

Net Neutrality and the Law of Common Carriage

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Net neutrality makes strange bedfellows. It links the truck operators that dominate India's highways, such as those that carry vegetables from rural markets to cities, and Internet service providers which perform a more technologically advanced task. Over the last decade, the truckers have opposed the government's attempts to impose the obligations of common carriage on them, this has resulted in strikes and temporary price rises; and, in the years ahead, there is likely to be a similar – yet, technologically very different – debate as net neutrality advocates call for an adapted version of common carriage to bind Internet services.

Net neutrality demands a rigorous examination that is not attempted by this short note which, constrained by space, will only briefly trace the law and policy of net neutrality in the US and attempt a brief comparison with the principles of common carriage in India. Net neutrality defies definition. Very simply, the principle demands that Internet users have equal access to all content and applications on the Internet. This can only be achieved if Internet service providers: (i) do not block lawful content; (ii) do not throttle – deliberately slow down or speed up access to selected content; (iii) do not prioritise certain content over others for monetary gain; and, (iv) are transparent in their management of the networks by which data flows.

Almost exactly a year ago, the District of Columbia Circuit Court of Appeals – a senior court below the US Supreme Court – struck down portions of the 'Open Internet Order' that was issued by the Federal Communications Commission (FCC) in 2010. Although sound in law, the Court's verdict impeded net neutrality to raise crucial questions regarding common carriage, free speech, competition, and others. More recently, Airtel's announcement of its decision to charge certain end-users for VoIP services – subsequently suspended pending a policy decision from the Telecom Regulatory Authority of India (TRAI) – has fuelled the net neutrality debate in India.

Because of its innovative technological history in relation to the Internet, the US has pioneered many legal attempts to regulate the Internet in respect of net neutrality. In 1980, when Internet data flowed through telephone lines, the FCC issued the 'Computer II' regime which distinguished basic services from enhanced services. The difference between the two turned on the nature of the transmission. Regular telephone calls involved a pure transmission of data and were hence classified as basic services. On the other hand, access to the Internet required the processing of user data through computers; these were classified as enhanced services. Importantly, because of their essential nature, the Computer II rules bound basic services providers to the obligations of common carriage whereas enhanced services providers were not.

What is common carriage? Common law countries share a unique heritage in respect of their law governing the transport of goods and people. Those that perform such transport are called carriers. The law makes a distinction between common carriers and other carriers. A carrier becomes a common carrier when it "holds itself out" to the public as willing to transport people or goods for compensation. The act of holding out is simply a public communication of an offer to transport, it may be fulfilled even by an advertisement. The four defining

elements of a common carrier are (i) a holding out of a willingness (a public undertaking) (ii) to transport persons or property (iii) from place to place (iv) for compensation.

Common carriers discharge a public trust. By virtue of their unique position and essential function, they are required to serve their customers equally and without discrimination. The law of carriage of goods and people places four broad duties upon common carriers. Firstly, common carriers are bound to carry everyone's goods or all people and cannot refuse such carriage unless certain strict conditions are met. Secondly, common carriers must perform their carriage safely without deviating from accepted routes unless in exceptional circumstances. Thirdly, common carriers must obey the timeliness of their schedules, they must be on time. And, lastly, common carriers must assume liabilities for the loss or damages of goods, or death or injuries to people, during carriage.

The Computer II regime was issued under a telecommunications law of 1934 which retained the classical markers and duties of common carriers. The law extended the principles of common carriage to telephone services providers. In 1980, when the regime was introduced, the FCC did not invest Internet services with the same degree of essence and public trust; hence, enhanced services escaped strict regulation. However, the FCC did require that basic services and enhanced services be offered through separate entities, and that basic services providers that operated the 'last-mile' wired transmission infrastructure to users offer these facilities to enhanced services providers on a common carrier basis.

In 1996, the new Telecommunications Act revisited US law after more than sixty years. The new dispensation maintained the broad structure of the Computer II regime: it recognised telecommunications carriers in place of basic services providers, and information-services providers in place of enhanced services. Carriers in the industry had already converged telephone and Internet communications as a single service. Hence, when a user engaged a carrier that provided telephone and broadband Internet services, the classification of the carrier would depend on the service being accessed. When a carrier provided broadband Internet access, it was an information-services provider (not a telecommunications carrier) and vice versa. Again, telecommunications carriers were subjected to stricter regulations and liability resembling common carriage.

In 1998, the provision of broadband Internet over wired telephone lines through DSL technologies was determined to be a pure transmission and hence a telecommunications service warranting common carriage regulation. However, in 2002, the FCC issued the 'Cable Broadband Order' that treated the provision of cable broadband through last-mile wired telephone transmission networks as a single and integrated information service. This exempted most cable broadband from the duties of common carriage. This policy was challenged in the US Supreme Court in 2005 in the *Brand X* case and upheld.

Significantly, the decision in the *Brand X* case was not made on technological merits. The case arose when a small ISP that had hitherto used regular telephone lines to transmit data wanted equal access to the coaxial cables of the broadcasting majors on the basis of common carriage. Instead of making a finding on the status of cable broadband providers based on the four elements of common carriage, the Court employed an administrative law principle of deferring to the decisions of an expert technical regulator – known as the Chevron deference principle – to rule against the small ISP. Thereafter wireless and mobile broadband were also declared to be information services and saved from the application of common carriage law.

Taking advantage of this exemption from common carriage which released broadband providers from the duty of equal access and anti-discrimination, Comcast began from 2007 to degrade P2P data flows to its users. This throttling was reported to the FCC which responded with the 2008 'Comcast Order' to demand equal and transparent transmission from Comcast. Instead, Comcast took the FCC to court. In 2010, the Comcast Order was struck down by the DC Circuit Court of Appeals. And, again, the decision in the *Comcast* case was made on an administrative law principle, not on technological merits.

In the *Comcast* case, the Court said that as long as the FCC treated broadband Internet access as an information service it could not enforce an anti-discrimination order against Comcast. This is because the duty of anti-discrimination attached only to common carriers which the FCC applied to telecommunications carriers. Following the *Comcast* case, the FCC began to consider reclassifying broadband Internet providers as telecommunications carriers.

However, in the 2010 'Open Internet Order', the FCC attempted a different regulatory approach. Instead of a classification based on common carriage, the new rules recognised two types of Internet service providers: (i) fixed providers, which transmitted to homes, and, (ii) mobile providers, which were accessed by smartphones. The rules required both types of providers to ensure transparency in network management, disallowed blocking of lawful content, and re-imposed the anti-discrimination requirement to forbid prioritised access or throttling of certain content.

Before they were even brought into effect, Verizon challenged the Open Internet Order in the same court that delivered the *Comcast* judgement. The decision of the Court is pending. Meanwhile, in India, Airtel's rollback of its announcement to charge its pre-paid mobile phone users more for VoIP services raises very similar questions. Like the common law world, India already extends the principles of common carriage to telecommunications. Indian jurisprudence also sustains the distinction between common carriage and private carriage, and applies an anti-discrimination requirement to telecommunications providers through a licensing regime.

TRAI must decide if it wants to continue this distinction. No doubt, the provision of communications services through telephone and the Internet serves an eminent public good. It was on this basis that President Obama called on the FCC to reclassify broadband Internet providers as common carriers. Telecommunications carriers, such as Airtel, might argue that they have expended large sums of money on network infrastructure that is undermined by the use of high-bandwidth free VoIP applications, and that the law of common carriage must recognise this fact. And still others call for a new approach to net neutrality outside the dichotomy of common and private carriage. Whatever the solution, it must be reached by widespread engagement and participation, for Internet access – as the government's Digital India project is aware – serves public interest.
