatrimony-google.

[5] Sabu Mathew George v. Union Of India & Ors., Writ Petition (Civil) No.341 of 2008 (Supreme Court).

In a White Paper[6] commissioned by the company in the context of the US investigation, the argument that Google's algorithm's ranking of search results was an exercise in editorial discretion, available to all speakers as a First Amendment right was first debuted, effectively laid the groundwork for claims of Google's (and more generally, search engines') rights to freedom of speech. The result is a potentially problematic one: users' and content creators' right to free speech could be pitted against the same right of of large companies' (like Google's) online. This raises important concerns for constitutional law, antitrust regulation as well as for the governance of platforms and services online.

Against this backdrop, this essay very briefly introduces comparative scholarship around search and the constitutional right to free speech and takes the first steps to making that the argument for the need to regulate important participants such as search engines in the information landscape, and for the need to construct and clarify Article 19(1)(a) frameworks to ensure rights adjudication to such regulation result in balanced outcomes.

THE SEARCH ENGINE[7]

Stakeholders & Functions

James Grimmelmann defines a search engine as "a service that helps its users locate publicly accessible content on the Internet"[8]. Search engine operations involve the participation of four primary classes of stakeholder. *First*, there are content generators populating the Internet, whose main interest lies in maximizing the visibility and consumption of their work. *Second* in the chain of information delivery are search engine operators themselves. In as much as they are private and corporate entities, they provide services with the fundamental objective of profit maximization. *Third*, advertisers provide the revenue upon which the search service relies. *Finally*, there are the users of search facilities, with an interest in obtaining quick and maximally

[6] Eugene Volokh & Donald Falk, *First Amendment Protection For Search Engine Search Results*, GOOGLE WHITE PAPER, (April 20, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364.

[7] Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 9 YALE J.L. & TECH. 124 (2006); Marcelo Thompson, *In Search of Alterity: On Google, Neutrality, and Otherness*, 14 TULANE JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY 1 (2011); James Grimmelmann, *Regulation by Software*, 114 YALE L.J. 1719 (2005).

[8] James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007).

accurate search results. A miscellany of other stakeholders (regulators, competing search providers, offline copyright holders, and so on) are involved, as are a miscellany of interests other than those cited above (users' interest in privacy is one important omission). These are held as constant variables for the purpose of this essay's argument.

Importance

The search engine performs the function of organizing and enabling access to the vast array of content that is contained online, and so plays a critical role in the modern digital information landscape.

More generally, Andrew Murray's paradigm of a virtual gatekeeper describes accurately the function that search engines perform online.[9] The gatekeeper is an online actor who wields a significant amount of *power* in the information supply chain online. They wield this power through their ability to mediate users' access to the content on the Internet.

Importantly, the market for search displays fairly monopolistic tendencies in India, as elsewhere and Google Search is understood to be a 'dominant search engine' (DSE), given its market share.[10] When the functional importance of the gatekeeper online is combined with Google's market dominance, some multiplier would need to be factored into the power that its search facility would have previously held.

Another useful tool by which to understand the importance of search engines on the Internet is to apply the taxonomy in economics of a two sided platform market.[11] This refers to an economic platform which serves two distinct user groups, and creates value by enabling direct interactions between the two 'sides' of the platform.[12] The search engine in the digital information eco-system does this as between websites and

[9] Andrew Murray, *Nodes and Gravity in Virtual Space*, (2011) 5 LEGISPRUDENCE 195.
[10] Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL. FORUM 263.
[11] *C.f.* Giacomo Luchetta, *Is the Google Platform a Two-Sided Market?*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2048683 (Arguing that Google is a 'sui generis' two sided platform market, at best).
[12] David S. Evans, Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667.

users.[13] Importantly, the danger that search engines pose to the free exchange of content is the fact that it is able to exercise power *vis à vis* both sides of the platform, *i.e.*, as against websites as well as its users seeking information.

A final, if broad, category that could be useful to how search engines should be regulated is that of an 'advisor', rather than merely or exclusively an editor or conduit.[14] This formulation would allow for users' interests to be placed in focus, with search results being treated as advice and search engines as advice-givers whose function includes fiduciary duties to its users.

Process

In simplified terms, search engine operations involve, first, the process of indexing,[15] *i.e.*, the aggregation and categorization of content online. Then, the process of querying by users follows. Finally, the search engine will return results available in its database which satisfy the query, in ranked[16] order.

The search process clearly establishes that providers of the facility are *dependent* on the creation of content by websites and the search for content by users. It serves only a mediating function in linking the demand for a certain type of information or content with the correct channel(s) of supply for this content. In other words, it would be possible to argue that search is not an independent service, but rather one that is both dependent on and derivative of other content.

UNDERSTANDING SEARCH NEUTRALITY

Origins

Ideal formulations of the Internet as network of networks come bundled with the principle of net neutrality. According to Timothy Wu who coined the term, 'net neutrality' is a key principle of network design by which "a maximally useful public

[13] *See for e.g,* Bruno Jullien, *Two-Sided Markets and Electronic Intermediaries, available at* idei.fr/doc/conf/ecm/jullien.pdf.
[14] James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014).
[15] *For a sampling of the concerns that arise in this context see* Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 DAYTON L. REV. 180 (2001).
[16] *See e.g.* Frank Pasquale, *Rankings, Reductionism, and Responsibility*; 54 CLEV. ST. L. REV.115 (2006).

information network aspires to treat all content, sites, and platforms equally."[17] Essentially, then, the Internet is a network built on the idea of non-discrimination between content.

The origins of search neutrality are not as clear, but it is not unreasonable to suggest that it derives much of its spirit and substance from the net neutrality principle, and that there is a fair analogy between the two. With Google's establishment as a dominant power that is able to exploit its position to privilege its own content and services in Internet search, information policy has evolved a new concept of "search neutrality", that is analogous to the founding idea of network neutrality.[18]

Search Bias and Other Elements of the Search Neutrality Concern

Search neutrality refers essentially to the claim that search engines must return results to search queries in a manner that is comprehensive, is based solely on relevance and is impartial as between content.

Admittedly, the results of search are incapable, by definition, of *absolute* or perfect neutrality. They are necessarily listed in a hierarchy, with one result appearing at the top of the results and another at the very end, and "traffic drops by rank".[19] The arguments for search neutrality are intended to eliminate what has been termed 'search bias'.[20]

Jennifer Chandler recognizes that search engines may introduce several different types of bias into their results. These include "(1) the removal of websites from the search engine index, (2) the reduction of website ranking, (3) the refusal to accept

[17] TIMOTHY WU, NETWORK NEUTRALITY, BROADBAND DISCRIMINATION (2003).
[18] For an attempt at applying net neutrality principles to search, see Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL FORUM 263. See also, Phil Weiser, *The Next Frontier for Network Neutrality*, 60 (2) ADMIN. L. REV. (2008); Andrew Odlyzko, *Network neutrality, search neutrality, and the never-ending conflict between efficiency and fairness in markets*, available at www.dtc.umn.edu/~odlyzko/doc/net.neutrality.pdf.
[19] Nico Brooks, *The Atlas Rank Report: How Search Engine Rank Impacts Traffic*, ATLAS INSTITUTE 3 (2004), *available at* www.atlassolutions.com/pdf/RankReport.pdf
[20] Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006).

keyword-triggered advertisements from certain websites, and (4) the practice of providing preferences in indexing or ranking for paying websites".[21]

In another approach, James Grimmelmann makes the claim that search neutrality is, in fact, the shorthand for a number of constitutive elements.[22] It is possible, for the purposes of this paper to group Grimmelmann's eight elements into two classes (of three and five elements respectively), based on their importance for the argument here. There is first the requirement not to differentiate between content or websites ('equality').[23] Then, there is the requirement that search providers rank on the basis of general standards, not by specific or individual interventions ('manipulation'). The key principle, however, is the principle which requires that search engines refrain absolutely from any attempts to distort the information landscape online ('bias'). The remainder of these principles are the requirement to return correct, and verifiably accurate results ('objectivity'), the requirement to maximize user satisfaction ('relevance'), the requirement to disclose the algorithm upon which the search functions ('transparency'), the requirement to refrain from acting on the search provider's own account ('self-interest'), the requirement that websites reliant on a steady stream of visitors not be cut off by the search provider ('traffic').[24]

SEARCH ENGINES & FREEDOM OF SPEECH

The manner in which search engines operate raises important questions for free speech online. But more critically, they point to conceptual fogs in our understanding of the right itself. This section will list three areas of work that the search engines problem requires to be addressed.

In the formulation of search engine as gatekeeper or even as editor, it is clear that search listings are an important means by which users of the Internet as a medium access information online. The argument for access as an element of the right to freedom of speech and expression has been made expressly and eloquently in the

[21] Jennifer Chandler, *A Right To Reach An Audience: An Approach To Intermediary Bias On The Internet*, 35 HOFSTRA L. REV 1095, 1109 (2007).
[22] James Grimmelmann, *Some Skepticism About Search Neutrality* in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET (Berin Szoka and Adam Marcus, eds.) 435 (2010).
[23] *Id.*
[24] *Id.*

context of the First Amendment.[25] Any effective articulation of the right to freedom of speech and expression would presuppose that speaker and listeners across media have access to the communications medium. So, the rationale for a right to access under Article 19(1)(a) would stand as well.

Even more fundamental questions arise.

Is data or raw information is speech?[26] Does the Constitution require speech to carry some "expressive" quality, for example? Do parallels from copyright's idea/expression dichotomy hold? This type of reasoning would be important to determining whether individual listings amount to 'speech'.

Another question that arises relates to whether algorithms or code are speech or can generate speech. On the one hand such content would appear to be machine made, and therefore ineligible for protection as speech since its source would not be likely to qualify as a speaker. On the other, algorithms and code produce content on the basis of instructions which do indeed originate from human speakers.[27]

A DEFENSIVE LEGAL TRANSFORMATION OF SEARCH NEUTRALITY?

A range of accusations were fielded against Google Search for its failure to meet search neutrality standards and comply with fair information practices. These have led to investigations in India by the Competition Commission,[28] by the Federal Trade Commission[29] in the United States and the Competition Commission[30] in the European Union for abuse of dominance. With these developments, interesting

[25] Jerome A. Barron, *Access to the Press. A New First Amendment Right*, 80 HARV. L. REV. 1641 (1966-1967).
[26] Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235 (2013);
[27] Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013); Stuart Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013).
[28] *See, e.g.,* Indu Nandakumar, *CCI probing Google for abusing its dominance by adopting anti-competitive practices*, THE ECONOMIC TIMES, August 21, 2012 *available at* http://articles.economictimes.indiatimes.com/2012-08-21/news/33303045_1_google-search-search-engine-google-ranks.
[29] *See e.g.,* Steve Lohr, *Drafting Antitrust Case, F.T.C. Raises Pressure on Google*, NEW YORK TIMES, October 12, 2012, *available at* http://www.nytimes.com/2012/10/13/technology/ftc-staff-prepares-antitrust-case-against-google-over-search.html?pagewanted=all&_r=0.
[30] *See, e.g.,* Foo Yun Chee and Bate Felix, *EU Launches Google Investigation after Compliants*, REUTERS, November 30, 2012*, availabe at http://www.reuters.com/article/2010/11/30/idINIndia-53238520101130*

arguments have been made of search neutrality being raised to the status of an antitrust principle.[31] However, much debate still surrounds issues such as whether search would amount to an essential facility[32] for websites who are indexed by search engines or even to users.

Additionally, as part of a defense strategy to resist these claims, Google Inc. commissioned a set of White Papers by legal experts in information policy, antitrust and constitutional law. In April 2012, Google released a White Paper authored by Eugene Volokh, a noted constitutional law scholar in the United States. That paper made the argument that Google's algorithm's ranking of search results was an exercise in editorial discretion, available to *all* speakers as a First Amendment right.

While the argument was made on the basis of specific lines of precedent in the United States, it is an interesting one to unpack, both in terms of how it will stand under our Article 19(1)(a) and in terms of its consequences for the landscape for speech online in India. By pitting (higher) constitutional rights against alleged commercial losses to competitors and websites, Google steered the conversation away from its liability in antitrust to the regulability of search engines in the first place. In a hypothetical case of litigation involving a conflict between content generators and consumers on the one hand, and search engines on the other, the results could well be contrary to the public interest if such a rationale is adopted.

THE INDIA HYPOTHETICAL

Google's approach, of course, assumes that search engines, and intermediaries more broadly can argue that they exercise a right to freedom of speech and expression. For some categories of intermediary, a fair analogy may be drawn to the facts in cases like *Sakal Papers v. Union of India*[33] in which the Supreme Court held that there was a right to circulate content. It is not clear how far approaches of this type would extend.

On the other hand, if search engines cannot claim a free speech right, but rather a right in Article 19(1)(g) to business alone, the inclusion of the ground of public

[31] Daniel A. Crane, *Search Neutrality as an Antitrust Principle*, 19 (5) GEO. MAS. L. REV 1199 (2012).
[32] *For an authoritative primer on the essential facilities doctrine, see,* 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 771c (3d ed. 2008).
[33] 1962 AIR SC 305.

interest for restrictions means that search engines are subject to a broader range of regulation.

Additionally, arguments from deliberative democracy, grounded in marketplace of ideas rationales, which *Shreya Singhal v. Union of India*[34] confirms is applicable to Article 19(1)(a) analysis, may enable some regulation of search engines.

The constitutional, cyber and competition laws provide the generic framework within which search facilities must operate is arguably conducive in India to preserving users' interests. On the assumption that express recognition of an editorial function in search engines is tenable with Article 19(1)(a) jurisprudence, the results could be problematic here as well as under the First Amendment. It would fall to a balancing exercise to be undertaken upon adjudication, but the danger remains that such an approach could remain *ad hoc*, and create some uncertainty atleast until the Supreme Court has cause to opine on the matter, in determinative terms.

However, the Indian law's treatment of intermediaries in general bodes well for the public interest in this context. The Information Technology Act, 2000 (as amended) defines intermediaries in broad terms,[35] such that providers of search facilities online would qualify as such. The main provision governing intermediaries is Section 79 of the Act, by which intermediaries are immunized from liability for content created and/or uploaded by others.[36] The tenor of the Act clearly suggests that search engines would amount to no more than commercial carriers of content, and the question of their rights to free speech may not even arise.

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[34] (2015) 5 SCC 1.

[35] *See* § 2(w), *which provides that* " "intermediary" with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;".

[36] *The material portion of* § 79 *reads as follows*:

79. Intermediaries Not To Be Liable 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 made available or hasted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the 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 hasted; 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.

THE ALTERNATIVES

Frank Pasquale's argument that search engines perform a public function, and must be treated as one is an important one.[37] He avers that they are an important cultural and political facility.[38] There are significant *social* costs in acquiring, evaluating and managing information.[39] In as much as search engines perform a socially useful, even arguably necessary function, Pasquale's argument underlines the need for the delivery of fair and effective search facilities in the semantic web of today. Pasquale's specific prescription suggests that search be treated and delivered by state machinery in the same manner as any other public good. In as much as the best repository is the most comprehensive one, the strains of natural monopoly in the provision of search are clearly apparent. This, along with the apparent propensity for abuse would provide good grounds to argue in favour of such a proposal, *prima facie*. However, the proposition of treating search engines as a public utility may be a little unrealistic. In the alternative, there is the proposal for closer regulation of search,[40] which merits closer consideration and, possibly, impelentation.

IN LIEU OF A CONCLUSION

The preceding analyses of the *status quo* in the law applicable to search engines clearly reveal that a major overhaul could be afoot. While no complete answer to address all concerns appears yet, the foregoing analysis has only served to spotlight the reality that the question of search engine regulation requires closer attention, as do attempts to free content from artificial and commercial control. In the result, this paper closes with an affirmation of the principle that free speech must necessarily include a right to *access*[41] and consume that speech, if the right is to have more than hollow resonance in the Internet era.

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[37] *See* Frank A. Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762241.
[38] *See id*.
[39] Thomas Cotter, *The Role and Future of Intermediaries in the Information Age: Some Observations on the Law and Economics of Intermediaries,* 2006 MICH ST L REV 67 (2006).
[40] Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search.*
[41] *See* Jack Balkin, *Media Access: A Question of Design*, 76 GEORGE WASHINGTON LAW REVIEW 933.