

Disneyization of data markets and Neutering net neutrality

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The removal of net neutrality provisions can have far reaching effects on the way our lives function in contemporary times. From handing over control on -- how digital content is to be made accessible, to what kind of content be made available, as well as why content be denied due to unaffordability – the service provider and consumer relationship has come to be completely distraught. Moreover, the emergence of new quasi-monopolistic media groups that have immense market power and advertising control is changing the dimensions of innovation and competition in the sector. Amidst these law and technology developments, small businesses, small Internet Service Providers, and the consumers are caught in the crosshairs over the right to open access to the once unconstrained commodity called the internet. This article discusses the global concern related to internet freedom and finds that, comparatively speaking, India is cautious and steady in adopting measures to tackle the effects of such disruptions in major economies. Finally, Governments adopting approaches that mindfully reconcile the business, the policy and the legal perspectives for effectively managing the Internet will serve the greater good of netizens.

Keywords: Antitrust, big data, copyright, consumer choice, contract, commercialisation, free speech, innovation, media and entertainment, mergers and acquisitions, net neutrality, privacy, zero-price-market

Introduction

On February 26, 2015, the United States Federal Chamber of Commerce (FCC) ruled that wireless and fixed-line broadband service providers have to be reclassified as “common carrier” under Title II of the Communications Act of 1934 and Section 706 of the Telecommunications Act of 1996. This regulatory step clarified the scope of net neutrality policies to be consumer-centric in the USA.

Net neutrality, generally speaking, is a concept that requires internet users to be able to access all online content without being discriminated by Service Providers (in terms of speed and cost). The 2015 ruling ensured that companies (such as Comcast, AT&T, and Verizon) were checked from blocking websites, slowing down or speeding up applications, and charging extra for faster connections. Phone and cable internet service providers (ISPs) could not discriminate against internet companies nor self-impose tolls to give pay-for-play treatment to subscribers.

However, these policies were repealed in 2017. Thus, ISPs may influence 'how' choice of content is to be made accessible to internet users. Therefore, the operational future of the internet as such and the possible implications for us as “netizens” has become intensely debate worthy in contemporary times.

A cursory look at the debate on net neutrality

Operational since 1993, the internet has been largely regulation free. “Net neutrality”, a term first coined by Professor Tim Wu in 2003, has evolved with the aim to support three fundamental principles: (i) Creating an equal playing field, (ii) Promoting innovation and (iii) Providing freedom of expression over the internet. These principles have formed the ethos of the internet over time and usage in the late 20th century.¹ They are said to encourage independent journalism and small businesses to flourish, as ISPs would be curtailed from charging a separate fee from users for accessing digital content. Therefore, proponents asserted that the repeal of neutrality provisions would lead to the internet losing its freedom, and functioning more as a cable TV provider that gives limited access to content.²

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When the FCC accorded a public utility-type designation in 2015, ISPs were given control to set the rates, open up access to competitors and regulate the content industry as a whole. Hypothetically speaking, Verizon, the telecom giant would now be able to slow down a subscriber's access to Google and promote Yahoo!, which is a subsidiary company, so as to gain consumer traffic and competitive edge. Thus, the repeal of the regulations is suspected as anti-competitive and deemed as pro-oligopoly by many.

However, those in support of the repeal view the policies as a potential hindrance to competition and innovation in the longer run. Portugal, with no net neutrality provisions, has been cited as an example of successful corporate strategy and consumer satisfaction. Portugal Telecom, the only major service provider in the country, charges monthly rental along with multiple other charges based on the variety of web content made accessible for the users.³ In comparison, USA with multiple service providers that are expected to only grow in the years to come with the shift from broadband to wireless is said to be enhancing consumer choice by offering numerous options in ISP packs that provide access to new and diverse content.

Online content generation and distribution: The business of it all

Corporate mergers increasing in the entertainment sector shows the removal of net neutrality provisions is more likely to reduce competition between content providers (including Netflix and Google) and the ISPs. For instance, ISP AT&T and Time-Warner, wherein the vertical merger in effect provides the distributor of content (i.e. AT&T) with a medium of generating content (Time Warner). This was precisely the reason for Comcast's acquisition of NBC Universal in 2011. Another recent development in the past months has been Walt Disney Company's \$52.4 billion USD worth acquisition of 21st Century Fox.⁴ This corporate deal has delighted Marvel Comic distributors and fans across the world, as all the intellectual property held by Marvel (such as X-Men and the Avengers) will now be better leveraged and made available under one banner.

However, one significant corporate strategy deserves greater attention in light of net neutrality: Disney's acquisition of TV streaming service Hulu in December 2017. Prior to this deal, Disney decided on non-renewal of its joint content development and streaming deal with Netflix that is due to expire in 2019. It has gradually become clear that Disney intends to start its own streaming service in the near future; whether that comes by way of Hulu or another entity is yet to be seen. It is certain that with the entire roster of Marvel Comics, Simpsons, Family Guy characters and pre-existing intellectual properties in the Star Wars franchise, Disney will now successfully co-brand and strategically commercialise to meet the expectations of new genre fans at an even greater scale. In times of such Disneyization comes the recent ruling in Disney v Redbox (February 2018) wherein the US Court found Disney's copyrights in the combo-pack movies to be unenforceable due to its attempts to tie use of the download code to ownership of the physical discs and create market inefficiencies.

With these developments, it is not far-reaching to expect that while a clever advertiser may now be able to capitalise by approaching Disney with a proposal to target superhero fans in a unique revenue sharing arrangement, and at the same time small time player may require protection from ambiguous contractual liabilities due to irresponsible activities of the dominant ones. Amusingly, the buying of airtime on the show *Agents of S.H.I.E.L.D.* on ABC could now be sold to include purchasing advertisements around *Legion* on FX and *Runaways* on Hulu, both platforms in which Disney now owns a majority share. These deals will result in better monetisation of genre content and improved revenue inflow for the entertainment sector overall. They also acutely represent the increasingly blurred lines caused by the mergers and acquisition between content generators and distributors that must not be missed.

The emergence of these new quasi-monopolistic media behemoths is primarily due to the market influence of entities (such as Facebook, Google, Amazon, and Netflix) that have immense market power and advertising control. Their dominant presence necessitates the need for such mergers to engender business innovation. Consequent profitability makes telecom giants (such as Comcast and Verizon) disfavour net neutrality, while technological giants, small business, small ISPs and the consumers are caught in the crosshairs over the right to open access to the once unconstrained commodity called the internet. Thus, the repeal of the net neutrality regulations and the emergence of these larger media oligopolies will eventually impact other parts of the world as well.

Comprehending the cross-continental struggle for data transfer

The recent law enforcement against ISPs – such as the German Court ruling that Facebook's default settings aren't privacy-friendly⁵ and similar⁶ – indicate that regulation of digital technologies has begun to assume centre-stage in public discourse in Europe.⁷ These data transfers occur in what is termed as a 'zero-price-market', i.e. products for which firms set the price to customers at \$0. According to experts, 'privacy' norms ought to be construed as a basis for assessing and reprimanding anti-competitive activities carried out by firms operating in such markets.

Essentially, the manner in which information is traded consistently over longer periods of time can impact the line-up of content for a consumer. The firms that sustain such patterns eventually succeed in exploiting the market effectively and enjoy dominant market presence. For example, if one assumes that Google search provides information to be consumed for 'free' in a zero-price-market, one must realise that the user while making the searches provides valuable information to Google for which they are not paid in return.⁸ Thus antitrust applicability to *big data* may be comprehended by acknowledging that information, as provided by the consumer, serves as appropriate consideration for the services offered in such markets.

The modern antitrust theory is grounded in neo classical economics which is based on Price theory, a theory that without prices there can be no markets, therefore there can be no market power! However, too much reliance on the concept of positive prices may cause one to ignore the resultant impact and control that these Zero Market entities seek to establish.⁹ A practical application of the economic impact of data markets requires serious study. One can illustrate possible ramifications by using the Portuguese Telecom provider MEO as an example. As mentioned earlier, Portugal does not espouse net neutrality. Upon examination of the myriad data plans offered by this service provider, it is clear that several applications which are subsidiaries of this service provider come free with it. However, in order to use the applications developed by competitors of the subsidiary, the user has to pay an additional charge. Five set of packs namely Social Media (Facebook, Instagram, Twitter), Messaging (WhatsApp, Viber, Skype), Video (Netflix, YouTube, Twitch), Music (Pay Music, Spotify, Tuneln), Email and Cloud (Gmail, Drive, Dropbox) are offered. To access these, subscribers have to pay an extra amount of €4.99 per month for every pack on top of the fee that they are already paying for the broadband connection to the ISP. Thus, zero rating of particular apps creates economic incentives for users to use those apps, at the expense of other apps that might be just as good or better.

Interestingly, the EU net neutrality framework is not clear whether such activities are violations *per se*. Both the EU and the USA assess zero rating – leaving enforcement to be determined on a case-by-case approach. While the EU and USA have clear guidelines for obvious infringements such as blocking or throttling web traffic, zero rating applications would require specific scrutiny. It is the same in the USA. In fact, erstwhile FCC chairman Wheeler required close examination of plans launched by service providers such as AT&T's "Sponsored Data" program, and Verizon's "Freebee Data 360" to assess any instance of net neutrality violations. This same line of argument seems to be emerging in India as well.

India moving from uncertainty to greater clarity and rights based jurisprudence

The Telecom Regulatory Authority of India (TRAI) conducted extensive consultations for over two years and has adopted net neutrality within the regulatory framework.¹⁰ Wary of handing over the control lines to the telecoms entirely, TRAI chose to tread cautiously while regulating the practices of firms involved in advertising placement and content generation as well as to regulate data transfer in India.

The 2016 TRAI pronouncement made all zero-rating plans illegal. Accordingly, any differential pricing of data based on content is prohibited in India. Therefore, Facebook's Free Basics and similar services - such as Airtel Zero - were banned in February 2016.

Absent such a ban on zero-rating, large, well-established content providers and service providers, or those that have the benefit of large networks, would find themselves in a stronger bargaining position as compared to new or smaller business start-ups in India.

Thus, the ban was justified as a move to avoid creation of barriers to market entry and harm competition and innovation in the longer run. Notably, music streaming start-ups, like Saavn and Gaana, whose business models allow them to operate in multiple geographical territories, have begun focusing on pro-net neutrality countries like India rather than the USA. The transactional cost of negotiating individual deals with each ISP for preferential treatment in the USA may discourage small businesses. However, despite the proactive approach taken by TRAI, some companies have succeeded in manipulating markets through bundling and fast lane tracking activities. Thus, while the government's resolve to continue with net neutrality appears resolute there are newer challenges for enforcing them systematically.

As with the CJEU, the Supreme Court of India is currently adjudicating upon the data sharing activities by WhatsApp to third parties. This matter assumes prominence in light of the landmark *K.S. Puttaswamy* decision (August 24, 2017). The Supreme Court clarified that 'informational privacy' is integral to the fundamental Right to Privacy read within the meaning of The Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution. Furthermore, the Court held that any remedy sought for infringement of informational privacy would be actionable and available even against non-state actors. Now the right to have digital anonymity or the right to be forgotten can be availed by Indians. The affirmation of the privacy as a fundamental right elevates the concerns related to unauthorised data use onto a constitutional plane.

New age problems need new age solutions

Globally, the EU has been most proactive in implementing the General Data Protection Regulation (GDPR) for informational privacy which is binding and self-executing in all 27 EU member States from May 2018. This regulation establishes higher responsibilities for data controllers and imposes stricter fines in the event of violation of their provisions. Whereas the European e-commerce directive, in particular, Article 14 has moved swiftly to regulate the activities of ISPs; specific net neutrality regulations have been formulated – namely the Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and user's rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

The rest of the world is similarly gearing up for the challenges posed by the data economy. In the recent decision of February 2018, the Competition Commission of India, on the lines of US, Canada and Taiwan, reiterated a consumer-centric approach while deciding on the competition probes against Google. It found Google's non-neutral presentation of search results to be misleading for online users. A narrowly targeted tweak on the product design that can remedy the quality of consumer's interaction with Google's products was directed and a fine of approximately Rs 1.36 billion. Bangladesh is launching a similar probe against Google, while China has for long firewalled Google and Facebook to promote their domestic corporations.

Thus, understanding the business of data markets and the role of ISP may result in better revenue generation and regulation for these appreciation economies.

It is timely to realise that concerns of possible data infringement heighten in the light of the ongoing mergers. As was previously mentioned, the Disney-Fox merger and the merger of their respective Indian subsidiaries, Star TV & Walt Disney Company India, pose a need for robust data localisation laws. If one were to account for the market power enjoyed by the merged media conglomerates, their combined might can successfully wield control over a variety of smaller streaming entities such as Hotstar (Star TV), multisport streaming service Bamtch (acquired by Disney in 2017¹⁰) and Hulu (where post-merger Disney owns 60% of the company). These properties are in addition to their massive empire encompassing films, DTH services (such as Sky), and Television channels (ESPN & the other networks under the Fox banner). While one can assume that any anti-competitive activity after the merger will invite attention for antitrust scrutiny, it would be worthwhile to also anticipate possible actions in relation to privacy breaches that may cause consumer harm.

At the heart of all these disruptions lies the quest to find the best possible method to manage the internet, whether an American laissez-faire approach or the European interventionist approach, these contestations and subsequent actions are reflective of the control that the digital world has come to assert. Its influence is not limited to commercial gains but has transcended to shaping and retooling public opinion across the internet. From the Trump election results to BREXIT decision, data has assumed enormity of a new kind. A mindful approach to regulating data use and a strategy that furthers consumer welfare is the need of the hour. It is indeed ironic that the Internet – a tool which was once seen as an unconstrained haven for informational sharing – is likely to be splintered with numerous national and regional regulations controlling the value given to our day to day existence ■

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1. Mark Perry and Thomas Margoni *Interpreting Network Discrimination in the CRTC and FCC (net neutrality)* https://www.researchgate.net/publication/228199636_Interpreting_Network_Discrimination_in_the_CRTC_and_FCC_net_neutrality?fullTextFileContent
 2. Jessica Rowenworcel, *I'm on the FCC. Please stop us from killing net neutrality*, L.A. TIMES (Nov.22,2017), <http://www.latimes.com/opinion/op-ed/la-oe-rosenworcel-fcc-net-neutrality-repeal-20171122-story.html>
 3. Ro Khanna, *Rep. Ro Khanna: ISPs Are Violating Net Neutrality By "Zero Rating" Certain Apps*, FAST COMPANY (Dec.8,2017), <https://www.fastcompany.com/40505399/rep-ro-khanna-isps-are-violating-net-neutrality-by-zero-rating-certain-apps>
 4. Dana Feldman, *What the Disney-Fox Merger means for consumers*, FORBES (Dec.15,2017), <https://www.forbes.com/sites/danafeldman/2017/12/15/what-the-disney-fox-52-4b-merger-means-to-the-consumer/#58aa935217c83>

5. Hans-Edzard Busemann and Nadine Schimrozik, "German court rules Facebook use of personal data illegal" (February 12, 2018) in Reuters, <https://www.reuters.com/article/us-germany-facebook/german-court-rules-facebook-use-of-personal-data-illegal-idUSKBN1FW1FI>
6. Samuel Gibbs, *WhatsApp faces EU taskforce over sharing user data with Facebook*, THE GUARDIAN (Oct.26,2017), <https://www.theguardian.com/technology/2017/oct/26/whatsapp-facebook-eu-data-article-29-working-party-taskforce-sharing-user>
7. Mark Scott, *Europe's tech ambition: To be the world's digital policeman*, POLITICO (Aug.20,2017), <https://www.politico.eu/article/europe-tech-ambition-to-be-world-digital-policeman/>
8. JOHN M. NEWMAN *ANTITRUST IN ZERO-PRICE MARKETS: FOUNDATIONS*, 164, U. Pa. L. Rev. 149, 178 (2015)
9. *Id.* 149-150
10. Sarah Perez, *BAMTech valued at \$3.75 billion following Disney deal*, TECH CRUNCH (Aug.8,2017), <https://techcrunch.com/2017/08/08/bamtech-valued-at-3-75-billion-following-disney-deal/>

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