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NET NEUTRALITY – LEGAL FRAMEWORK AND PRIVACY CONCERNS IN INDIA*

INTRODUCTION

Internet is serving as a means to express creativity and innovation where individuals and companies develop lawful services without seeking permission of Network service providers. Internet is global network of interconnected computers where data sent or received is divided into number of segments called packets. The packets would travel from one node to another where they will be routed through best path to reach the destination and reassembled to form data readable by the user. The transmission of data takes place in accordance with OSI Model where ISP plays the role of carrier between the netizens and Content creator.

Network Neutrality is based on principle that data which is transmitted through internet shouldn't be discriminated, what is important is, all packets in a network should be treated equally.

Increasing dependency on Internet

Development in the field of technology whether it may be personal computer, networking or emergence of Internet have made man dependant on it. The World Wide Web 1.0 was used to send emails, to create access or store data, but by coming of 2.0 it is possible for us to share information through sites like YouTube or express our views through blogs, interact through video calls. It had also facilitated to do online shopping, online studying and finding jobs besides this, the navigation facility which helps us to find right path while travelling have made life of man so easy that we can see that internet has emerged as powerful tool controlling life of each and every individual. As per the report of the Standing Committee of Information Technology, India ranks 3rd place so far as Internet usage is concerned. The total number of websites during 2005 was 1.7 lakh, which have remarkably increased to 14 million in 2012. In 2005 there were 11 million email accounts whereas in 2012 the number have increased to 180 million and so far as Net users are concerned they were 21 million users in India during 2005 and 150 million in 2012.¹

Open Internet

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¹ Ministry of Communication and Information Technology, Standing Committee on Information Technology Fifty – Second Report 2013-14, available at http://164.100.47.134/Isscommittee/InformationTechnology/15_Information_Technology_52.pdf, last seen on 27/01/2015

Open Internet means all the resources available on internet and means to operate it are easily accessible by all.² It serves as a platform for web users to access content or applications of their choice. Anyone can host website with little expense. It also serves as a means to application provider for innovation in services, for instance whatsapp through its services have gained popularity and thereby enjoying innovation without permission. So it is very important from the perspective of small entrepreneurs as they rely on open internet to launch business or advertise their products.

Network Neutrality

Network neutrality refers to open internet where netizens can make their choice as to what applications and services they want to use with no discrimination between suppliers of content and customers who access such content. In absence of net neutrality ISP will get power to shape the internet traffic so that they can get additional benefit from it. It is quite possible ISP may come out with package plans for consumers where they can limit access to websites or it is also possible they can restrict the speed depending on type of content or service one is paying for.

Net neutrality is essential to foster innovation. Big companies like facebook, whatsapp, google and many more are the product of Net Neutrality.

The term was first coined by Prof. Tim Wu "Network neutrality is best defined as a network design principle. 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."³

Foundation on which Net Neutrality is based

The Telecom providers manage telephone lines where operators do not interfere with core functioning of providing service as to whom the subscriber calls, how much benefit he is receiving through use of use of telephone lines. They neither block a particular number nor delay connection to a particular number unless the same is obliged by law. In India, Telecom service providers are mostly Internet service providers, so adhering to same principles the ISP should give freedom to net users to connect to service they want. We cannot let the ISP to select which content to be viewed and which to be not.

- No Throttling: To slow internet speed for specific services and apps or asking users to pay extra.
- No Paid Prioritization: The NSP/TSP should not provide fast lanes i.e. there should be no paid prioritization of bandwidth for lawful traffic over other lawful traffic for consideration.
- No Blocking of websites can be done to avoid competition or for social, public or political reasons. Network Service Providers should not block online legal content, applications or services.⁴

² https://en.wikipedia.org/wiki/Net_neutrality, last seen on 30/09/2015

³ https://mygov.in/sites/default/.../Net_Neutrality_Committee_report.pdf, last seen on 30/09/2015

⁴ <https://www.whitehouse.gov/net-neutrality>, last seen on 28/09/2015

Freedom of Speech and Expression

Net Neutrality means Internet that protects free speech. Article 19 guarantees freedom of speech and expression however Article 19(2) puts reasonable restrictions when speech leads to defamation, contempt of court, offends decency or morality, security of state, friendly relations with foreign states, provides incitement to an offence, threat to public order or sovereignty and integrity of India.⁵

Net Neutrality implies that there should be no blocking of websites i.e. no blocking of lawful content or traffic on network. However acts which invade the constitutional provision have been penalised under Information Technology Act, 2000

S.67 of the Information Technology Act, 2000 prohibits publishing or transmitting obscene materials electronically. This is reasonable restriction imposed on publishing and transmitting obscene matter on the internet. S.67B of the IT Act, 2000 prescribes that publication, transmission, creation, collection, browsing, downloading of child pornography is a punishable offence.

Further S.69 of the IT Act confers power on the Central Government or the State Government to issue directions for interception, monitoring or decryption of any information through any computer resource. S.69A confers power on the Central Government to issue directions for blocking for public access of any information through a computer resource. And S.69B empowers the Central Government to monitor and collect traffic data or information through any computer. S.69A empowers the Central Government to block any site that it considers necessary for preventing incitement to the commission of any cognizable offence.⁶ Websites that promote hate speech, defamation, terrorism, pornography including child pornography can be blocked since this websites cannot claim constitutional right of freedom of speech.

Privacy Concerns

Internet is used as a means to exercise freedom of speech and expression, in absence of net neutrality voice of people can be curbed by blocking the content for social or political reasons.

In the case of PUCL v. Union of India,⁷ S.C. have held that telephone tapping is invasion of individual right of privacy guaranteed by Article 21 unless the same is permitted under the procedure established by Law. Thus the concept of privacy of individual which has evolved case by case is held to be fundamental right by the Supreme Court.

Prefiltering Internet content

In 2011, the minister for Information Technology had urged the social networking sites to monitor the third party content which was defamatory, news regarding this appeared in Times of India on 7th Dec, 2011 where the issue of precensoring the third party information posted on social networking sites like facebook and twitter came into limelight. If, in case government proposes to precensor such third party content then clear rules that define ambit and scope of such regulation including the due diligence process for filtering by intermediaries ought to be passed.⁸ For instance a blog complaining shortcoming of services provided by service provider is protected by free speech so long

⁵ Seervai, H.M., Constitutional Law of India: A Critical Commentary, Vol.1, N.M. Tripathy, Bombay, 1975

⁶ Information Technology Act 2000, Bare Act, 29,30(2013)

⁷ PUCL v. Union of India, cited at: (1997) 1 SCC 30

⁸ Sibal snaps at social networks, says code of conduct coming, The Times of India, 7th December, 2011, <http://timesofindia.indiatimes.com/tech/news/internet/kapil-Sibal-snaps-at-social-network-says-code-of-conduct-coming/articleshow/11012467.cms>, last seen on 03/07/ 2012

as it does not use abusive language. Rule 3(2) of IT (Intermediaries Guidelines) Rules, 2011 mandates removal of illegal content within 36 hours from lodging of complaint.

OTT refers to -

The OTT players mean applications and services which are accessed over the Internet. They make use of the infrastructure that built by TSPs' to reach the users. Search engines, social networks are some of the examples of OTT services. Messengers like Whats App, Skype, Viber, Line, WeChat etc. are OTT services, besides this e-commerce websites like Amazon, Myntra, Flipkart, Snapdeal etc. work in the same manner i.e. all these services can be accessed from internet connected devices

Whatsapp have 700 million users worldwide. The growing popularity of whatsapp can be witnessed through number of Indian users which is 10% of worldwide users⁹, the only concern is it has no office or server based in India due to which the Indian government is finding it difficult to regulate content over such application. In situation where offensive message is circulated over the app the only remedy that is available to government is to block entire application. The app is being used to instigate communal riots, one of its instance is the riots that broke in Saharanpur over the extension of gurudwara, in this case the government approached the global offices of Facebook and Whatsapp to block the video.¹⁰

The process of blocking the content is time consuming and as no regulation or licensing factor is imposed on such apps, neither they have server located so it is not possible to restrict the specific content using ISP route. In such situation investigating officers are faced with problem as to what should be done in such circumstances, even if request is put to take down the content immediate action is not taken and the only remedy available to government is blocking entire application. Government has faced similar problem while regulating content over social networking sites such as facebook and Twitter.

Debate about net Neutrality

The debate regarding issue of Net Neutrality was triggered in India when Bharti Airtel planned for launching differential pricing in respect of certain internet services (Charging of higher rate for calls made using VoIP using Skype, Viber and similar services).¹¹

In view of Telecom Service providers the Over the Top providers make use of Telecommunication service provider's infrastructure for reaching customers and offering products and services by which they not only make money but compete with traditional services offered by Telecom Service Provider

The insecurity of competition created by popular apps like Skype and Facebook has made TSPs to raise voice for differential pricing. But in this context it should not be forgotten that TSPs do benefited from apps, data is charged to users on the basis of KB and larger the usage of data the operator is paid more. If user send 10 sms a week with usage at Rs.0.5 per sms would give the telco only Rs. 5 per week. Whereas when user sends or receives 1000 whatsapp messages in the

⁹ <https://en.wikipedia.org/wiki/WhatsApp>, last seen on 30/09/2015

¹⁰ Surabhi Agarwal, India's struggle with hate on Whatsapp, Business Standard, Aug. 12, 2014 http://www.business-standard.com/article/current-affairs/india-s-struggle-with-hate-on-whatsapp-114081201185_1.html, last seen on 29/09/2015

¹¹ Anandita Singh Mankotia, *Airtel customers to be charged more for VoIP calls*, The Economic Times, Dec. 25, 2014, available at, times of India- economic times, last seen on 05/05/2015

same week where cost of data is considered to be Rs. 0.01 per KB and each message is 5KB then the user spends Rs. 50 per week.¹²

Zero Rating Plans

It was on 10th Feb, 2015 Facebook launched Internet.org in India with Reliance communication. They had plans to provide free access to 38 websites by way of an app where Bing was the only search engine made available for the purpose. Later on in April 2015 Airtel came up with Airtel Zero Scheme which provided apps who sign contract with Airtel would be given free access to its customers. Flipkart have joined the plan but after receiving negative response from people it withdrew from the plan.¹³

TRAI Consultation Paper

Telecom Regulatory Authority of India have released two consultation paper, first was released in 2006 for seeking opinion from industry bodies and stakeholder for upholding the issue of net neutrality and secondly in March 2015, considering the growing popularity of OTT players, paper seeking opinion whether there should be regulatory framework for OTT players like WhatsApp or Skype. But Till date no rules have been formulated.

Arguments against Net neutrality

The TSP/ISP are of view Net neutrality cannot be followed in strict sense because traffic management need to be done in cases of congestion, or for protecting the network against malware.

The TSP/ISP are of view that OTT players should be charged for content whereas the content providers i.e. OTT players are of view that they are already paying hosting charges, domain registration charges, connectivity charges etc. and should not be charged separately for content as this would lead to discrimination between different OTT players.

In India Internet Telephony is licensed service which is permitted under Unified Access Service granted under Indian Telegraph Act 1885. The licensed TSPs are required to pay Entry fee, License fee and Spectrum Usage charges. They are required to observe quality of service and monitor and intercept the traffic whereas none of these provisions are applicable to OTT providers, they are running their services without license and so OTT voice services like Skype are evading the licensing norms.

As per the unified License agreement TSP/ISP are obliged to maintain confidentiality but OTT players are not, so in order to protect the privacy of data and security of nation there should be regulatory framework to which the OTT players should adhere to.

Committee Report

On 19th January, 2015 Department of Telecommunication constituted committee to examine the issue of net neutrality.

The growing popularity of OTT players in communication services competing the licensed service providers in their traditional business has raised concern regarding differential regulation for same services.

The committee in its report have stated that the rights of netizens should be ensured. The TSP/ISP should not restrict any lawful activity on internet.

¹²Deepak Shenoy, Telecom companies are not losing money to Data services: The Net Neutrality Debate, Capital Mind, April 15th, 2015, Available at capitalmind.in/2015/04/telecom-companies-are-not-losing-money-to-data-services-the-net-neutrality-debate, last seen on 30/09/2015

¹³ https://en.wikipedia.org/wiki/Net_neutrality_in_India, last seen on 30/09/2015

1. The committee in its report have stated it aims for facilitating affordable, quality and universal broadband for citizens.
2. The application services provided by OTT should be encouraged and necessary steps should be taken to remove the impediments in the growth of OTT services.
3. The committee is of view that messaging services of OTT should not interfered by regulatory instruments
4. In respect of VoIP service, TSP and OTT players are competing for same service, there exists regulatory framework for TSP and besides this they are paying revenue to government but there is no such regulation imposed on OTT.
5. The committee comes to consensus that every user must have equal access through internet to all content, services and applications irrespective of who is supplying and using them, but on other hand they are of view in order to protect the network from attacks and to deal with problem of network traffic there is need to manage the network with traffic management tools.

Legislation or resource on violation of Net Neutrality in India

Till date there is no law in India governing the concept of net neutrality. The Information Technology Act, 2000 is silent on the concept of Net Neutrality. However according to Unified Access Service License the Telecom providers are bound to follow certain rules.

Clause 2.2 of License Agreement provides that ISPs are required to provide access to all content available on internet to consumers

Clause 16 lays down provisions regarding tariffs whereby ISPs are obliged to comply with TRAI's pricing policies.

Clause 25.1 Responsibility of ISPs to ensure Quality of Services.

Clause 37 the licensee have been entrusted with the responsibility to maintain confidentiality of information.

Though TRAI's guideline by way of Unified Access Service License promotes net neutrality but does not enforce it. There are cases were there had been violation of net neutrality principle for instance Airtel Zero plan or Facebook Internet.org, but Till date no action is taken against any ISP on the basis of this Agreement.

Foreign Scenario

Chile

It was on 13th June 2010, Telecommunication law of Chile was amended to protect network neutrality, and thus it became the 1st country in the world to enforce the concept of Network neutrality. The law makes provision whereby ISP cannot arbitrarily block, interfere, discriminate, create any hindrance or restrict an Internet user's right to use, send, receive or offer any legal content, application, service or any other type of legal activity or use through the Internet.¹⁴

USA

The Federal Communications Commission recently adopted strict Net neutrality rules restricting the ISP from creating fast and slow lanes on Internet. In USA Microsoft, Google, Steve Wozniak, Tim Berners- Lee and many more have raised voice for protecting net neutrality.¹⁵ The American president Barack Obama is strong supporter of Net Neutrality and is of view that there should be

¹⁴ https://en.wikipedia.org/wiki/Net_neutrality_law, last seen on 29/09/2015

¹⁵ Mathew Honan, Inside Net Neutrality: Is your ISP filtering content, Macworld Available at www.macworld.com/article/1132075/netneutrality1.html, last seen on 29/09/2015

no blocking of legal content by the ISP, the ISP should not be allowed to speed up or slow down contents by their preferences and there should be no paid prioritization. It was on 26th Feb, 2015 broadband access was treated as telecommunications service and rules rooted in Title II (common carrier) of the Communications Act, 1934 banned blocking, throttling and paid prioritization thereby upholding Net neutrality.¹⁶

Conclusion:-

Need of hour is that government must satisfy demands of consumers by providing affordable and quality broadband. Broadband providers should not discriminate between content providers, they should not block legal online content or create fast or slow lanes. Further it is necessary that government should promote investment in nation's broadband network.

The TSPs should not be allowed to charge extra fees because if they are allowed to do so it would affect aspirations of millions of people and boost the monopolistic tendencies thereby encouraging the TSPs or ISPs to start Internet business.

For Security concern the OTT players should place servers in India, because as per S.75 of Information Technology Act, 2000 only those contravention will be prosecuted in respect of which computer, computer system or computer network in India.

It is also necessary that concept of Net neutrality be understood from point of view of netizens because dependency of netizens on internet has increased to such an extent that Internet is being claimed to be fundamental right of netizens. The Online freedom of speech and expression which was upheld by Supreme Court in *Shreya Singhal vs Union of India* should not be given up while deciding the policy of Net Neutrality.

¹⁶ https://en.wikipedia.org/wiki/Net_neutrality_in_the_United_States, last seen on 29/09/2015