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India and Net Neutrality

Stephen Mathias gives some insight into the recent regulation of net neutrality in India, which outlaws tariffs that discriminate on the basis of content. It sheds greater light on the recent Facebook face-off with the Indian authorities over 'Free Basics'

The Telecom Regulatory Authority of India (TRAI), in its regulation dated 8 February 2016, has decided to prohibit tariffs for Internet access that discriminate on the basis of content. The decision is largely a response to Facebook's Free Basic's program.

Under Free Basics, Facebook had set certain technical standards on the basis of which any website could join the platform. A Reliance Communications customer could access these websites either through a downloaded app (Android only) or from freebasics.com. Individuals would have unlimited access to the websites available on Free Basics without incurring any Internet charges. Websites would essentially be 'lightweight' without streaming video, high resolution images, etc and would have to be without JavaScript, SVG images and WOFF fonts, iframes and flash and java applets. Websites could still track usage through cookies and some types of web analytics are possible. However, the terms seem somewhat ambivalent about privacy issues.

The program was opposed by advocates of net neutrality on the ground that it discriminates on the basis of content and would allow Facebook to become a gatekeeper to such content. The discrimination allegation is not entirely correct as it appears that any website could qualify as long as it meets the technical standards.

In December 2015, the TRAI issued a consultation paper on the subject, calling for inputs from stakeholders on the issue. Many organisations, including Facebook, telcos and key businesses in the Internet space responded. The regulations are a result of this consultation exercise.

Regulations

The regulations essentially state that a telco cannot charge discriminatory tariffs for data services on the basis of content. Two exceptions have been mentioned – for business intranets and for emergency usage. A detailed explanatory note has been provided relating to the regulations. The law will come into force immediately, but for discriminatory tariff structures that are already in force there is a sunset clause of six months, which means these tariffs must cease after six months.

Analysis

Outlawing Free Basics

The regulations effectively outlaw Facebook's Free Basic's program. The way the regulations are written, one feels there is still some scope for Facebook to contend that it is not discriminating against any content as long as the content meets its technical specifications. Of course, some content can meet those specifications while others cannot but it is debatable whether technical standards meant purely to ensure lightweight websites can be considered discrimination. The language could have been clearer, to address this issue.

Denying the underprivileged?

Some activists have criticized the decision on the grounds that it is a case of the haves restricting Internet access for the have-nots. However, the regulations do not actually prevent discounting or free access to the Internet; it merely provides that it cannot discriminate on the basis of the content accessed. In other words, you cannot say that you can use only certain websites for free; but you can say that you can use all websites for free up to a specified limit. This goes back to the fundamental question –

do you want to give people unlimited access to limited content or limited access to unlimited content?

OTT and Voice over IP

A key issue that has not been addressed relates to OTT – over the top applications involving voice over IP and messaging, such as Skype and WhatsApp. The language is broad enough to cover OTT. There was a paper issued by the TRAI in 2015 on net neutrality which created a furor. Following this, the Department of Telecom ('DoT') had done a study and came out with a report containing recommendations. While it accepted the principle of net neutrality, it did not state explicitly that an ISP cannot charge a different price for OTT content. It indicated that OTT providers should be brought within the regulatory framework though a lighter touch approach could be adopted for international connectivity. The explanatory note to this regulation does not mention OTT at all, leaving one in some doubt whether the OTT issue has been resolved with finality.

Content applications

An interesting aspect to the regulation relates to content applications where telcos and other parties compete with each other. This includes ringtones and IPTV. For example, telcos are increasingly marketing their television services, including subscription to on demand videos, through the Internet. Airtel's marketing materials for its IPTV offering state: 'Use of IPTV services will not consume bytes from your current broadband plan'. The regulation appears to have the effect of barring telcos from discounting the bandwidth used to stream video content through their own service, thereby setting a level playing field in this sector. Netflix will surely be delighted, especially after its recent international (including India) launch. This is unlikely to help competition against delivery of video content through television networks such as direct-to-home or cable. There will surely be some discussion in the days to come as to the ambit of the regulation in these situations.

Preventing legitimate use?

There are several situations where differential pricing would be legitimate. For example, a telco could charge less for locally peered content such as content stored on a CDN server within the ISP's own data centre or charge a premium for higher speed for specific content such as VoIP applications. The argument against this is that charging a higher price for higher speed of some content indirectly relegates the other content to a lower standard. It would have been advisable for the TRAI to have provided for a case-by-case approval procedure – one could approach the TRAI for approval of specific proposals and TRAI could approve the same provided that the process is completely transparent to the public. Perhaps the TRAI will study these situations and deal with them when the regulation comes up for renewal in two years.

Other aspects of net neutrality

Finally, one feels that given the extensive discussion on net neutrality in the last year and the net neutrality rules prescribed by the USA's FCC in March 2015, the TRAI could have taken the opportunity to cover other aspects of net neutrality. In particular, issues such as blocking, paid prioritization, throttling, legitimate network management, etc might have been addressed. Some of this has been captured in the DoT's report of May 2015 but those are only recommendations. Issuing binding regulations would have settled all of these issues once and for all.

Conclusions

Overall, this is a good move by the TRAI but it does not settle all issues surrounding net neutrality.

About the author:

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