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Net Neutrality for a Web of Equals

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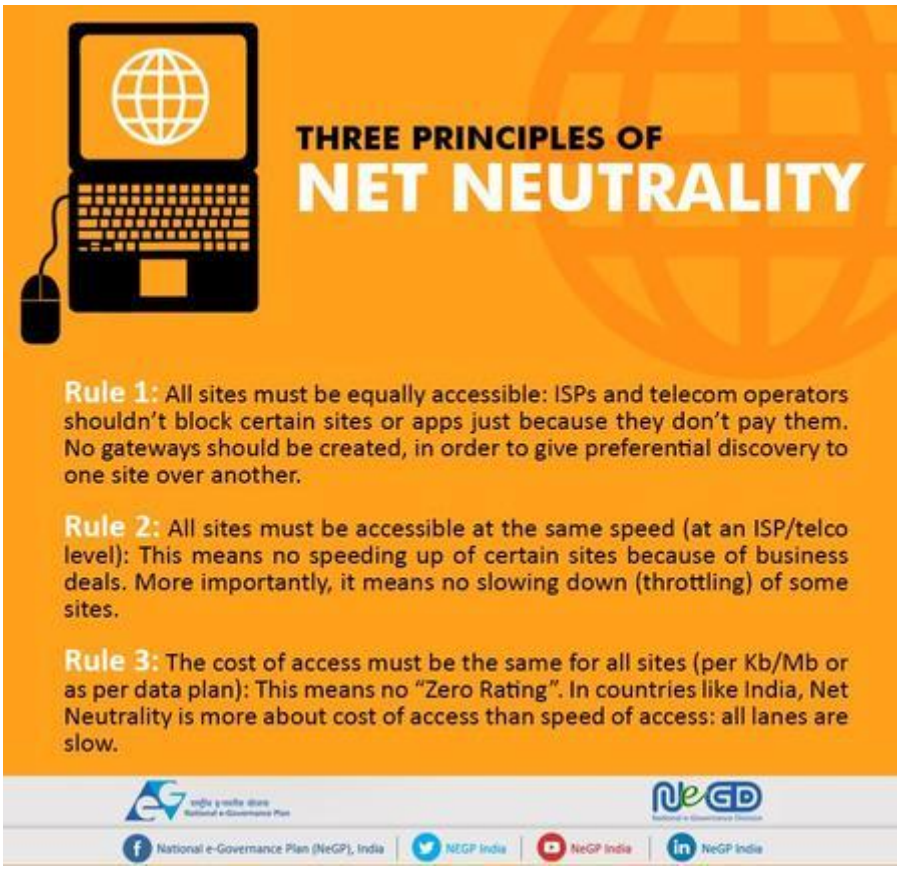

Source: National e-Governance Division NeGD

Why should we be worried about the impending legal assault on net neutrality? In this piece, ***Smarika Kumar*** *contextualises the net neutrality issue by foregrounding a number of related issues linked to the Right to Freedom of Information and equal access to the Internet for all users without prejudice. She draws attention to the scarcity of newsprint in the 1970s in India that made the government want to unsuccessfully regulate bigger newspapers and limit their pages. She argues that limited bandwidth availability is akin to that situation. However, there need to be measures to make Internet access more equal, not less equal.*

In the past few weeks, net neutrality has spiralled from an obscure term of concern only to telecom and Internet companies to a major topic that sparks off innumerable passions about peoples' personal perception of the Internet. A public debate on net neutrality is much needed. As most popularly understood, net neutrality is the principle that

says that all traffic on the Internet must be treated equally, irrespective of its source or content. This is also what underpins the basic architecture of the Internet. A fair amount of public discussion on the issue has concentrated upon how the presence of net neutrality is essential to keeping the Internet free and democratic, whereby everyone can access all Internet content with the same ease.

Framed this way, net neutrality becomes an issue of simplicity of access to diversity and choice of content on the Internet. Advocates of net neutrality argue that this concept amplifies the ease of access to all Internet content, and its violation in any form produces a fragmented Internet that will kill the Internet, as we know it. Those who question net neutrality say that the lack of it can facilitate creation of specialised markets that can cater to choice and diversity of the Internet more comprehensively.

TRAI's Consultation Paper on Regulatory Framework for Over-the-top (OTT) services, in PDF format [PDF 1.66 MB], can be downloaded here

Net Neutrality as a Problem of Scarce Resource Allocation

What does the law have to say on such questions of ease of access to diversity of content on the Internet? In India, there is not much legal discussion on this issue. However, the 1972 Supreme Court judgment in *Bennett Coleman and Others v. Union of India*, which discusses this question in the context of newspapers, can provide immense guidance in this matter. The *Bennett Coleman* case concerned the constitutional validity of the Import Policy for Newsprint, 1972 and the Newsprint Control Order, 1962, which together specified a cap on the consumption of the scarce resource of newsprint by newspaper companies, as well as limited the maximum number of pages a newspaper could have to ten. This regulation was challenged on the grounds that it limited the right to circulation of newspapers and, therefore, infringed upon their Right to Freedom of Speech and Expression under Article 19(1)(a).

The majority judgment in the matter held that the right to circulation meant the right to unlimited volume of circulation: So, if a big newspaper had the economic ability to purchase enough newsprint and sell more number of pages at a cheaper price than other newspapers, a regulation restricting the number of its pages would attack its business model in two ways. First, it would mean that the newspaper would have less space to run advertisements that subsidise its prices. Second, due to an absence of advertising subsidy, the price of the newspaper would have to increase for its business to be profitable, which would mean that demand, and hence circulation, of the newspaper would decrease. On this basis, the majority opinion held that restricting the amount of newsprint consumed by a newspaper would directly affect its circulation, which would be in violation of Article 19(1)(a).

If limited bandwidth can be thought of as akin to limited newsprint in the context of the Internet, then the rationale of the majority judgment can be used to justify differences in bandwidth consumption by different Over-the-top (OTT) services. That is because in this argument, an OTT's right to circulation justifies usage of an unlimited amount of bandwidth. Note that even as the net neutrality principle is followed, some OTTs use more bandwidth than others because of the kind of data they carry and because of higher demand. For example, high demand for Facebook can consume a disproportionate amount of bandwidth, and YouTube demand can clog the bandwidth because videos constitute heavy amounts of data. Telecom Service Providers (TSP) that oppose net neutrality do not question this uneven usage of the bandwidth either: They merely demand that they be paid for higher bandwidth

usage, apart from being paid for mere usage of data. That is why Airtel demands a higher rate of payment for using WhatsApp on its network.

Moving Away from OTTs and TSPs: A Third Way of Looking at Net Neutrality

How does such an articulation of right to circulation play out for the Internet user or a newspaper reader? Justice Mathew wrote a dissenting opinion in the Bennett Coleman case that highlights the problem of framing the right to circulation as the right to circulate unlimited volume, viz. it does not take into account the interests of the newspaper reader or of the community in receiving diverse information from diverse sources. He held that distribution of a scarce resource of newsprint must happen in accordance with public good, which in this case meant ensuring that readers have equal ease of access to different voices in the Press.

Recent legal scholarship and subsequent judgments like Cricket Association of Bengal (1995, SC) give credence to this view. This argument may be translated into uncontested support for net neutrality on the Internet, since it is understood to prevent discrimination between OTTs and thus enhance access to diversity of content and sources. Or it may be translated to advocate against net neutrality, since specialised and differentiated markets in OTT/ISP services may be argued as enhancing diversity and choice for consumers. But both these translations can only be the consequence of a superficial understanding of Justice Mathew's stance, and of how the Internet works.

Justice Mathew's note does not merely advocate easy access to diverse choice in information for the reader, it actually considers the mechanism to achieve it. It analyses the mechanism of a free market for the distribution of scarce resources (like newsprint) and how it falls short of providing equally easy access to all newspaper voices to the reader. This, it is pointed out, happens because some newspapers are able to flood the market with their content due to low prices made possible through advertising subsidies. He holds that neither the interests of equality, nor of innovation, nor of diversity of information are supported when *"newspapers of long standing which have built up a large and stable advertisement revenue being in a more advantageous position than newcomers in the field of journalism are in a position to squeeze out such newcomers with the result that they are able to destroy the freedom of expression of others"*.

It is uncanny how familiar this statement rings when one looks at OTTs "of long standing" in Internet time. Large OTT players like Google and Facebook, which are able to build up large and stable advertising revenues, often gobble newer platforms, thus destroying the freedom of expression of others. Dominant OTTs, which have come to define what the Internet is, consume a large portion of limited bandwidth that the Internet Service Providers (ISPs) have on offer, leading to unequal allocation of the resource. Such unequal allocation cannot be in the Internet users' interest to access diverse content with equal ease either, because demand for data-heavy content also slows down access for those who are not viewing such content. So if 97 users are watching YouTube which is taking up, say, 90 per cent of the bandwidth of an ISP for instance, the Internet connection will also slow down for the three users who want to access independent blogs as they have only 10 per cent of bandwidth to work with. Those three users could have had faster access to their blogs if the bandwidth was not so clogged up by YouTube demand.

Majority opinion in *Bennett Coleman* implies that a regulation that tries to redistribute the bandwidth between different OTTs so that it is more equitable shall be unconstitutional, as it will restrict big OTTs right to circulation. Minority opinion of Justice Mathew implies that it is not unconstitutional to regulate for redistribution of bandwidth between different OTTs for equitability, because this will only enhance the right to freedom of information for the Internet user under Article 19(1)(a), by making the access to all OTTs equally easy, without slowing one at the

behest of another. The concern of equitability in limited resource allocation thus becomes entwined with the issue of simplicity of access to diversity and choice of content on the Internet. In Justice Mathew's formulation, one cannot hold without another. This opens up a third way of looking at the debate on net neutrality: Away from the arguments of both TSPs and OTTs and towards the interests of common Internet users.

Questioning the Advertising Model of the Media

Most pertinently, this third way is realised through a critique of the model of media business, which bases itself on advertising revenues. By questioning this model itself, Justice Mathew's dissent moves away from justifying disproportionate use of newsprint by big newspapers on the basis that there is demand for these newspapers. The dissent recognises that demand is created through the use of extra newsprint to place advertisements and earn more revenue, and then use a portion of it to subsidise the price of the newspaper. This, it is argued, not only stifles the freedom of expression of new entrants in newspaper business, it also undermines the right to easy access to a choice of information for the readers under the Constitution. Therefore, it is justified to redistribute newsprint so that advertisements in big newspapers can be regulated.

Bringing this critique of the advertising model to the Internet means interrogating the business models of some of the most successful OTT companies like Google and Facebook, and the disproportionate allocation of the Internet's limited bandwidth to their advertisements. This is not to say that the bandwidth itself cannot or should not increase. Telecom companies do need to upgrade their technologies and invest in the expansion of their bandwidth and services. They cannot fairly expect to be paid both for the actual data consumed as well as charge for using an OTT service depending on the proportion of bandwidth it consumes. That will certainly lead to double charging the Internet user in an unfair manner.

But stopping there will also mean conflating Internet user interests with interests of established OTTs. There is an imminent need to understand that it is not just telecom companies that have vested interests here, there are also OTT companies with vested interests and whose interests do not coincide with common Internet users. Users need to find their own independent, third position in the net neutrality debate, because they also have vested interests, which are different from any OTT and different from any ISP or telecom company.

Rethinking Net Neutrality

What does it mean when we say we support net neutrality? Because mere non-interference in how OTT traffic is directed on the Internet does not respond to all the interests which users have. Such a situation manifests the need to make our understanding of the concept of net neutrality more nuanced and more in line with our interests as common users.

Pranesh Prakash of Centre for Internet and Society, Bangalore offers the following definition of net neutrality as an alternative: "The regulation of gatekeepers to ensure they do not use their power to unjustly discriminate between similarly situated persons, content, or traffic." This presents a much more desirable configuration than a regulation, which mandates no interference with the Internet traffic at all: First, Internet is not the perfect, egalitarian and democratic platform some believe it to be. So any regulation which can work towards making it more egalitarian and democratic should be welcomed, not rebuffed. Second, with bandwidth being the limited resource, it is at this point in time that some traffic management methods can actually be used to improve the quality of service for users. To be clear, this is not an endorsement of any TSP or ISP stand. But it is high time we recognised that the

complications that come up in the allocation of resources for either newspapers or the Internet are fairly real, even when issues of corruption and greed shield them from plain sight.

(Smarika Kumar is a legal researcher with Alternative Law Forum, Bangalore. Her areas of interest lie at the intersection of law, science & technology and development. She works on legal issues concerning media content, ownership and infrastructure, Internet governance, and the allocation of natural resources.)
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