

NET NEUTRALITY: A BATTLE FOR THE INTERNET

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Network Neutrality and Jurisprudential Analysis: An Introduction

The term ‘Net Neutrality’, as coined by Tim Wu⁵³⁵, was initially used to explain the concept of ‘common carriage’⁵³⁶ and ultimately broadened the strata of information technology. This concept has permeated into every nation and clarity is to be established with respect to its understanding and implementation. The authors believe that in order to understand the reason for a particular action, it is of paramount importance to look into the history and jurisprudential aspect of the issue in hand. There exists deep roots of information technology in the evolution of legal theories, much before they even came into existence. As law has departed from the Natural School, to Positivist School to Legal Realism, it can be said that a fairly new concept like net neutrality too has seen its inception and links to the fundamentals of law. Before delving into the analysis of net neutrality as understood today across the globe, a brief study of jurisprudence is crucial. Jean-Jacques Rousseau (1712-1778), the Genevan philosopher, propounded the well-known social contract theory which can be traced to be one of the earliest theories related to the concept of net neutrality. The Social Contract Theory⁵³⁷ as explained by Rousseau analyses the freedom of man in a society. Rousseau states that “*man was born free, but is chained everywhere*”⁵³⁸ so a question arises as to how does man stay free and live together in a society? Rousseau answers this question based on his social contract theory in which the people enter into an agreement based on the general will or collective will of all. Rousseau goes on to define social order as founded on man’s freedom.⁵³⁹ This is exactly what is demanded by the people who are supporters of net neutrality, who wish to have absolute freedom of speech and expression through the internet. Moreover, Rousseau states

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⁵³⁶ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 Journal of Telecommunications and High Technology Law, 141 (2003).

⁵³⁷ Stanley Hoffmann, *Rousseau and Freedom*, 113 (2010).

⁵³⁸ *Ibid*, at 114.

⁵³⁹ *Ibid*.

that “the general will is at the heart of social contract”⁵⁴⁰ which means that the collective will should be understood to be the will of the people. Keeping this concept in mind, net neutrality can be adopted in all nations or worldwide as it can be safely said that it is in consonance with the collective will of the people. The purpose of the state to preserve the human freedom is an idea propounded by Rousseau⁵⁴¹ which throws more light in support of the acceptance of net neutrality. Further, Jeremy Bentham (1748-1832), the British philosopher also known as the Father of Law, a propounder of utilitarianism⁵⁴², advocates “*greatest happiness of the greatest number is the measure of right and wrong*”⁵⁴³. This theory propounded by Bentham holds true even to the issue in question. The time in which this theory was propounded, technology did not even exist, but the evolution with time has not made this theory obsolete. Net Neutrality can be considered to be an idea which benefits the netizens of a nation together and there exists a common interest of all with the acceptance of it. The Utilitarianism theory also mirrors this analysis as it deciphers right from wrong based upon the greatest happiness of the greatest number. Thus, we can trace jurisprudential backing to this concept and can apply pre-existing principles of law to adjudge this debate in hand. The authors strongly conform to the theories propounded by Jean-Jacques Rousseau and Jeremy Bentham, which stand valid even in this age of digitization. The application of these theories to the issue in debate enhances the study and analysis of net neutrality to a greater level.

The International Regime on Net Neutrality

While the net neutrality debate has many aspects, the authors choose to examine the issue by first, analysing the existing legal framework relating to net neutrality in multiple nations. The global issue of net neutrality has been addressed differently in different countries. Since it is a complex issue, it has various nuances specific to a country depending on the country’s social, political and economic conditions. Chile was the first nation which implemented network neutrality principles into its General Telecommunications Law through an amendment in 2011⁵⁴⁴. The law establishes a duty for every Internet Service Provider to provide non-discriminatory treatment to anyone using

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid, at 113.

⁵⁴² Jeremy Bentham, *The Principles of Morals and Legislation*, 2 (1907).

⁵⁴³ Ibid, at 4.

⁵⁴⁴ The net neutrality law in Chile is officially known as “Law 20453”, or “Ley que establece la neutralidad de la red para consumidores y usuarios de Internet” (“Law that establishes the net neutrality for consumers and internet users”).

content or services for legal purposes. Yet, ISPs are given the discretion to ultimately determine what qualifies as a legal or illegal purpose.⁵⁴⁵ Netherlands followed the footsteps of Chile and adopted the network neutrality principles in 2011, prohibiting mobile telephone operators from charging discriminatory prices for using various Internet services.

Brazil

Brazil adopted a legislation known as the Marco Civil da Internet (The Civil Internet Regulatory Framework) which runs on similar lines as the law in Netherlands and Chile. Popularly known as the ‘Internet Constitution’, the law seeks to reinforce the protection of fundamental freedoms in the digital age. It pledges to adhere to freedom of speech and expression, along with an acknowledgement of the worldwide comprehensive scale of the network, its openness and concerted nature, its plurality and diversity.⁵⁴⁶ The ISPs are prohibited from blocking, monitoring or filtering content during any stage of transmission or routing of data.⁵⁴⁷ Art. 7 of the framework also guarantees to all Internet users the ‘*inviolability of intimacy and privacy*’, including the confidentiality of all Internet communications, along with ‘*compensation for material or moral damages resulting from violation*’. Therefore, it ensures that no personal data or communication of the users shall be shared with third parties in the absence of express consent. By adopting protections for net neutrality as well as online privacy and freedom of expression, the Marco Civil may be treated as a model for Internet rights within the domestic sphere. It provides the ideal structure which may be adopted in countries where currently there exists no legal provisions regarding net neutrality, including India.

The European Union

On April 3, 2014, the European Union adopted a Net neutrality amendment as part of its initiative to consolidate the telecommunications policies of member countries. Though the amendment has not yet taken its final form, it currently states that “*traffic should be treated equally, without*

⁵⁴⁵ Luca Belli and Primavera De Filippi, *Dynamic Coalition on Network Neutrality*, IGF 2014 Meeting, available at <http://www.intgovforum.org/cms/documents/dynamic-coalitions/dynamic-coalition-on-network-neutrality/309-dc-network-neutrality-report-of-the-igf-2014-meeting/file>, last seen on 19/07/2015.

⁵⁴⁶ Marco Civil da Internet, Art. 2, available at <https://www.apc.org/en/blog/marco-civil-brazilian-internet-bill-rights-english>, last seen on 21/07/2015.

⁵⁴⁷ Ibid. See Marco Civil da Internet, Art. 9 (All Internet providers “*to treat any data package with isonomy, regardless of content, origin and destination, service, terminal or application*”).

discrimination, restriction or interference, independent of the sender, receiver, type, content, device, service or application.”⁵⁴⁸ The EU Parliament has made it clear that the internet commons should be free of corporate capture, and remain a space where freedom of communication and innovation can thrive. Hence, the UK follows a light-touch regulatory approach. Ofcom, the communications regulator in the UK, has not yet imposed stringent limitations on traffic management, but instead relies on existing regulations and market structures. The ISPs follow a voluntary code of practice which was developed by stakeholders. However, few of the major ISPs have refused to sign the Open Internet Code of Practice.⁵⁴⁹ Moreover, the UK, along with 27 other EU member states, are also deliberating over amending the EU Net Neutrality proposals by allowing some providers to prioritise ‘time-sensitive’ content, and the situation remains uncertain. Ofcom and the EU agree that as long as users are informed of how their traffic is prioritised - or not prioritised, as the case may be - a little traffic management is fine. This is in stark contrast to the Brazilian structure which gave complete priority to the rights of the netizens and imposed stringent ban on the ISPs from filtering or interfering with any internet traffic.

The United States of America

The United States of America, similar to the other nations in question has only recently come up with concrete provisions with regard to net neutrality. Net Neutrality has gained its popularity in the USA after the passing of the new draft of rules⁵⁵⁰ in February, 2015. The Federal Communications Commission (FCC) passed the first draft with a 3-2 vote in favour of Net Neutrality⁵⁵¹, which forbid service providers from blocking or slowing the traffic of their rivals or from taking unfair advantage of their large market share to charge websites extra for priority traffic speeds. The new conduct banned the act of paid prioritization, which could threaten the smaller

⁵⁴⁸ *Report on European Single Market for Electronic Communications*, European Parliament, EU Document A7-0190/2014, 2, (26/03/2014), available at <http://www.europarl.europa.eu/sides>, last seen on 22/07/2015.

⁵⁴⁹ *Open Internet Code of Practice*, Broadband Stakeholder Group, available at <http://www.broadbanduk.org/wp-content/uploads/2012/08/bsg-open-internet-code-of-practice-25-jul-2012.pdf>, last seen on 21/07/2015. (The voluntary code of practice puts forward a set of commitments agreed by signatories in support of the open internet. They were developed by signatories following discussions with government, the regulator, industry and broader stakeholders and building on Communications Minister Ed Vaizey MP’s statement in 2011.)

⁵⁵⁰ *Open Internet*, Federal Communications Commission, available at <https://www.fcc.gov/openinternet>, last seen on 28/07/2015.

⁵⁵¹ *Ibid.*

websites from being able to host their websites⁵⁵². The USA has also experienced many years of debate from 2005 to 2012 and non-passing of several statutes with provisions with regard of net neutrality by the Congress. The debate on Net Neutrality has occupied regulatory, political and judicial mind-space in the United States of America for some time. In May 2010, FCC introduced strong net neutrality provisions that said that the internet service providers could not block websites or impose other such restrictions. The necessity for these regulations arose from disputes between ISPs and application service providers⁵⁵³. It was questioned in the case of *City of Ontario v. Quon*⁵⁵⁴ whether the Fourth Amendment⁵⁵⁵ rights can be broadly applied to the latest technology available. The Court embraced the 'affirmative' concept⁵⁵⁶ of free speech, which required ISPs to facilitate individual communication; else the internet shall cease to exist as it does today.⁵⁵⁷ Soon after the network neutrality provisions were adopted in the US, Verizon Communications Inc. filed a lawsuit against such provisions to get them struck down. It was argued by the supporters of net neutrality that it is violative of the First Amendment⁵⁵⁸ if not adhered to. Various scholars argue that like the principles that govern telegraph and telephone operators, as common carriers, the same principles of non-discrimination shall be applicable even to internet communications⁵⁵⁹. In the Landmark judgment of *Verizon Communications v. Federal Communications Commission*⁵⁶⁰, the District of Columbia Court held that this FCC Open Order Regulations are only applicable to 'common carriers'. The rules laid down in the Order of transparency that no blocking and no unreasonable discrimination were only applicable to the common carriers. This resulted in an appeal to the Court of Appeals for the District of Columbia

⁵⁵² (It must be noted that the FCC's Open Internet rules are designed to protect free expression and innovation on the Internet and promote investment in the nation's broadband networks. The Open Internet rules are grounded in the strongest possible legal foundation by relying on multiple sources of authority, including: Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996.)

⁵⁵³ See Marguerite Reardon, *Comcast v. Netflix: Is this really about Net Neutrality*, CNet (15/05/2014), available at <http://www.cnet.com/news/comcast-vs-netflix-is-this-really-about-net-neutrality/>, last seen on 17/07/2015.

⁵⁵⁴ *City of Ontario v. Quon*, 560 U.S. 746 (2010, Supreme Court of the United States).

⁵⁵⁵ US Constitution, Amendment IV (The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.)

⁵⁵⁶ Dawn C. Nunziato, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age*, 23, (2009).

⁵⁵⁷ *Ibid.*

⁵⁵⁸ US Constitution, Amendment I (Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.)

⁵⁵⁹ *Jane E. Kirtley*, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age*, 50, Jurimetrics, 539

⁵⁶⁰ 740 F.3d 623 (2014, U.S Court of Appeals for the D.C Circuit).

Circuit which upheld ‘transparency’ but vacated the ‘no blocking’ and ‘no unreasonable discrimination’ rules⁵⁶¹. Also, it required the ISPs to carry on traffic at the same speed without any extra charge to the providers. As mentioned earlier, the turning point for the United States came about in 2015, when President Obama backed Net Neutrality and recommended the FCC to reclassify broadband Internet services as a telecom service.

The circumstances in India are similar to that of the United States except that in India, prior to March, 2015 no such enactment with provisions of net neutrality existed. There exists a lacuna in the Indian legal framework in relation to this raging issue of net neutrality which has gained the attention of nations across the globe. The Best Practice Guidelines for Enabling Open Access⁵⁶², issued by UN International Telecommunications Union’s Global Symposium for Regulators in 2010, recommend that regulators should only allow differentiation in traffic management when it is objectively justifiable.⁵⁶³ At the same time, the greater financial implications also have to be taken into consideration. Revenues have to be generated in order to pay for the expansion of networks, which ultimately contribute to general economic growth. However, according to some studies, operators are no longer likely to achieve the necessary revenues by simply providing core and access networks. Instead, more and more revenue is coming from OTT services.⁵⁶⁴ It appears that India is taking steps towards filling up this lacuna of net neutrality provisions in Cyber law. The TRAI has released the Consultation Paper on Over-the-top (OTT) Services which defines net neutrality as understood by the TRAI and the intrinsic functioning of it within the existing legal framework.⁵⁶⁵ The following section analyses the exiting legal regime in India with respect to net neutrality and its feasibility in the Indian society.

⁵⁶¹ Ibid.

⁵⁶² GRS10 Best Practice Guidelines for Enabling Open Access, available at <http://www.itu.int/ITU-D/treg/bestpractices.html> last seen on 25/07/2015.

⁵⁶³ The Best Practice Guidelines were developed based on input received from: Congo (Rep. of), France, India, Lebanon, Liberia, Mauritius, Portugal, Saudi Arabia, Senegal, Suriname, Switzerland, Thailand, and the United States.

⁵⁶⁴ U.N International Telecommunication Union, World Conference on International Telecommunications, *Quality of Service and Net neutrality*, available at <http://www.itu.int/en/wcit-12/documents/wcit-background-brief11.pdf> , last seen on 23/07/2015.

⁵⁶⁵ The Telecom Regulatory Authority of India, *Consultation Paper on Regulatory Framework for Over-the-top services*, Consultation Paper No. 2/2015 (27/03/2015), available at <http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/OTT-CP-27032015.pdf>, last seen on 15/07/2015.

The Indian State of Affairs on Net Neutrality

The Internet can be described as an information network that operates between different groups of users and content providers. Initially, with the onset of the Internet saga, though there were no specific rules which required ISPs to adhere to the principles of net neutrality, yet the service providers were not inclined towards discriminating and controlling internet traffic. The principles survived so far because few people realized the potential of internet when it emerged decades ago. However, from the mid-2000s, certain internet service providers began to discuss their desire to charge the large content providers, additional fees to reach their subscribers. Failure to comply with such desires would result in the ISPs blocking or slowing down access to these sites by their customers. The historical practice of treating all internet traffic equally has culminated into the ‘zero-pricing’ rule, according to which there exists a de facto ban on charging additional fees.⁵⁶⁶ In the context of the Indian democracy, the question arises whether this zero-pricing structure should be preserved or whether the ISPs should be allowed to charge differential prices from different content providers.

A Committee⁵⁶⁷ was established in January 2015, by the Department of Telecommunications for the purpose of looking into the concept of net neutrality in the existing legal framework present in India. Even prior to the establishment of the Committee, Net Neutrality was being adhered to but it was creating a lot of chaos and disruption in the market. The Committee has looked into the intricacies of the telecom industry and has given a detailed report on its observations. It has looked into various definitions, regulations of various other countries and the development of the nation with respect to the issue in question. March 2015 was a historic step in Independent India in the context of Information Technology, wherein significant events have occurred which shall have a long-term impact on numerous stakeholders. After the Hon’ble Supreme Court, on March 24, struck down Section 66A of the Information Technology Act, 2000 as being violative of the freedom of speech and expression on the internet⁵⁶⁸, thereafter, on March 27 2015, the Telecom Regulatory Authority of India (TRAI) issued a consultation paper titled “Regulatory Framework for Over-the-Top (OTT)

⁵⁶⁶ Robin S. Lee and Tim Wu, *Subsidizing Creativity through Network Design: Zero-Pricing and Net Neutrality*, 23 *The Journal of Economic Perspectives*, 61,63 (2009), available at <http://www.jstor.org/stable/27740540> , last seen on 21/07/2015.

⁵⁶⁷ Department of Telecommunications Committee Report, Lok Sabha , *Net Neutrality*, May 2015.

⁵⁶⁸ *Shreya Singhal v. Union of India*, Writ Petition(Criminal)No. 167 of 2012.

Services”⁵⁶⁹ and this formed the starting point from where the issues about Net Neutrality in the background of OTT services has arisen. This paper has examined the various issues arising due to the increase in OTT services which have disrupted the revenues for the traditional Telecom Service Providers and has given an opinion with regard to this flaming issue of the modern India. The debate on Net Neutrality has arisen primarily from the desire of the people to preserve and protect the open nature of the internet. After a thorough analysis and also taking into account the view of the citizens of India, the Committee unhesitatingly recommends that ‘the core principles of Net Neutrality must be adhered to’.⁵⁷⁰

Role of the TRAI

If one looks at the existing laws in India, it can be deciphered that the issue of net neutrality has not been addressed in any of the current legislations of the country. Neither the Information Technology Act 2000, the mother legislation in the Indian digital arena nor any of the rules and regulations made thereunder have any reference to net neutrality. The question then arises as to what should be the Indian stand on the issue of net neutrality after TRAI has released its consultation paper and is on its way towards releasing a final report? Should the netizens succumb to the power of the ISPs and hence, pay additional and differentiated charges for accessing internet services, or should the internet users stand up for their rights to an equal access to all Internet services and protect the Internet as a common paradigm constituting the global heritage of mankind as a whole?

The stand of the netizens could be gauged from their reaction to the various incidents impacting their right to an equal internet access. Soon after the TRAI released its OTT Consultation paper, Airtel launched its ‘Airtel Zero’ which allowed customers to access apps of participating app developers at zero data charges.⁵⁷¹ This meant that whichever app developer or business was able to pay Airtel the necessary data charges would get a priority over competing apps in that department. Not only did this hamper competition in the Internet domain but also ultimately, pushed the financial burden on to the consumers. This initiative of Airtel faced severe criticism from the public as being violative of network neutrality and soon culminated into a ‘Save-the-Internet’ campaign launched

⁵⁶⁹ Department of Telecommunications Committee Report, Lok Sabha , *Net Neutrality*, May 2015.

⁵⁷⁰ *Supra* 33.

⁵⁷¹ *Bharti Airtel News*, Airtel, available at <http://www.airtel.in/about-bharti/media-centre/bharti-airtel-news/corporate>, last seen on 19/07/2015.

by AIB⁵⁷² requesting people to send in submissions to TRAI regarding the issue of Net Neutrality. By mid-April itself, more than one lakh emails had been sent to TRAI in support of net neutrality.⁵⁷³ However, an analysis of the consultation paper released by TRAI portrays that the TRAI is not advocating for an open internet. The consultation paper is inclined towards the competition that the telecom companies are facing with the advent of substitutable services such as WhatsApp, Viber, Skype and Facebook messenger. The spirit of nepotism showed by TRAI is apparent from one of the questions posed in the papers, as to whether the growth of data revenue is adequate to compensate for the impact of revenue loss for the telecom providers.⁵⁷⁴ The authors contend that TRAI, despite being aware of the importance of innovation, would rather suppress it by seeking to reimburse the telecom providers at the detriment of the innovators. Further, the extent of TRAI's jurisdiction regarding the various issues mentioned in the consultation paper seems rather insufficient. The TRAI Act, 1997 specifically ousts its own jurisdiction from matters relating to competition.⁵⁷⁵ The Competition Act, 2002 is the relevant law which must regulate competition in the market. The introduction of identical regulations of TRAI, overlapping the already existing mandate and basis of the Competition Act, shall create confusion and friction between regulators in the marketplace.

Role of the CCI with respect to Net Neutrality

If we examine the issue of net neutrality from the aspect of market competition, it can be contended that violation of net neutrality would indirectly violate the provisions of the Competition Act 2002, the law regulating and promoting fair competition in the Indian market. The Act prohibits abuse of dominance power⁵⁷⁶ and as well as entering into anti-competitive agreements.⁵⁷⁷ Applying the provisions of the Act to the issue at hand, it can be interpreted that it bans unfair or discriminatory pricing in purchase of the internet and its services. It further prohibits TSPs and ISPs from using their dominant position to enter into, or protect, other markets like e-commerce, e-banking or other

⁵⁷² *About STI*, Save the Internet, available at <http://www.savetheinternet.com/about-sti>, last seen on 19/07/2015.

⁵⁷³ *Over one lakh emails sent to TRAI supporting net neutrality*, The Hindu (13/04/2014), available at <http://www.thehindu.com/trending/over-one-lakh-emails-sent-to-trai-supporting-net-neutrality/article7099065.ece>, last seen on 15/07/2015.

⁵⁷⁴ *Supra* 31.

⁵⁷⁵ S.14(a)(iii), The Telecom Regulatory Authority of India Act, 1997.

⁵⁷⁶ S. 4, Competition Act, 2002.

⁵⁷⁷ *Ibid*, at S.3.

internet based services. However, the Competition Commission of India, which keeps a watch on unfair business practices, orders a probe only if there is prima-facie evidence of a violation of competition norms. The question whether the telecom and internet service providers are engaging in unfair business practices by providing preferential treatment for select mobile applications and websites has still not been answered by the CCI and investigation persists.⁵⁷⁸ The ISPs are turning the tables for the consumers, at the cost of the content providers thereby erecting entry barriers for those who would not be able to compete with recognized and time-honoured content providers. However, whether such agreements create an entry barrier for potential players is for the CCI to resolve. The Competition Act, 2002 is the relevant law that must ensure that agreements between entities do not create virtual barriers to entry for new players and are rendered illegal. The test is to determine whether the agreements between the ISPs and the app developers or content provider cause an ‘appreciable adverse effect on competition’⁵⁷⁹ in markets in India. The authors argue against such agreements that the dominant social networking website with established networks and financial strength would be able to pay for faster access compared to an emerging social networking website. This would operate as a barrier to expansion and innovation by the emerging company.

Defending the Internet Freedom or Challenging it? An Economic Perspective

Network neutrality promotes freedom of speech and innovation by allowing users to be in full control over how to go online, where to go and what to do as long as these transactions are lawful. If there is no net neutrality, ISPs will have the power to shape internet traffic and extract extra benefit from it. In this new age of digitalization, India is witnessing a paradigm shift from voice to data. The humungous usage of data in India is creating internet traffic and telecom providers seek to benefit from this situation. Several ISPs believe that they should be allowed to charge companies for services like YouTube and Netflix because these services consume more bandwidth compared to a normal website. In other words, these ISPs want a share in the money that YouTube or Netflix make. The question of whether this is in violation of network neutrality and equality in the internet arises. Lack of net neutrality will spell doom for innovation on the web. It is possible that ISPs

⁵⁷⁸ *Competition Act: Amid net neutrality debate, CCI looks at possible unfair ways*, Business Standard (10/04/2015) available at http://www.business-standard.com/article/pti-stories/amid-net-neutrality-debate-cci-looks-at-possible-unfair-ways-115040900999_1.html, last seen on 20/07/2015.

⁵⁷⁹ Supra 42, at s.3(1).

will charge web companies exorbitantly to enable faster access to their websites. Those who are unwilling to pay may find that their websites open slowly. The lack of net neutrality may lead to a situation somewhat similar to that of a monopoly in the market as it shall favour only those ISPs who have deep pockets to meet the demands of these service providers. This means bigger companies like Google will be able to pay more to make access to YouTube or Google+ faster for web users but a start-up company that wants to create a different and better video hosting site may not be able to do that.

Arguments can also be advanced which favours the ISPs of the market but the authors feel that it is an unjust and unequal scheme favouring few in an economy. The only positive which results from the lack of net neutrality is the investment by service providers or operators to meet the demands of the rapidly growing market. Telecom infrastructure, being capital intensive will need the investment by operators which will meet the capacity demands brought about by increasing broadband penetration, increasing speeds and increasing data usage. No telecom operator would say that net neutrality is feasible. As the Telecom Service providers face tough competition from the unlicensed application platforms, popularly called Over-the-Top (OTT) players, they have found new ways to increase their revenues by charging users and the content providers variably. Some of these revenue enhancing techniques and traffic management tools have raised concerns about Net Neutrality.

Another facet of the economic impact of net neutrality to be considered in this heated debate is the question of the allocation of the spectrum. The spectrum in India, consists of electro-magnetic waves spread across the country which is also shared with other nations. It is the duty of the government to ensure maximum speed of the internet and also minimize internet traffic. It is apparent that certain OTT players such as YouTube, Skype and Viber utilize more bandwidth of this spectrum leaving very less for others. This weighing of the demand and supply of these services in the market is purely an economic strategy as certain players have a higher demand than others in the market. A fair and equal allocation may result in over-utilization or under-utilization of the spectrum. Apart from this, as electro-magnetic waves or the spectrum is a limited resource for the nation and improper or over- use may hamper the sustainability for the future generations

of the nation.⁵⁸⁰ Lack of neutrality may be key to control to usage of the resource and limit it to a sustainable level. Thus, the authors accept this as a posing reason and consideration which may end net neutrality but they strongly feel that this economic factor can still be controlled in certain ways so that net neutrality can still be applied freely and equally. Moreover, the researchers opine that the detrimental effects on innovation and competition which would result from withdrawal of net neutrality outweigh the economic impact related to the allocation of limited spectrum. Taking into consideration the larger interests of the society, one can contend that without Net Neutrality, ISPs would be able to develop new schemes to charge users exorbitantly for internet access, making it harder for people to communicate online — and easier for companies to censor our speech.

Conclusion: The Way Forward

A global row is brewing over ‘net neutrality’ and depending on who wins – the Internet Service Providers or the regulators – the internet could be very different in the future. The authors have analysed the existing scheme of net neutrality in different political and economic domains as well the sequence of affairs taking place with respect to it in India. Further, the consultation paper released by TRAI, the role of the CCI as well as the benefits and shortcomings of net neutrality for the Indian economy has been thoroughly explored. On the basis of the foregoing discussion, the authors believe that the internet would lose its innovative edge if the TRAI rules against net neutrality. While the arguments favouring the ISPs has its merits, it can be contended that placing such power and control in the hands of the service providers would allow them to have the ‘gatekeeper’ capacity and would be at odds with the internet’s end-to-end principle. It is in the interest of the consumers and the larger interest of the society that the ISPs keep their hands off the internet traffic. The following should be the *mantra* of the service providers: *No blocking, no throttling and no paid prioritization*. If carefully designed and implemented, the authors believe that these rules shall not create any impediments for the ISPs. The provisions relating to net neutrality must not only be built on lessons of the past must also reflect the way the people use the internet today. Keeping in view the need to promote competition, innovation and investment in cyber space, there is no higher calling then protecting an open, equally accessible an free Internet.

⁵⁸⁰ Robert Hahn and Scott Wallsten, *The Economics of Net Neutrality*, Economists’ Voice (2006), available at www.bepress.com/ev , last seen on 18/07/2015.

Addressing the question of the overlapping role of the Telecom Regulatory Authority of India and the Competition Commission of India with respect to the issue of net neutrality, the authors seek to propose that the reasonable, balanced approach should be the priority of the Government agencies in India, including, perhaps, a combined role played by the TRAI and the CCI together to ensure that the internet continues to be the playground for innovation and is vibrant with healthy competition. The researchers opine that while it is necessary to protect the interest of the ISPs and secure their investments, the TRAI should first focus on protecting the interest of the netizens who constitute a larger proportion of the masses. This shall ultimately lead towards promoting innovation and economic development of the country. A free and open internet is the single greatest technology of our time and control should not be at the mercy of corporations. Net neutrality in India is fundamental to the future of democracy, development, demography and disparity.