ENHANCING NET NEUTRALITY IN INDIA

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I. Introduction and Characteristics

Net Neutrality is an overarching principle to which Internet Service Providers must be held accountable to: that they treat all internet communications equally, that they will not commit price discrimination or speed discrimination based on content, website, user, platform, application, equipment used, source or destination, or means and method of communication. ISP’s therefore, violate the principle if they intentionally slow down or block certain content, or if they charge a price for accessing certain content. This way they may create separate tiers of internet services: with entry-level customers having access only to basic internet websites and other tiers having larger access to walled gardens of content. If the principle was not adhered to, ISP’s can charge customers for accessing sites like YouTube or Netflix, and if such price cannot be paid by the customers, a two-sided market can appear, where customers are price-discriminated on one side, and online website competitors compete to pay ISPs for priority in internet traffic. For example, hypothetically, a situation could occur where YouTube pays ISPs to gain priority in traffic over other websites, putting its competitors like Odysee, Rumble and Bitchute at a disadvantage.

Open internet is an allied principle, advocating for open access to all portions of the internet and all content through decentralized communication, open-source software and without internet censorship. Where in Russia, Thailand or China, the state may have internet or secret police to block content, USA and Canada have closed platforms where ISPs restrict or block content – both having the same effect on the user. The second characteristic of net neutrality is Dumb pipe – or the fact that the ISP should act like a water piper where there is no intelligent manipulation of the water, or in this case, information, flowing through it. This would help adhere to the principles of non-discrimination and open internet.

A characteristic of open and vibrant net would be a device-neutral internet, i.e., the ISP must not discriminate based on the device of the user and the applications they use. As far as possible, the user must be free to use any device of any specification with any applications of their choice to access the internet.

II. History of Net Neutrality Issues

Net neutrality has faced a litany of issues based on which discrimination was done by ISPs. Discrimination by protocol meant that they discriminate users based on the internet protocol they use: like when Comcast blocked and discriminated against the peer-to-peer protocols of the users of Bit Torrent.

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Discrimination by IP address is when certain IP addresses can access certain content at certain price and others at another price, or not at all. A result of this is zero-rating by ISPs and ISP addresses like Facebook Zero and Google Free zone, where the user is charged no price to access a bare minimum or limited version of these websites for no price. While this may seem benign and well-intended, it leads to monopolization of internet and unbiased flow of information when Google Facebook and Wikipedia can construct a reality around the user. It is repeated often on the internet, and oft-misquoted: “If you’re not paying for the service, you are the product.” A manipulatable mass of people is far more valuable to an advertising company like Facebook and Google, than the paltry amount they pay the ISPs at third-world countries to prioritize their data traffic. Subsidized internet access is not a boon to the developing world, it will forever stymie their economic, social and political development. Intelligence agencies and Advertising trackers have sophisticated technology which penetrates many layers to access everything in the data packets and create a record of it: now it is so ubiquitous that if one has a device, one can be assured that it is being tracked. It is a literal World Wide Web in the sense that it is a manifestation of Jeremy Bentham’s Panopticon.

III. Developments in Net Neutrality Law

In Brazil, Belgium, Canada, Chile, India, Israel, Japan, Mexico, Netherlands, Russia, Slovenia and South Korea, Net Neutrality is enforced. Paradoxically, developed nations such as USA, Australia and EU find it hard to enforce net neutrality, with Portugal being an egregious example where there exists tiered internet. In Italy, net neutrality bill failed to be passed. Russia is actually a good place for open internet due to the prominence of P2P network traffic and communication blockage allowed only upon orders issued by the government.

In the USA, net neutrality principles could only be applied on Title 1 Common carriers according to the case of Verizon v FCC\(^2\), and as a result, broadband internet was reclassified from Title II information services, where there were no net neutrality regulations, to Title I common carriers, due to the 2015 FCC Open Internet Order. This order and its legal validity were upheld in the 2016 case of US Telecom Association v FCC.\(^3\) In 2017, these principles were rolled back when ISPs were classified as Title II information services as a result of political appointment. Subsequently in 2018, the case of Mozilla v FCC\(^4\) upheld states’ rights to have stricter regulation of ISPs in accordance with net neutrality, even if they were loosely regulated due to FCC’s right to reclassify them as Title I.

The European Union, while it has codified Net Neutrality in the form of Article 3 of EU Regulation 2015/2120, is heavily criticized for the loopholes due to corporate lobbying which allow for net neutrality to be violated. The ambiguity in law of Article 3 has allowed the simultaneous co-existence of strict national legislations in Slovenia and Netherlands to enforce net neutrality, alongside Countries like UK, Germany and Portugal where ISPs egregiously violate the basic principles of open internet like having tiered internet, to limit P2P and game traffic

\(^2\) 740 F.3d 623 (D.C. Cir. 2014); 11-1355
\(^3\) DC Cir., No. 15-1063 et al.
\(^4\) No. 18-1051 (D.C. Cir. 2019)
via deep packet inspection and other anti-competitive practices.

IV. How India Enforces Net Neutrality

India has an interesting history with regards to net neutrality: where violation is aplenty however with a hopeful and robust regulatory framework. The TRAI and the Department of Telecommunications both are heavily in support of net neutrality and open internet principles, with priority access only for autonomous vehicles and for tele-medicine. When Airtel decided to charge customers for WhatsApp and Skype calls, i.e., VoIP calls, the debate on net neutrality was ignited, with users heavily favouring it. TRAI’s consultation paper in 2015 inviting comments on allowing ISPs to charge users separately for OTT services like WhatsApp and Skype was heavily criticized in a unanimous manner for violating net neutrality by all sides of the political spectrum. Taking into account the criticism, TRAI passed “Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016.”

In 2014, Airtel demanded that WhatsApp and Skype should be regulated like telecom operators, which was rejected by TRAI. The heavy taxation on telecom operators prompted these comments. The irony is that Airtel was then investigated by TRAI for charging WhatsApp and Facebook data at lower rates than its standard rates for other data. It was found to be true, however, TRAI ruled that Airtel had only violated the principle of net neutrality, not any regulations. Net neutrality had no regulations.

In 2015, concepts like Airtel Zero and internet.org, zero-rating plans by Airtel and Facebook respectively drew flak from the public from across the political spectrum. TRAI’s consultation paper asking whether it can allow OTT to be charged separately drew even more flak. All the apps and news services aligned with internet.org, such as NDTV, Times, NewsHunt etc., pulled out in quick succession fearing public humiliation. In a move reminiscent of astroturfing, or piggybacking on the public support for net neutrality, the Cellular Operators Association of India claimed 4 million subscribers supported their view to regulate and charge users for using WhatsApp and other communication apps. Facebook tried to relaunch this initiative with ‘health sites’, BBC, Wikipedia and Facebook to dupe the public again with ‘Free Basics’, a zero-rating app. Fortunately, it only drew more ridicule as the gatekeeping was obvious and it was seen as a method of propagandizing the Indian Public.

In 2016, TRAI ruled in favour of Net Neutrality, establishing the following:

1. No service provider can offer or charge discriminatory tariffs for data services on the basis of content.
2. No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that the effect of discriminatory tariffs for data services being offered or charged by the service provider for the purpose of evading the prohibition in this regulation.
3. Reduced tariff for accessing or providing emergency services, or at times of public emergency has been permitted.
4. Financial disincentives for contravention of the regulation have also been specified.
5. TRAI may review these regulations after a period of two years.
In 2017 and 2018, the stance of TRAI on open internet has not changed and they have enforced a Rs 50,000 fine per day on operators who violate the ‘content agnostic’ approach that they should have towards the flow of internet communications.

V. How to Enhance Net neutrality and Conclusion

While it is a personal principle that more regulation leads to more loopholes, complexity and harder navigation for independent competitive businesses, this is one situation where simple, succinct and operating principles, instead of four-corner regulations have worked in tandem with public opinion to ensure net neutrality was enforced in India. This is a function of the open market of ideas and of the free market. Regulations, as far as possible should be sought to be kept to a minimum. The long-term goal for open internet and net neutrality would be for the regulations to facilitate decentralized internet networks and communication systems. Such protocols exist and are easily available for common users. Open-source should be encouraged and helped to develop in a free environment. Internet Businesses and start-ups with open-source principles should be given tax breaks. The law is showing a positive direction. Privacy regulation should be introduced to protect India’s national integrity to the highest level: if only the government could understand that the privacy of the nation is predicated on the freedom and privacy of its citizens from predatory influences of both its own and foreign governments.

An open internet and free-speech are the cornerstone of the future Indians idealize, while paradoxically, Indians have diametrically opposite views on morality on the internet while in their own homes versus in public. However, Indians have hopped the one hurdle where many developing nations failed: when Facebook’s and other operator’s zero-rating plans have helped monopolize the net in those regions, stymieing development of societal consciousness and their own economic development, India has managed to steer clear of such efforts by monopolist internet giants, so far. However, that remains to be seen whether India will be able to thwart such efforts in the future. For now, Big Tech has stopped its plans to enforce net neutrality due to its widespread unpopularity among software developers and the public backlash. Net neutrality, however, is the reality in certain nations like Portugal. In India, even if the legislature legalizes Net neutrality, or allows some limited application of such services, it is likely that the Supreme Court can be persuaded to strike down such measures due to the gravity of the problem, and its widespread Constitutional consequences to free-speech and its corollary, the free delivery of information. Fortunately, TRAI itself has come to the conclusion that the benefits of Net neutrality far outweigh the benefits of bringing internet to the masses via gatekept internet. It would not be fair to the poorer masses of they have restricted access to the internet compared to their paying counterparts. It would fundamentally alter their perception of world news, and with the ‘terminally online’ generation, a non-neutral internet would fundamentally alter their perception of reality itself.

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