IMPACT OF NET NEUTRALITY ON DIGITAL ERA

- Partha Sarathi Misra*

Abstract

Network neutrality *(also* ***net neutrality****,* ***Internet neutrality****) is a principle that advocates no restrictions by Internet service providers or governments on consumers' access to networks that participate in the Internet. Opponents of net neutrality claim that broadband service providers have no plans to block content or degrade network performance. Despite this claim, there has been a single case where an Internet service provider, Comcast, intentionally slowed peer-to-peer (P2P) communications. Critics of net neutrality also argue that data discrimination of some kinds, particularly to guarantee quality of service, is not problematic, but is actually highly desirable. The Supreme Court's Brand X decision has reignited the debate over "network neutrality, "which would limit broad band networks' authority to impose restrictions on end users 'ability to access content, run applications, and attach devices and to charge content and application providers higher prices for higher levels of quality of service. This case has also been discussed in this paper keeping in mind the debate over the issues of following the principle of net neutrality & the rules framed by the U.S. Federal Communications Commission (FCC) regarding Broadband Policy Statement (also known as the Internet Policy Statement) in 2005. Also the scenario in US, EU and India has been discussed in this paper.*

* B.Sc., LL.B., Advocate at Orissa High Court, Bhubaneswar; Email: partha.npd@gmail.com

INTRODUCTION

The incredible popularity and profitability of the Internet has led to both ISPs and Governments rethinking their role in cyberspace. The ISP market is characteristically oligopolistic with a few very large players with huge consumer bases and numerous smaller companies. Till very recently, ISPs had been limited to the role of mere 'conduits' – only facilitating the passage of data packets from one end user to another with no intervention. However, of late, ISPs have been abusing their position by slowing down data traffic to either websites that they are not affiliated with or websites that they are in direct competition with. Owing to the oligopolistic nature of the market, if one of the large players chose to significantly degrade traffic to any website, it would result in both, a deprivation of information for users trying to access that website and denial of the freedom of expression to the content provider.

It is in this background that Tim Wu's Network Neutrality principle enters the picture. The principle relates to the basic architecture and design of the Internet network. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application.[1] This neutrality protects the diverse nature of the Internet. The principle postulates an anti-discriminatory rule to preserve the Internet's decentralized and neutral nature in order to sustain its capacity to encourage innovation. If one user pays a certain amount for a certain level of connectivity and another user of another ISP does the same, the two should be able to connect at that designated speed and to all legal content available on the Internet.[2] The principle also stipulates that content providers should not have to pay variable rates. The neutrality of the internet is not only threatened by private ISPs but also by the Government when it intervenes and proposes extensive censorship.

[1] This principle can be better understood through an analogy to the electric supply network. The electric grid does not operate differently with different appliances that are connected to it. The neutral nature of the electric grid has led to a lot of innovation in the electrical appliances market., Available on http://www.timwu.org/network_neutrality.html

[2] Malik, Aman, Network Neutrality: Where Does India Stand Accessible at http://www.dare.co.in/strategy/it-outsourcing/network-neutrality-where-does-india-stand.htm

Net Neutrality is one of the major areas of concern regarding Internet. It affects the regulation of the infrastructure of Internet. In general, each packet of data sent and received by an internet user passes through routers, transmission infrastructure owned by a collection of private and public entities which may include telecommunication companies, government, universities and other service providers. Basically, net neutrality means providing equal treatment by the Internet Service Provider to all the content, websites and other platforms. The Internet service provider who provides internet services, can control the flow of data in their infrastructure by the way of determining which packet of data moves through them first, which moves next, which does not move at all. Internet developed on its own limb and imbibed the concept of neutrality at large. The net users can surf any website and download anything they want since the service providers of the internet did not differentiate various kinds of content. But, the Internet Service Providers no longer want to stay neutral and argue that providing bandwidth, infrastructure costs huge. In order to cover the costs and in their business interests be allowed to charge variable rates from the content providers and users.

Presently, content providers do not pay different amounts in accordance with the kind of content, moreover they pay a uniform amount and service providers do not prioritize the contents. In contrast, of ISPs are allowed to charge the content provides differently, this would enable them to transfer data packets containing content, data in a prioritized order depending on rent paid by content provider. This act of prioritizing the contents is against net neutrality. If Internet is not allowed to be neutral, an ISP would give preference to sites which pay more or with which they have some collaboration. The service providers can also block the content that is against their business interests.[3] The following paper will be dealing with the position of U.S in the debate of net neutrality & also will be dealing with the future prospective of this principle for India with critical analysis of the lacunas that the legislations in India are having in respect to the principle of net neutrality.

NET NEUTRALITY

[3] SAI SUSHANTH; Net neutrality and law; Available on http://www.bizandlegis.com/articles/

Net Neutrality (also known as Network Neutrality or Internet neutrality) is all about creating a neutral internet. The term supports the view that Internet traffic should be treated equally; and also backs that internet should be an open platform like any other utility used in our home like electricity as Internet has already become part and parcel of our lives and has been indispensable. While many believe that network neutrality is necessary; others argue it is totally unfair.[4]

Net Neutrality has not been popular till early 2000s when advocates of net neutrality and associated rules have raised concerns about the ability of broadband providers to use their last mile infrastructure to block Internet applications and content (e.g., websites, services, protocols), even blocking out competitors.

Net Neutrality advocates no restrictions by Internet service providers (ISPs) and governments on content, sites, platforms, the kinds of equipment that may be attached, and the modes of communication. Any website, whether it may be Google or Netflix or Amazon, should be treated the same way in terms of bandwidth used to reach the internet-connected services.

On the other hand, critics of net neutrality – mainly ISPs – argue that prioritization of bandwidth is necessary for future innovation on the Internet. Scott Cleland, Chairman of NetCompetition.org, says there isn't one thing to like about net neutrality regulation, it isn't needed and, worse, it is unwise.

The aim of net neutrality is a good thing, but innovation will require non-neutral services, argues Tekelec's Randy Fuller, director of strategic marketing at Tekelec.

In the United States, the Obama Administration has proposed a new Federal Communications Commission (FCC) rule that would enshrine net neutrality in the States. Policy Integrity works in coalition with consumer protection groups, including Free Press and Consumers Union, in support of the policy.

[4] Net Neutrality & the internet age; available on http://www.telecomreview.net/index.php?option=com_content&view=article&id=105:netneutrality&catid=27:featured&Itemid=58

While some proponents want to make net neutrality law in some countries to prevent the prioritization of some Internet services, the European Commission, for example, has refrained from adopting a law based upon the basic tenets of neutrality.

Following a recent public brag that the Dutch operator KPN was using deep packet inspection to throttle service and charge users for unintended network usage comes a massive industry buzz kill in the form of mobile net neutrality legislation. Wireless network operators in the Netherlands will no longer be able to charge customers for using VoIP service of their choice - Skype and Whatsapp, for starters.

ORIGIN OF THE DEBATE OF NET NEUTRALITY

The debate started, in 2002, when FCC under high pressure from broad band services decided to move the broadband from "Common Carriage" classification to a less restricted "Information Service" classification, under the pretense of promoting broadband deployment. This means that earlier regulation, which forced the narrow band services (services that carry data to and from a consumer), had to do so on terms and rates which were non-discriminatory, was no longer applicable to broad band services.

In the classical paper, [Wu, (2003)][5] coined the term “Network Neutrality”, kick starting the debate.

In April 2005, broadband customers of Mexico’s largest telephone operator Telmex reported that their VOIP call quality tanked and they were no longer able to access the site of VOIP providers such as Skype. It was alleged that Telmex identifies VoIP users based on the kind of traffic they send, and then chokes their bandwidth to disrupt the calls. Also by blocking the VOIP Provider site, Telmex could prevent potential new users from signing up, and existing users wouldn't be able to renew minutes on their prepaid calling cards or order other premium services. Michael Powell in White House announced that such blocking would be illegal if practiced is U.S. Something similar happened in March 2005 (though on a very small scale) when a small ISP

[5] Wu, Tim, A Proposal for Network Neutrality, 17 HARV. J. L. & TECH. 85 (2003). This issue has snowballed into a raging issue in global circles with Japan, Norway, Canada and the European Union effectively incorporating Network Neutrality principles into legislation or regulation; available on www.timwu.org/OriginalNNProposal.pdf

Madison River Communications blocked Vonage VOIP, but issue was quickly resolved with the intervention from FCC.

The first real test of reclassification ruling in US came when in October 2007 it was alleged that Comcast among many other broadband providers is throttling Bit-Torrent Traffic. In November 2007, Pro-Network Neutrality Communities and Scholars urged FCC to start an investigation against Comcast. FCC began an investigation against Comcast for the same in January 2008 & confirmed that broadband providers such as Comcast/Cox were indeed blocking Bit-Torrent traffic. The Comcast defended its policy as "Reasonable Network Management". In August 2008, FCC ruled against Comcast and asked it to stop the practice and initially Comcast agreed. Later Comcast in September 2008 challenged the authority of FCC to regulate its behavior and court ruled in their favor in April 2010.

Advantages for Net Neutrality[6]

1. **No Restrictions:** currently, there are no restrictions on what parts of the Internet that people can access, except for what local governments decide. For example, there are no restrictions or preferences over emailing, file sharing, instant messaging (IM), Voice over IP (VoIP), Video Conferencing, Podcasts, blogs, RSS feeds, USENET, etc.
2. **No Throttling:** Currently, Internet Service Providers (ISPs) cannot change the download or upload transfer rates depending on what people are accessing.
3. **No Censorship:** There are no restrictions on what or how much anyone can upload or download besides connection rates.
4. **Capitalism:** Net Neutrality promotes a level playing field for competing companies, and allows start-ups easier access to new potential customers. Net Neutrality is equated to a free market.

Disadvantages of Net Neutrality[7]

[6] The Pros and Cons of Net Neutrality; available on http://www.philforhumanity.com/Pros_and_Cons_of_Net_Neutrality.html

[7] Ibid

1. **Restrictions/Censorship:** ISPs, in addition to governments, can decide what parts of the Internet that people can access and what parts are blocked. For instance, ISPs could block peer to peer file transfers. Additionally, ISPs could censor criticism against themselves, other companies, or politicians that they favor.
2. **Anti-Competition:** Similar to the previous con, ISPs could block or prevent access to their competitors products, services, or web pages. Thus have restrictions against competition.
3. **Throttling:** ISPs can decide what types of services have prefer transfer rates. For instance, Google's Gmail could be fast why their competitors Microsoft's Hotmail could be slower, depending on how much both companies pay the Internet Service Providers. Another common example would be high data transfers, such as peer to peer file transfers, could have slow rates than regular shorter data transfer, such as email.
4. **Money:** ISPs could charge more money for more access to the Internet. ISPs believe that heavier users of the Internet should pay more. This extra money could be used to increase the bandwidth of the Internet for everyone and drive prices down. However, ISPs are already extremely profits and they can just as easily increase prices for everyone. Keep in mind, that Internet connection prices should be decreases why bandwidth increases. However in many parts of the world, this is not the case.
5. **Monitoring:** There is already a lot of monitoring on the Internet, however without Net Neutrality, ISPs could literally monitor everything that their customers do on the Internet and sell or use that information as they choose.[8]

E.U. SENARIO

BEREC[9] issued the following draft publications on 29 May this year (together with a helpful Explanatory Paper)[10]:

[8] *Supra note* 6

[9] Body of European Regulators for Electronic Communications, responsible for monitoring developments and issuing guidance on net neutrality

[10] The 'net neutrality' debate & recent developments in Europe; available on www.olswang.com/.../the-net-neutrality-debate-recent-developments-

1. Guidelines for Quality of Service in the scope of Net Neutrality
2. An assessment of IP-interconnection in the context of Net Neutrality
3. Differentiation practices and related competition issues in the scope of Net Neutrality

In addition, BEREC published new Transparency Guidelines[11] in December 2011 which set out the type of information to be provided by ISPs to end-users about traffic management practices and access restrictions, and how that information should be conveyed.

Guidelines for Quality of Service in the scope of Net Neutrality

These Guidelines follow the net neutrality quality of service framework published by BEREC in December 2011. They provide guidance for NRAs on assessing the severity of a situation by considering both the traffic management practice itself and the market context. The Guidelines stress that there is no need for intervention where there is a good availability of internet access services with satisfactory quality at a reasonable price along with the ability to switch easily to alternative providers.

An assessment of IP-interconnection in the context of Net Neutrality

In this draft publication, BEREC assesses the wholesale level of interconnection between ISPs and other intermediaries in the internet value chain. It concludes that the internet 'ecosystem' has managed to adapt IP interconnection arrangements to reflect a series of changes in technology, in players market power, in demand patterns and in business models, all without the need for regulation.

Differentiation practices and related competition issues in the scope of Net Neutrality

In this report, BEREC examines how differentiation practices by ISPs can affect the end user experience. Different treatment could result from slowing, accelerating or blocking traffic or from charging content and application providers for premium tiered services. The report concludes that differentiation practices are more harmful where there is vertical integration and an ISP can discriminate against applications or content which compete with its offering. Where

[11] BEREC Guidelines on Transparency in the scope of Net Neutrality: Best practices and recommended approaches, December 2011; Available on http://berec.europa.eu/doc/berec/bor/bor11_67_transparencyguide.pdf

there is no vertical integration, traffic management tends to be employed to reduce costs or increase income rather than for any anti-competitive purpose.[12]

U.S SCENARIO

The Open Internet principles have been redrafted, and expanded to a list of the following six rules[13]:

1. Content. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user's choice over the Internet.
2. Applications and services. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user's choice.
3. Devices. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.
4. Competitive Options. Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers and content providers.
5. Nondiscrimination. Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications and services in a nondiscriminatory manner.
6. Transparency. Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management

[12] Supra note 8

[13] The FCC Definition: The Open Internet Rules; Available on *online.wsj.com/article/SB12554727839448344 9.html*

> and other practices as is reasonably required for users and content, application and service providers to enjoy the protections specified in this part.[14]

While the first four rules (mandating lawful applications, services and content to be freely available to Internet users) track the intent of the original 2005 Open Internet principles quite closely, they did not speak to what is at issue for many Net Neutrality advocates and detractors today - the ability of ISPs to shape traffic (prioritize certain services or websites over others), or to degrade certain bandwidth consumptive, or business-model changing applications such as BitTorrent or Skype. This is where the more contentious of the two new rules, the fifth non-discrimination rule, comes in. It prohibits discrimination of lawful connections and content, directly the call for Internet Service Providers (ISPs) to treat all lawful sites and services "equally."[15]

Comcast v. FCC

For broadband, the Comcast v. FCC (BitTorrent) case was that scope of discretion determining case. The dispute came out of Comcast's 2007 blocking of BitTorrent activity (that took up a disproportionate amount of bandwidth), and defending its policies by echoing the FCC Open Internet Policy that they were only practicing "reasonable network management." The ISP would secretly send reset packets (the Internet equivalent to someone intercepting a phone call, pretending to be the person on the other side, saying goodbye and hanging up) to BitTorrent file uploaders, severely hampering their ability to share files.[16]

The FCC eventually made an adjudicatory ruling against Comcast, enjoining them from continuing to block traffic, and requiring them to be more transparent about their network management practices. 2008 Comcast BitTorrent Order. The order, along with strong public backlash (and lawsuits) prompted Comcast to comply with the FCC order. However, it still

[14] Jeff Kao, The Law and Politics of Net Neutrality; available on http://www.stlr.org/2010/11/the-law-and-politics-of-net-neutrality-part-1/

[15] Ibid

[16] The Law and Politics of Net Neutrality; available on http://www.stlr.org/2010/12/the-law-and-politics-of-net-neutrality-part-2/

challenged the validity of the FCC ruling in court, asserting, inter alia, that the FCC had no jurisdiction to regulate broadband Internet under its ancillary jurisdiction.

A trio of Supreme Court cases[17] informs the current understanding of ancillary jurisdiction under Title I of the Communications Act. The holdings have been well summarized into the two-part test that "the Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[18] Unfortunately for the FCC, and net neutrality proponents, the D.C. Circuit found that all the bases for ancillary jurisdiction that the Commission argued in the case were, in fact, without support. The court opined that jurisdiction to regulate broadband Internet under Title I was not given by Congress in the Act, not evident from past FCC policy statements, nor covered in Section 706 on advanced telecommunications services. The wording of Section 256 "establish[ing] procedures for . . . oversight of coordinated network planning . . . for the effective and efficient interconnection of public telecommunications networks . . ." seemed promising for the FCC, but the Commission's brief curiously failed to note an important limitation of that section, that "[n]othing in [it] shall be construed as expanding . . . any authority that the Commission otherwise has under law. As the D.C. Circuit enumerated and summarily dismissed the FCC's increasing tenuous theories of jurisdiction under Section 257, 201, and 623 of the Act, it was clear that the best legal efforts would not be able to salvage ancillary jurisdiction over broadband Internet, when there was no jurisdiction in the first place upon which to find ancillary jurisdiction. There was only one recourse for the FCC to (rightly or wrongly) reassert regulatory jurisdiction — broadband would have to be redefined under one of the regulated statutory categories of the Act.[19]

[17] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), United States v. Midwest Video Corp., 406 U.S. 649 (1972), and FCC v. Midwest Video Corp., 440 U.S. 689 (1979)

[18] *American Library Association* v. *FCC*, 406 F.3d, 689, 691 (2005)

[19] Comcast v. FCC: ancillary to nothing; available on www.circleid.com/.../20100406_fcc_comcast_ancillary_jurisdiction_

FreePress, the clear leader of the net neutrality movement via its six-year stewardship of SaveTheInternet.com, recently asked the D.C. Court of Appeals for permission to withdraw its legal challenge to the FCC's net neutrality rules for not being strict enough. After six years of full-throated constant campaigning for net neutrality legislation or FCC regulation in the U.S., it is remarkable that FreePress has quietly retreated from the latest and most pivotal net neutrality battlefield in the U.S. -- i.e. whether or not the FCC's net neutrality regulations stand or are thrown out by the D.C. Court of Appeals.[20]

A group of US consumer interest groups are set to file a complaint against AT&T, following the operator's decision to restrict access to the FaceTime app included in Apple devices – including the new iPhone 5. Three bodies are to make filings with the US Federal Communications Commission, arguing that this goes against the principles of "net neutrality".[21]

Challenges to the FCC's new Net neutrality rules filed by Verizon and MetroPCS were dismissed by a federal appeals court judge. The U.S. Court of Appeals for the District of Columbia tossed out the cases on a technicality.[22] Since the rules had not yet been published in the federal register, it was too early to file challenges to them. The decision does not prevent either company from filing suit again after the new regulations are published however, and, according to Forbes, Verizon is planning to re-file.[23]

INDIAN SCENARIO

Legality of blocking websites

[20] U.S. Net Neutrality Movement in Retreat; available on www.netcompetition.org/fcc/u-s-net-neutrality-movement-in-retreat

[21] AT&T facing net neutrality complaint after Face Time restrictions; available on http://www.mobilebusinessbriefing.com/articles/at-t-facing-net-neutrality-complaint-after-facetime-restrictions/25330

[22] Court Dismisses Challenges to Net Neutrality Rules, Leaves Door Open for Future Suits; available on www.switched.com/.../court-dismisses-challenges-to-net-ne

[23] Ibid

While piracy may be a genuine concern, all users of file sharing websites are not pirates. File-sharing websites are not only used to transfer movies and music but also to transfer large-sized documents, pictures and files. There are several small and medium sized companies in India that rely on these file-sharing websites for their administrative and official tasks like sharing huge files of designs, video presentations, spreadsheets etc. Many companies have paid accounts on these file-sharing websites. Should these companies be watchful for every film release in India? Should they be left at the mercy of ISPs and Entertainment companies? These are the questions which have to be kept in mind in order to determine whether blocking a website by any companies request is morally correct.

The Internet Service Providers (ISPs) play a major role in the delivery of content to its users. The ISPs control the user's access to any website. While it may be difficult to approach each and every website (whose platforms are used for distributing infringing content), it is not difficult for the content creators to put pressure on the local ISPs to block the infringing content at the ISP level itself.

Under Section 79 of the Information Technology Act, 2000 the ISPs have to show and prove that they have exercised 'due diligence' to absolve themselves from any liabilities. Therefore, ISPs when faced with a John Deo order have to show satisfactory compliance to the order. But ISPs need not block websites to show compliance to the John Deo order. Let us not forget that a John Deo order is different from an order to block a website.[24]

The Intermediary Guidelines only speak of reasonable steps to be taken by the ISP to prevent such malicious activities. For blocking websites we have the *information Technology (Procedure and Safeguards for Blocking for access of information by public) Rules, 2009*. Under these rules only the designated officer appointed by the Central government is empowered to issue orders for blocking of a website. ISPs have no authority to block websites.

The US is proposing the Stop Online Piracy Act (SOPA) as a means to protect the interests of entertainment companies. However, this is widely criticized and condemned as an attempt of the US government to control the internet. The claims cited in support of the bill may appear just and

[24] Sec.79 of the IT act 2000

fair. However, the execution of the provisions of the enactment poses a severe threat to the freedom of speech and expression. The SOPA contains several provisions aimed at destroying and disintegrating the internet. A major threat described in the bill is DNS and IP blocking. However, there are already plug-ins available to tackle this and developers are working hard to overcome the other harmful provisions of SOPA. Reason - Internet was designed to be free, open and accessible to all without any discrimination of content. The court orders directing such blocks are technically very difficult to implement, considering the architecture of the internet.

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

The Indian government is carefully watching the SOPA process unfold in the US as it too has plans to control the internet. The Indian government has already attempted this by citing various reasons including 'protecting religion sentiments' and "national security'. Therefore, instances like this where the rights of online users are curbed will not be noticed or acknowledged by the government. If SOPA is passed in the US then all nations, including India will pass a law on the same lines to take control of the internet and incidents like these blockages will be a common feature in India. India is the world's largest producer of films. If all producers and entertainment companies in the country are to follow the Reliance model blockades for every movie release, the internet users in India will be left with a crippled, fragmented, and distorted internet.

The issue is to be addressed by balancing the rights and liabilities of all players in this field- the ISPs, Internet Users, content holders and websites (It is to be noted that paid users of file-sharing websites have a special agreement for availability of services, so ISPs cannot block these websites). Each player here has a set of rights. One cannot impose on the other or transgress into other's freedom. At the end of all, the fundamental debate revolves around Internet Neutrality and Internet Censorship.[25]

Reliance Entertainment, the producer of the movie Don 2 has once again obtained a John Deo order from the Delhi High Court to prevent online piracy of the movie. As a result of the order

[25] ISP liability and internet; Available on *nopr.niscair.res.in/bitstream/.../5215/.../JIPR%2014(4)%20321-329.p…*

all file-sharing websites like Mega upload, Rapid share, Media fire, File sonic etc. were blocked on the Reliance Communications (RCom) since the day the movie hit theaters. This is the third time that Reliance Entertainment has obtained a John Deo order against file-sharing websites, the earlier instances being for the movies Singham and Bodyguard. Despite all these blockades in place, circumventing them is not a very complicated process. Some of the popular methods include - changing browsers or using a proxy server. Besides, there are numerous software applications and browser add-ons available to evade these blockades. One can also find several internet forums discussing new and innovative methods to do this. Today, with these tools and technologies in place, it is not very difficult to bypass even a nation's firewall.[26]

AIRTEL EXPERIENCE WITH NET NEUTRALITY[27]

Airtel provided internet access through different mediums. It is one of the largest private sector internet service provider in India through airtel broadband. Airtel has a long history of going against the concept of net neutrality which is yet to become a law in India. One of the earliest step was when they collaborated with YouTube to offer online access to Indian Premier League matches at 2mbps connectivity at no extra charge to all their customers. IPL matches streamed online from YouTube were broadcast at 2mbps no matter what speed user was supposed to get according to his internet plan. This step was pro-consumer but still went against the concept of network neutrality. Airtel was treating traffic from a specific internet source differently from other sources. The data used in this transmission was still being counted from the user's allocated quota. The biggest step taken by airtel that goes against network neutrality is when they started throttling bittorrent protocol during the day time. This practice is still ongoing. Users get heavily throttled speeds during the daytime if they try to download anything using torrents. This applies to legal downloads like if you are trying to download Ubuntu ISO as well. We can consider this as something Airtel does to manage the QoS on their network. But they should be doing it during periods of heavy network congestion. Having a fixed time for throttling cannot be considered as

[26] Free Speech, Internet Freedom and Net Neutrality in India; available on www.legallyindia.com/.../free-speech-internet-freedom-and-net-neutr...

[27] Airtel has strongly opposed to the Govt. of India against the Principle of Net Neutrality.

a step taken to ensure quality of service to the end user especially when all their unlimited plans are still heavily restricted when it comes to overall data consumption.[28]

Airtel wanted specific online services to pay them for enabling their users to access their services. This is again a case of preferential treatment as they are only targeting a specific group of web services and asking them to pay them to offer their services on Airtel's network. Online services like Facebook and Google are already paying for bandwidth in data centers to the ISPs like Airtel. They have to operate or lease data centers around the world to ensure that connectivity is smooth for global internet users, and as one of India's top-3 wholesale bandwidth suppliers, Airtel already makes money from online companies operating through data centers here in India. Airtel already charges a lot of money for internet access from their subscribers. They have some of the costliest internet plans in the country. Industry sources reveal that the cost of bandwidth in India is generally lower than Rs. 5 per GB but consumers are paying as high as 200-300 rupees per GB of data transfer.[29]

POSITION OF NET NEUTRALITY LAW IN INDIA

Currently, in India there is not much development regarding net neutrality law. The TRAI (Telecom Regulatory Authority of India) in its guidelines for the issue of access service license to provide Unified Access Service also includes Internet. It promotes the principle of non-discrimination by prescribing an obligation on licensee to provide services to subscribers without any discrimination.

It is also essential for the ISP's to provide other licensees access to their services without discrimination. The Information Technology Act does not however, provide any regulatory provisions regarding access to the internet and does not expressly prohibit a service provider from controlling the net for his business interest.[30] The TRAI Act, 1997 only stipulates that ISPs

[28] TRAI on Airtel; available on www.medianama.com/.../223-trai-needs-to-take-note-of-airtels-anti-n

[29] Ibid

[30] *Supra note* 1

must act in consumer interest.[31] The sole other mention of Network Neutrality principles by the TRAI can be found in a consultation paper issued in 2006 where it foresees a situation where ISPs 'may use their market power to discriminate against competing applications and/or content'.[32] The TRAI's Quality of Service of its Broadband Service Regulations of 2006 did not incorporate any anti-discriminatory measure. The License Agreement (which an ISP must mandatorily enter into before being granted a license to operate in India) does stipulate that ISPs must refrain from discriminating between Internet content otherwise it stands to have its license cancelled.[33] However, that hasn't stopped big business ISPs from openly flouting Network Neutrality principles.[34] After the Information Technology (Amendment) Act, 2008 (which was modelled on the safe harbour provisions of the Digital Millenium Copyright Act, 1998),[35] ISPs were exempted from liability for illegal content on their networks[36] but for some reason best known to our legislators, this exemption did not extend to any content illegal under the Copyright Act, 1957 or the Patent Act.[37] Thus ISPs can still avail of the legal defence that they disabled content as they were under the belief that the content was illegal under the Copyright Act, 1957 or the Patent Act. The Honourable High Court of Delhi, in Avnish Bajaj v. State[38] ruled that the principle of absolute liability applied when an ISP was found to host illegal content on its network, thus giving ISPs further impetus to wantonly censor any and every content that

[31] TRAI ACT, 1997, § 11(b)(v)

[32] Clause 3.6.2 of the TRAI Consultation paper on Internet Services (Available at www.trai.gov.in)

[33] Clause 10.2 of the ISP License Agreement for the Provision of Internet Services (Available at www. trai.gov.in)

[34] Recently, MTS, a telecom operator announced its Internet service which explicitly provides for faster access to websites such as Yahoo! India. Thus, we see that Network Neutrality is not a mere hypothetical any longer. Apar Gupta, (TRAI)ing to Keep it Neutral accessible at http://www.iltb.net/2010/09/traiing-keep-it-neutral/

[35] DIGITAL MILLENIUM COPYRIGHT ACT, 1998 § 512. Also referred as the DMCA. The safe harbour provisions of the DMCA exempt ISPs from all liability for illegal content that they might passively carry on their network thereby denying them the defence that they censored material in the fear that it might be illegal.

[36] INFORMATION TECHNOLOGY ACT, 2000 § 79

[37] INFORMATION TECHNOLOGY ACT, 2000 § 81.The proviso to Section 81says that despite the overriding effect of the IT Act, nothing in the Act can restrict any person from exercising any rights conferred under the Copyright Act, or the Patents Act.

[38] **Avnish Bajaj** v. **State,**150 (2008) DLT 769.

might be illegal regardless of whether it is ultimately found to be so, often with malafide intentions. Safe harbour provisions such as the one in the DMCA would go a long way in ensuring ISP adherence to Network neutrality principles in the Indian context. As regards government censorship, numerous clauses of the ISP License Agreement grant the government the authority to over-ride ISPs and monitor the data on their network if such censorship is in the 'interest of the State'. Thus we see that the law does not actively prohibit the violation of Network Neutrality which could be detrimental to the effectiveness of the Internet as a tool for empowerment.

IMPORTANCE REGARDING NET NEUTRALITY LAW IN INDIA

The information technology is growing at a fast pace in India showing a tremendous increase in Internet usage and users. The advent of latest technology like mobiles, touch tablets, i-pads and other gadgets has contributed to the unprecedented growth of net users enabling internet access with a touch anywhere across the country. With 3G technology hitting Indian Market, there is a sharp rise in the mobile users. This indicates a higher probability of network clogging[39] which is beginning to start in India and in such cases; it would be possible that the service provider might impose premium rates for download or surfing endangering net neutrality.

It is necessary to ensure net neutrality to promote fair competition and provide growth opportunities to small, medium businesses operating on the Internet as they will not be able to pay high costs for prioritization. The slowing down on the basis of content, price would also have an effect on the speed of global traffic and will hinder the increasing Internet use.[40] The Government of India has also recognised the potential of the Internet by setting the goal of 40% broadband penetration by 2014.[41] In an article[42] in the Indian Express, the auther expressed the view that the Indian media had largely over-hyped Anna Hazare's fast against corruption on the

[39] Network Clogging means

[40] *Supra*

[41] Broadband Policy, 2004 released by the Department of Telecommunications (accessible on www.trai.gov.in).

[42] Mihir Sharma, Breaking Fast, INDIAN EXPRESS, April 9th, 2011 at p. 9 Accessible at http://www.indianexpress.com/news/breaking-fast/773642/0

ground that his protest at Jantar Mantar saw poor attendance. While it is appreciated that the piece was largely satirical, it would be erroneous to accuse the media of exaggerating the popularity of the movement as the correspondent omitted to mention one crucial factor – the groundswell of support that developed for the protest among 'netizens'. That is the undeniable role played by the Internet in today's civil society - a tool that that has altered the world as we know it over the last two decades, which possesses an unimaginably large user base[43] and which could prove to be vital in India's persistent struggle against poverty.[44]However, the open and free character of the internet which has played a major role in ensuring its global patronage is under siege. Current Internet Service Provider (and Government) practices have often been deceptive, blocking content for anti-competitive and traffic management purposes & the most recent being the blocking of face book and restriction on SMS services due to the Assam violence.

CONCLUSION

To conclude, net neutrality is turning into one of the critical aspects of Cyber Law which might have immediate jurisdictional implication, as laws in one jurisdiction can potentially have dramatic effects in other jurisdictions when telecom companies or host servers are affected. Net neutrality is based on the principle that ISP' must treat all the Internet content equally in terms of speed, access and pricing. Therefore, this principle needs to be protected since providing a free hand to the ISP's, other telecom operators can result in censorship, establishing anti-competitive prices. Internet is an open network providing free flow of information and hope it continues to be so.

[43] The use of online social networking has exploded in the past five years, with 600 million users of Facebook and even more registered accounts using the Voice over Internet Protocol (VoIP) software supplied by Skype. Almost instant search through tens of billions of World Wide Web pages is conducted weekly for over a decade now, and YouTube hosts 15 billion video clips uploaded by its 500 million users since 2005. The numbers speak for themselves.

[44] Sir Tim Berners-Lee, Designing the Web for an Open Society: Keynote Speech at the 20th International World Wide Web Conference, Hyderabad, 2011 accessible at http://portal.acm.org/citation.cfm?id=1963408&CFID=17121399&CFTOKEN=15854639