

World Wide Web – in danger

“If net neutrality goes away, it will change everything about the internet”- James Hilton

Introduction

Net neutrality has no set definition, but is predicated on the idea of keeping the web free and open.¹ It implies preventing broadband companies from blocking or deliberately slowing down legal content and preventing them from collecting a higher fee from content providers to enable them to reach consumers faster.² With tremendous growth in information technology in India, net neutrality has become an important phenomenon. India has 99.20 million broadband subscribers with an access to internet at a speed higher than 512 kbps.³ The Government of India, of course, has a regulatory mechanism in place for broadband and internet services. The Telecom Regulation Authority of India (“**TRAI**”) issues various regulations, directives, and orders, keeping in mind the ever evolving Indian telecom market. However, TRAI is yet to formulate any policy on net neutrality. At present TRAI’s consultation paper on “**Regulatory Framework of Over-the-top services**” deals with the issue of net neutrality followed by the **Department of Telecom (“DoT”) Committee Report**.

This newsletter touches upon the principles of net neutrality as it evolves in India and highlights the key points under: (a) Telecom licensing regime in India; (b) Findings of the TRAI’s paper; (c) Recommendations by DoT; and (d) International scenario on net neutrality.

1. Telecom licensing framework

The Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, and TRAI Act, 1997 along with corresponding policies provide the regulatory framework for the telecommunications sector in India. Section 4 of the Telegraph Act grants exclusive privilege to the central government to establish, maintain and use telegraphs and grant licenses to any person to establish, maintain or work a telegraph. This right to grant licenses may be delegated by the central government to the telegraph authority with such restrictions and conditions as it may deem fit. The section also specifies the terms and conditions delineating network operations and provisions of services by telecom service providers (“**TSP**”). Further, there are specific licensing guidelines issued by the DoT on data services, carrier services and unified access services. Internet service guidelines, 2007, grant license for providing internet access and internet telephony. Guidelines for carrier services permit license for voice mail/audiotex/unified messaging service, license for national long distance service (NLD) and

¹Sascha D. Meinrath and Victor W. Pickard, “The New Network Neutrality: Criteria for Internet Freedom,” (2008) International Journal of Communication Law and Policy, 12, 225-243; Timothy Wu, “Network neutrality, Broadband Discrimination,” Journal of Telecommunications and High Technology Law (2), 141-179 (2003)

²Internet is an absolute human right’, The Times of India, September 07, 2015, available at <http://timesofindia.indiatimes.com/city/bengaluru/Internet-is-an-absolute-human-right/articleshow/46081243.cms>

³Statistics are available at <http://www.dot.gov.in/reports-statistics/report-committee-net-neutrality-0> last visited on September 21, 2015

international long distance service (ILD). Guidelines for grant of unified license⁴ issues license for all services including access services, internet services, NLD, ILD, etc. It is the unified license guidelines which stipulate the condition that the subscriber of internet services shall have unrestricted access to all content available on internet except for such content which is restricted by the licensor or designated authority under law. This provision throws light on the concept of net neutrality though it does not enable a mechanism for prescribing the principles and rules of net neutrality.

2. Findings in TRAI's Paper

According to TRAI, the term Over-The-Top (“OTT”) refers to applications and services which are accessible over the internet and ride on operators’ networks such as social networks, search engines, amateur video aggregation sites etc.⁵ At present, users can directly access these applications through the internet. The objective of the consultation paper is to analyze the implications of the growth of OTT services and consider whether or not changes are required in the current regulatory framework.

The paper is based on the principle that user rights need to be protected so that service providers are not able to restrict their ability to access any service on the internet, though favoring the TSP in providing discriminatory transmission of content. According to the TSP, OTT services are unlicensed and run unmonitored on TSP networks. TSP invests in the infrastructure and incurs costs associated with operation of the network along with fulfilling various governmental obligations like payment of entry fee, license fee and spectrum usage charges. It has to adhere to regulations regarding quality of service, tariff and consumer protection, emergency and public utility services, security services and monitoring services, all of which does not apply to OTT services. TSPs feel that OTT services take away telecom revenues since the internet model, with low or zero tariffs, results in usage shifting from telecom to internet telephony as seen in case of VoIP.⁶ VoIP services are in stiff competition with telecom operators as they provide telephony services at no additional costs. Contrary to TSP’s opinion, OTT service providers feel that it is the telecom operators who make money from internet access as telecom operators and the Government are paid for the internet services consumed by an end-user. Increased data usage means larger revenue for telecom operators. The paper has raised varied questions including: (i) if it is too early to establish a regulatory framework for internet/OTT services; (ii) can OTT services be brought under licensing regime; and (iii) what are the ways to manage internet traffic.

After the publication of the TRAI paper, DoT released its much awaited report on the net neutrality in July 2015. The report holds immense significance as it will be submitted to the Parliament to assist them on making a decision on internet neutrality.

⁴ <http://www.dot.gov.in/sites/default/files/amended%20%20UL%20guidelines.pdf>

⁵ The best known examples of OTT are Skype, Viber, WhatsApp, Chat On, Snapchat, Instagram, Kik, Google Talk, Hike, Line, WeChat, Tango, e-commerce sites (Amazon, Flipkart etc.), Ola, Facebook messenger, Black Berry Messenger, iMessage, online video games and movies (Netflix, Pandora)

⁶ Voice over Internet Protocol is a methodology and group of technologies for the delivery of voice communications and multimedia sessions over Internet Protocol (IP) networks such as Skype and Viber

3. DoT's Recommendations

The report has admonished telecom companies and has laid down recommendations to ensure that internet in India remains free and fair. It unhesitatingly recommends that “the core principles of Net Neutrality” must be adhered to which is equal access to all.

According to DoT, international best practices should be taken into consideration while formulating India specific net neutrality laws. It underscores that India should take a rational approach and initiate action in making an objective policy, specific to the needs of our country. The recommendations highlight that innovation and infrastructure have to be promoted simultaneously, without any compromise on net neutrality. Further in the Indian context, net neutrality should be based on principles like no denial of access, no unreasonable discrimination, and fair and reasonable practices. The recommendations propose that net neutrality should be based on the following:

- a) Absence of unreasonable traffic discrimination;
- b) Enhanced internet access;
- c) Open internet – no blocking and throttling;
- d) Facilitation of innovation; and
- e) Reasonable traffic management and prioritization.

DoT has stressed upon facilitating “affordable”, “quality” and “universal” broadband for its citizens. User rights on the internet need to be ensured so that TSP do not restrict the ability of the user to send, receive, display, use, post any legal content, application or service on the Internet, or restrict any kind of lawful internet activity or use. In addition, it recommends licensing and regulating domestic VoIP calling services, while taking a more liberal approach to international VoIP services and applications.

With respect to legal and regulatory regime on net neutrality, DoT has clarified that the only relevant reference is found in the scope of internet service license and the internet services authorization under unified license which stipulates that the subscriber of internet services shall have unrestricted access to all content available on the internet except for such content which is restricted by the licensor or designated authority under law. However, as stated earlier this provision does not enable a mechanism for prescribing the principles and rules of net neutrality. Thus, DoT recommends incorporation of a clause in the license conditions of TSP that will require the licensee to adhere to the principles and conditions of net neutrality. This will be possible once a new legislation on net neutrality is enacted and enforced.

4. International position on net neutrality

Net neutrality has been examined in various jurisdictions. In Norway, the Norwegian Post and Telecommunications Authority (NPT) published “Guidelines for Internet Neutrality” in February 2009. These guidelines state that the internet is free of discrimination and internet users are free to send and receive the content of their choice, use services and run applications of their choice, connect hardware and use software of their choice that does not harm the network. In July 2010, Chile was the first nation to enact net neutrality principles into law. The main legal principle is that TSP may not arbitrarily block, interfere with, discriminate against,

hinder or restrict the right of any internet user. In the United Kingdom, the Office of Communications⁷ published principles for the publication of consumer information on traffic management, recognizing the benefits associated with best efforts internet access and the provision of managed services, and sought for them to coexist. In the USA, on March 12, 2015, the Federal Communications Commission released specific details of its new net neutrality rules, and on April 13, 2015 the final rules were published.⁸ The new rules ban internet providers from blocking and slowing down access to websites and applications or striking deals with content companies for priority delivery of traffic. However, there are a few countries like Australia, New Zealand which are yet to take any specific measure on the issue of net neutrality. The various international practices along with the core principles of net neutrality will help India formulate its own policy on net neutrality.

Conclusion

Based on DoT's report and recommendations of TRAI, the government ought to soon take a considered decision on various aspects of net neutrality in the best interest of the users while safeguarding national interests. Net neutrality, along with its core principle of equal access to internet for all has become the guiding path on which all internet transactions are based. The high internet traffic growth rate is leading to network congestion and spectrum crunch, forcing TSP to adopt traffic management tools that restrict flow of data on the internet. Thus, in turn, are potentially impelling telecom companies to enter into network sharing agreements and tie-ups for offering free access to certain websites and mobile applications. These activities have raised concerns for unfair competition. The Competition Commission of India ("CCI") has to take stringent steps to determine possible monopolistic or collusive dealings. CCI has the power to rule on the anti-competitiveness of non neutral platforms⁹ being provided to consumers by virtue of TSP providing preferential treatment to selected mobile applications and websites. The need of the hour is to ensure that fair access to internet is guaranteed and laws are drafted to ascertain that net neutrality is maintained in India. Further, OTT services that enhance consumer welfare and increase productivity should be actively encouraged and impediments in its growth should be removed. While India awaits its legislation on the principle of net neutrality, reliance can be placed on unified license guidelines which provides for unrestricted access to all content available on the internet.

It is to be seen when and what decision does the TRAI and DoT take in order to address the ongoing feud between the TSP and OTT services.

Author

Krishna Jhala

⁷OfCOM, "Ofcom's approach to net neutrality", retrieved on September 18, 2015 from <http://stakeholders.ofcom.org.uk/consultations/net-neutrality/statement/>

⁸New Net Neutrality Guidelines by FCC, retrieved on September 21, 2015 from http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf

⁹ Like internet.org and airtel zero