A COMPARATIVE INQUIRY INTO INTERNET NEUTRALITY IN SOUTH AFRICA.

Submitted in fulfilment of the requirements for a

Magister Legum

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Declaration of originality

I, Daniël Jakobus Eloff (13051972),

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I would like to thank my loving wife for her constant and continuous support and motivation to complete this degree, which at some point during the second year of my research seemed to have hit rock bottom.

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Summary

This dissertation will examine the question of whether internet neutrality is protected within the current South African legal framework and secondly whether or not internet neutrality should be protected when considering the policy advantages and disadvantages that it presents.

Due to the fact that the arguments in support as well as against internet neutrality fundamentally originate from broadly two different and distinct philosophical approaches, this paper starts off with a historical analysis of the development of the internet. This is followed by a discussion of the nature of rights *vis-à-vis* the question of whether access to the internet can be considered as a fundamental human and/or legal right.

After discussing both the history of the internet and the nature of rights in the context of the subject matter of this paper, the paper turns to the policy of internet neutrality itself. The paper compares the differing approaches followed by firstly the USA and secondly the EU with regards to internet neutrality, specifically in relation to consumer rights, competition law and corporate transparency.

At the end of the paper, current South African consumer rights protection and competition law are analysed in order to determine whether or not the existing regulations afford adequate protect against potential abuses of data discrimination by ISPs.

The debate regarding internet neutrality potentially affects each and every jurisdiction throughout the world where internet users accesses the internet. Not only is internet neutrality therefore a policy consideration all over the world but the policy consideration is one that should be answered through multidisciplinary research and inputs. It is therefore important to note that this research paper is written from a legal perspective and is merely a contribution to a policy question (namely that of internet neutrality) that has to be considered through the lenses of various academic fields.

Glossary

Bandwidth

"Bandwidth is defined as the capacity in Hertz (Hz) necessary for offering different multimedia services such as telephony, video and data transfer. However, it is interesting to define bandwidth scientifically as a measurement unit for transmitting our telecommunication services."[1]

Broadband

"Designating high-speed internet access capable of a faster transmission of data than dial-up (dial-up n. 2), typically involving transmission over multiple channels simultaneously via a single cable or data link; of, relating to or providing internet access of this kind."[2]

Data discrimination

Data discrimination can be described as bias that is affected by means of algorithms where predefined data types, data sources or data content is intentionally or unintentionally treated differently than others.

End-to-end

The end-to-end principle (E2E) is a network design principle that is applied in order to determine whether a network function is sufficiently endowed with the capacity to be properly and entirely sent to the end host or user of that function and without it having been delegated to other parts of the intermediary network.[3]

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1 Sergio Castro, Bandwidth Optimization (2009) pg

2 "broadband, adj. and n." (Oxford University Press)

3 Jerome H Saltzer, David P Reed and David D Clark, 'End-to-end arguments in system design' (1984) 100 Technology 0661 510

Internet

"*Originally (with lower-case initial): a computer network comprising or connecting a number of smaller networks, such as two or more local area networks connected by a shared communications protocol; an internetwork; spec. such a network (called ARPANET) operated by the United States Department of Defense. In later use (usually the internet): the global network comprising a loose confederation of interconnected networks using standardised communication protocols, which facilitates various information and communication systems such as the World Wide Web and email.*"[4]

Transmission Control Protocol/Internet Protocol

"*TCP/IP is the software underpinning of the Internet and its World Wide Web. TCP/IP also includes services and applications that work with the protocols. Before we get into the hairy details of the protocols themselves, we give you some background on the people and committees who decide the direction of TCP/IP's growth.*"[5]

Internet Service Provider

"*A company or other organisation which provides access to the internet and related services; abbreviated ISP*."[6]

Network management practices

"*Network management is typically introduced to protect or enhance subscriber quality of experience, whether in general or when portions of the network are congested. While there will always be voices that object to any kind of traffic management, it is nevertheless possible for CSPs to achieve their network management goals without running afoul of public perception and official regulation.*"[7]

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4 Oxford English Dictionary, "internet, n." (Oxford University Press)

5 Marshall Wilensky Candace Leiden, TCP/IP for Dummies (John Wiley & Sons 2009)

6 Oxford English Dictionary, "internet service provider, n." (Oxford University Press)

7 Sandvine, Reasonable Network Management: Best Practices for Network Neutrality

Tiered services

Tiered services are frequently used in the telecommunications field where telecommunications providers offer selected packages (tiers) at progressively increasing prices for consumers to pay for better, faster or more comprehensive services or products.[8] Tiered services in the telecommunications industry are similar to what logistics or courier service offer in terms of premium faster service.

Traffic prioritisation

Traffic prioritisation or paid prioritisation takes place where internet service providers optimise data traffic speed of particular data sources or data types in exchange for payment to prioritise.[9] Traffic prioritisation has also been defined as the creation of so called "fast lanes" where certain data gets preference and therefore enjoys greater broadband speed.

Traffic shaping

"*Traffic shaping": traffic control mechanism which "alters the traffic characteristics of a stream of cells on a VCC or a VPC to achieve a desired modification of those traffic characteristics, in order to achieve better network efficiency while meeting the quality of service (QoS) objectives or to ensure conformance at a subsequent interface*."[10]

Worldwide web

"*A widely used multimedia information system on the internet, whereby documents stored at numerous locations worldwide are cross-referenced using hypertext links, which allow users to search for and access information by moving from one document to another*."[11]

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8 George N Rouskas, Internet Tiered Services: Theory, Economics, and Quality of Service (Springer Science & Business Media 2009) 15.

9 Doug Brake, 'Paid Prioritization: Why We Should Stop Worrying and Enjoy the "Fast Lane"' (2018) Information Technology and Innovation Foundation 2.

10 Section 7.2.7 of ITU-T Recommendation I.371: Traffic control and congestion control in B-ISDN (2004)

11 Oxford English Dictionary, "World Wide Web, n." (Oxford University Press)

Chapter 1 - Introduction

1.1. Introduction

1.1.1. Background

In today's society, the internet plays a vital role in the communication of information.[12] It is the most widely used tool for the sharing of information and will most probably remain the most utilised form of communication for the foreseeable future.[13] The internet has continued to develop the scope of South African Constitutional law in that the internet affects a host of Chapter 2 rights such as the right to privacy[14], freedom of speech and expression and the right to access to information, to name a few.[15] To a certain extent, it could be argued that internet and digital rights are seen as *sui generis* rights in their own capacity. The debate regarding the recognition of internet and digital rights as fundamental rights are elaborated upon in Chapter 3 of this study.

The internet plays a crucial, if not the most important, role in how our society receives, sends, and spreads information. It further provides for the most significant and most effective flow of information that humanity has ever experienced in its history, and it is unlikely that the *status quo* will soon change.[16]

The internet has been developed from and continues to build on the foundation laid down by its predecessors such as telegram, telephone, radio and television.[17] The internet is at the same time a worldwide broadcast tool, an information dissemination mechanism and a medium for interaction and

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12 Dawn C Nunziato, Virtual freedom: Net neutrality and free speech in the Internet age (Stanford University Press 2009) 1. see comments re initials and surname

13 Christopher S Yoo, 'The changing patterns of Internet usage' (2010) 63 Fed Comm LJ 67.

14 Ss 14, 16 & 32 of the Constitution of the Republic of South Africa, 1996

15 L Belli and M Van Bergen, 'Protecting human rights through network neutrality: Furthering internet users' interest, modernising human rights and safeguarding the open internet' (2013) Council of Europe CDMSI (2013) Misc19 6.

16 Yoo, 'The changing patterns of Internet usage' 6. Year

17 Kerry G Coffman and Andrew M Odlyzko, 'Growth of the Internet', Optical fiber telecommunications IV-B (Elsevier 2002) 8.

collaboration on a scale that has never before been experienced.[18] This service has grown from a mere communication medium to one of the most important infrastructures of the economy, which plays a critical role in the daily lives of billions of people.[19]

One of the central questions regarding the future of the internet is that of internet neutrality.[20] Internet neutrality has become a key policy question since the rapid commercialisation of the internet. In brief, internet neutrality can be described as the idea that all data on the internet should be treated equally without any preferential treatment based on the content of the data being transmitted.[21] Professor Timothy Wu first coined the phrase internet neutrality.[22] The history of the phrase and its accompanying policy development will be discussed later in this paper. Particular focus will be on the specific policy connotation attributed to the term internet neutrality and how that has influenced the debate during the past decade.

Internet neutrality is, however, a relatively unknown policy consideration in South Africa, due to two facts. Firstly, South Africa has never truly had any internet neutrality to start with.[23] Secondly, South Africa's socio-economic situation within the economic development cycle, internet neutrality has remained a peripheral consideration in view of the broad internet development challenges facing our country.[24]

A proper framing of this paper requires the following short introductory discussion of the arguments in support of and against internet neutrality.

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18 *Ibid* 12.

19 Mark Holden, 'Life With or Without the Internet: The Domesticated Experiences of Digital Inclusion and Exclusion', London School of Economics and Political Science 2012) 3.

20 Konstantinos Stylianou, 'The Persistent Problems of Net Neutrality or Why Are We Still Lacking Stable Net Neutrality Regulation', Net Neutrality Compendium (Springer 2016) 211.

21 Christopher S Yoo, 'Network neutrality, consumers, and innovation' (2008) *U Chi Legal F* 179, 180.

22 Tim Wu, 'Network neutrality, broadband discrimination' (2003) 2 *J on Telecomm & High Tech L* 141.

23 Nisha K De Lany, 'From a Developing Country's Perspective: Is Net Neutrality a Non-Issue for South Africa' (2015) 47 *The U of Pac L Rev* 347 347.

24 *Ibid.*

1.1.2. Literature Review

On the face of it, the debate on internet neutrality seems to be clear, especially if mainstream news and media are to be believed. The perception exists that the majority of parties involved are in favour of internet neutrality. This issue is, however, a complex regulatory issue that needs to be discussed, deliberated, and addressed by jurisdictions around the world.

There are both fierce proponents and opponents of internet neutrality regarding this controversial issue, and any solution will have both social and technological consequences. In the academic world, the main opponent of internet neutrality is Professor Chris Yoo at the University of Pennsylvania Law School, and the main proponent of internet neutrality is the academic who coined the term, namely Professor Tim Wu of Columbia University.[25]

Opponents of internet neutrality argue that the principle has a detrimental effect on the quality of service provided and that for this reason Internet service providers (ISPs) should be prohibited from charging varying rates for different services as a way to effectively optimise their bandwidth usage.[26] Internet neutrality advocates argue that the main technical reason to support internet neutrality is that data discrimination and price differences for various types of data do not affect the quality of service.[27]

The debate on internet neutrality entails social consequences. Ironically, both proponents and opponents of internet neutrality argue that either the application or rejection of the policy will promote innovation or competitiveness.[28] Internet neutrality advocates argue that equality is central to ensuring the development of the internet, while opponents are convinced

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25 Wu, Tim and Yoo, Christopher S., "Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate" (2007). Faculty Scholarship. Paper 779.

26 Martin Cave and Pietro Crocioni, '[Special Section on Net Neutrality] Does Europe Need Network Neutrality Rules?' (2007) 1 *International Journal of Communication* 11.

27 Christopher Marsden, 'Network neutrality: A research guide' (2011) 4.

28 Wu, 'Network neutrality, broadband discrimination' 5.; and
Christine Quail and Christine Larabie, 'Net neutrality: Media discourses and public perception' (2010) 3 *Global Media Journal* 31 34.

that ISP's autonomy is the most effective way of ensuring the development of the internet. Both sides of stakeholders in this debate argue that the right to freedom of expression is violated depending on whether the policy is applied or not.[29]

Consequently, there are two main issues in focus regarding the debate on internet neutrality. Firstly, whether or not there is a need for state interference regarding the regulation of bandwidth policy. Secondly, if there is a need for such determination, how and to what extent should states be involved?[30]

1.1.2.1. Arguments for Internet Neutrality

The main arguments in support of internet neutrality are well established. The first issue in this regard pertain to the control of content on the internet. The view is that principal gatekeepers in the form of Internet Service Providers (ISPs) should not control the internet, and this is the fundamental argument in support of internet neutrality.[31] It is argued that the internet has multiple stakeholders and that it was designed without the control of authorities.[32] This is the essential reason for the vast success of the internet, and it could be compromised should internet users on their own be allowed to determine the nature and accessibility of content. Supporters of the internet neutrality principle contend that innovation will be stymied if only ISPs are to determine which content would be available to internet users and at what speed.[33]

The second main argument supporting the internet neutrality principle is that the absence of internet neutrality would bring about an encroachment

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29 Jennifer L Newman, 'Keeping the Internet neutral: Net neutrality and its role in protecting political expression on the Internet' (2008) 31 *Hastings Comm & Ent LJ* 153 170.

30 Barbara A Cherry, 'Misusing network neutrality to eliminate common carriage threatens free speech and the postal system' (2006) 33 *N Ky L Rev* 483 486.

31 Christopher S Yoo, 'Network neutrality or Internet innovation' (2010) 33 *Regulation* 22 181.

32 V. Cerf, 'The Open Internet: What It Is, And Why It Matters' (2009), *Telecommunications Journal of Australia* Vol 59, 1, 2.

33 Sidak "What Is the Network Neutrality Debate Really About?" (2007) *International Journal of Communication* 1, 383.

of citizens' rights. It is maintained that the internet serves as a critical and the main platform for the expression of speech because of its ease of access and usability.[34] It is further argued that accessibility and usability enhance the process of democratisation and participation in a democracy.[35] The internet has been a propellant of freedom of speech throughout the world, not only in furthering freedom of speech in certain countries but in some recent instances also establishing a platform for freedom of speech.[36] Any breach of internet neutrality through lack of accessibility and usability as explained above would constitute a dramatic impediment of the internet users' constitutional rights of access to information, and right to freedom of expression, and it could be argued, many other rights such political rights.[37]

The third main argument in support of internet neutrality is that an open and neutral internet would improve competition and innovation between competitors.[38] Should no internet neutrality exist, the possibility for the internet to be guided by arrangements and corporate 'handshakes' rather than innovation would be an obvious reason for concern.[39] Supporters of internet neutrality generally argue for the so-called 'open internet' movement.[40] The idea of an open internet commonly bears reference to principles such as internet neutrality, transparency and an internet without any censorship. It is argued that full utilisation of the internet's potential requires low barriers of access to benefit for more people.[41]

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34 Nunziato Virtual Freedom: Net Neutrality and Free Speech in the Internet Age (2009) 1.

35 *Ibid* 29.

36 Zhuo, Wellman & Yu 'Egypt: The first internet revolt?' (2011) *Peace Magazine* 1, 8.

37 Nunziato (2009) 31.

38 Verf (2009) 3.

39 Read (2010) 145.

40 Sascha Meinrath and Victor Pickard, 'Transcending net neutrality: Ten steps toward an open Internet' (2008) 12 *Education Week Commentary* 1.

41 Belli and Van Bergen, 'Protecting human rights through network neutrality: Furthering internet users' interest, modernising human rights and safeguarding the open internet' 11.

Prima facie evidence suggests that internet neutrality promotes innovation.[42] It is argued that internet neutrality has benefits firstly in terms of content and applications used by internet users, and secondly by levelling the playing field for ISPs thus encouraging healthier competition between competitors.[43]

A further supporting argument, also one of the first advanced in favour of internet neutrality pertains to the original structure and design of the internet. During the early days of the development of internet communication, sending and receiving information was relatively straightforward. Information was sent from the one end and received at the other. The end-to-end principle (E2E) is a network design principle which entails that if a network function can entirely and adequately be sent to the end host or user that function should take place exclusively at the end user and not be delegated to other parts of the intermediary network.[44] This is one of the key arguments which is put forward in support of internet neutrality. Generally speaking, the most common intermediaries are internet service providers (ISPs) who provide their clients with access to the internet, but the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) also includes any person who provides these services.[45]

As with many other branches of knowledge here too one finds differences of opinion. For each of the arguments supporting internet neutrality as stated above, there is a directly contrasting and opposing argument. These are discussed concisely below.

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42 SEO Economic Research, 'The innovation-enhancing effects of network neutrality' (2013) Commissioned by the Ministry of Economic Affairs of the Netherlands 20.

43 *Ibid* 23–25.

44 Saltzer, Reed and Clark, 'End-to-end arguments in system design' In: Proceedings of the Second International Conference on Distributed Computing Systems. Paris, France. April 8–10, 1981. IEEE Computer Society, 510.

45 Sylvia Papadopoulos, Cyberlaw @ SA vol 3 (Van Schaik 2012) 240.

1.1.2.2. Arguments against Internet Neutrality

The main argument against internet neutrality is that, in direct contrast to the views of those supporting internet neutrality, it is argued that internet neutrality may in fact, lead to a reduction in investment and as a result it could potentially lead to less innovation.[46] It is further argued that ISPs should be able to provide better and thus faster services to clients from whom they get paid for those services .[47] Opponents of internet neutrality believe that the principle of internet neutrality would undermine investment returns, which would lead to a loss of capital.[48] The lower investment would make it less likely for ISPs to further develop broadband infrastructure. It is further argued that offering a premium service for internet users who are willing to pay for it should be allowed in the context of a free market society.[49]

The second major point of contention is that ISPs hold the view that they (ISPs) should be entitled to charge content providers when they (ISPs) provide internet users with bandwidth intensive content.[50] This would also protect the average internet user from other users who congest bandwidth with intensive content.[51] By throttling the speed and amount of bandwidth to each user all clients of the respective ISPs will enjoy the benefits better regulated and hence more enjoyable speed.[52]

Thirdly, opponents of internet neutrality contend that existing competition law and consumer protection offer sufficient protection against behaviour that is unhealthy for market competition and to the detriment of consumers.[53]

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46 Hart Internet Law (2007) BNA Books, 750.

47 Wu (2003) 384.

48 Sidak (2007) 377.

49 G. S. Becker, D. W. Carlton & H. S. Sider 'Net Neutrality and Consumer Welfare' (2007) *Journal of Competition Law & Economics*, Vol. 6(3) 497, 502.

50 Read (2010) 78.

51 C.S. Yoo, "Network Neutrality or Internet Innovation?" (2010) *Telecommunications & Technology* 22.

52 *Ibid*.

53 Peter Gregory, 'Net neutrality is techno socialism' (2015) 67 Institute of Public Affairs Review: A Quarterly Review of Politics and Public Affairs, 32.

A last contentious issue, mainly in the USA, is that adoption of a set of internet neutrality rules, will introduce unnecessary regulation.[54] It is argued that the success of the internet lies in the fact that it is not and has never been over-governed.[55] This freedom has propelled innovation and investment, and any regulations thereof would put strain on the success of the internet.[56]

Behind each of the above-mentioned arguments, either supporting or opposing internet neutrality, there are a few critical basic concepts which stand central in the debate surrounding internet neutrality.

1.1.3. Research Statement

This research paper deals with the merits of the principle termed internet neutrality in South African law. A few introductory remarks about the exact meaning of the term 'internet neutrality' will be followed by a thorough investigation later in this dissertation.[57] At this stage: internet neutrality could be described succinctly as a situation on the internet where there is unhindered and equal treatment of data processing.[58] This would entail that an internet user's access to content is not limited or constrained because of the nature of data or content that the user wishes to access.[59] It is important to note that if there is no internet neutrality it does not mean that some internet users will be deprived of access to certain content on the internet. What it means is that all users may not necessarily access different types of content at the same speed.[60]

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54 Sidak (2007) 388.

55 L. Belli & M. van Bergen, "Protecting Human Rights through Net Neutrality: Furthering Internet User's Interests, Modernising Human Rights and Safeguarding the Open Internet" (2013) Steering Committee on Media and Information Society, 11.

56 *Ibid*.

57 Chapter 2, 47.

58 Lucie C Audibert and Andrew D Murray, 'A principled approach to network neutrality' (2016) 13 *SCRIPTed* 118.

59 *Ibid* 121.

60 *Ibid* 143.

Internet neutrality implies that users and publishers of the content may not on any given grounds be denied the speediest possible access to all content on the internet. More specifically, that access to the content may not be slowed based on the type and nature of the content or based on action (or lack of it) by the owner of the content.

1.1.4. Research Question

The central question of this research paper is twofold. Firstly, whether or not the principle of internet neutrality is applied within the South African legal framework. Secondly, the question arises of whether the protection of internet neutrality or lack thereof is recognised within our legal system.

To answer these research questions, the present thesis contains a comparative analysis on how other countries or jurisdictions, namely those of the United States of America (USA) and the European Union (EU), deal with the matter. To this end the analysis is conducted in three parts. In the first part (Chapters 1 – 3) a description is provided as to the physical and legal nature of the internet. The second part (Chapters 4 – 6) contains a discussion about the debate which took place as part of the background information pertaining to the internet neutrality, as well as its influence upon the varying policies adopted in the USA and the EU. The third part of this paper, the concluding part, attention is devoted to internet neutrality in South Africa.

In order to guide the above mentioned second part of this paper the following questions will be asked. Firstly: What is the legal background and historical precedent pertaining to the principle of internet neutrality in the particular jurisdiction? Secondly: Is there a right to internet access which effects the policy position of internet neutrality? Thirdly: Are there sufficient alternative legal mechanisms that adequately protect the internet consumer against arbitrary data discrimination? Lastly: What are the potential effects and consequences which adopting a policy of protecting internet neutrality would have for internet consumers? These four questions serve as the legal

benchmark against which the internet neutrality policies of the USA, EU and that of South Africa will be compared.

1.1.5. Assumptions

Firstly, this dissertation will assume that currently, there is no particular South African legislation or regulatory framework that explicitly protects or rejects the principle of internet neutrality.

Secondly, this dissertation expects to find mixed approaches when comparing how the United States of America and the European Commission each deal with the issue of internet neutrality in their respective jurisdictions.

Thirdly, this dissertation expects to find different approaches in addressing the issue of internet neutrality and that differing legal philosophical principles underpinning these approaches.

1.1.6. Scope

The central question of this research paper is whether or not internet neutrality is and/or should be protected within the South African legal framework. Although this paper's central question is quite clearly defined, it stands to reason that different answers in accordance with different and often opposing views, including those held within different academic disciplines are to be expected.

Internet neutrality is a policy question that has vast legal, economic, social, political, and philosophical implications. It would therefore be quite easy to unnecessarily broaden the scope of this paper. To guide this research

and answer the research questions the guiding questions mentioned above will be strictly followed.[61] In summary these questions are:

1. What is the legal background and historical precedent of internet neutrality?
2. Is there a right to internet access that potentially influences the internet neutrality debate?
3. Are there sufficient other or alternative legal mechanisms that adequately protect the internet consumer against arbitrary data discrimination?
4. What would be the potential effects and consequences of adopting a policy of protecting internet neutrality would be for internet consumers?

This paper will attempt to answer the above-mentioned guiding questions in chapters 5 and 6 which deal with internet neutrality in the USA, EU, and South Africa specifically by limiting the discussion to topics relevant to these questions.

1.2. Structure of paper

This paper aims at seeking the best approach to regulating the internet access provision by evaluating the policy goals and objectives sought. These goals focus mainly on consumer welfare, healthy competition among ISP competitors and the continuous development of internet infrastructure. In the end, this will answer the main research question of this paper, namely what regulations exist in South Africa, and if there are no such regulations, how should regulation in this regard be approached and what regulatory measures should be introduced.

In the process of seeking an answer to the main research question, this paper will firstly analyse the history and origins of the internet as we know it

61 See above at paragraph 1.1.4.

today and simultaneously look into the legal relationships between all parties involved in the internet.

Secondly, due to the foundational philosophical question on the role of government that is at the heart of this paper, this paper will delve into the nature of rights and more specifically the question of whether or not internet access could be regarded as a natural or legal right.

Thirdly, the history of internet neutrality as a policy consideration will be discussed to properly frame the paper within the contemporary context.

Fourthly, this paper will offer a brief comparative study on how the internet neutrality policy debate has shaped up in the contrasting USA and EU jurisdictions. Such study could serve as support for a proposed a framework to be considered for South Africa.

Lastly, this paper will inquire into current South African consumer protection and competition law to point out that existing protections already exist, ensuring consumer welfare and healthy market competition. The paper will conclude by putting forth recommendations that will ensure a mutually beneficial relationship in the marketplace that maximises total welfare and growth for all involved.

1.3. Motivation and rationale

What follows is a background explanation, which aims to contextualise the legal research that is envisaged. Three issues are highlighted.

Firstly, the exact meaning of the term internet and its development into what it is today?

Secondly, the clarification of the meaning of data.

Thirdly, characterisation of the internet by the presence of three parties.

An explanation of the identity of these three parties will be undertaken later when this explanation will lead to the fourth but ancillary issue, namely

the nature of the legal relationship between these parties. The legal relationship and the rights and interests of all the parties involved in the transmission of data is central to the debate regarding internet neutrality. The interests of the users (consumers), the content creators and the ISPs have to be balanced and weighed up against those of one another.

1.3.1. Limitations of the study

The first limitation of this study is that there is currently no other academic literature on internet neutrality in South Africa available. There are limited authoritative sources on internet neutrality in South Africa, and most of the writing is in contemporary mainstream media.[62]

The second limitation is that this topic relates to a broad, comprehensive principle and that the study cannot focus on all multidisciplinary aspects of the issue. This study will focus on what the writer deems to be the most salient points regarding the policy of internet neutrality. Moreover, this research is conducted, and the paper is written from a legal perspective. The quantitative economic and econometrical data, which is quite influential in the debate, cannot be adequately discussed and incorporated in this paper.

The third limitation is that in the comparative study, the writer focussed mainly on the approaches followed in the USA and by the European Commission, respectively. Even though internet neutrality has been a policy consideration in both these jurisdictions for longer than anywhere else. The study is limited to these two examples and necessarily excludes valuable contributions from other countries.

Lastly, due to the fact that internet development is exceptionally dynamic and ever evolving at a rapid pace, so too is the debate regarding internet neutrality. During preparation of this paper, there have been landmark

[62] Mostly news and other forms of media.

changes within both the USA and the EU regarding their respective positions on internet neutrality.

At the outset it must be pointed out that the writer refers to internet neutrality throughout the paper for ease of writing and reading. This despite the fact (which will also be discussed later during the paper), that phraseology carries with it a particular premise and possible bias regarding the subject matter.

1.4. Methodology

The analytical approach for this study is a legal analysis of the existing and suggested regulatory frameworks regarding internet neutrality and will mainly concern itself with the nature of law regarding internet neutrality. Due to the nature of the study, several sources will be used through the Internet.

This study involves a strong literary review element. The literature study entails written and published reading material on the specific topic being consulted.[63] It is important to note that this literature study is not a mere summary of reading material but that it involves a critical analysis of the relevant literature through studying and analysing the relationships between the relevant works of literature.[64]

Due to the limited availability of South African literature on this subject, inevitably, foreign sources as well as case law and legislation will have to be considered. For this purpose, a micro-comparative approach will be followed as a basis. This entails that only separate and a limited number of elements of other foreign jurisdictions will be studied. Consequently, the issues of internet neutrality will receive attention in particular in jurisdictions where the issue has been discussed in detail. These jurisdictions are mainly the United States of America and the European Union.

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63 Jose L Galvan, Writing literature reviews: A guide for students of the social and behavioural sciences (Routledge 2016) 3.

64 *Ibid.*

A functional comparative approach that focuses on commonalities as distinctive elements between the relevant jurisdictions will be used. This approach identifies common obstacles and regulatory needs between the relevant jurisdictions and then investigates how those obstacles and regulatory needs are addressed in these jurisdictions.[65]

[65] Geoffrey Samuel, An introduction to comparative law theory and method, vol 11 (Bloomsbury Publishing 2014) pg.

Chapter 2 - What is the internet?

2.1. Structure of the Internet

2.1.1. Origin of the Internet

The internet finds its origins alongside the development of early computers. In the 1960's the United States Department of Defence funded the Advanced Research Projects Agency Network (ARPANET) which was the first network that made use of packet switching.[66] This project was originally funded by the United States Department of Defence.[67]

Following the development of ARPANET, many other networks that were based on the same or similar concepts to packet switching were created. These included the NPL (National Physical Laboratory) network which was a project by the National Physical Laboratory in England, Tymnet which was a network that sold networking time to various companies, and CYCLADES which was a French network created in the early 1970s and was used for academic purposes.[68] These are a few of the early networks that were later interconnected and were the start of the internet as we know it today.[69]

After the initial successful development of ARPANET, the Defence Advanced Research Projects Agency (DARPA) in the USA started with the development of the Internet Protocol (IP) and Transmission Control Protocol (TCP) which would later on become the most commonly used set of communication protocols used not only on the internet but on computer systems throughout the world. TCP/IP is a set of rules that provides for

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66 Vinton G. Cerf Barry M. Leiner, David D. Clark,, Leonard Kleinrock Robert E. Kahn, Daniel C. Lynch, and Larry G. Roberts Jon Postel, Stephen Wolff., 'Brief History of the Internet', 2 accessed 2019/02/22.

67 Raphael Cohen-Almagor, 'Internet History' (2011) 2 *International Journal of Technoethics* 45 46.

68 Richard Bennett, 'Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate', 2 <https://www.itif.org/files/2009-designed-for-change.pdf> accessed 2019/02/17.

69 Cohen-Almagor, 'Internet History' 46.

standardisation in a communication network.[70] These rules determine and describe how packets of data are sent through a network.[71] In simple terms, IP provided for a universal language that all machines and computers that were part of a network could interpret.[72]

Furthermore, the ECT Act defines IP address and TCP/IP as follows:

"…*'IP address' means the number identifying the point of connection of a computer or other device to the internet;*

and

TCP/IP" means the Transmission Control Protocol Internet Protocol used by an information system to connect to the Internet."[73]

The manner in which TCP functions is that it takes various packets of transmitted data sent by a host and then reassembles the various packets of transmitted data at the receiving end.[74] After receiving the data and reassembling it, TCP checks for errors and confirms the sequence in which it should have been reassembled.[75] The IP part of TCP/IP is the address part of the protocol concerned with "…the addressing and forwarding" of the transmitted data.[76] Due to this ground-breaking technology, the exchange of data packets between various networks that were wide apart was finally possible. This is also referred to as packet switching.[77]

TCP/IP ensured end-to-end communication on networks by specifying how data packets should be addressed, routed and delivered.[78] Through the use of TCP/IP, networks were designed so that functions and decision making

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70 *Ibid* 50.

71 *Ibid.*

72 ICANN, 'Beginner's Guide to Internet Protocol (IP) Addresses ICANN' (2011) 4 - 5

73 Section 1 ECTA.

74 Cohen-Almagor, 'Internet History' 50.

75 *Ibid.*

76 *Ibid.*

77 As defined in the Glossary above.

78 Hong-kyu Lee Changi Nam, Seongcheol Kim & Taehee Kim, 'Network Neutrality Debate: an End User's Perspective' (2011) 18 *International Telecommunications Policy Review* 1, 3.

takes place at the ends of the network.[79] This is known as the end-to-end principle (E2E), which, as the reader will see, is an important principle of the current internet neutrality debate.[80]

After various other networks were able to interconnect with each other and to ARPANET, the National Science Foundation of the USA funded the establishment of various computing networks at several tertiary education institutions.[81] These various individual networks were later on connected to each other through the National Science Foundation Network (NSFNET) in 1986.[82]

Due to the vast successes of this transnational network of which the NSF was the early vanguard, many commercial firms and organisations wanted to connect to the network due to the distinct commercial advantages and opportunities that it presented. At first, the commercial use of the internet was, however, prohibited.[83]

A primary challenge that the early internet faced in commercial terms was the scalability of what was, at the time, new technology. By the late 1980s, the internet's use was limited to a few hundred users mostly in academic, governmental, and military institutions.[84] Concurrent to this network which had selective use, many alternative ISPs were started which created regional networks.

In 1992 a federal law was passed in the United States of America which then allowed for the commercial use of computer networks. In response to the new legislation and access, the NSF adopted the NSFNET Backbone Services

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79 *Ibid.*

80 *Ibid.*

81 Barry M. Leiner, Robert E. Kahn and Jon Postel, 'Brief History of the Internet' (Undated), 1 - 5.

82 *Ibid* 10.

83 Cohen-Almagor, 'Internet history." Moral, ethical, and social dilemmas in the age of technology: Theories and practice' (2013) IGI Global 19-39.

84 Barry M. Leiner, Robert E. Kahn and Jon Postel, 'Brief History of the Internet' 3 - 5.

Acceptable Use Policy which regulated in broad terms how others could make use of the network.[85]

2.1.2. Network of Networks

After the early development of the internet, more and more organisations, companies and countries started to develop their own versions of connected networks in the form of internal networks.[86] Due to the clear usefulness of computer networking, these organisations created their own networks in order to facilitate more efficient communications and logistics.

The earliest networks that were developed outside of ARPANET were largely purpose built with specific functionalities.[87] Academic institutions, private companies and national governmental bodies, all had their own unique requirements for their networks, and their networks were built accordingly.[88] Due to the fact that these networks were designed for and exclusively used by a closed set of people, their designs differed. This led to incompatibility between the various networks.

With the development of TCP/IP and its selection as preferred communication protocol, it was decided by the NSFNET program to streamline existing networks in order to ensure interconnectivity.[89] The NSF arranged various interconnection points between different networks, which led to the start of the network of networks. For example, the NSF collaborated with its European partners to establish trans-Atlantic connectivity.[90] This was the start of the process of connecting different networks together.

The internet or interconnected network only truly became interconnected when the different networks that had up until that point

85 *Ibid* 10.
86 Cohen-Almagor, 'Internet History' (2013) 52.
87 Barry M. Leiner, Robert E. Kahn and Jon Postel, 'Brief History of the Internet' 10.
88 *Ibid.*
89 Cohen-Almagor, 'Internet History' (2013) 52.
90 Barry M. Leiner, Robert E. Kahn and Jon Postel, 'Brief History of the Internet' 10.

developed concurrently yet separately, started connecting to each other. As these different networks were connected to each other, and the capacity and reach of the broad, interconnected network started to expand, it began to be referred to as the network-of-networks.

2.2. Control and ownership of the Internet

2.2.1. Internet Infrastructure

In order to discuss who controls the various elements of the internet and how this control is exercised, it is first important to elaborate on how the internet is structured physically. There is a clear distinction to be made between what the internet is and what the World Wide Web is.

The internet is the physical infrastructure that makes up the so called "network of networks" as a whole.[91] The internet's physical infrastructure consists of computers, internet servers, fibre optic cables, routers *etcetera*. It is, therefore, the physical devices through which data is sent and received.[92]

The World Wide Web (www), on the other hand, is the collection of data available on the internet.[93] This includes all documents, pictures, audio, video or anything else that contains data information.[94] Each document, photo or video image has a uniquely identifiable code that is known as a Uniform Resource Locator (URL) which determines the location of the relevant data and on which internet server it is.[95] Users gain access to this data by sending a request along with the URL to the particular server, which then sends the data

91 *Ibid* 2.
92 *Ibid.*
93 S 1 ECTA.
94 *Ibid.*
95 Papadopoulos, Cyberlaw @ SA 3 (2012) 3.

back to the user.[96] The whole process thus involves the request followed by the almost immediate provision of data.

The reason that this distinction is important is that internet neutrality touches on both the World Wide Web and the internet, but in completely different ways. How this precisely links and where it fits into the wider picture is discussed later on.[97]

The internet consists of various interconnected networks, big and small. These networks range from household networks that consist of Wi-Fi routers and connected laptops and tablets to big corporate companies that have their own internal networks for sharing documents and sending emails.[98]

What connects these networks are routers. Routers are devices that consistently contain updated directories, and which send packages to other routers, in the direction of the final destination. With each package, the router determines the fastest route to the final destination, in other words, packets that belong together and are from the same document do not necessarily follow the same route.[99] By looking at factors such as traffic flow and bandwidth the fastest route is determined and the protocol decides on how the package can reach the final destination in the fastest amount of time.[100]

2.2.2. Decentralised nature of the Internet

The internet was initially developed as a relatively centralised communication method. ARPANET was at its core a centralised system with central architectural components and a central governing body in the form of

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96 Rus Shuler, 'How Does the Internet Work?' 2002) available at <https://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm> accessed 2019/02/14.

97 See Chapter 4 below.

98 Cohen-Almagor, 'Internet History' (2013) 51.

99 Shuler, 'How does the internet work' white paper (2002) available at https://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm.

100 *Ibid.*

the NSF.[101] Although the first network that would later become the fully fledged internet was centralised, the design thereof was decentralised and open.[102]

Musiani argues that there are two main components, which summary the writer agrees with, when it comes to the internet and its decentralised nature. The first is the architectural decentralisation of the internet which entails that the internet is decentralised in how its infrastructure is connected and constructed.[103] The second component is the fact that the internet is politically decentralised.[104] No single body is in control of the whole internet. Both components are discussed below.

The internet is architecturally decentralised in its design. As the internet consists of various interconnecting systems, computers, devices and an array of different networks no single component functions on its own and no single component is able to single-handedly control all the different streams of data.[105] For example, should the author's own personal household Wi-Fi network cease working the internet, and other connections will continue to function, with or without the personal network? To further illustrate this point, there is more than one possible route that data is able to take to reach its end destination. Should one route fail or be unavailable other routes remain open and available for use.

As discussed earlier, the internet developed by connecting various and dissimilar networks and making them interoperable. This foundational nature of the internet continues to exist until today.[106]

Each participating member of the internet is connected to one another. When data packets are sent from one end of a network to another, the

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101 Francesca Musiani, 'Network architecture as internet governance' (2013) 2 *Internet Policy Review* 3.

102 Bennett, 'Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate' (2009) Information Technology and Innovation Foundation 11.

103 Musiani, 'Network architecture as internet governance' (2013) 3.

104 *Ibid* 6.

105 *Ibid.*

106 Vinton G. Cerf Barry M. Leiner, David D. Clark,, Leonard Kleinrock Robert E. Kahn, Daniel C. Lynch, and Larry G. Roberts Jon Postel, Stephen Wolff., 'Brief History of the Internet', 2 accessed 2019/02/22.

participating members forward the data packets to the next participating member. Should one of the participating members be unable to pass the data packet along another participating member is used. The extent of decentralisation in design is clear.[107]

The decentralised design of the internet is also ensconced in the end-to-end (E2E) principle. According to this principle the discretionary powers of the network itself should not vest within the network but rather with the endpoint user.[108] Analogically speaking, should the internet be compared with a postal service, the discretion to determine which route a letter (In the case of the internet a data packet) should follow, lies with the person sending as well as the person receiving the letter and not with the postman or postwoman.

The internet is furthermore decentralised in terms of its governance and control structures.[109] Internet governance should, however, not be confused with an internet government. The governance of the internet does not entail the existence of a single regulatory and executive body to control the whole of the internet. Internet governance rather entails the development of mutual norms, standards and accepted procedures that determines how the internet is used by its various stakeholders.[110]

The global network-of-networks has no central governing or decision-making body.[111] The internet comprises rather of a vast number of members, ranging from individual users, private enterprise, different jurisdictions, academic communities and international organisations.[112] All of these bodies

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107 Bennett, 'Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate' (2009) 12.

108 Luca Belli, 'End-to-End, Net Neutrality and Human Rights' in Primavera De Filippi (ed), Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet (2016) 15.

109 Michel van Eeten, 'Where is the Governance in Internet Governance' (2013) New Media & Society 5.

110 *Ibid* 6.

111 Jeremy Malcolm, Multi-Stakeholder Governance and the Internet Governance Forum (Terminus Press 2008) 22.

112 *Ibid* 116

voluntarily connect to the global network but remain in control over their own networks.

It is practically impossible to impose a top-down hierarchical structure over the internet because no single body is able to exert authority over every element of the internet.[113] For example, it would be difficult if not virtually unmanageable for a regulatory body based on another continent to exercise control over a network of a private company based in, for example, South Africa. Internet governance consists of various stakeholders, numerous international regulatory bodies, vast amounts of private enterprises and national governments who are all involved at various levels in internet governance.

Moreover, because the internet is used in various different countries, there are jurisdictional differences between different countries.[114] Although the United Nations and its numerous affiliated institutions function as quasi-regulatory bodies, the United Nations would, for example, be unable to control non-sovereign country members that participate in the internet such as Google or even academic institutions in whichever country.[115] Just as the United Nations would be unable to direct companies such as Google, Google is unable to direct how countries and their citizens use the internet.

Not only would there be a difficulty in attempting to establish a single regulatory body to govern the internet, but it would be difficult to consolidate the various responsibilities that are already spread across and divided amongst different organisations.[116] For example, the Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for coordinating the unique identifiers such as IP addresses while the Internet Architecture Board (IAB) oversees the technical and engineering development of the internet.[117] Therefore these two responsibilities are split up, and the accompanying powers

113 The governance structure of the internet is discussed below at paragraph 2.2.3.

114 Malcolm, 'Multi-Stakeholder Governance and the Internet Governance Forum' (2008) 157.

115 *Ibid* 140.

116 *Ibid* 176.

117 *Ibid* 32.

are not consolidated in one place. Simply put, there exists no sole channel for data to travel through, no centralised storage location and no single control point.

Further with regard to the internet's decentralised technological nature, how the internet is used is also decentralised. In simple terms, communication of data of information always involves a receiving as well as a sending party. What differs is the number of people who are busy sending the data or information as well as the number of people who are receiving it.

Users are able to choose whether or not they wish to use one-to-one communication such as emails or text chats, one-to-many communication such as emails or comment sections or websites or many-to-many communication like websites such as Reddit or 9Gag.[118]

2.2.3. Governance of the Internet

Not a single individual, organisation, government entity or business controls and drives the internet in its entirety.[119] As previously stated, the internet consists of a network of voluntary interconnected networks and computers that are spread out globally.[120] This implies that the internet works without a single recognised entity that fulfils a central authority role. The internet, therefore, has multiple stakeholders that make up its network of interconnected groups. These groups consisting of academics, governments, businesses, organisations, consumers, and international bodies, have to work cooperatively within their respective roles to effectively management and maintain the internet for the public good.[121]

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118 Rikke Frank Jørgensen, 'Internet and Freedom of expression', Raoul Wallenberg Institute 2001) 21.

119 Nicholas Economides, 'Net neutrality, non-discrimination and digital distribution of content through the internet' (2008) 4 *ISJLP* 209 142.

120 Papadopoulos, Cyberlaw @ SA III (2012) 2.

121 World Summit on the Information Society 'Tunis Agenda for the Information Society' (2005)

The Internet Corporation for Assigned Names and Numbers or ICANN is one of the few bodies in the world with a certain extent of centralised power over the internet.[122] ICANN assigns unique codes and domain names to all IP addresses and ports.[123] ICANN therefore has a centralised discretion in the assigning of the above mentioned aspects. Most of the internet, however, remains decentralised with the power to govern the internet vested in multiple stakeholders each with varying responsibilities.

Internet governance could be split up into three aspects: Firstly, the physical infrastructure aspect, secondly the logical and coding aspect and lastly the available content aspect.[124]

Various stakeholders throughout the world recognised the need for global discussion about the challenges and opportunities of the internet at the highest level.[125] The UN General Assembly Resolution 56/183 paved the way for discussions on internet governance and through this for the principle of non-discrimination.[126] In 2001 it was decided by the ITU Council to hold the summit in two distinct phases.[127]

The first phase, which was held in Geneva from 10 to 12 December 2003, put together a plan of action for achieving an information society accessible to all people and based on collective and shared knowledge.[128] This was the first step taken towards advocating for internet neutrality.[129] The adopted declaration makes the specific mentioning of "…the fundamental values of

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122 Milton L Mueller, Networks and states: The global politics of Internet governance (MIT press 2010) 61.

123 As defined in the Glossary above.

124 Yochai Benkler, 'From consumers to users: Shifting the deeper structures of regulation toward sustainable commons and user access' (1999) 52 *Fed Comm LJ* 561.

125 International Telecommunication Union, 'International Telecommunication Union Basic Information: About WSIS' (2006)

126 United Nations General Assembly Resolution 56/183 (2001).

127 International Telecommunication Union, International Telecommunication Union Basic Information: About WSIS' (2006).

128 World Summit on the Information Society 'The Geneva Declaration of Principles and Plan of Action' (2003).

129 World Summit on the Information Society 'Declaration of Principles Building the Information Society: a global challenge in the new Millennium' (2003)

freedom, equality…and shared responsibility" which implies a consumer-centred and multiple-stakeholder approach to the 'information society'.[130] The term 'information society' describes a society where the creation, dissemination and subsequent integration of information within the society becomes the main driver in economic, political and cultural life.[131]

This declaration could, however, be interpreted in favour or against internet neutrality. It remains open for debate and interpretation of whether internet neutrality would enhance or impair the fundamental values of freedom, equality, and shared responsibility. In this paper it is strongly argued that internet neutrality does not ensure or enhance the above-mentioned values.

The second phase of the World Summit on the Information Society (hereafter 'WSIS') took place a couple of years later in the city of Tunis.[132] Here the Summit aimed to continue with the discussion around the creation of an Information Society with specific focus placed on internet governance and the creation of the Internet Governance Forum.[133] The agenda stated that in recognition of "…internet governance it is an essential element for a people-centred, inclusive, development-oriented and non-discriminatory Information Society".[134] This places a consumer-centred approach in the creation of an information society which supports the idea of non-discrimination and hence internet neutrality.[135]

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130 World Summit on the Information Society 'The Geneva Declaration of Principles and Plan of Action' (2003).

131 William J Martin, The global information society (Taylor & Francis 2017) 2.

132 International Telecommunication Union, ' Basic Information: About WSIS' (2006), available at http://www.itu.int/wsis/basic/about.html (accessed 12 April 2016).

133 *Ibid*.

134 World Summit on the Information Society 'Tunis Agenda for the Information Society' (2005), 6.

135 UNESCO 'Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet' (2011) 65.

2.2.4. Parties involved in the internet

There are three main but arguably five parties involved in the process of requesting and sending information on the internet. First, on the one hand of the network of networks, there is the user. For ease and convenience, this party will be referred to as internet consumers. The internet consumer sends and receives data and can be seen as the average person on the internet. An example of an internet consumer is a person who is browsing the internet.

Secondly, on the other side of the network of networks, there are parties who create content and publish the content on the internet.[136] This includes creators of content such as journalists, photographers, and video creators. In addition, it includes the subsequent buyers and publishers of this content.[137] The creators of content are in some cases not the owners of the content that they create. An example of this is journalists writing for online news websites. The journalists' writing is subject to the usual exception to the copyright law. In other cases, creators of content are also the legally recognised owners of the content. These parties involved in the internet are defined as creators of content. Other parties that also fall in this category of parties are for example websites like Netflix or Wikipedia.

Thirdly, we have internet service providers who act as intermediaries between internet consumers and creators of content. Internet service providers make it possible for the internet consumer to connect to the internet and thus access the creators of content's content.[138] A South African example of an internet service provider is Telkom.

There is a possible fourth party involved in the processing of data acquisition and provision. Many companies are solely focussed on data

136 Grant Blank, 'Who creates content? Stratification and content creation on the Internet' (2013) 16 *Information, Communication & Society* 590 592.

137 *Ibid.*

138 Ian Kerr, 'The Legal Relationship Between Online Service Providers and Users' (2001) 35 *Canadian Business Law Journal* 429.

storage. These companies store binary data from websites and make it accessible to the websites to obtain the data immediately.

Lastly, an important role player, especially when it comes to the regulation of information technology is the government. The modern state is a crucial role player in that it not only enforces existing laws and regulations regarding the functioning of the internet, but it also enacts new laws and regulations that directly affect the above mentioned parties involved in the internet. Interestingly, the state is often also a creator of content as referred to above. This once again highlights the fact that the various role players fulfil different roles at different points in time.

In some cases, creators of content are also the data-saving party. In addition, most internet service providers also offer this service, but it does not always mean that an internet service provider is also responsible for data storage of a website.[139]

The open and accessible nature of the internet ensures that, in some cases, these parties overlap and perform various overlapping functions across the boundaries of these categories. Most private individuals who create content and publish it on the internet also use the internet as consumers. Furthermore, some internet service providers are also creators of content.[140]

To explain the various parties involved in the internet, the following comparison of a library can be used:

In the case of a library, the users are the people who visit the library and want to take out certain books. The authors of the books in the library are the creators of content, and as already mentioned, in some cases they have ownership of their books and in other cases not, subject to the intellectual property law.

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139 Rob Frieden, 'Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits' (2009) 12 *U Pa J Const L* 1279 1299.

140 *Ibid.*

The library can be compared to internet service providers. The library charges a user's fee so that the user can access the content. The library may also charge a fee payable by the creators of content to keep the books on their shelves. Lastly, it may be that the library does not own the building in which the books are stored, and this party who owns the building in the comparison is the party that stores data.

There are, therefore, three relationships with regards to the usage of the internet:

1. The relationship between ISPs and internet consumers;
2. The relationship between internet consumers and content providers;
3. The relationship between content providers and internet service providers.

For purposes of this study the focus would be limited to the legal relationships between the parties regarding specifically the access and usage of the internet which are discussed and considered. In light of these legal relationships any discussion regarding access to the internet would be greatly shaped by the answer to the question of whether or not the exchange between the parties entail the internet as a service or the internet as a good. These questions are discussed in more detail directly below.

2.3. Internet as a service

In order to answer the main questions of this chapter, namely what the internet is, it is important to determine whether or not the use of the internet by its consumers should be considered as a service or a good. The reason why it is necessary to go beyond the definition of the internet as a network-of-networks is due to the fact that the question of whether or not access to the internet should be considered as a legal right has become increasingly more discussed and debated.

The categorisation of the internet as either a good or a service has a significant impact on how access to the internet can potentially be seen as being a legitimate right. The legal nature of the internet as a right is discussed in Chapter 3 of this paper.

2.3.1. What are Goods?

The famous British economist and philosopher Adam Smith defined goods as objects that have exchangeable value.[141] Therefore the rights of ownership in the goods can be exchanged for value in return.[142] A good can be further defined as a physical and tangible object.[143] However, although most goods are tangible objects, not all goods are necessarily tangible. In our modern world, information is also considered as good as discussed below.

The classical definitions are still accepted today. The South African Consumer Protection Act defines goods in Section 1 as:[144]

> *''…goods'' includes—*
>
> *(a) anything marketed for human consumption;*
>
> *(b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;*
>
> *(c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;*

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141 Adam Smith, An Inquiry into the Nature and Causes of The Wealth of Nations (The Pennsylvania State University 1776) 30. (An Inquiry into the Nature and Causes of the Wealth of Nations by Adam Smith is a publication of The Electronic Classics Series by The Pennsylvania State University.)

142 *Ibid.*

143 Nassau William Senior, Political Economy (London: Richard Griffin and Co 1854) 47.

144 S 1 Consumer Protection Act 68 of 2008 (hereafter CPA).

(d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and

(e) gas, water and electricity;

This definition draws a distinction between tangible and intangible goods but includes both types of goods under its definition.

To further elaborate on the definition given in the CPA, Hill provides two main characteristics of goods.[145] This definition builds on the early definitions provided by Smith and Nassau.[146] Hill writes that a good exists independently from its current legal owner over a period of time and secondly the legal owner of goods derives a form of economic benefit from owning the particular good.[147]

2.3.2. What are Services?

Services, in contrast to goods, cannot exist without an existing relationship between the consumer of the service and the producer of that service.[148] Services are not tangible goods.[149] Services effect change in the conditions of the consumer or the goods owned by that consumer and that change is effected through the activity of the producer of the service.[150] In essence, the producer of the service performs an activity which is beneficial to the consumer. It is important to note that as per this definition, services do not result in the transfer of ownership of any goods.

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145 Peter Hill, 'Tangibles, Intangibles and Services: A New Taxonomy for the Classification of Output' (1999) 32 *The Canadian Journal of Economics* 426 437.

146 *Ibid.*

147 *Ibid* 438.

148 *Ibid* 441.

149 *Ibid.*

150 *Ibid.*

Parry recognises services using four distinguishing elements, namely intangibility, heterogeneity, inseparability, and perishability.[151]

2.3.2.1. Intangibility

The most fundamental element of services is that it is intangible due to the fact that the end product of service is performance or an action and not a good that is exchanged.[152] Considering that services brings about a change in condition for the consumer or the consumer's goods, it is clear that services are rendered in an intangible format. All services are intangible, but not all things intangible are services.[153] Services are not manufactured, transported, or stocked but rather rendered by the service producer. The consumption of service and production therefore occur simultaneously.[154]

2.3.2.2. Heterogeneity

Due to the fact that services are performance or act based on the exact nature and scope of the service may differ depending on the producer providing the service. Generally speaking, products tend to be homogeneous whereas services tend to be heterogeneous.[155] These are, however, characteristics that are not cast in stone and exceptions to the rule do exist.[156]

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151 Linda Newnes Glenn Parry, and Xiaoxi Huang, 'Goods, Products and Services', (Springer 2011) 21.

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

155 *Ibid.*

156 *Ibid.*

2.3.2.3. Inseparability

Another differentiating factor between goods and services is that services are inseparably linked to the consumer of the service. Services cannot be rendered without the involvement of the consumer.[157] Goods, in contrast, can be manufactured without the involvement of the consumer. The consumer's participation is delayed until a later stage.

2.3.2.4. Perishability

Due to the fact that services are terminated at the performance by the service provider, it is said that services, therefore "perish" at completion.[158] Services cannot be stocked.[159]

2.3.3. Consumer Protection Act

The Consumer Protection Act (CPA) defines 'services' as follows:

"…*'service' includes, but is not limited to—*

(a) any work or undertaking performed by one person for the direct or indirect benefit of another;

(b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

(c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—

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157 *Ibid.*

158 *Ibid* 22.

159 *Ibid*.

(i) constitutes advice or intermediary services that are subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or

(ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);
(d) the transportation of an individual or any goods;

(e) the provision of—

(i) any accommodation or sustenance;

(ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;

(iii) access to any electronic communication infrastructure;

(iv) access, or of a right of access, to an event or to any premises, activity, or facility; or

(v) access to or use of any premises or other property in terms of a rental;

(f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and

(g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;"

The CPA, therefore, makes particular mention of the provision of *access to any electronic communication infrastructure*. Moreover, the CPA draws a clear distinction between goods and services.

2.3.4. Services versus Goods

There are four main elements of distinction when determining the difference between products and services, namely intangibility, heterogeneity, concurrent nature of production and consumption and perishability.[160]

2.3.5. Internet as a Service or Good

Taking into consideration the differences between products and services, the question remains, whether or not the internet is a service or a product. By looking at the various parties involved in the internet, we are able to determine if the internet is a service or a good.

When one, for example, looks at a movie theatre, there are three parties involved, the consumer watching the movie, the producer of the movie and the movie theatre company that is simultaneously the producer of service as well as a consumer of the good.

The movie theatre company purchases the rights to showcase the film from the movie producers. In this relationship, the movie theatre company is the consumer receiving a product for which it pays the movie producer for.

The movie theatre company that shows the film then provides a service to the consumers and the consumer pays to view the film. In this relationship, the movie theatre company is the producer of the service, and the consumer is at the other end.

Access to the internet is gained in a similar fashion.

When it comes to the relationship between ISP's and internet consumers, it is clear that the internet is used in this instance as a service. The ISP provides

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160 Einar Breivik, 'Evaluation differences between goods and services: the role of product intangibility' (1995) 6.

access to the internet for the internet consumer. Here there are therefore the following two relationships:

1. The relationship between internet users and content providers;
2. The relationship between content providers and internet service providers.

Moreover, it is argued that the internet as a service complies with the four characteristics of services as listed by Parry, namely that the internet as a service is intangible, heterogeneous, inseparable as well as perishable.

The present author is of the opinion that the internet as a service that is provided by ISP's is quite clearly intangible. Secondly, the internet as a service is heterogeneous due to the vast amounts of different options, packages and types of connections that are available to the consumer. Each ISP provides unique types of access to the internet, which adds to the variety of internet options. Here too, the internet clearly has the heterogeneous characteristic of a service. Thirdly, consumption of the internet is inseparable from the consumer of the internet. Access to the internet is not produced and stocked for later use. Access to the internet only takes place with the involvement of the consumer or the end user. Lastly, the internet as service ends after the consumer or end user has terminated or stopped their access to the internet. Use of the internet at a specific time cannot be packed away and saved for another time. If the internet was not used by the consumer at that particular moment, the opportunity for use at that moment disappears.

The early development of the internet has led to the decentralised nature of the internet as we know it today. The network of networks has developed into the widest spread and widely adopted communications method in the world. The internet was commercialised through making access to the internet available as a service. This is a key characteristic that is influential in the discussion regarding the potential right to internet access, which is discussed in the following chapter.

Due to the fact that the internet has developed the way it did, we now have distinct role players that form the legal relationships with regards to how access to the internet is provided. Understanding these legal relationships are crucial when answering the fundamental question regarding internet neutrality. Due to the fact that internet neutrality will fundamentally change the legal relationship between ISPs, content creators and internet users, an adequate understanding of these relationships is essential.

Not only is the precise nature of the legal relationship between these parties important when discussing internet neutrality but so too is the question as to whether or not the provision of internet access should be considered as a good or a service. Upon determining that the internet is a service, the question arises as to whether or not a right to service can exist. This is discussed and considered in the next chapter.

In summary, from the chapter above it is clear that the internet developed as a decentralised and voluntary mode of communication that was provided as a service by ISPs to internet users for internet users to access the content of internet content creators.

2.4. What is internet neutrality?

In the previous two chapters, the historical development and the legal nature of the internet and access to the internet were discussed. In light of the discussion that framed access to the internet in legal terms, this chapter will focus on what precisely internet neutrality is and how it is defined.

2.4.1. Founding history of internet neutrality

Internet neutrality as a legal problem has become apparent with the rapid growth of the Internet. The definition of internet neutrality is a controversial issue, and there is no established and accepted definition of the

concept.[161] The reason being that although several attempts to define the concept have been made, they all range across a variety of academic disciplines.[162]

Internet neutrality which is commonly also referred to as net neutrality, is simply put the principle that all data should be treated equally.[163] This means that Internet users must be able to use the full extent and speed of the Internet regardless of nature or content or service they use on the Internet.[164]

The debate on internet neutrality is intertwined in a complex manner with political and ideological considerations around the world. So far, this debate has focused on local and national concerns regarding regulation by governments in each country. The reason for this is because it is primarily a policy consideration regarding the way in which the currently applicable law should be applied.[165] Internet neutrality touches on an array of particular legal fields, including the law of contract, consumer protection, competition law, public law and cyber law. As with many complex legal issues, various principles and doctrines are interwoven in the discussion of internet neutrality.

Furthermore, as the Internet does not strictly obey national boundaries, this makes internet neutrality a complex international issue that has inevitably led to the participation of several stakeholders from around the world.[166] The debate has led to how, if at all, the Internet should be regulated. The final conclusions drawn from this debate on internet neutrality and how these networking networks should be controlled and regulated will have far-reaching consequences for each user.

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161 Cave and Crocioni, '[Special Section on Net Neutrality] Does Europe Need Network Neutrality Rules?' (2007) 12.

162 *Ibid.*

163 Christine M Stover, 'Network neutrality: A thematic analysis of policy perspectives across the globe' (2010) 3 *Global Media Journal* 75 75.

164 Wu, 'Network neutrality, broadband discrimination' (2003) 154.

165 Milton Mueller and others, 'Net neutrality as global principle for Internet governance' (2007) 9.

166 Malcolm, 'Multi-Stakeholder Governance and the Internet Governance Forum' (2008) 18

The debate regarding internet neutrality emerged in the United States of America (USA). The historical development and progression of the discussion are thoroughly dealt with in the chapter below. For purposes of that chapter a brief background of its development in the USA, and hence its background, in general, is provided.

The term 'net neutrality' was used for the first time in 2003 by media law professor Timothy Wu of Columbia University.[167] Wu defined internet neutrality as the equal treatment of all internet traffic regardless of the content of the type of traffic being transmitted.

2.4.2. Reasons for proposing internet neutrality

Internet neutrality requires that ISPs guarantee equal access at equal speed to all content, without favouring some types of content or blocking others. The proponents of internet neutrality support the policy due to good intentions.[168] Supporters of internet neutrality regulations fear that without it, ISPs would collude with content and service providers from big established businesses at the expense of small businesses or entrepreneurs. This line of reasoning suggests that innovation on the side of content creators, and service providers would be stifled.

Supporters of internet neutrality contend that the internet is of such crucial importance that a sound regulatory framework is necessary in order to protect this valuable communication method that has taken over the everyday lives of numerous consumers. Supporters of internet neutrality view the prospect of ISPs being empowered to exercise a discretion as to what content and services should be allowed on the internet as dangerous and a

167 Wu, 'Network neutrality, broadband discrimination' (2003) 150.

168 Ryan Radia and Jessica Melugin, 'A Net Neutrality Primer' (2017) On Point 5 – 7.

threat to consumer welfare.[169] The author recognises the clear and noble good intentions motivating the suggested regulations.

However, by contrast, the reality is that the regulations are harming consumer welfare because ISPs are disincentivised from providing varying pricing models to serve differing needs of different consumers.[170] Moreover, ISPs are not the only providers of tiered services. Almost all services across the world are available in tiered packages.

2.4.3. Framing of the term

An important point of discussion bears upon how internet neutrality has been framed within public and academic discourse. Broadband discrimination and internet neutrality have become the terms used to describe the practice of data prioritisation, network management practices and differential pricing.[171] To a large extent, the term internet neutrality is defined in a particular and arguably biased manner. The layman description of internet neutrality is internet discrimination which invokes a negative connotation. It is therefore important to discuss the polemic scope of the term internet neutrality because of the influence it has had on shaping the debate since its inception.

The first definition of internet neutrality framed the discussion in a particular manner in support of regulating ISPs ability to control data transmissions and apply network management practices. This early slant to the discussion resulted in the general adoption of the term "internet neutrality" which carried with it its underlying predisposition in the debate.

It is important to note that a lack of internet neutrality does not equate to internet censorship. Non regulation of ISPs ability to control traffic flow has often been misconstrued as internet censorship. This disingenuous

169 Belli and Van Bergen, 'Protecting human rights through network neutrality: Furthering internet users' interest, modernising human rights and safeguarding the open internet' (2013) 1 - 10.

170 Radia and Melugin, 'A Net Neutrality Primer' (2017) 1.

mischaracterisation has often resulted in the discussion being shifted away from the true crux of the matter.

The actual gravamen of internet neutrality is whether ISPs should have the ability to vary speeds depending on the type of traffic flowing through its networks. A lack of internet neutrality would entail that ISPs are able to slow certain traffic based on congestion, network management and contractual considerations. A lack of internet neutrality would not entail that ISPs are suddenly able to circumvent existing constitutional rights, current consumer protection measures or anti-competitive controls in order to enact so called corporate censorship.

The argument is often put forth that a lack of internet neutrality would result in the form of private or corporate censorship.[172] Due to the principle of internet neutrality requiring the "non-discrimination" of all internet traffic, it seems as if internet neutrality is inherently supporting freedom of expression.[173] However, a lack of internet neutrality does not entail that internet traffic will be blocked entirely or censured. Congestion management and network management practices do not justify breaches of the constitutional rights to freedom of expression and access to information.

For the greater part of the internet's commercial usage history, the internet functioned without any internet neutrality regulations. During this time, the internet grew significantly and reached its current status as the most widely used communication method. This growth was possible despite the fact that no formal internet neutrality regulations were in place in any jurisdiction in the world.

In many ways, the calls for internet neutrality appears to be aimed at a situation for something which is not a definite and prevailing problem.[174] The American Civil Liberties Union, which has adopted a position in favour of

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172 Joel Timmer, 'Promoting and Infringing Free Speech? Net Neutrality and the First Amendment' (2018) 71 *Federal Communications Law Journal* 2, 11.

173 *Ibid.*

174 Gerald R Faulhaber, 'The economics of network neutrality' (2011) 34 *Regulation* 18, 20.

internet neutrality regulation has listed merely four incidents where internet neutrality has been unjustly breached in the United States of America.[175] All of these instances took place prior to 2007. [176] As will appear from later discussions in this paper these incidents were decisively dealt with despite the fact that at the time no overarching internet neutrality regulations existed in the USA.

Despite the lack of internet neutrality, the internet grew and developed significantly. Moreover, there were not any major violations of the principles underpinning internet neutrality despite there not being any guarantees for internet neutrality.[177] In the United States, prior to the enactment of the first comprehensive internet neutrality regulations by the FCC, there had been only three relatively significant examples of where the principles of internet neutrality were flouted.[178] Of these three, two were settled between the parties and the last one was remanded back to the FCC after the FCC's original decision was overturned.[179] The supposed threats of the internet without guaranteed internet neutrality seem to be extremely limited in terms of both scope and frequency.[180]

There are two predominant ways in which the internet can be viewed. On the one hand, it could be viewed as a collectively owned entity. To some extent this view would justify the notion of internet neutrality that due to the equal ownership of the internet, all users should have equal and identical access. On the other hand, the internet is a free voluntary association of private individuals and organisations freely interacting and granting access to each other's networks. It is submitted that the latter is the correct view. The distinction between the two views is to be borne in mind when framing the discussion of internet neutrality.

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175 Gregory, 'Net neutrality is techno socialism.' (2015) Institute of Public Affairs Review: A Quarterly Review of Politics and Public Affairs, 32.

176 *Ibid.*

177 Faulhaber, 'The economics of network neutrality' (2012) 20.

178 *Ibid.*

179 *Ibid.*

180 Statement of Commissioner Robert M. McDowell Regarding Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52 (FCC 07-31).

Not only has the definition of internet neutrality obtained a rather strong position when it comes to the broader debate, but it has also morphed from the original position – when the said definition embodied a meaning and envisaged objectives commensurate with the humble early stages of the debate to encompass a broader set of objectives. At first internet, neutrality was limited to the principle of non-discrimination of data by ISPs.

Since then, the definition of internet neutrality has developed to include the prohibition on paid prioritisation. Paid prioritisation entails that ISPs provide so called "fast lanes" to users who are able and willing to pay for more for higher broadband speeds.

2.5. Conclusion

The internet without onerous internet neutrality regulations has transformed global commerce. The development of internet infrastructure is merely another example amongst countless others where private investment and profit driven development have resulted in a vast amount of public good. The success of the internet has been due to the fact that it has remained mostly free from burdensome bureaucracy and overregulation. Regulatory bodies have rather reverted to a light touch approach which has benefited the further development of internet infrastructure and is playing a vital role in closing the digital divide in various countries.

The chapter that follows analyses how the USA and the EU have respectively approached internet neutrality. Due to the fact that both the USA and the EU have rather well-developed histories of engaging the question of whether internet neutrality is necessary and since there is a balanced approach between the two differing methods used, South Africa could learn and apply a great deal from developments in these two jurisdictions.

Chapter 3 looks at the legal nature of the internet, the nature of rights and the influence that it has in the discussion regarding internet neutrality.

Chapter 5, which looks at both the USA and the EU, focusses specifically on the history of engaging on the subject matter and particularly how consumer rights, competition law and corporate transparency play their part in informing their internet neutrality policies.

Chapter 3 - The Legal Nature of the Internet

3.1. What are 'rights'?

Due to the role that the internet plays in our modern society the question of whether the internet or at least access to the internet should be considered as a legal right, has become increasingly important and more widely discussed. Whether or not access to the internet can even be considered a right remains open for debate.

Internet neutrality regulates the manner in which internet users are able to access the internet.[181] Therefore the question of whether or not internet access can and should be considered as a right directly affects the debate regarding internet neutrality. Accordingly, in order to answer the broader question of whether or not internet neutrality should be protected in South Africa, it is important to discuss the above-mentioned question and topic of this chapter through considering the nature of rights.

To determine the status of access to the internet as a potential right firstly the nature of what constitutes a right should be discussed. Secondly, the definition of a right should then be applied to the internet in order to ascertain whether or not we should and could consider access to the internet to be a human right. Both of these questions are discussed hereunder.

When referring to rights, the terms 'human rights' and 'natural rights' are often used interchangeably. However, both these terms do have vastly different interpretations and meanings which will be discussed below.

181 Yoo, 'Network neutrality or Internet innovation' (2010) 22.

3.1.1. What are natural rights?

Although the focus of post 1994 jurisprudence in South Africa placed heavy emphasis on human rights, the concept of natural rights remains central to our understanding of justice and the law.[182] It is therefore necessary to consider the Constitution stating in section 7(1) that the rights contained in the Bill of Rights are the cornerstone of our democracy and that it enshrines the rights of all people.

The term 'right' simply means to be entitled to a particular thing, any deprivation or denial of which will constitute an injustice.[183] The concept of natural rights or *ius naturale* dates back to ancient Greece and has been developed throughout history.[184] The detailed history of the development of human thought regarding natural rights is worthy extensive study in itself but will not be discussed here in any detail. A synopsis of certain highlights in its development will rather be given.

3.1.2. Greek and Roman Natural Rights

During the early development of the concept of natural rights, they were seen as having been derived from a divine foundation.[185] They were therefore seen as being both objective and universal.[186] Aristotle was an early writer who referred to natural rights. He drew a distinction between *nature* and *law* stating that the law might differ from community to community but that nature, or rather the law of nature, was consistent and the same in every community (*polis*).[187]

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182 *Soobramoney v Minister of Health (Kwazulu-Natal)* BCLR (Constitutional Court of South Africa)(12) BCLR 1696 at par 8 & 9

183 Ashford, '*Human rights: What they are and what they are not'* (1995) Libertarian Alliance 1 – 3.

184 Fred D Miller Jr, 'Aristotle and the origins of natural rights' (1996) The Review of Metaphysics 873.

185 Maurice Le Bel, 'Natural law in the Greek period' (1949) 2 *Nat L Inst Proc* 3, 8.

186 *Ibid.*

187 Miller Jr, 'Aristotle and the origins of natural rights' (1996) 877.

The *polis* in Aristotle's view developed from early forms of human associations such as villages and households.[188] It is important to note that the *polis* or political society that Aristotle described differs vastly from the political society as we know it today. The *polis,* in contrast with modern states, did not possess the monopoly of the use of force to administer laws.[189]

Aristotle argued that the community and its laws pre-existed the individuals within the community.[190] In his view, the community as a grouping of people came first, and without the community, the individuals did not exist.[191] In Aristotle's view natural rights are derived from living within the *polis* and through rational thought.[192] This diverges from the traditional view that natural rights are obtained from a Creator and rather posits that natural rights are obtained by living within a community. Aristotle believed people were first and foremost social and political beings predisposed to living within groups.[193]

He argues that 'rights' should be constituted to be sovereign over all matters and that these "rights" or laws should be binding to both the individuals and the "magistrates" or interpreters of the law.[194] Despite placing great emphasis on individualism, Aristotle believed that the individual could not exist outside of the *polis*. Justice or the application of natural rights, according to him, could only be achieved within the *polis*.[195] The natural rights that Aristotle argued for were enforceable against all other individuals in the *polis*, including the rulers within the *polis*, but these rights were not enforceable against the *polis* itself.[196]

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188 *Ibid* 878.

189 Moshe Berent, 'The stateless polis: A reply to critics' (2006) 5 Social Evolution & History 141, 142.

190 Miller Jr, 'Aristotle and the origins of natural rights' (1996) 879.

191 *Ibid.*

192 *Ibid.*

193 *Ibid* 877.

194 David Mirhady, 'Aristotle and the law courts' (2006) 23 Polis: The Journal of the Society for Greek Political Thought 302 10.

195 Miller Jr, 'Aristotle and the origins of natural rights' (1996) 879.

196 *Ibid.*

In Aristotle's view, the natural law and natural rights existed independently from human laws and all within the *polis* were subjected thereto. In short, natural rights existed without governments mandating or approving their existence. Although Aristotle's work was more philosophical in nature and less concrete legal work, it did provide the foundation for those to follow upon which the concept of natural rights could be further developed.[197]

The Roman philosopher Cicero built on the work done by Aristotle and said that natural rights contributed to the wellbeing of society as a whole. Cicero expressly stated that rules and societal customs were not in their nature *laws*.[198] He rather argued that laws were a reflection of what was objectively just and true. Therefore, any rules enacted by the community or rulers of the community that were not objectively just or moral, could not be considered as law. He maintained that justness and morality were determined through rationality and that all people had reason in common.[199] Therefore, because all people had the ability to reason, human nature was at its core a reflection of natural law.

In his great work, *De Legibus* Cicero defines the word *law* in two particular senses.[200] Firstly, he states that the law can be defined as that which society places in writing to command and prohibit certain actions.[201] Cicero viewed this as the superficial meaning of the word *law*.[202] Instead, Cicero argued that the law was derived from nature itself.[203]

Since Cicero viewed natural rights as being derived from nature and objectively true, he viewed it as a universal concept that was applicable to all societies all over the world.[204] He grounded the natural law and natural rights

197 *Ibid* 874.
198 Thomas G West, 'Cicero's teaching on natural law' (1981) 32 *St John's Review* 74, 76.
199 *Ibid* 77.
200 *De Legibus* is translated as "concerning the law" or "concerning laws".
201 *Ibid.*
202 *Ibid*.
203 *Ibid.*
204 Ernst Levy, 'Natural law in the Roman period' (1949) 2 *Nat L Inst Proc* 43, 50.

in God, reason and nature. Natural law according to Cicero, was created by God, placed in nature and discoverable through reason.[205]

Despite drawing a clear distinction of the concept 'law' in the popular sense of the word as well as what Cicero deemed to be the true meaning of it, Cicero argued that there existed an interplay between the two meanings.[206] The popular opinion of the law had to be shaped by the true natural law definition in order to achieve the ultimate public good and benefit.

Cicero viewed the law as an objective, fixed, set of rules but that its interpretations vary and changes over time as "philosophers" gain more wisdom through reason.[207] Therefore, according to Cicero, although natural rights were universal, a *ius gentium* as it was phrased by him, they were discoverable but not always clear and applied similarly in all societies.[208][209] Although natural law and natural rights are not always clear to us, they are unchangeable and therefore not subject to the whims of the rulers of people.

In Cicero's view, governmental authorities or the state existed in order to uphold the natural law and to protect natural rights.[210] Due to the fact that natural rights existed objectively and unchangeably, a state that did not uphold these rights was not considered a legitimate state. The state, therefore, did not determine which rights existed and which did not because rights existed universally.[211]

Both Aristotle and Cicero built the foundation for the concept of natural rights to be further developed and crystallised.

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205 West, 'Cicero's teaching on natural law' (1981) 78.

206 *Ibid* 77.

207 *Ibid* 80.

208 *Ius gentium* is translated as "law of nations".

209 Levy, 'Natural law in the Roman period' (1949) 45.

210 West, 'Cicero's teaching on natural law' (1981) 78

211 Levy, 'Natural law in the Roman period' (1949) 46.

3.1.3. Magna Carta

Few documents have had the same continued influence on legal development as the Magna Carta has had since it was signed in 1215 in England. Although the Magna Carta did not reference natural law or natural rights directly, the underlying principles of natural law and natural rights are clearly evident from the document.[212]

The importance of the Magna Carta is clear from its introduction of controls over the executive and governmental powers. The document was ground-breaking in establishing the norm that power cannot be exerted arbitrarily and without due consideration.[213] This led to the foundational birth of the rule of law.

Three particular ideals espoused in the Magna Carta have remained part of the general legal rights doctrines, which are still to this day applied in South African constitutional law as well as in many other democracies. The first of these finds expression in the rule that rights cannot be arbitrarily taken away from individuals without due process being followed.[214] Secondly, that state authority is given through the consent of individuals that it governs and presides over.[215] Lastly, both the state authority and the individuals within the state are bound by the same set of laws.[216]

The Magna Carta contributed to the development of the rule of law and provided an early framework for the limitation of governmental power. Both these concepts were later elaborated on by the great philosophers of the 17th century.

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212 Richard. H. Helmholz, 'Magna Carta and the Law of Nature' (2016) 62 *Loyola Law Review* 876.

213 *Ibid* 884.

214 *Ibid*.

215 *Ibid.*

216 *Ibid* 881.

3.1.4. Hobbes and Locke

The theory of natural rights strongly led to the wide scale adoption of modern nation states. Furthermore, within the concept of a nation state, the English philosopher John Locke provided the modern foundation for inalienable individual rights within this framework.[217]

Locke wrote that rights are that which rightly and morally belongs to each individual and therefore cannot be taken away from the individual without an injustice being caused.[218] It is important to note that Locke wrote his famous work against the backdrop of the sovereignty of the monarchy, where the sovereignty of the individual was a foreign concept.[219]

Locke argued that natural rights did not come into existence through human creation.[220] These rights were not produced by humans but rather are in existence and belong to all human beings by virtue of the fact of being and living within the state of nature.[221] Universally all individuals have these rights in common, and they do not differ from individual to individual. Therefore, according to Locke, these rights existed regardless of whether they are acknowledged by different states or authorities because these rights exist in the state of nature.

Natural rights, according to Locke, arise from what he described as the state of nature. The state of nature was a device used by Locke to clarify natural rights. The state of nature, according to Locke is the perfect state of equality and freedom.[222] This state of nature is described as space within which all people are equal and able to conduct their affairs and make their decisions

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217 Peter C. Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) Special Report 7.

218 John Locke, Second treatise of government: An essay concerning the true original, extent and end of civil government (John Wiley & Sons 2014) 4.

219 Robert Faulkner, 'Preface to Liberalism: Locke's First Treatise and the Bible' (2005) *67 The Review of Politics* 451, 452

220 Locke (2014) 2.

221 *Ibid.*

222 *Ibid.*

as they deem fit, provided that it is done within the bounds of the laws of the state of nature.[223]

The law of nature is aimed at peace, and the preservation of mankind and its enforcement is in the hands of each individual.[224] In Locke's state of nature, everyone has the ability and right to punish wrongdoers who transgress the law of nature.[225] The extent of the punishment is determined to be so much as is needed to deter future violations of the law of nature.[226]

Locke, however, identified some difficulties facing his version of the state of nature. Firstly, according to Locke, the law of nature was not always clear to everybody. The law of nature was open to interpretation and therefore had different applications.[227]

Secondly, in the state of nature, there are no impartial decisions by the enforcers of the law of nature.[228] As there is no single judiciary to enforce the laws in the state of nature the law of nature is enforced by the members of the state of nature, and these laws are open to different interpretations. This hardly makes the decisions which are handed down impartial or fair, which in turn leads to the decisions not being peacefully accepted by all parties involved to the dispute.[229]

Thirdly, in the state of nature, there exists no communal and competent authority to interpret the law of nature.[230] As individuals are the sole judges of their own cases true justice is challenging to achieve. Locke points out that individuals who are unjust in dispensing justice to members of their own society will surely be unjust when having to do so in their own cases.[231] Due to these shortcomings of the state of nature, Locke argued that higher authorities or

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223 John Dunn, 'The contemporary political significance of John Locke's conception of civil society' (1996) Iyyun: The Jerusalem Philosophical Quarterly/105 103 עיון :רבעון פילוסופי

224 Locke (2014) 2.

225 *Ibid.*

226 *Ibid* 4.

227 *Ibid* 6.

228 *Ibid.*

229 *Ibid.*

230 *Ibid.*

231 *Ibid.*

governments existed and needed to exist to regulate individuals and their actions.[232]

However, in view of the fallibility of human nature, Locke argued that natural rights are, in essence, uncertain and not guaranteed.[233] Locke therefore submitted that the state of nature should be deviated from in order to create a political society that protects the natural rights and freedoms to be enjoyed by each individual. The natural rights that Locke identified include the right of free speech, the right of freedom of religion, the right of assembly and the broad right of press freedom.[234]

To protect these rights, Locke found that the second class of rights are necessary.[235] These additional rights are not natural rights but are needed to ensure that natural rights are protected within political society. These include limitations on state power to protect fundamental natural rights.[236]

Locke described human beings as social beings who are living within communities as social beings, and therefore distinct social contracts were necessary to protect the natural rights of all people from violations by others.[237]

The enjoyment of the natural rights described by Locke is, however, limited by the law of nature.[238] The law of nature creates obligations for each individual because of the equality in the state of nature.[239] As all are equal and independent, no individual should harm another individual's life, health, liberty or possessions.[240] In the state of nature, individuals are entirely free to dispose of their possessions but are not free to destroy themselves or others and their

232 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 8.
233 Locke (2014) 40.
234 *Ibid* 4.
235 *Ibid* 45.
236 *Ibid* 48.
237 Faulkner, 'Preface to Liberalism: Locke's First Treatise and the Bible' (2005) 454
238 Locke (2014) 4.
239 *Ibid.*
240 *Ibid.*

possessions. Liberty, therefore, does not equate to license to abuse others because it is prohibited by the law of nature.[241]

To answer the question as to the reason for governmental power, Locke suggests that a social contract is entered into by all in the state of nature to seek the protection of property, including the property of their own bodies.[242] This social contract was created to regulate the chaotic state of nature that resulted because of the difficulties that it faced, as discussed above.[243]

In the state of nature, disputes that arise would never end, and therefore an authority was needed to act as arbiter. As the property is the cornerstone of Locke's argument for the social contract and civil government, other natural freedoms are abandoned along with the state of nature to seek protection for property in the broad sense.[244]

By concluding a social contract, individuals abandon or limit certain freedoms to regulate life within the social society.[245] Society asserts the power to a civil government to ensure the safety of citizens and the protection of property. Political society comes into existence when individuals come together in the state of nature and agree to abandon the natural right to punish transgressors of the law of nature themselves and to hand over this prerogative to the public power of a civil government.[246] By doing so, individuals become subject to the will of the majority in the form of the civil government.[247]

The rights that are protected are, in Locke's view, mainly negative restrictions rather than positive entitlements. This entails that the rights obligate others to refrain from infringing on the pursuits of others to fulfil their rights because the rights themselves do not guarantee compliance with the rights.

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241 *Ibid.*
242 *Ibid 5.*
243 *Supra* par. 3.1.4.
244 Locke (2014) 8.
245 *Ibid* 26.
246 *Ibid* 28.
247 *Ibid.*

Individuals either join this political society from the outset or through explicit subsequent consent.[248] Through the creation of political society and civil government of which individuals become part, they gain a number of advantages that they lacked in the state of nature, namely laws, adjudicators of the laws and concentration of power in the civil government to enforce these laws. In simple terms, individuals give up their personal power to protect their natural rights of life and property through punishment and transfer it to the civil government.

This transfer of power does, however, come with a *caveat*, in that as soon as the civil government with the derived power of the population is unable to fulfil the responsibilities to protect life, liberty and property, then the population has the power to change or overthrow the civil government.[249] The justification for civil government's power stems from its provision of protection and insurance of life, liberty and property. Therefore, as soon as this justification no longer exists, that is when civil government does not use its derived power to ensure the protection of life, liberty, and property, then it no longer acts in the interest of the individuals. Individuals therefore always retain the right to resist unjust authority.[250]

In Locke's view, the civil government that failed to fulfil its responsibilities to its creators should easily be overthrown, and the state of nature should return.[251] Hereafter, a new and better version of the political society and civil government should be formed. Locke's ambit of natural rights is therefore limited to that which is necessary for the civil authority to ensure the protection of rights and nothing more. The authority of the state to ensure natural rights is limited to the natural rights themselves and cannot, in his view, be elaborated or expanded upon.[252]

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248 *Ibid* 37.

249 *Ibid* 51

250 *Ibid.*

251 Dunn, 'The contemporary political significance of John Locke's conception of civil society' (1996) 115.

252 *Ibid* 117.

Thomas Hobbes was another English philosopher during the 17th century that has played a fundamental part in developing the theory of natural rights.[253] Hobbes' most famous political philosophy work comes from *Leviathan,* which was first published in 1651.[254] Unlike Locke, Hobbes believed that the state of nature should be avoided at all costs. Hobbes posits the question of how life would be without the state or any authority.[255]

According to Hobbes, within the state of nature, each individual, will act in his or her own interest and therefore be their own judge, jury, and executioner in any potential dispute. Should the state of nature exist, it would be in Hobbes' words "…solitary, poor, nasty, brutish, and short".[256]

Despite disagreeing on the state of nature, Hobbes and Locke held similar views on the fact that natural law and natural rights were not to be confused with the law of man. Hobbes provided for a number of laws of nature that are *eternal and immutable* yet are weak and cannot enforce themselves in the state of nature.[257] Due to this fact, Hobbes argued for the necessity of state authority to protect these rights which existed universally but had to be protected.[258]

The natural rights that Hobbes listed gave freedom to individuals, yet Hobbes made a clear distinction between liberty and power.[259] Hobbes argued that should an external hindrance exist that restricts voluntary action, this is a lack of freedom, but when an internal hindrance exists which restricts voluntary action, this is rather a lack of power.[260] This was an early notion of the idea of negative rights that prohibit action and the impediment of rights.

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253 Shaun Kenney, 'Natural Law and the Hobbesian Social Contract' (2020) 1.
254 Thomas Hobbes, 'Leviathan' (A&C Black 2006) 1 - 10
255 *Ibid* 177.
256 *Ibid* 110.
257 *Ibid* 138.
258 *Ibid* 86
259 David Undersrud, 'On Natural Law and Civil Law in the Political Philosophy of Hobbes' (2014) 35 *History of Political Thought* 683, 686.
260 Hobbes, 'Leviathan' 47

In Hobbes' view, natural rights existed within the state of nature, but they were threatened by human nature. It was, therefore, necessary to create the authority of a civil government or state to ensure that these rights are protected and upheld.[261] Hobbes held that there were two main rights that should be protected, namely the right of the individual to pursue a peaceful life and the right of the individual to protect that pursuit of a peaceful life by any means necessary.[262]

Both Locke and Hobbes are seen to have held strong individualistic positions, albeit for vastly different reasons. Both writers believed that a form of civil government or a state is necessary so as to protect certain inalienable rights. This position led to the adoption of individual natural rights within the constitutional and legal frameworks around the world and because of the focus on individuals paved the way for human rights to be adopted the world over.

3.1.5. From Natural Rights to Human Rights

The concept of natural rights morphed into the modern term of human rights through three distinct generations of rights.[263]

In the United States Declaration of Independence of 1776, the founders of the United States of America stated that there are certain rights derived from the law of nature (natural rights) and from the Creator of nature. The second paragraph of the Declaration reads:

> "…*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness. -*

261 Undersrud, 'On Natural Law and Civil Law in the Political Philosophy of Hobbes' (2014) 691
262 *Ibid.*
263 Karel Vasak, 'A 30 year struggle' (1977) 11 Unesco Courier 29.

that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[264]

The idea that "all men" hold "certain inalienable rights" meant that all human beings possess these rights.[265] All human beings had these rights due to our very existence as human beings which made them inalienable. These rights apply to all people at all times and in all situations.[266]

The American founders placed great emphasis on the fact that these inalienable rights stem from a higher authority.[267] The rights espoused by the American founders are first generation rights that closely relate to natural rights.[268]

The most prominent and early use of the term human rights was shortly after the Second World War in the Universal Declaration of Human Rights that was adopted by the United Nations General Assembly in 1948.[269] Being a declaration, the adoption of this document served as a statement of intent by the adopting countries, but it had no provisions that enforced the 30 listed and adopted rights.[270] Yet despite not factually being applied by all adopting nations, the Universal Declaration of Human Rights does still to this day function as a foundational document that informs international law and indeed domestic laws around the world.[271]

The important distinction between natural rights and human rights are that natural rights as inalienable rights do not come from the state but are rather secured by state authority.[272] The state secures these rights through

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264 Thomas Jefferson, Copy of Declaration of Independence (1776).

265 Duard Godfried Kleyn and Frans Viljoen, Beginner's guide for law students (Juta and Company Ltd 2010) 112.

266 Maurice Cranston, Human rights, real and supposed (Taylor & Francis. New York, NY 2002) 49.

267 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 4.

268 *Ibid* 2

269 *Ibid* 12.

270 Cranston, Human rights, real and supposed (2002) 4.

271 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 1.

272 *Ibid* 15.

creating and maintaining the political society in which these rights can be exercised or protected.

Human rights are conceived as the fulfilment of human needs and not as the natural rights given to individuals due to the distinctive value of being human.[273] Although human rights have been used interchangeably with natural rights, the contemporary use of the terms human rights does not denote the same meaning as natural rights do.[274]

To address the research topic of this paper, it is important to properly define what rights entail and whether or not access to the internet could be considered a right. If the definition of natural rights, as discussed above, is applied to access to the internet it is clear that it is difficult to consider access to the internet a natural, inalienable right that intrinsically all human beings possess by virtue of their humanity which will be elaborated upon later in this paper.

3.1.2. Three generations of human rights

One of the most generally accepted categorisations of human rights is defining it into three distinct generations of the historical development of human rights. The first classification of human rights that marked three distinct generations of rights was made in 1977 by Karel Vasak.[275] Vasak categorised human rights into firstly civil and political rights, secondly economic, social, and cultural right and thirdly collective or solidarity rights.[276]

Two years later, in 1979, Vasak used the three concepts of the French Revolution namely liberty, equality and fraternity (*liberté, egalité, fraternité)* to illustrate the three generations of rights that he identified.[277]

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273 *Ibid* 13.

274 *Ibid* 1.

275 Vasak, 'A 30 year struggle' (1977)

276 *Ibid* 29.

277 Patrick Macklem, 'Human rights in international law: three generations or one?' (2015) 3 *London Review of International Law* 12.

3.1.2.1. First generation rights

The concept of human rights in its initial phase was identical to natural rights. These first-generation rights are described as civil and political rights.[278] They are what writers such as Locke and Hobbes wrote about and the rights that were developed by these 17th and 18th century legal scholars. As the authority and influence of states grew the necessity for these civil and political rights became increasingly important.[279] These universal rights focused on the individual and the concept of non-intervention which essentially protected individuals from the states that governed their activity.[280]

The key characteristic of these rights is that they are so called negative rights.[281] Negative rights, therefore, ensure that individuals are not subjected to the actions of other individuals or authority by prohibiting the use of forced or coercion when consent is not given.[282] Negative rights protect against the action of other individuals or the state. In short negative rights exist until they are negated through another's action.

It is, however, important to note that first generation rights are not completely negative. Although first generation rights generally require states or individuals from refraining from particular actions, some first generation rights require positive action from state authorities to ensure that these rights are guaranteed.[283] For example, in order to ensure the right to life, which is a negative right, states around the world are required to act positively through state sponsored protection to protect this right.

The concept of first generation rights finds its roots in the United States of America Bill of Rights and the French Declaration of Rights of Man and of the

278 *Ibid* 5.
279 *Ibid* 6.
280 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 10.
281 *Ibid* 7.
282 Vasak, 'A 30 year struggle' (1977) 29.
283 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 11.

Citizen.[284] [285] Both these documents built on the ideas enshrined in the Magna Carta and elaborate on further rights.

First generation rights include the right to life, the right to equality, the right of free speech, the right to freedom of religion as well as political voting rights.[286]

The potential right to internet access does not fit into this categorisation of rights not only due to the fact that at the time first generation rights were crystallised the internet did not even exist, but because it does not share the similar characteristics as civil or political rights.

3.1.2.2. Second generation rights

The International Covenant on Economic, Social, and Cultural Rights which was adopted by the United Nations General Assembly in 1966 is a central document that established second generation rights.[287]

Second generations rights are considered to be economic and social rights mainly.[288] These rights shifted the focus away from liberties and highlighted the outcomes of rights.[289] Second generations rights endeavoured to achieve particular tangible outcomes that, at least in theory, attempted to advance living standards of individuals. They include the right to housing, the right to health care, the right to adequate working conditions, the right to education *et cetera*.[290]

284 Vasak, 'A 30 year struggle' (1977) 30.
285 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 4.
286 Vasak, 'A 30 year struggle' (1977) 29.
287 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 15.
288 Daniel J Whelan and Jack Donnelly, 'The West, economic and social rights, and the global human rights regime: setting the record straight' (2007) Human Rights Quarterly 908, 909.
289 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 12.
290 *Ibid* 14.

These rights characteristically impose a positive obligation on states or governments to promote the outcomes that these rights aimed for which is unlike first generation rights that are mostly negative rights.[291]

3.1.2.3. Third generation rights

Third generations rights are a new addition to the legal vocabulary an established accepted definition. Third generation rights aim to address modern societal issues and challenges that are deemed not to be addressed by first- and second-generation rights. Third generation rights are often referred to as solidarity or collective rights.[292]

In contrast with first- and second-generation rights, third generation rights can be seen as group rights. A clear illustration of what this means is when there is referred to as 'women's rights' or 'minority right'. These rights encompass a broad range of second and third generation rights that are deemed not to have been protected for these particular classes or groups.[293]

3.1.3. Liberty rights versus entitlement rights

With the development of rights into three distinct generations, there seems to have come about a clear distinction to be drawn between liberty rights and entitlement rights.[294] Liberty rights protect the right to act freely where entitlement rights are claims to goods and services of others.[295]

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291 Whelan and Donnelly, 'The West, economic and social rights, and the global human rights regime: setting the record straight' (2007) 919.

292 Eric Engle, 'Universal human rights: a generational history' (2006) 12 *Ann Surv Int'l & Comp L* 219 254.

293 *Ibid* 260.

294 Jonathon W Penney, 'Internet access rights: A brief history and intellectual origins' (2011) 38 *Wm Mitchell L Rev* 10, 24.

295 *Ibid* 16.

For rights to be of any effect, not to mention substantial benefit, it has to be able to be applied universally.[296] The right to adequate housing is of little benefit when it cannot be guaranteed. The South African Constitution famously states that the rights guaranteed through it should be achieved through the state that "…*must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights*".[297] These rights are therefore not universal because they are not guaranteed to all. In contrast, the right to freedom of expression or the right to life is universal.[298]

Natural or human rights can be justified as being universal if rights are not universal claims to services, goods or amenities.[299] Although these claims are noble and commendable ideals, they should not be included in the same category as rights as this would reduce the status of ideas and the universality of rights will suffer as a consequence.[300]

Natural or human rights, by their very definition cannot be deprived of any person anywhere in the world without causing a severe injustice.[301] Should we consider access to the internet as a human right, then not only will 56.1% of the world population be facing a grave injustice by not having this right fulfilled but the whole of mankind prior to the creation of the internet in the 1960s would have been the victims of a grave human right violation. Moreover, it is the authors opinion that there is no guarantee that the internet will not sooner or later disappear as a relevant technology. The recognition of claims to entitlements as human rights, will cause severe damage to the universality of rights.[302]

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296 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 28.

297 Sections 24(b), 25(5), 26(2) & 27(2) of the Constitution of the Republic of South Africa, 1996.

298 Engle, 'Universal human rights: a generational history' (2006) 230.

299 Ashford, 'Human Rights: What They are and What They Are Not' (1995) 3.

300 *Ibid*.

301 Engle, 'Universal human rights: a generational history' (2006) 258.

302 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 28

The universal enactment of liberties as human rights is a practical possibility. Broadly speaking, liberties only require individuals to respect the freedoms of others.[303] No claims can be made that cannot physically be fulfilled.

It is, however, important to mention that although entitlement rights should not be seen as natural or human rights, they could be considered as rights of a different kind, namely legal rights. Legal and natural rights are different sets of philosophical entities and equivocating the two should be avoided.

3.1.4. What are the legal rights?

A common definition of the concept of legal rights is an interest that is recognized by law and protected by the rule of justice. The two main elements, therefore, are legal recognition as well as legal protection.[304] Although natural rights may also be considered legal rights in that they are legally recognised as well as legally protected, not all legal rights are natural rights.[305]

Every natural right form part of the innate capacity of every human being and natural rights held by one individual, natural person are the same as those held by all other natural persons. That is why these rights are said to be universal rights. A so-called legal right, on the other hand, is created or received by or bestowed upon an individual person through operation of law. The number, nature and content of legal rights held by any one individual person may vary significantly from those held by other individuals. Legal rights are subject to change from time to time as may be deemed necessary.

303 Ashford, 'Human Rights: What They are and What They Are Not' 1995.

304 Kenneth Campbell, 'Legal Rights' (The Stanford Encyclopedia of Philosophy 2017) available at <https://plato.stanford.edu/archives/win2017/entries/legal-rights/> accessed 17 June 2019.

305 Engle, 'Universal human rights: a generational history' (2006) 222.

Natural rights, in contrast, cannot be changed or amended because of their universal nature.[306]

Legal rights, which go beyond the scope of natural rights, are used as instruments to attempt to achieve certain material outcomes. Many second and third generations human rights as discussed earlier in this chapter go beyond the scope of natural rights and attempt to solve societal challenges through legally recognising and protecting these rights.[307]

However, the mere fact that a legal right exists does not guarantee that the individual will necessarily enjoy the fulfilment of that right. The debate regarding legal rights versus natural rights and how they should be viewed and differentiated, if they should be differentiated at all, boils down to the age-old academic discussion and debate on the significance of natural law and legal positivism, respectively. The question of whether rights exist and belong to all human beings by virtue of our humanity or whether rights exist due to governments or societies that create these rights remains the central point of legal philosophical controversy and will likely remain for many years to come.

3.2. Internet as a Right

Due to the enormous influence and societal benefit that the internet has provided humanity, it seems almost natural that the question of whether or not access to the internet should be considered a right has gained prominence throughout the media and academia.[308] Although in this research paper this particular question is not the issue, it is, however, a crucial point to be discussed when determining whether or not internet neutrality should be protected or not. Just as the limitations of freedom of expression can only be discussed if the foundation of freedom of expression as a right has been determined, so too

306 *Ibid* 239.

307 Vasak, 'A 30 year struggle' (1977) 29.

308 Brian Skepys, 'Is There a Human Right to the Internet?' (2012) 5 *Journal of Politics and Law* 15.

can the question of internet neutrality only truly be deliberated if the broader question of access to the internet as a right is considered.

In order to determine whether or not access to the internet should be considered a right three main questions have to be answered, namely:

1. Can the right of access to the internet exist as a natural right?
2. Can the right of access to the internet exist a legal right?
3. If the right of access to the internet can exist as a legal right, should it exist as a legal right?

3.2.1. Can the right to access to the internet exist as a natural right?

As is clear from the development of human rights, its core characteristic is its universality. Rights must be susceptible to universal application in order for it to be considered as a natural right.[309]

It seems quite impossible to consider access to the internet as a natural right when measuring it against the universal nature of natural rights. The internet has only existed for the past 70 years, and it has only been extensively used for the past 30 years.[310] Moreover, for how long the internet will retain its current powerful technological role is uncertain since further technological developments and improved communication methods are bound to take place.

Prior to the advent of the internet the right of access to the internet was non-existent and therefore beyond the reach of any human being. Some writers, however, have argued that new rights can 'come into existence.[311] This view, however, is hugely philosophically problematic because of the universal

309 Engle, 'Universal human rights: a generational history' (2006) 258.

310 Shane Greenstein, How the internet became commercial: Innovation, privatization, and the birth of a new network (Princeton University Press 2015) 159.

311 Jerome J Shestack, 'The philosophic foundations of human rights', Human Rights Quarterly' (Routledge 2017) 215.

nature of rights. If certain things are capable of becoming rights at any given point in time, they are similarly capable to stop being rights.[312]

Without giving recognition to the universal nature of natural rights, it loses its influence and *raison d'etre*. Rights are important as well as influential if they are considered to be universal. If rights are not universally applicable, they cannot be considered inalienable, and if rights are not inalienable, they do not have the desired protection that we seek through its application, in other words the protection afforded by any universal right.[313]

The United Nations passed a resolution in 2017, which emphasised the importance of internet access for the fulfilment of various human rights.[314] It is argued that access to the internet is not a right in and of itself but rather an enabler of rights.[315] Access to the internet facilitates the exercise of various rights such as the right to freedom of expression, right of equality and various legal rights aiming at the material benefit of individuals.[316] But these rights do not stand and fall on access to the internet alone. They are and always had been available with or without access to the internet and certainly will still be upon its disappearance.

3.2.2. Can the right to access to the internet exist as a legal right?

Legal rights create legal obligations to comply with it.[317] Legal rights are, therefore, rights that are determined to be valuable to protect through legislation.[318] Many natural rights are codified into legal rights through constitutions or statutes, but not all legal rights are natural rights.

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312 Myers, 'From Natural Rights to Human Rights - And Beyond' (2017) 28.

313 Herbert Lionel Adolphus Hart, Essays on Bentham: Jurisprudence and political philosophy (OUP Oxford 1982) 162.

314 United Nations Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet' (2016)

315 Vinton G Cerf, 'Internet access is not a human right' (2012) 4 New York Times 25.

316 *Ibid.*

317 Hart, 'Essays on Bentham: Jurisprudence and political philosophy' (1982) Chapter 5.

318 Campbell, Kenneth. "Legal Rights." Stanford Encyclopedia of philosophy (2010).

Different societies and states around the world classify various differing things as a legal right. An example hereof is the statutorily protected cooling off period that is applied in various transactions throughout different jurisdictions. South Africa grants a cooling off period when credit agreements are entered into, but not all jurisdictions grant this protection.[319]

The right to internet access can, therefore, be promulgated to be protected as a right. However, in making this legislative decision the question of whether or not the right to internet access should be protected as a legal right remains to be discussed.

3.2.3. Should the right to access to the internet exist as a legal right?

The question of whether or not access to the internet should be a guaranteed right requires a policy decision that countries around the world are faced with. Policy decisions are made subject to various factors, including but not limited to, resource considerations.

In South Africa, we already see various rights enshrined in the Constitution that cannot be considered natural rights but are legal rights recognised through the Bill of Rights. These include housing, environmental, health care, food, water and social security and educational rights.[320] These rights are not universal natural rights but are rights that are enshrined and elevated in our Constitution.

On a practical level, therefore, it is possible to elevate the right to internet access to the same level through a Constitutional amendment. Alternatively, the right could be guaranteed through the promulgation of legislation, which would, however, not grant the same protection against amendments as a right enshrined in the Constitution does.

319 Section 16 (3) CPA.
320 Sections 24, 26, 27 & 29 Constitution of the Republic of South Africa,1996.

A further challenge in guaranteeing a right of access to the internet results from serious limitations on resources in South Africa. In the same way as the right to housing, although it is protected, it however cannot completely and universally be guaranteed by the Constitution due to practical restrictions, similarly a right to access to the internet will not easily be guaranteed due to similar resources limitations.

Moreover, the right of access to the internet may already be sufficiently protected by other rights. The right to privacy, the right to freedom of expression and the right of access to information are all indirectly touching on access to the internet.[321] These rights, particularly those in relation to internet access, is also bear reference to the right or freedom to seek, receive and impart information.[322]

The legal and political philosophy of cyber libertarianism strongly contends that as a broad principle, the internet should be a space that maximises individual liberty and usage freedom.[323] Overregulation and governmental involvement limits individual freedom of internet users.[324] Therefore cyber libertarianism militates against overregulation and rather support the foundational characteristics of the internet for the maximisation of individual freedom.[325]

Elevating access to the internet to the level of a right also risks weakening the concept of rights in South Africa.[326] The attainment and fulfilment of rights in our country's constitutional rights based dispensation can hardly afford the degrading of value of rights that have been so hard fought for.

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321 Penney, 'Internet access rights: A brief history and intellectual origins' (2011) 18.

322 *Ibid* 30.

323 Lincoln Dahlberg, 'Cyber-libertarianism 2.0: A discourse theory/critical political economy examination' (2010) 6 Cultural politics 331, 336.

324 Penney, 'Internet access rights: A brief history and intellectual origins' (2011) 18.

325 *Ibid* 17.

326 Eric R Sterner, 'The Folly of Internet Freedom: The Mistake of Talking About the Internet as a Human Right' (2011) *The New Atlantis* 134.

3.3. Conclusion

In conclusion, the question of whether or not access to the internet should be considered as a right requires a foundational discussion when debating internet neutrality. An affirmative answer to the above-mentioned question would fundamentally change how the discussion regarding internet neutrality is framed.

It is clear that the term "right" has developed considerably since the dawn of human philosophy. Three distinct generations of rights have appeared, which led to a difference in the theory of rights.

In continuing with this research paper, the approach will be followed that access to the internet is not a natural or human right. Internet access is not a fundamental part of humanity. The question of whether it should be, extends beyond the scope of this research paper and merits thorough discussion. It is from this point of departure that the central research question will be answered. In the next chapter, the history of internet neutrality is discussed as well as how the policy debate regarding the subject matter has developed over the years.

Chapter 4 – International Regulation of Internet Neutrality

4.1. Introduction

In the previous chapter, the history of internet neutrality, as well as the limited discourse regarding internet neutrality in South Africa, were discussed. In order to answer the main research question of whether or not internet neutrality is explicitly protected within the current South African legal framework and, more importantly for purposes of this chapter, whether or not the protection of internet neutrality in South Africa is merited, prudence requires a comparative inquiry into how both these questions are dealt with in other jurisdictions.

This chapter focuses on the jurisprudence pertaining to the questions surrounding internet neutrality in the United States of America (USA) and the European Union (EU). Due to the significance of both the EU and the USA as centres for development and innovation of new internet technology as well as the fact that both these jurisdictions have well developed schools of thought regarding internet neutrality and are often the focal points of this debate, developments in both these jurisdictions will now be discussed and compared below.

The comparison of both the jurisdictions of the USA and the EU with South Africa will be limited to four particular key questions, namely:

1. What is the legal background and historical precedent of internet neutrality in the jurisdiction concerned?
2. Does the jurisdiction consider internet access to be a right?
3. What is the current legislative framework and does the jurisdiction's existing consumer protection and anti-competition regulations and legislation already protect internet consumers?

4. What have been the effects of the implementation of internet neutrality regulations or lack thereof in the respective jurisdictions?

Subsequently, these four key issues are dealt with within the context of each jurisdiction concerned. Issues unique to the specific jurisdiction under discussion may also be briefly be touched on in order to adequately examine the differences between the relevant jurisdictions. These distinctions and similarities are important considerations when discussing South Africa's own internet neutrality policy.

4.2. Internet Neutrality in the USA

4.2.1. Legal background and historical precedent

Although the first reference to the term internet neutrality or 'net neutrality' was coined in 2003, the regulation of the practice of broadband discrimination (the prohibition of broadband discrimination is in essence internet neutrality) started in the United States of America (USA) in 1999.[327] The American Federal Communications Commission (FCC) which is the independent agency in the USA responsible for the regulation of interstate communications within the federal government of the USA.[328]

In 2005 the FCC committed itself *"…to ensure consumers benefit from the innovation that comes from competition"* through the adoption of the following four principles.[329]

> *"…To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.*

327 Christopher T Marsden, 'Network neutrality: From policy to law to regulation' (2017) 29.
328 Title 47 - Telegraphs, Telephones, And Radiotelegraphs (47 U.S.C. § 151 and § 154).
329 Marsden (2017) 30.

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers."

The FCC aimed to ensure that internet access remained neutral.[330] These were the first formal protective steps against broadband discrimination.

4.2.1.1. Madison River (2005)

In 2005 the first case regarding internet neutrality was heard in the USA.[331] In the *Madison River* case before the FCC, the FCC prohibited *Madison River*, an ISP, from denying its consumers access to a Voice over Internet Protocol (VoIP) service.[332] This pioneering case before the FCC has become a widely cited case in the debate over internet neutrality. Proponents of internet neutrality refer to the case as an early example of how internet neutrality was protected in the early years of commercial internet adoption.

The *Madison River* case was significant as it was the first case dealing with broadband discrimination. However, the FCC did not make a finding in

330 FCC, Internet Policy Statement 05– 151 (2005).

331 Federal Communications Commission, 'In the Matter of Madison River Communications, LLC and affiliated companies." (2005) Consent Decree DA-05-543. Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-05-543A2. pdf.

332 *Ibid* 3.

the matter, but a consent order or decree was entered into by and between the parties.[333] None of the merits or factual background of the matter was adjudicated on. This case can hardly serve as a shining example of protecting against internet neutrality. Despite the matter between *Madison River* and the Enforcement Bureau of the FCC being settled through agreement and by consent, this FCC ruling is often mistakenly referred to as an order or a finding by the FCC.

4.2.1.2. AT&T and BellSouth Merger (2007)

The merger of AT&T and BellSouth in 2007 was the next major movement on the internet neutrality front. The FCC raised concerns prior to the merger of AT&T and BellSouth, at the time two major ISPs in the USA. In reaction to the FCC's concerns, AT&T committed itself to maintain a neutral network and use neutral routing practices.[334] This commitment to internet neutrality by the ISPs reaffirmed and complied with the FCC's position at the time to protect neutral networks.

4.2.1.3. Comcast Corp. v FCC (2008)

In 2008 the FCC held that Comcast, another American ISP, "…*unduly interfered with internet users*" rights to neutral broad band access by hampering internet consumers' ability to access internet content by controlling types of data passing through its network. Comcast appealed the decision by the FCC which appeal was upheld by the Washington D.C. Circuit Court of Appeal.[335] The Court found that the FCC was not mandated to make an order

333 *Ibid.*

334 Federal Communications Commission, 'AT&T Inc. and BellSouth Corporation application for transfer of control', (2007) WC Docket 06-74.

335 *Comcast Corp. v. FCC* 600 F. 3d 642 - Court of Appeals, Dist. of Columbia Circuit 2010, 36.

to regulate ISPs through its ancillary authority vested in the Communications Act of 1934.[336] This judgement by the USA court was a significant decision in those early days of internet neutrality because of its confirmation of the FCC's limited ability to enforce internet neutrality rules.

4.2.1.4. Verizon Communications Inc. v FCC (2010 - 2014)

In response to the *Comcast* judgement, the FCC released the *Report and Order Preserving the Open Internet, 2010* where an aggressive stance against broadband discrimination was taken by the Commission.[337] The order took three main policy positions namely that ISPs were obliged to disclose their network management practices; that no legal content may be blocked by ISPs; and thirdly that ISPs may not unreasonably discriminate against legal network traffic.[338] As had happened to the previous FCC order regarding internet neutrality, it was again challenged, this time by other ISPs and major telecommunications company, Verizon.

The same court that found in favour of Comcast in the 2010 appeal found in favour of Verizon in the current matter.[339] The court held that the FCC did not have the delegated powers in terms of the Communications Act to impose the requirements and restrictions of common carriers on ISPs who were in contrast classified as information service providers.[340] The Court set aside the FCC's policies regarding the complete prohibition of blocking as well as the position prohibiting unreasonable data discrimination.[341]

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336 *Ibid.*

337 Federal Communications Commission, 'Report and Order, Preserving the Open Internet.' FCC10-201 (2010).

338 *Ibid* 37.

339 *Verizon Communications Inc. v. FCC* 740 F.3d 623 (United States Court of Appeals for the District of Columbia Circuit) 2014, 62- 63.

340 *Ibid* 45.

341 *Ibid.*

4.2.1.5. FCC Open Internet Report and Order on Remand, Declaratory Ruling, and Order (2015)

On the back of two consecutive judgements that found against the FCC's attempts to ensure internet neutrality, the FCC issued the Open Internet Order of 2015.[342] This order made specific reference to the *Comcast* and *Verizon* judgments.[343] This 2015 FCC Order expanded on its 2010 predecessor by broadening the scope beyond just the relationship between ISPs and the consumer to include the entire internet service network and all parties involved.[344]

The most significant change brought about by the 2015 FCC Order was the reclassification of ISPs, from information services providers to common carriers.[345] This change entailed that ISPs were now subject to the FCC's legal authority to broader mandated interference and to exercise its discretion to prohibit data discrimination and data speed throttling.

The 2015 Order also imposed five key rules (referred to as the bright line rules) that prohibited transmission speed throttling, data discrimination, paid prioritisation and expounded on existing transparency requirements which required ISPs to disclose their network management policies.[346]

4.2.1.6. United States Telecom Association v FCC (2016)

The above-mentioned 2015 FCC Order had barely been issued, when ISPs approached to the United States Court of Appeals for the District of Columbia Circuit to challenge the FCC's attempts to stifle the ability of ISPs to manage their networks under the banner of internet neutrality. However, this

342 Federal Communications Commission, 'Open Internet Report and Order on Remand, Declaratory Ruling, and Order' FCC-15-24, (2015).

343 *Ibid* 20.

344 *Ibid* 142.

345 *Ibid.*

346 *Ibid* 47.

time the very same court that had found against the FCC in the *Comcast* and *Verizon* cases upheld the reclassification of ISPs by the FCC.[347] The court found that it was well within the FCC's delegated powers and authority to reclassify ISPs from 'information service providers' to 'common carriers'.

4.2.1.7. FCC, Order Restoring Internet Freedom (2017)

As is the case with many federal policy positions taken in the USA but subsequently changed following upon a changed political climate inspired by changed political representation at the helms of the executive and United States Congress, it also happened in this case when in 2017 the FCC got a newly appointed chairperson, and subsequently, the FCC announced its plans to roll back the internet neutrality rules established in the sweeping 2015 FCC Order.[348]

The new 2017 FCC Order focused on three main issues. Firstly, the 2017 FCC Order contained a declaratory ruling that restored the status of ISPs as 'information services providers', reverting back from the 2015 classification of ISPs as 'common carriers'.[349] Secondly, the 2017 FCC Order retained requirements that ISPs were compelled to disclose information about their network management practices.[350] Thirdly, the 2017 FCC Order undertook to lessen the administrative burden on ISPs.[351]

It is clear that there has been a back and forth movement between the FCC and ISPs during the past decade. The current 2017 FCC Order is the prevailing legislative position in the USA and is discussed at length below.

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347 *United States Telecom Association v. FCC* 227 F. 3d 450 (United States Court of Appeals for the District of Columbia Circuit) 2000, 110

348 Federal Communications Commission, 'Restoring internet freedom." Declaratory ruling, report and order, and order' (2017).

349 *Ibid* 8.

350 *Ibid* 122.

351 *Ibid* 184.

4.2.2. Internet access as a right in the USA

Currently there is no recognised right to internet access at either state or federal levels in the United States of America.[352] There are numerous other recognised rights at federal and state levels which to some extent protect an individual's right to access the internet.[353] However, a discussion of each one of these rights and their potential influence on the right to internet access is beyond the scope of this paper. The fact that there is no recognised right to internet access in the USA means that there is no binding legislation to be borne in mind when internet neutrality policy is considered.

However, it has been argued that although the right to internet access is not explicitly guaranteed by an independent fundamental right, such guarantee is provided through proper implementation of other existing fundamental rights such as the right to free speech and the right to access information.[354] Although a right to internet access is not codified into American federal or state law, there is a US Supreme Court decision alluding to the possibility that internet access could be considered a right.[355]

In the *Packingham*-case the US Supreme Court held that laws that deprive individuals of internet access were causing disproportionate harm to the realisation of the right to free expression and other rights. Likewise, a number of state level court decisions have in different respects struck down state level legislation which is having an unjust influence and limiting effect on internet access of individual internet consumers. It was held that due to the central role that the internet plays in the transmission of information in our modern society access thereto cannot arbitrarily denied.[356] It would seem that

352 Ryan Shandler and Daphna Canetti, 'A Reality of Vulnerability and Dependence: Internet Access as a Human Right' (2019) *52 Israel Law Review* 77.

353 *Ibid* 80.

354 *Molly Land, 'Toward an international law of the internet' (2013) 54 Harv Int'l LJ* 393.

355 Madeleine Burnette-McGrath, 'Packingham v. North Carolina' (2019) 44 *Ohio Northern University Law Review* 6, 127.

356 Elizabeth Tolon, 'Updating the Social Network: How Outdated and Unclear State Legislation Violates Sex Offenders' First Amendment Rights' (2016) 85 *Fordham L Rev* 1827.

the common approach is that internet access is viewed as a supporting actor to achieve the realisation and protection of other rights.

Moreover, there have been particular calls in the USA that a right to internet access can be derived from other existing traditional rights.[357] In the USA the right to free speech and the right to press (media) freedom are guaranteed in the same sentence in the USA Constitution.[358] Although internet access does not emanate from the fact of being human, it does however support other rights that do. Therefore, many authors consider that internet access should be guaranteed for all individuals as it enables them to progressively realise other rights.[359] Wellman describes auxiliary rights as part of the second wave of (either civil or political) rights that protect and support primary fundamental rights.[360]

Considering the above, it remains important to bear in mind that no explicit right to internet access is recognised in the USA. Internet access and the internet itself is viewed as a mechanism to achieve the realisation of rights. It is submitted that because of the extreme importance of the internet in modern society, in particular with regard to the realisation of numerous other rights it is essential that the right of access to the internet should in no way be restricted. The effect of this position regarding the right to internet access plays a fundamental role when considering whether or not internet neutrality should be adopted as policy. If internet access is no longer a guaranteed right, the recognition of any right to non-discriminatory data practises becomes less likely. The question then arises as to whether access to the internet is allowed, not by virtue of a right to access but merely in terms of a policy consideration. The history of this policy consideration in the USA is discussed in the rest of this chapter.

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357 Kay Mathiesen, 'The human right to Internet access: A philosophical defense' (2012) 18 *International Review of Information Ethics* 9, 13

358 *Ibid.*

359 Wellman Carl, The Proliferation of Rights: Moral Progress or Empty Rhetoric? Boulder (CO Westview Press 1998) 41 – 54.

360 *Ibid* 168.

4.2.3. Current legislative framework

The FCC's 2017 Order has now reverted the regulation of internet neutrality to the same position it had when the internet was flourishing before 2015. The 2017 Order restored the less burdensome regulatory framework that historically governed ISPs and repealed many of the prohibitions placed on ISPs with regards to network management practices. The new 2017 Order tackles three main issues, namely consumer protection, transparency, and the removal of unnecessary regulations to promote broadband investment. These three issues will now be discussed below.

4.2.3.1. The "Common carriers" classification

The definition of a common carrier (which ISPs are no longer classified as in terms of the 2107 FCC order) is provided for in the USA's Communications Act where it is defined as follows:

> "…*any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act.*"[361]

The Communications Act furthermore defines 'information service providers' as:

> "…*the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.*"[362]

361 47 U.S.C. § 153(11) (2012).

362 47 U.S.C. § 153(24)

Common carriers in the USA include telephone network operators and other utilities such as water and electricity.[363] The Communications Act placed a number of restrictions on common carriers, enacted within a particular context which prevailed at the time.[364]

Firstly, common carriers are required to provide service in reaction to all reasonable requests by consumers.[365] This entails that common carriers merely act as a conduit between the providers of the service and the end consumer.[366] Secondly, common carriers may not discriminate based on the content of that which is passing through the utility network.[367] Thirdly, the rates and fees common carriers charge for providing the service are regulated by the FCC.[368]

These restrictions placed on common carriers were used in an attempt to broaden the FCC's powers and to impose internet neutrality when the FCC reclassified ISPs from 'information service providers' to 'common carriers' in its 2015 Order. One of the central changes that the new 2017 FCC Order brought about was the reclassification of ISPs from 'common carriers' as defined in the USA Communications Act back to the classification of ISPs as information service providers.[369]

This is the current status quo and ISPs are therefore not currently defined under 'common carriers'.

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363 Christopher S Yoo, 'Is there a role for common carriage in an Internet-based world' (2013) 51 *Hous L Rev* 545, 552.

364 *Ibid* 570.

365 *Ibid.*

366 *Ibid* 564.

367 *Ibid* 570.

368 *Ibid* 571.

369 Federal Communications Commission, 'Restoring internet freedom." Declaratory ruling, report and order, and order' (2017).

4.2.3.2. Transparency rules

The second main position that the FCC has taken regarding internet neutrality is to require extensive transparency regulations that have expanded on the preceding transparency requirements from earlier FCC orders.[370] The new position emphasises the full disclosure of ISPs' network management practices in order to enable consumers to make informed service decisions.[371]

The disclosure of network management practices includes that ISPs are required to specifically disclose to consumers their blocking practices, throttling practices, content prioritisation, paid prioritisation of content, congestion management policies and device attachment rules.[372] These measures ensure that consumers are able to make informed decisions.

This is a markedly different position taken by the FCC after it having moved away from paternalistic and heavy-handed regulation.[373] Through its transparency requirements, the FCC has now shifted towards "…*public scrutiny and market pressure*" to ensure the continued development of internet infrastructure and broadening of access.[374]

Not only do the FCC's new regulations refer to particular transparency and fairness regulations, but the USA has well-developed and established federal and state level consumer protection legislation and regulations.[375] On the federal level, the Federal Trade Commission Act of 1914 empowers the Federal Trade Commission (FTC) to do the following[376]:

> "…*(a) to prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce;*

370 *Ibid* 118.
371 *Ibid* 120.
372 *Ibid* 122.
373 *Ibid* 134.
374 *Ibid.*
375 Spencer Weber Waller and others, 'Consumer protection in the United States: an overview' (2011) *European Journal of Consumer Law* 1.
376 Federal Trade Commission Act of 1914 5 U.S.C. §§ 41-58.

(b) seek monetary redress and other relief for conduct injurious to consumers;

(c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices;

(d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress."

These measures protect American consumers against any egregious conduct or unfair practices by companies and corporations, specifically ISPs who provide internet access to consumers. The new FCC regulations merely aim to reaffirm already existing protection offered by regulations and where necessary fill certain gaps in the regulations.[377]

4.2.3.3. Competition law

The 2017 FCC Order thoroughly discussed the benefits of vibrant market competition between ISPs and affirmed the FCC's commitment to ensure that healthy competition takes place to the benefit of consumers. The position taken by the FCC is that USA anti-competition law provides sufficient protection from the potential adverse effects of lack of internet neutrality.[378]

The USA Federal Trade Commission Act already prohibits unfair and deceptive practices to the benefit of consumers.[379] Furthermore, the Federal Trade Commission is the statutory body responsible for consumer protection in

377 Angele A Gilroy, Net Neutrality Debate: Access to Broadband Networks (Congressional Research Service 2017) 10.

378 Federal Communications Commission, 'Restoring internet freedom." Declaratory ruling, report and order, and order' (2017).

379 *Ibid* 140.

the USA and has previously successfully challenge conduct by ISPs that amount to unfair consumer practices as discussed above.[380]

Moreover, current anti-competitive (antitrust) regulations have in the past and will also in the case of internet neutrality ensure that non-market public goods such as the freedom of expression and freedom to exchange information are protected.[381] The purpose of antitrust law in the USA is to ensure a healthy and competitive market place within particular sectors and in this instance, within the internet access services. During the previous FCC regulations that supported the notion of internet neutrality regulations, the FCC stated that one of the aims of the regulations was to ensure healthy competition. However, this, has duplicated already existing regulations against anti-competitive conduct. Since then, the FCC has taken the position that the FTC has the mandate to ensure that the ISP marketplace is healthy and competitive.[382]

4.2.3.4. Traffic prioritisation

The FCC has taken the position that allowing traffic prioritisation is necessary for ensuring a vibrant market with healthy competition between ISPs'.[383] Allowing for paid prioritisation provides more room for ISPs to compete and to offer different packages according to the needs of internet consumers. This enhances variety in consumer options.[384] The position is, therefore, a reversal of the previous position taken by the FCC but it is one that seems to have benefitted the overall advancement and development of internet

380 *Ibid.*

381 Maureen K Ohlhausen, 'Antitrust over Net Neutrality: Why We Should Take Competition in Braodband Seriously' (2016) 15 *Colo Tech LJ* 119 133.

382 Federal Communications Commission, 'Restoring internet freedom." Declaratory ruling, report and order, and order' (2017).

383 *Ibid* 102.

384 *Ibid.*

infrastructure due to increased investments into network upgrades and expansions.[385]

In broad terms, the current position taken by the FCC has reduced the regulatory burden on ISPs and has encouraged companies and investors to improve and expand on existing internet infrastructure. Despite the fears that many raised shortly before the adoption of the 2017 FCC Order, competition between ISPs has subsequently flourished.

The USA provides a useful framework for comparison with South Africa due to the fact that the USA seems to have the most well-developed public discourse regarding internet neutrality.

4.2.4. Effects of not protecting internet neutrality

Despite stark warnings that the repealing of the 2015 FCC Order and the subsequent issuing of the 2017 FCC Order which recalled the previous stringent internet neutrality regulations would lead to the metaphorical death of the internet, the internet remains functioning and vibrant with innovation.[386] The aim of the current 2017? FCC regulations were to removed heavy handed and burdensome regulations that disincentivised ISPs from further investment and innovation into internet infrastructure.[387]

The 2017 FCC Order provided its own analysis on the effects of heavy handed internet neutrality regulations versus the effects of a light touch regulatory approach.[388] The FCC predicted that repealing internet neutrality regulations would open up investment into internet infrastructure which would

385 Gilroy, Net Neutrality Debate: Access to Broadband Networks, (2017) 13.

386 Christopher Tremoglie, 'We Survived the Net-Neutrality Apocalypse' available at <https://www.nationalreview.com/2019/06/net-neutrality-apocalypse-fails-to-pass/> accessed 02-06-2020.

387 Federal Communications Commission, 'Restoring internet freedom." Declaratory ruling, report and order, and order' (2017).

388 *Ibid* 53.

in turn benefit internet consumers. Subsequent evidence suggests that this has in fact been the case.[389]

Since the adoption of the new light touch approach by the FCC average internet access speeds have in fact risen considerably.[390] By contrast, during the period 2014 – 2017, average internet access speeds flatlined.[391] This period was marked by strict internet neutrality regulations under the 2015 FCC regulation. The new approach adopted by the FCC which ignorers internet neutrality seems to have had a positive effect on average internet speeds in the USA.

It should therefore be pointed out that on both the investment and innovations fronts the USA has demonstrated that less regulation attracts more investment and consequently more innovation that benefits the end internet consumer.

4.2.5. Lessons for South Africa

There are a number of valuable lessons that South Africa can learn from the approach followed by the USA and in particular the FCC's 2017 Order. There are a number of similarities between the USA and South Africa that make comparisons useful when discussing how South Africa should approach internet neutrality.

Firstly, the USA's FCC and South Africa's ICASA have similar functions and similar mandates as national telecommunications regulatory bodies.[392] Secondly, although there are differences between the South African unitary system and the federal USA system, the USA has, like South Africa,

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389 George S Ford, 'Net Neutrality and Investment in the US: A Review of Evidence from the 2018 Restoring Internet Freedom Order' (2018) 17 *Review of Network Economics* 175, 202

390 Internet & Television Association, 'America's Internet Speeds Continue to Rise' available at <https://www.ncta.com/whats-new/americas-internet-speeds-continue-rise> accessed02-06-2020.

391 Akamai Research, 'State of the internet report.' (2017) Available at http://www. akamai. com/html/about/press/releases/2014/press-093014.html

392 The functions of ICASA is discussed in Chapter 6 below.

federal/national legislation that acts as an overarching legislative framework regulating telecommunications. Lastly, both South Africa and the USA have a healthy and competitive ISP market.

The main feature of the most recent adjustment affected by the FCC in the USA which could beneficially be employed in South Africa is the light touch approach to internet neutrality regulation which simultaneously uses existing consumer protection, transparency and anti-competitive measures along with private sector innovation to best serve the broad public and achieve digital parity and equality.

4.3. Internet Neutrality in the EU

According to Marsden, European legislators and policy makers have lagged behind the USA when it comes to regulating internet neutrality.[393] However, it is, important to keep in mind that there are significant differences in regulatory approaches, state structures and legal systems when comparing the USA, European Union (EU) and South African policies and legislation with one another.

Scott notes that there are two noteworthy differences between the EU and the USA when it comes to the question of internet neutrality. The first is that the EU has a substantially more competitive ISP market and in the second place, that many of the major content providers and internet services companies, are not based in the EU but rather in the USA.[394]

Comparing the approaches followed in the USA and the European Union with potential policy options for South Africa and within our particular context is useful in the broader sense. In both the USA and the European Union, the debate regarding internet neutrality has been framed around a central

393 Marsden (2017) 35.

394 Ben Scott, Stefan Heumann and Jan-Peter Kleinhans, 'Landmark EU and US Net Neutrality Decisions: How might pending decisions impact Internet fragmentation?' (2015) 5.

line.[395] This line intersects normative legal positions on the one hand and the legal and economic consequences of over-regulation on the other.[396]

In order to sufficiently frame the historical development of internet neutrality regulation in the EU, it is important to briefly distinguish the various bodies of legislators in the EU and to determine how the legislative process of the 27 member political and economic union functions.[397] In short, the European Commission is the body responsible for initiating the legislative process of any decision that is referred to as an 'Ordinary Legislative Procedure'.[398] Then the European Parliament and European Council of Ministers will review the proposals received from the European Commission. Depending on the type of decision and whether or not the European Parliament and the Council of Ministers agreed on the proposed decision, the review of the decision is repeated until it is passed.[399]

4.3.1. Legal background and historical precedent

The first formal legislation in the EU regarding internet neutrality was adopted in 2009.[400] Two Directives and a Regulation collectively comprise what is now referred to as the 'Telecoms Package'.[401] The first Directive contained an annexed declaration which committed the Commission to preserve "*…the open and neutral character of the Internet*".[402] This

395 Alison Powell and Alissa Cooper, 'Net neutrality discourses: Comparing advocacy and regulatory arguments in the United States and the United Kingdom' (2011) 27 The information society 5.

396 *Ibid.*

397 At the time of writing the European Union consisted of 28 member states and later 27 after the United Kingdom left the Union.

398 European Union, 'How EU decisions are made' 2020) available at <https://europa.eu/european-union/eu-law/decision-making/procedures_en> accessed 13 March 2020.

399 *Ibid.*

400 Scott, Heumann and Kleinhans, 'Landmark EU and US Net Neutrality Decisions: How might pending decisions impact Internet fragmentation?' (2015) 5.

401 These are Directive 2009/140/EC; Directive 2009/136/EC; Regulation No 1211/2009; establishing the Body of European Regulators for Electronic Communications (BEREC).

402 The first Directive was the European Union, Directive 2009/28/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC

commitment was of no binding legal consequence, but it did highlight the fact that legislative clarity regarding internet neutrality was needed.[403] This left the possible regulation of internet neutrality within the hands of EU member states.

The Board of European Regulators for Electronic Communications (BEREC) was created through the 2009 Telecoms Package.[404] BEREC is the regulating body of telecommunications within the European Union and includes national regulating body representatives in the EU member states.

The early regulations adopted in the EU had a strong focus on consumer rights and ensuring transparency by ISPs.[405] This included certain compliance requirements that compelled ISPs to explicitly report to consumers when their network management practices changed and directly affected consumers.

After following a consultation process with particular regards to internet neutrality, BEREC released a 2011 report recommending best practices and approaches regarding transparency, disclosure of network management practices of ISPs and internet consumer rights.[406]

In 2013, the European Commission initiated the process to adopt a proposal regarding internet neutrality that supported an open and neutral internet but left room for ISPs to apply preferential data treatment and network management practices.[407] The proposal was then passed on to the European Parliament for review where the legislating body strengthened measures to

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on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (2009) L 337/69.

403 Scott, Heumann and Kleinhans, 'Landmark EU and US Net Neutrality Decisions: How might pending decisions impact Internet fragmentation?' (2015) 5.

404 *Ibid.*

405 European Union, Directive 2009/28/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

406 Scott, Heumann and Kleinhans, 'Landmark EU and US Net Neutrality Decisions: How might pending decisions impact Internet fragmentation?' (2015) 6.

407 *Ibid.*

protect against preferential data treatment. A final regulation as adopted in 2016, enshrined the principle of internet neutrality within the European Union.[408] This Regulation is generally applicable to all member states of the EU and enjoys primacy over national legislation governing internet neutrality.[409]

4.3.2. Internet access as a right in the EU

The European Union has at the time of writing not adopted any legislation or regulations that promulgate a right to internet access.[410] There is therefore no binding *supra* national European Union legislation that compels member states to recognise a fundamental right to internet access. Only a handful of countries, including, Greece, Finland, Spain and Portugal have legislated on a national level a right to internet access as a fundamental right.[411]

The right to internet access has, however, been widely discussed and debated within the European society. In 2011 the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression suggested that due to the immense influence of the internet access to the communication network should be actively ensured.[412]

In France the EU member state's Constitutional Council in 2011 held that the right to internet access is an ancillary right to the right to freedom of expression.[413] This is an example of the pragmatic approach that is often followed by EU member states and the EU itself when it comes to the question of the right to internet access. Often courts and legislators prefer to attach a

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408 Epicenter.works, 'The Net Neutrality Situation in the EU' (2019)

409 *Ibid.*

410 Oreste Pollicino, 'Right to Internet Access: Quid Iuris?' (2019) The Cambridge Handbook on New Human Rights Recognition, Novelty, Rhetoric, Cambridge University Press 4.

411 *Ibid.*

412 Frank La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (2011) 60.

413 Nicola Lucchi, 'Regulation and control of communication: the French online copyright infringement law (HADOPI)' (2011) 19 *Cardozo Journal of International and Comparative Law (JICL)* 117.

potential right to internet access as a supplementary right in terms of the right to freedom of expression.[414] Similarly the EU itself has taken the position that internet access supports the fulfilment of other fundamental guaranteed rights.[415] In 2009, the European Parliament amended previous directives to recognise "…*that the Internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms*".

The European Parliament took the position that a right to internet access does not exist in isolation but rather that it supports the realisation of other rights. This accords with the notion discussed in chapter 3 that the internet as a right cannot exist in isolation. The author is in agreement with the view that the internet is a communication method and a means of realisation of other rights but is not a right in itself. The internet is an enabler of rights, quite possibly the most effective enabler of all time, but not a fundamental right on its own.

In light of the above, it remains important to bear in mind that no explicit right to internet access is recognised at the overarching EU level, but many member states do recognise such right. In the EU, the preferred view is that internet access and the internet itself is viewed as a single mechanism to achieve the realisation of rights. The effect of this position regarding the right to internet access plays a fundamental role when considering whether or not internet neutrality should be adopted as policy. If internet access is not a guaranteed right, an absolute right to non-discriminatory data practises becomes less likely and the question then arises whether a determination of the real nature of this so-called "right" should not rather be made with reference to policy considerations.

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414 Pollicino, 'Right to Internet Access: Quid Iuris?' (2019) 7.

415 Union, Directive 2009/28/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

4.3.3. Current legislative framework

In order to contrast the approach adopted by the European Union with that of the USA and South Africa three main issues are considered, namely consumer protection, transparency and the effect on broadband investment and innovation. These three issues are subsequently discussed below.

4.3.3.1. Transparency rules

Under the current EU regulation, traffic management practices by ISPs are limited, and they are not allowed to block or throttle any internet traffic, with the exclusion of three instances. Firstly, when national or EU regulation requires ISPs to block content, for example, content that is illegal.[416] Secondly, when traffic management practices are necessary to protect the integrity and security of the ISPs' networks.[417] Thirdly, when traffic management practices are necessary to mitigate or prohibit congestion on the network, but these measures have to be temporary or only applied in exceptional circumstances.[418]

Reasonable traffic management practices are, however, allowed and ISPs are required follow these practices which are known and transparent to all users.[419] These reasonable traffic management practices may not be applied for commercial reasons but rather only for technical and infrastructural reasons.[420] The EU Regulation 2015/2120 prohibits traffic prioritization and even

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416 Art 3(3)(a) EU European Union, 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 users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (2015) Article 3(3)(a)

417 Art 3(3)(b) EU Regulation 2015/2120.

418 Art 3(3)(c) *ibid*.

419 Art 3(3)(c) *ibid*.

420 Art 3(4) *ibid*.

forbids consumers and ISPs from entering into voluntary contracts in terms of which consumers pay lesser prices and in return ISPs are enabled to prioritise traffic.[421]

The EU Regulation 2015/2120 that has been adopted, provides effective transparency measures to ensure that consumers are informed of the network management practices and their application by ISPs. The trouble, however, is that disclosing these practices serves no particular purpose if consumers derive no benefit from being informed of these practices. Transparency measures are required to enable consumers to compare various options of service providers and to arrive at informed conclusions and base their decisions on the provided information. The EU Regulation 2015/2120, which stifles variation of service and different consumer options limits consumers to a single choice which is offered by all ISPs.[422]

4.3.3.2. Competition law

Due to the EU regulation taking a different stance regarding internet neutrality than that of the FCC's regulation in the USA, the EU regulation had to counter the potential risks of lowering healthy competition between ISPs by setting a review period for the regulation EU Regulation 2015/2120. In April 2019, the EU Commission concluded a consultation process to determine what the economic and developmental effects of the regulation EU Regulation 2015/2120 were on ISPs and infrastructure development.[423]

Although the 2016 regulation EU Regulation 2015/2120 aimed at promoting innovation within internet technology development, the regulations seem to have achieved the opposite as an unintended consequence.

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421 Art 3 *ibid*.

422 Roslyn Layton, 'Alternative Approaches to Broadband Policy: Lessons on Deregulation from Denmark' (2017) 6.

423 European Commission, Report from the Commission to the European Parliament and the Council on the implementation of the open internet access provisions of Regulation (EU) 2015/2120 (2019).

European ISPs have spent less on innovation and upgrading of existing internet infrastructure than before the adoption of the EU regulation EU Regulation 2015/2120.[424] Moreover, American and Asian content providers, service providers and developers have increased their market share after the regulation EU Regulation 2015/2120, which has had a detrimental effect on the European information technology market.[425]

The adoption of internet neutrality regulations in the EU has created unnecessary regulatory hurdles for ISPs and potential smaller start up ISPs are therefore faced with higher barriers at entry level.[426] The resultant less competition amongst ISPs will obviously harm consumer choice in the long run.

4.3.3.3. Traffic prioritisation

In terms of the adopted regulation EU Regulation 2015/2120, no traffic prioritisation or paid prioritisation by ISPs is allowed.[427] The regulation EU Regulation 2015/2120 leaves open the possibility for ISPs to apply traffic prioritisation in order "*…to meet requirements of the content, applications or services for a specific level of quality*".[428] This, however, is subject to the *caveat* that the provision of the specific level of quality does not negatively affect any other consumers.[429]

These measures remain subject to the general rule that traffic management may only take place for reasons other than commercial objectives.[430]

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424 Strand Strand Consulting, 'Net Neutrality in EU after 2 Years: Unintended Consequences for operators, content providers, and consumers' (2019) Strand Consult Publications

425 *Ibid.*

426 Jan Krämer, Daniel Schnurr and Alexandre de Streel, 'Internet platforms and non-discrimination' (2017) Available at SSRN 3083114 56.

427 Art 3(3) EU Regulation 2015/2120.

428 *Ibid.*

429 Art 3 EU Regulation 2015/2120

430 Art 3 EU Regulation 2015/2120

4.3.4. Effects of not protecting internet neutrality

Although the EU regulation enjoys supremacy over national legislation of member countries, the regulation leaves room for member states to adopt their own national regulations subject to them being in accordance with the EU regulation. Prior to EU Regulation 2015/2120, two countries, namely the Netherlands and Slovenia adopted their own and more rigorous policies to ensure internet neutrality, whilst Denmark had an established existing policy regarding internet neutrality that is now superseded by EU Regulation 2015/2120. These three countries ae briefly discussed below.

4.3.4.1. The Netherlands and Slovenia

In 2011 and 2012 the lower Dutch house, as well as the Dutch Senate, passed an amendment of their Telecommunications Act which prohibited ISPs from hindering or slowing down internet traffic.[431] This amendment allowed for certain circumstances in which ISPs would be allowed to slow down or block the flow of internet content legally. The circumstances included the following goals: to manage congestion, but only after it had occurred, to ensure the security of the network, to block illegal and unwanted content and to comply with any other relevant legislation or law.[432]

Later during 2012 Slovenia adopted its own national law regarding internet neutrality which was similar to the Dutch prohibitions on internet traffic management.

Both the Netherlands and Slovenia enacted strict provisions protecting internet neutrality. Furthermore, both the national legislations seem to be in accordance with the EU regulation, which was later on adopted EU Regulation 2015/2120.

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431 Art 74(a) Wijziging van de Telecommunicatiewet ter implementatie van de herziene telecommunicatierichtlijnen Wet van 10 Mei 2012.

432 *Ibid*.

Since the adoption of strict internet neutrality regulations in the Netherlands, there has been a stagnation and in some instances a drop in average internet access speeds.[433] This is a stark contrast with the rise that was seen in the US following the repealing of internet neutrality regulations during the same period.

4.3.4.2. Denmark

Up until the superseding EU Regulation 2015/2120 on internet neutrality was adopted, Denmark quite successfully followed a deregulated and relatively *laissez-faire* approach to internet neutrality.[434] During this time the country experienced year on year improvements in average internet access speeds.[435] Moreover, during this time Denmark was a leading country in terms of internet infrastructure investment by ISPs, which led to the improvements in internet access speeds.[436]

The Danish government unsuccessfully lobbied the European Union not to adopt stringent internet neutrality provisions citing the successes of its own light touch approach.[437] The adoption of the EU Regulation 2015/2120 has resulted in a less competitive ISP market in Denmark due to the new entry barriers which are created by this Regulation.[438]

Both the Dutch and Danish experiences provide examples of the negative implications of burdensome internet neutrality regulations that have counterproductive results. The Danish example in particular points to the fact that to deregulate markets do not necessarily imply a type of *laissez-faire* approach. Existing consumer protection and competition law provisions

433 Akamai Research, 'State of the internet report.' (2017) Available at http://www. akamai. com/html/about/press/releases/2014/press-093014.html

434 Layton, 'Alternative Approaches to Broadband Policy: Lessons on Deregulation from Denmark' (2017) 3

435 Akamai Research, 'State of the internet report.' (2017) Available at http://www.akamai. com/html/about/press/releases/2014/press-093014.html

436 Layton, 'Alternative Approaches to Broadband Policy: Lessons on Deregulation from Denmark' (2017) 42.

437 *Ibid* 53.

438 *Ibid* 55.

provide for a conducive environment where investment and innovation were encouraged to the benefit of the end consumers.[439]

4.3.4.3. Conclusion: Current EU framework

Although it seems that the approach followed by the EU has had some adverse effects on innovation and competition amongst ISPs, there remain elements that have been adopted in Europe that could be effectively applied elsewhere and also in South Africa. A fundamental similarity between the situation in Europe and South Africa relates to positions that both hold relative to the USA. Both Europe and South African mostly enjoy the technological developments made in the USA especially when it comes to new internet technology. The USA remains the technological epicentre of new innovation and development.[440]

It is likely that due to the new approach followed by the FCC in the USA that there will be strong calls within the EU and EU countries to adapted and revised their internet neutrality policies in order to align them with the latest position in the USA. However, the EU and European countries have historically approached government regulation and state involvement in affairs more favourably than the USA which is generally more liberty minded. This could entail that the EU is enabled to adopt a more balanced approach to internet neutrality than the approaches previously followed in the EU as well as in the USA.

4.3.5. Lessons for South Africa

In contrast to what South Africa can learn from the approach followed in the USA, the biggest lesson to be learnt for South Africa when looking at the

439 *Ibid* 60.
440 Robert D Atkinson, 'Understanding the US national innovation system' (2014) ITIF, June 1.

development of internet neutrality regulations in the EU is how not to do it. The EU's approach has been marred by patchwork legislation lacking uniformity and clarity. Due to the vast variety of regulations applicable in the different national EU jurisdictions each with its own individual internet neutrality framework, internet neutrality in the EU remains quite detrimental to both the future development of internet infrastructure as well as to the detriment of European consumers.

4.4. Conclusion

It is clear from the chapter above that due to the nature of internet neutrality and the importance of the internet as a communication method and technology that the development of the internet neutrality debate within the USA and the EU has not conclusively been settled. Due to the political nature of the discussion, the ambiguous interpretations of the rights involved and the uncertainty about potential consumer benefits, the various issues remains unlikely to be resolved soon.

This process has so far clearly revealed a number of key components involved in this debate relevant to the questions of how to deal with ISP transparency; how the broad debate effects consumer rights and competition amongst ISPs; and how traffic prioritisation should be regulated, if at all. In the forthcoming chapter, these three components are discussed within the South African context taking into consideration the approaches followed in both the USA and the EU.

Chapter 5 - Internet neutrality in South Africa

5.1. Introduction

In the previous chapter, the regimes regulating internet neutrality in both the USA and the EU were discussed. Although both these jurisdictions currently have contrasting approaches in regulating internet neutrality, two of the central themes that have been revealed through years of debating potential internet neutrality policies pertain to the role that consumer rights and competition law have to play in the broader context of the discussion.

The preceding chapters have focused mainly on providing the historical background and foundation of the development of the internet as well as the crucial discussion of the theory of rights and in particular the right to access to the internet. This chapter will predominantly deal with the South African context and a discussion of internet neutrality within the South African legislative framework.

This chapter will be discussed in three parts. Firstly, the current South African consumer rights regulatory framework and how it guards against potential data discrimination. Secondly, the protection of corporate transparency and how it guards against the adverse effects of data discrimination and paid prioritisation and lastly, South African competition law and its potential effect on internet neutrality.

5.2. Legal background and historical precedent

5.2.1. Internet neutrality in South Africa

Although the concept of internet neutrality has mainly originated in the United States, the debate has affected South Africa more or less simultaneously. Although the particular context in South Africa differs from that in the USA and the EU comparisons between the various jurisdictions become necessary due to the complexity of the debate.

Over the last decade, the number of internet users has grown considerably. The total number of internet users has increased more than tenfold, from 300 million users in 2000 to 3.4 billion users in 2015.[441] South Africa has followed this global trend almost as a mirror image, as the total number of Internet users in the country grew from 2.4 million users in 2000 to an estimated 25 million users in 2016.[442]

By 2019, 70% of all South Africans had access to the Internet.[443] This will inevitably lead to an increase in bandwidth usage.[444] With this huge increase in Internet users, the issue of internet neutrality demands consideration.

5.2.1.1. OTT's in South Africa

The debate in South Africa regarding internet neutrality has so far focused on so-called "over-the-top" services or OTT's. 'Over-the-top' services are defined as "…content, services, or applications provided to end users using

441 International Telecommunications Union, 'Facts & Figures' available at <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf> accessed 12 April 2017.

442 Indra de lanerolle, 'The New Wave: Who connects to the Internet in South Africa, how they connect and what they do when they connect' available at <http://www.networksociety.co.za/internet-report.php> accessed 12 April 2017 .

443 Statista, 'Statista Digital Market Outlook in South Africa: online penetration 2017-2023' (2017).

444 Jane E Kirtley and Dawn C Nunziato, Virtual Freedom: Net Neutrality and Free Speech in the Internet Age (JSTOR 2010) 10.

the open Internet."[445] Some examples of OTT's include WhatsApp, the mobile messaging application and Skype, the online voice over the Internet protocol or VoIP communication application.[446]

The reason why OTT's are such a hotly debated subject is because OTT's are threatening traditional sources of revenue of the mobile phone network companies.[447] An OTT such as WhatsApp replaces SMS, and therefore mobile network companies lose the revenue of that service because users prefer the free application.[448] The same is true about applications like Skype, Zoom or Microsoft Teams that replace the calling function of mobile network companies.[449]

Mobile phone companies often request regulatory intervention by the legislature to protect their companies against loss of income.[450] These requests for regulatory protection entail reliance upon the principle of internet neutrality.[451] Mobile network companies argue that OTT services and applications have no licensing or taxation responsibilities but enjoy profits, while mobile phone companies need to shoulder licensing and taxation duties without benefiting from profits.[452]

ICASA issues three types of licenses. First, for electronic communications network services or ECNS, secondly for electronic communications services or ECS, and lastly for Broadcasting Services.[453]

Each of these licenses contains certain rights and responsibilities. OTT's which are not based in South Africa, provide their services over the top of

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445 Body of European Regulators of Electronic Communications, 'Report on OTT services' (2015) 10.

446 *Ibid* 20.

447 Christoph Stork, "OTT - threat or opportunity for African Telcos?" (2016) available at https://researchictafrica.net/publications/Other_publications/2016%20_Working_paper_1_OTT-threat%20or%20opportunity%20for%20African%20Telcos.pdf, 2 (accessed 3 October 2018).

448 *Ibid*.

449 *Ibid*.

450 *Ibid* 5.

451 *Ibid* 6.

452 *Ibid*.

453 Electronic Communications Act 36 of 2005 (the ECA).

mobile network operators' bandwidth and over their licenses.[454] ICASA licenses are limited to any national or provincial communication services. [455] Therefore OTT's are, unlike South African mobile networking companies, not subject to the regulatory or licensing terms and conditions.

OTT services and applications make use of the Internet and in South Africa specifically make use of the infrastructure of, among other things, mobile network companies to enable their users to send and receive data.[456] According to ISP's, this creates infrastructure and capacity issues on their broadband networks.[457] OTT's are disruptive innovations in the established broadband markets by providing for more effective and speedy services than their traditional counterparts such as SMS and call functions.[458] OTT services and applications are more accessible to the general public due to lower costs and more user friendly experience.[459]

The innovative nature of OTT's attracts more users.[460] ISP's concerns about and objections to OTT services and applications are based on the argument that OTT's override their services and their networks, and secondly, that OTT services and applications are profiting from using the ISP's networks without the ISP sharing any profits. [461] The *prima facie* solution to the first problem is simply to increase bandwidth capacity to accommodate this additional load.[462] Therefore, the main argument made by ISP's and especially mobile network companies in South Africa is that OTT services and applications

454 Stork (2016) 6.

455 S5(3) ECA.

456 Department of Telecommunications and Postal Services, 'Policy and Regulatory Options for Over-the-Top Services' (2016)

457 Gary S Becker, Dennis W Carlton and Hal S Sider, 'Net neutrality and consumer welfare' (2010) 6 *Journal of Competition Law and Economics* 497, 517.

458 Solomon Russom Habtay, 'Business model reinvention for enabling disruptive innovation', University of the Witwatersrand, Johannesburg 2011) 146.

459 *Ibid* 151.

460 Department of Telecommunications and Postal Services, 'Policy and Regulatory Options for Over-the-Top Services' (2016).

461 Yoo, 'The changing patterns of Internet usage' (2010) 70.

462 *Ibid.*

make use of their networks without ever investing or paying for the use of the network. [463]

There are, however, opposing arguments along the following submissions: Users are charged the costs for using OTT services and applications by paying data charges for each message sent and received.[464] The argument that mobile network companies lose profits due to the availability of OTT services and applications is therefore not valid, with the logical conclusion that users are benefiting and that OTT services and applications have created a new market that previously did not exist.[465] It appears that the mobile networking companies' attempt to gain profits from OTT services and applications under the banner of internet neutrality will hamper innovative and disruptive newcomers. OTT services and applications are a clear example of better and cheaper services and products developed for the user.[466]

The present writer will further argue that, using the logic which is said to be underpinning the main argument of ISP's in relation to OTT services and applications (i.e. that OTT services and applications are benefiting financially from ISPs), that argument may be applied to any company, entity, application, website or business that yields an income from some or other involvement of the Internet.

OTT's form part of the broader debate on internet neutrality in South Africa. [467] As mentioned previously, the principle of internet neutrality ensures that no data discrimination should take place. If the majority of ISP's succeed in their argument, they want to use the principles of equal data and

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463 Department of Telecommunications and Postal Services, 'Policy and Regulatory Options for Over-the-Top Services' (2016).

464 Christoph Stork, "OTT - threat or opportunity for African Telcos?" (2016) Accessed on 3 October 2018 and available at https://researchictafrica.net/publications/Other_publications/2016%20_Working_paper_1_OTT-threat%20or%20opportunity%20for%20African%20Telcos.pdf, 3.

465 *Ibid.*

466 C.S. Yoo, 'Network Neutrality, Consumers, and Innovation'. (2008) Faculty Scholarship. Paper 234, 69.

467 Department of Telecommunications and Postal Services, 'Policy and Regulatory Options for Over-the-Top Services' (2016).

information to force OTT services and applications to share their profits. Not only will this impede future innovations and technological development, but normal users will be the hardest hit.[468]

In March 2016, the Parliamentary Portfolio on Telecommunications and Postal Services Report reported on their involvement and talks with various stakeholders regarding OTT services and applications.[469] Their final suggestions are still unknown at the time of preparing this dissertation.

5.2.1.2. National Integrated ICT Policy Review Report

With the debate on Internet neutrality reaching our shores the in the form of OTT's trying to preserve Internet neutrality against South Africa's cellular network providers the South African legislature opened up discussions with various role players and leaders in the ICT sector regarding Internet neutrality.[470] In fulfilment of the National Development Plan, the process to create a new ICT policy was launched at the end of 2012.[471] In 2016 the final policy white paper was published with the findings of the ICT Policy Review Panel.[472]

The white paper detailed that in support of Internet neutrality a policy based on the principle of the open Internet will be actively sought to ensure fair competition between different content and service providers which would

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468 C.S. Yoo, 'Network Neutrality, Consumers, and Innovation' (2008) Faculty Scholarship. Paper 234, 31.

469 Parliamentary Portfolio Committee on Telecommunications and Postal Services, Report of the Portfolio Committee on Telecommunications and Postal Services on Over The Top (OTT) services by Parliamentary Portfolio Committee on Telecommunications and Postal Services (2016) Accessed on 27 March 2018 and available at http://www.ellipsis.co.za/wp-content/uploads/2016/03/20160308-PCTPS-Final-Report-on-OTTs.pdf (accessed 27 March 2018).

470 Department of Telecommunications and Postal Services, 'National Integrated ICT Policy White Paper' (2016)

471 *Ibid* 50 - 54

472 *Ibid.*

lead to better Internet consumer protection.[473] The white paper mentions explicitly that policy would be adopted so that no preferential treatment should be given to any data and include requirements relating to equal charges regardless of user, content, site, platform, or mode of communication.[474]

The white paper recommended that an open Internet policy which broadly also includes the principle of Internet neutrality is adopted.[475] The recommendations include a proposed provision that ISPs and network managers are transparent in their doings, that there be no blocking of any lawful content and that there be no data discrimination.[476]

This white paper stressed the notion that it is in the public interest for Internet neutrality to be established in South Africa's regulatory framework. It was further decided that regulations should be put into place pro-actively without awaiting further developments resulting from the debate in South Africa.[477] According to the white paper "reasonable network management" should still be allowed within the regulation but that data discrimination specifically should never be practised.[478]

While this white paper stresses the importance of the internet in a democratic South Africa and how the internet plays a crucial role in the realisation of constitutional rights, it remains to be seen what actions will be taken by the independent regulatory body ICASA or by the legislative branch of government.

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473 *Ibid*.
474 *Ibid*.
475 *Ibid*.
476 *Ibid*.
477 *Ibid*.
478 *Ibid*.

5.2.1.3. South Africa Specific Considerations

A major relevant distinction between the USA, EU *vis-a*-vis South Africa regarding internet neutrality is our particular socio-economic position and historical background. To a certain extent, internet neutrality is premature considering the levels of internet access in our society.[479] Despite the fact that South Africa does not have comparable levels of internet penetration and access as the USA and the EU have, South Africa would be wise to come to an early conclusion regarding this important matter.[480]

South Africa has some of the highest wired broadband access levels in Africa and the highest mobile coverage and usage on the continent.[481] Yet, compared to developed countries of the EU as well as the USA, these levels of wired broadband access and mobile coverage are considerably lower. Not only does South Africa have proportionally fewer internet users than other developed countries but South African internet infrastructure is not as well developed.[482]

However, South Africa currently has some of the highest levels of bandwidth per internet users, ranking 18th in the whole world.[483] This is likely due to the lower proportional number of internet users when compared to other countries while still having taken advantage of new internet infrastructure

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479 The Internet Service Providers' Association, "Net Neutrality" A Non-issue in South Africa for the Present by The Internet Service Providers' Association (ISPA). Available at http://ispa.org.za/press-release/net-neutrality-a-non-issue-in-south-africafor-the-present-says-ispa/ accessed 02 June 2020.

480 Genna Robb and Ryan Hawthorne, 'Net neutrality and market power: the case of South Africa' (2019) Telecommunications Policy 1.

481 AJ Carillo, 'Having Your Cake and Eating It Too? Zero-Rating, Net Neutrality, and International Law'(2016)' 19 *Stanford Technology Law Review* 364, 388.

482 Research Africa IT, 'The State of ICT in South Africa by Research Africa IT' (2018) Accessed on 15 July 2019 and available at https://researchictafrica.net/after-access-south-africa-state-of-ict-2017/south-africa-report_04.pdf 18. Accessed on 15 July 2019

483 International Telecommunication Union, Internet bandwidth - Country rankings by International Telecommunication Union & TheGlobalEconomy.com (2016) Accessed on 17 July 2019 and available at https://www.theglobaleconomy.com/rankings/Internet_bandwidth/ Accessed on 17 July 2019

technology such as fibre. South Africa's challenge is that as mass internet adoption takes place and access levels rise internet infrastructure will most likely lag behind the growing number of new users which will, in turn, lower the average bandwidth per internet user. This will result in less bandwidth per internet user.

As previously mentioned, internet neutrality will hinder ISPs ability to protect their networks and manage congestion. In light of South Africa's growing number of internet users, it will become increasingly important for ISPs to manage their networks to avoid congestion, optimise the user experience and protect networks. Ratifying internet neutrality will impede ISPs ability to precisely do that. This is an important distinction to be made between the situation of South Africa compared to that of the EU or the USA.

Another vital consideration that particularly pertains to South Africa is the fact that South Africa internet neutrality will result in higher barriers to entry for new and possible disruptive ISPs that would stifle healthy competition.[484] Internet neutrality prohibits ISPs from offering tailored packages to consumers which could potentially lead to monopolies. Although South Africa has some of the higher rates of ISPs per 100 000 people, in 2012 around 80% of all internet access is provided for by only ten ISPs.[485] Internet neutrality, which will raise the barriers to entry may potentially result in solidifying a monopoly amongst ISPs. The dangers of anti-competitive consequences caused by internet neutrality are discussed at length in Chapter 6 of this study.

Lastly, due to the vast differences between various socio-economic classes in South Africa internet neutrality could inadvertently force consumers to pay for internet access that they do not necessarily require but are a force to pay for the non-discrimination principle of internet neutrality. Not all South African internet users require the same type of internet access nor do all South

484 Timothy B Lee, 'The durable internet: Preserving network neutrality without regulation' (2008) Cato Policy Analysis Series 3.

485 Arthur Goldstuck, 'Internet matters: The quiet engine of the South African economy' (2012) 236 World Wide Worx 41.

Africans have similar internet usage habits. This gap or difference in usage and levels of access is often referred to as the digital divide.[486]

Not only does South Africa have a unique composition of internet infrastructure and internet traffic, but the way in which South Africans connect to the internet is unique. In South Africa, 78% of internet access takes place through mobile phones, and the rest is spread among laptops, personal computers, tablets and other devices.[487] Users do not access the same internet content on mobile phones as they do on other devices.

Internet neutrality forces all ISPs to offer similar packages that do not treat any internet traffic differently. Should South Africans require packages that prioritise certain frequently used websites or content providers over others that are not as frequently used, the potential internet neutrality would, subject to some possible exclusion to the regulation, prohibit South African internet users from entering into tailored agreements for particular usage and access needs.

It is clear that South Africa's internet landscape has specific circumstances and an internet user base that differentiates it from the USA and the EU. Although broadly speaking there are numerous similarities between the three jurisdictions, which are discussed in chapter 5, careful consideration must be given to the possible effects that internet neutrality holds in our context and given our socio-economic situation.

5.3. Internet access as a right in South Africa

At the time of writing South Africa does not recognise any constitutional right of access to the internet. There are, however, possible arguments that could be advanced in support of the notion that a right to internet access

486 Papadopoulos, Cyberlaw @ SA III (2012) 3.

487 Qwerty Foundation, 'The Digital Landscape in South Africa' (2017), 7.

does in fact exist to a certain extent. These arguments are briefly discussed below.

5.3.1. Right to internet access as an auxiliary right

As discussed in chapter 4, it could be argued that the right to internet access is an auxiliary right that flows from the fulfilment of other rights such as the right to freedom of expression and the right to access information.[488]

The Constitutional Court has found that the right to freedom of expression extends beyond the content of the speech which is communicated to also include the means used to express the speech.[489] The internet being the means of dissemination of speech such means could arguably be protected by this constitutional precedent. The author could not find any Constitutional Court case law directly supporting the existence of a right to internet access or precedent that dealt to any extent with the particular question of whether or not there exists a right to internet access.

Section 16 of the Constitution provides that everyone has the right to freedom of expression, including freedom of the press and the media. Freedom of expression is a cornerstone of the South African Constitutional dispensation and aims to achieve openness, transparency, and accountability.[490]

As Dworkin noted:

> "…*freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and constitutive of a feature of a just political society that government treat all its adult members as responsible moral agents. That requirement has two dimensions firstly,*

488 Shandler and Canetti, 'A Reality of Vulnerability and Dependence: Internet Access as a Human Right' (2019), 1.

489 *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC) par 53.

490 Iain Currie and Johan De Waal, *The Bill Of Rights Handbook* (Juta and Company Ltd 2013) 360.

morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice and faith. Government insults its citizens and denies them of their moral responsibility when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions. We retain our dignity as individuals, only by insisting that no one, no official and no majority has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it".[491]

Freedom of expression is central to a functioning and vibrant democracy.

In South Africa freedom of expression is broadly defined and has been expanded through Constitutional precedent.[492] Freedom of expression includes the freedom to receive and impart information or ideas, academic and scientific research freedoms, freedom of the press and artistic creativity. However, a discussion of the broad content of the freedom of expression would be beyond the scope of this study.

The right to freedom of expression is, however, not absolute and is subject to limitation such as prohibitions of hate speech, child pornography, defamation, and incitement of imminent violence, as well as misuse of personal data and intellectual property rights.

Section 25 of the Constitution provides that everyone has the right to own private property and not to be arbitrarily deprived of it. It could be argued that if sections 16 and 25 are read together a strong case could be made that a person may not be deprived of access to the internet unjustly. However, this entails a negative reading of a potential right to internet access and does not include a positive reading that requires the state to provide access to the internet as a fundamental right.

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491 Ronald Dworkin, *Freedom's Law: The Moral Reading Of The American Constitution* (OUP Oxford 1999) 200.

492 *De Reuck v Director of Public Prosecutions* (Witwatersrand Local Division) and Others (CCT5/03) 2004 (1) SA 406 (CC)

Furthermore, section 32 of the Constitution provides that everyone has the right to access information. Section 32 ensures that:

(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

The scope of this right is limited and explicitly phrased. Section 32 enables individuals to access specific information and does not entail a broad or general right to access any information. This is once again a negative right which ensures that a right to access information cannot be withheld. It does not create a positive right that the state is required to ensure every person has access to all information in existence in order to fulfil this positive right. The discussion therefore once again comes back to chapter 3 of this paper which discusses the nature of rights and the right to access the internet as a natural and/or legal right.

5.3.2. Universal access in terms of Electronic Communications and Transactions Act

The Electronic Communications and Transactions Act 25 of 2002 (ECTA), deals with electronic communication and includes provisions regarding universal access. Thus, section 6 of ECTA states that:

"…In respect of universal access, the national e-strategy must outline strategies and programmes to –

(a) provide Internet connectivity to disadvantaged communities;

(b) encourage the private sector to initiate schemes to provide universal access;

(c) foster the adoption and use of new technologies for attaining universal access; &

(d) stimulate public awareness, understanding and acceptance of the benefits of Internet connectivity and electronic transacting".

Moreover, ECTA defines 'universal access' as follows:

"…"*universal access*" *means access by all citizens of the Republic to Internet connectivity and electronic transactions*".[493]

From the above-mentioned extracts of ECTA, it is evident that this legislation contemplates the achievement of the progressive realisation of universal access to the internet and electronic transactions for all South Africans. The author is of the opinion that these provisions do not, *per se* create a fundamental right to access the internet but they rather outline a policy of universal access through both public and private initiatives. This view draws support from the fact that section 6 of ECTA is part of the provisions of Chapter II of the Act under the heading *Maximising Benefits and Policy Framework*.

For purposes of this chapter, the point of view that there is no existing right to internet access will be considered when internet neutrality in South Africa is discussed.

5.4. Current legislative framework

5.4.1. South African consumer rights and internet neutrality

At the heart of the debate on internet neutrality, the legal relationship between ISPs and consumers play a key and fundamental role. This relationship is briefly discussed below before the effect of consumer rights on internet neutrality receives attention.

493 S1 ECTA.

The law of contract is the fundamental underlying foundation of consumer protection law.[494] Therefore, a brief look into the South African law of contract is necessary in order to discuss the effects of consumer protection law on internet neutrality. The South African law of contract is underpinned by four cornerstones, namely, the freedom to contract, the sanctity of contract, the privity of contract and good faith when contracting.[495]

These cornerstones can be discerned from the basic definition of a contract as being "…*an agreement where two or more parties enter into with the serious intention of creating a legal obligation.*"[496] The four cornerstones are accordingly discussed below within the context of contracts concluded between internet consumers and ISPs.

5.4.2. Contract law

5.4.2.1. Freedom to contract

Freedom to contract is one of the cornerstones of South African contract law.[497] Freedom to contract entails that parties are free to decide whether or not to contract, are free to decide with whom to enter into a contract and on which terms to contract.[498] The freedom to contract finds its origins in the historical development of South African contract law from Roman law principles that were significantly adapted and developed through Dutch law and later on strongly influenced by the English law.[499]

The Constitutional Court has held that the freedom to contract, which is a freedom enjoyed by all South Africans, is trite in our law.[500] The freedom to

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494 Philip N Stoop and Chrizell Chürr, 'Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008' (2013) 16 *Potchefstroom Electronic Law Journal* 514 519.

495 Dale Hutchison and Chris-James Pretorius, *The Law Of Contract In South Africa* (Oxford University Press Southern Africa 2017) 23.

496 *Ibid* 6.

497 *Ibid* 23.

498 *Ibid.*

499 *Ibid* 11.

500 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par. 104.

contract is strongly linked to the Constitutional values that "…*allow individuals the dignity and freedom to regulate their affairs.*"[501] The freedom to contract enables parties to agree upon their expectations adequately and therefore provides a foundation to the law of contract.[502]

Despite the importance of the freedom to contract as a foundational component of contract law and the protection the freedom to contract to be paramount, there are a number of issues that have been accentuated in our Constitutional dispensation.[503] In recent years authors have acknowledged the fact that although freedom to contract is crucially important, it faces genuine challenges . Contracts are often not negotiated from positions of equal bargaining power.[504] This could potentially lead to contracts that have been negotiated with limited contractual freedom.[505]

In order to address this challenge faced by legal scholars and society, our courts have adopted the approach to take into consideration public policy which entails "…*the legal convictions of the community*" and which "…*represents those values that are held most dear by the society.*"[506]

Enforcing internet neutrality regulations might result in the encroachment of internet consumers' freedom to contract and hence the autonomy of the individual as a Constitutional value. Due to the nature of internet neutrality regulations and as we have seen through the examples thereof in the USA and the EU, enforcing broad bans on data discrimination removes the possibility of internet consumers and ISPs to freely contract on their own agreed upon terms.[507] Internet neutrality regulations prohibit internet consumers from a variety of internet access offerings by ISPs.

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501 *Ibid* at par. 104.

502 *Ibid* at par. 171.

503 Hutchison and Pretorius, (2017) 25.

504 Richard Hunter Christie and Graham Bradfield, *Christie's Law of Contract in South Africa* (LexisNexis 2016) 14.

505 Hutchison and Pretorius (2017) 26.

506 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).at par. 28.

507 Kevin A Hassett and Robert J Shapiro, 'Towards universal broadband: flexible broadband pricing and the digital divide' (2009) Washington, DC: Georgetown Center for Business & Public Policy 12.

Internet neutrality bars internet consumers from paying a premium price to receive faster internet access.[508] Moreover, internet neutrality compels ISPs to provide a standard speed to all internet consumers and applies the same standard speed to all types of internet content and data, which results in internet consumers being obliged to pay for these services despite not necessarily wanting the entirety of internet content which ISPs are required to provide at the standard speed.[509] Internet neutrality deprives internet users of the opportunity to tailor their internet access packages in accordance with their needs.[510]

This infringes on the ability of internet consumers to determine the terms of the agreement with ISPs and weakens the required legal obligations between the contracting parties.[511] All South Africans, regardless of their particular needs and the extent of their use of internet access, will be compelled to pay for such internet access that ISPs have to provide under potential internet neutrality policies.

The author believes that given the prevailing and vast economic and social inequality in South Africa that it would be wrong to introduce the broad and sweeping policy such of internet neutrality without careful consideration of the socio-economic nuances. Internet access is crucial for the creation of new economic opportunities in South Africa. To those who wish to avail themselves of these opportunities' internet access should be available. However, in view of the wide diversity of South African internet users in need of different forms of access tailored to their respective needs, internet accessibility must cater for these needs. To exclude any possibility of providing such tailored forms of internet access by enacting internet neutrality measures seems counterproductive.

Although the freedom to contract is an essential cornerstone of South African contract law, it has in recent years and with the dawn of our

508 Becker, Carlton and Sider, 'Net neutrality and consumer welfare' (2010), 499
509 *Ibid* 500.
510 Christopher S Yoo, 'Beyond network neutrality' (2005) 19 *Harv JL & Tech* 1, 6.
511 *Ibid* 56.

Constitutional dispensation been regarded as not being an absolute principle which is cast in stone.[512] In order to strike a balance with the freedom to contract, the good faith doctrine has been further developed by our courts to counterbalance the inequities that may be caused through an absolute application of the freedom to contract principle.

5.4.2.2. Good faith

The second cornerstone of South African law of contract is good faith between contracting parties.[513] Through the development of South African law of contract, the antitheses of good faith, namely bad faith, has been used as an instrument to introduce fairness and equity into our law.[514] The use of bad faith as a basis for the *exceptio doli generalis* was substituted by the consideration of public policy in contract law.[515] Public policy is used as a mechanism to ensure equity and fairness between contracting parties due to the often unequal positions that contracting parties hold *viz-a-viz* each other.

The values enshrined in our Constitution have dramatically developed the views of our courts with regard to good faith and public policy considerations. By considering public policy, effect is given to the community's sense of reasonableness and fairness.[516] Although the importance of the legal convictions of the community enjoys significant consideration in our constitutional dispensation, its application has not resulted in the summary replacement of the freedom to contract.[517]

The question arises as to how one should deal with contracts that have been ultimately agreed upon and concluded between ISPs and internet

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512 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 36 at par. 25.

513 Hutchison and Pretorius (2017) 23.

514 Fritz DJ Brand, 'The role of good faith, equity and fairness in the South African Law of Contract: a further instalment' (2009) 126 *Stellenbosch Law Review* 71, 73.

515 *Ibid* 74.

516 *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at par. 2.

517 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC) at p. 29.

consumers and which contain legal obligations that do not accord with the principles of internet neutrality?

5.4.2.3. Sanctity of contracts

The sanctity of contracts is the general principle that once a contract is concluded the contracting parties are obliged to honour the contract and fulfil their obligations in terms of that contract.[518] When contracts are freely entered into, and the terms thereof are not *contra bonis mores,* then the contract must be adhered to.[519] This principle finds expression in the words *pacta sunt servanda*.[520]

It is submitted that the effect of the sanctity of contracts principle on internet neutrality, the writer hereof would argue, should be considered hand-in-hand with the principle of transparency which is discussed below. Without portending that discussion in too much detail it could be mentioned, in a nutshell, that it relates to the inference that if ISPs and consumers should freely enter into agreements in terms of which ISPs disclose with full transparency their network congestion management practices and their offers for paid prioritisation and consumers freely enter into those agreements with the full knowledge then surely these agreements are not only contractually sound but morally too.

5.4.2.4. Privity of contracts

The final cornerstone of South African contract law is privity of contract.[521] Privity of contract entails that the obligations created between contracting parties are binding exclusively on them with the exclusion of any

518 Hutchison and Pretorius (2017)24.
519 *Ibid.*
520 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC).
521 Hutchison and Pretorius (2017) 26.

third party.[522] The effect of privity of contracts principle has only limited effect on the internet neutrality discussion. When ISPs and consumers enter into voluntary agreements whereby ISPs provide internet access subject to the fulfilment of the consumer's obligations, no third parties are involved in that agreement.

5.4.3. Consumer protection

Before the enactment of the South African Consumer Protection Act 68 of 2008 (hereafter CPA), consumer protection within South Africa was developed through various court judgments, various statutes, and common law. Broadly speaking, there have been two leading schools of thought regarding the role and function of consumer protection legislation.[523] On the one hand, consumer protection is seen as a mechanism to ensure effective economic activity; and, on the other hand, in contracts consumer protection should be aimed at providing protection against inequalities and imbalanced contractual relationships.[524]

The development and acceptance of the CPA was the result of an extended process of deliberations and consultations, which cumulated with the promulgation of the Act in April 2009.[525] The CPA is legislation that in no small measure, reaffirms various constitutionally enshrined values and rights.[526] The CPA is now an umbrella statute that revised and amended the previous

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522 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176.

523 Colin Scott, 'Enforcing consumer protection laws', Handbook of Research on International Consumer Law, Second Edition (Edward Elgar Publishing 2018) 466.

524 *Ibid.*

525 Monique L Du Preez, 'The Consumer Protection Bill: a few preliminary comments' (2009) 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 58, 1.

526 The preamble of the CPA recognises the legal injustices of South Africa's past and aims to protect the interests of South African consumers.

regime of consumer protection and now offers more protection for South African consumers than ever before.[527]

The reality of economic activity, which is especially applicable in South Africa, is that there exists an imbalance of power between consumers and the corporations or business that they contract with. This imbalanced bargaining power relationship gave rise to consumer protection measures, not only in South Africa but throughout the world.[528] Fairness, both procedural and substantive, is at the heart of consumer protection law.[529]

A complete and thorough analysis of the CPA, however, falls outside of the purview of this study. What will follow below is a brief analysis of current protection offered by consumer protection legislation in South Africa and a brief analysis of how these protections are applicable to the consumer relationship between internet users and their ISPs.

5.4.3.1. Applicability of CPA

It is important to note that the CPA provides consumer protection but is subject to a number of exemptions. In terms of Section 5 of the Act, the Act does not apply to any transaction:[530]

(a) in terms of which goods or services are promoted or supplied to the State;

(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;

(c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);

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527 Tjakie Naudé and Sieg Eiselen, Commentary on the Consumer Protection Act (Juta 2014) Par. 29.

528 Scott, 'Enforcing consumer protection laws' (2018), 468.

529 Stoop and Chürr, 'Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008' (2013) 520.

530 S5 CPA.

(d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;

(e) pertaining to services to be supplied under an employment contract;

(f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or

(g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

In the context of this study, the most important exclusion being the fact that juristic person whose asset value or annual turnover exceeds 2 million Rand as determined by the South African Minister of the Department of Trade and Industry.[531]

Thus, only natural person consumers and a juristic person who is not excluded are protected by the CPA and hence enjoy the protection that the CPA offers.

5.4.3.2. Consumer's Right to Choose

The CPA protects the consumer's right to select a supplier and, in this case, ISP, of their choice.[532] Due to the fact that South Africa has a vibrant and competitive internet service provision market, South African consumers are spoilt for choice. Various ISPs also offer tailored packages that suit particular consumer needs. This right to choose coupled with compulsory transparent dealings by ISPs ensure that consumers are able to gain maximum benefit from internet access without hindering ISPs ability to manage network traffic and

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531 Determination of Threshold in Terms of the Consumer Protection Act, 2008 (Act No. 68 Of 2008) (1 April 2011) Available at https://www.gov.za/sites/default/files/gcis_document/201409/34181gon294.pdf

532 S13 CPA.

offer varying services to different consumers based on their particular needs and preferences.

5.4.3.3. Consumer's Right to Disclosure of Information

The right to disclosure of information comprises mainly of two aspects. Firstly, the right to receive information in plain and understandable language and secondly, the right to have suppliers disclose the exact nature and terms of service on offer.[533] The right to disclosure of information aims at bridging the existing gap between consumer's ability to engage in fair conduct in their contractual engagement with each other.[534] The right to disclosure of information aims at promoting fairness through mandating transparency to the benefit of consumers.

The right to receive information in plain and understandable language aims at levelling the unequal playing field resulting from a difference in the extent of the power held by consumers and suppliers, respectively as discussed previously.[535] By ensuring that consumers and suppliers completely and correctly understand the terms of the contract between them it is ensured that they not only contract in good faith but also in terms of a contract meeting the requirements of sanctity. The right protected by section 22 of the CPA encourages informed decision making by consumers.[536]

Moreover, section 22(2)(a) of the Act requires "comprehensiveness" as an element of plain and understandable language.[537] The requirement to comprehensively disclose information relating to the product or service entails providing full information which means that the *essentialia* of consumer contracts, and those pertaining to contracts between internet users and ISPs,

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533 Ss22–28 CPA.

534 Stoop and Chürr, 'Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008' (2013) 520.

535 *Ibid* 532.

536 *Ibid* 531.

537 S22(2)(a) CPA.

are clearly outlined and explained. [538] [539] The requirement of comprehensiveness is complied with when the information concerned enables *"…a consumer to make an informed choice"*.[540]

Not only does section 22 require comprehensive disclosure, it requires that no important facts regarding the contract may be left out.[541] This includes full disclosure of all obligations created in terms of the contract that both parties are required to fulfil.[542] This would therefore include the manner in which an internet consumer is able to use the service provided by an ISP as well as the manner in which the ISP provides the service, which is central to the contract between the two parties.

Suppliers are therefore required to disclose to the consumer the nature and terms of the agreement plainly and understandably. The right to disclose the nature of services further serves the purpose of informing consumers in order to enable them to make informed and beneficial decisions.[543]

In terms of the relationship that consumers have with ISPs the above-mentioned rights that form part of the right to disclosure of information enable internet consumers to make informed decisions with regards to whom they select as an internet access provider. This is already existing protection offered to consumers without internet neutrality regulations. Greater emphasis on these transparency measures would be more beneficial to consumers than broad sweeping changes aimed at prohibiting data discrimination and network management practices, as has been seen in the approach followed by the USA.

Healthy competition between ISPs (which is discussed later in this chapter) is only possible and useful if sufficient information is available to

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538 Stoop and Chürr, 'Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008 (2013) 520.'

539 Naudé and Eiselen (2014) par 22-5.

540 *Ibid* 22-6

541 Frances Gordon and Candice Burt, 'Plain language: the law' (2010) 10 *Without Prejudice* 59, 63.

542 *Ibid.*

543 Stoop and Chürr, 'Unpacking the Right to Plain and Understandable Language in the Consumer Protection Act 68 of 2008' (2013) 531.

consumers so that they can make informed decisions.[544] Moreover, with suitable transparency measures in place, not only are consumers able to make informed decisions but they are empowered to switch between ISPs as new competitors enter the market, which in turn enhances healthy competition.[545]

The CPA's provisions requiring complete disclosure of information to consumers are aimed at the achievement of these goals. However, these transparency measures could be further elaborated and strengthened through guidelines provided by regulatory bodies and the state as was done in the USA.

5.4.3.4. Consumer's Right to Honest Dealing

The CPA further prohibits unconscionable, unfair, unreasonable, unjust or improper trade practices and any deceptive, misleading, unfair or fraudulent conduct in order to achieve fairness between contracting parties.[546] Not only does the CPA prohibit apparent unconscionable and unfair conduct relating to duress and undue influence through physical means but it also prohibits conduct that is unethical in terms of negotiation, execution and enforcement of agreements.[547]

Section 41 of the CPA prohibits false, misleading, or deceptive representations. This protects consumers against ISPs 'hiding' or 'misrepresenting' data discrimination and unfair network management practices. The CPA further strengthens the existing principle in terms of which a contracting party enjoys protection against any misrepresentations being

544 Roger Mason, 'Consumer protection awareness in South Africa' (2007) 1 World Journal of Retail Business Management 27, 28

545 *Ibid.*

546 S40 CPA.

547 Wenette Jacobs, Philip N Stoop and René Van Niekerk, 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13 *PELJ* 347.

made by another party.[548] A misrepresentation could cause annulment of the contract.[549]

Should ISPs therefore knowingly and deliberately give misleading information regarding the exact nature of the internet access service provided, consumers would be entitled to seek recourse in terms of either the CPA or common law.

5.4.3.5. Consumer's Rights to Fair, Just and Reasonable Terms and Conditions

Sections 48 to 50 of the CPA regulates the consumer's rights to fair, just, and reasonable terms and conditions. Section 48 of the CPA provides as follow the general standard for fairness in consumer contracts:

"*…(1) A supplier must not—*

(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—

(i) at a price that is unfair, unreasonable or unjust; or

(ii) on terms that are unfair, unreasonable or unjust;…"

Moreover, section 51 provides a non-exhaustive list of prohibited transactions, agreements, terms or conditions. Amongst other provisions, section 51 provides for protection against misleading or deceiving consumers through standardised contracts and further protects consumers against suppliers who are defeating the broad and general purpose of the Act.

Should the contracting terms allowing for network management practices and paid prioritisation be found to be unfair, unjust, or unreasonable, the CPA provides consumers with recourse.

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548 *Ibid* 348.

549 *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC 378 par. 1

Section 48(2) of the CPA provides the factors that determine the fairness, reasonableness and justness of terms and conditions.[550] It reads as follows:

> *"…Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—*
>
> *(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;*
>
> *(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;*
>
> *(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or*
>
> *(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—*
>
> > *(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or*
> >
> > *(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49."*[551]

Section 48(2) provides a measure of substantive fairness when it comes to consumer contracts.[552] It prohibits the conclusion of any contract if the terms of the contact are not fair, reasonable and just. In this regard the CPA aims to

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550 Jacobs, Stoop and Van Niekerk (2010) 1098.

551 S49 CPA.

552 Luanda Hawthorne, 'Public governance: unpacking the Consumer Protection Act 68 of 2008' (2012) 75 *THRHR* 345, 361.

address the imbalances between the contracting parties (internet users and ISPs) as well as the social and economic inequalities in our society.[553]

If the above mentioned is applied to the set of circumstances where ISPs are allowed to manage their networks and provide for paid data prioritisation then it is quite clear that firstly it does not *excessively favour* the ISPs because consumers are able to opt for packages that do not constrain traffic flow or broadband speed.

Secondly, the terms would not be inequitable as they do not harm the consumer. However, it could possibly be argued that, a term would be inequitable based on the premise that consumers are entitled to compete for the very best packages that ISPs have to offer. It is submitted that the premise in question is quite obviously an incorrect point of departure because should consumers be entitled to the highest and best level of internet access that ISPs have to offer, it would fundamentally change one's entire view on goods and service provision.

Thirdly, should ISPs clearly inform consumers that they do use network management practices to avoid network congestion and that they do offer tiered services and paid prioritisation would they then comply with the necessary existing transparency requirements? ISPs have to be upfront and honest about the fact that they do make use of these techniques to ensure that their infrastructure functions properly.

5.4.3.6. Consumer's Right to Fair Value, Good Quality and Safety

In terms of section 54(1) of the CPA states that:

"…(1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—

553 Yeukai Mupangavanhu, 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) 48 *De Jure* 116, 128.

(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;

(b) the performance of the services in a manner and quality that persons are generally entitled to expect;"

The CPA therefore protects consumers and entitles them to receive a quality of service that could general be expected.[554] As internet infrastructure and technology continues their rapid development pace, we could conceivably reach a point where broadband capacity and speeds are so well developed that the general expectations of consumers would be unhindered internet access. At this point, however, and specifically in South Africa, we have not yet reached this stage of internet development.

5.4.3.7. CPA and Internet neutrality

It is submitted that after the adoption of their new position regarding internet neutrality, South African consumer rights will, as is the case in the USA, offer satisfactory and sufficient protection against potential unjust and unreasonable violations of internet neutrality. The CPA which has also been supplemented and further developed through court precedent since its adoption in 2009 has indeed, according to Scott been making great strides towards closing the gap in power between consumers and companies.[555]

Similar successes in terms of the CPA has also been achieved in respect of internet access provision. Should ISPs ever endeavour to unjustly, unreasonably, or unfairly block or slow internet traffic then the CPA would have more than enough proverbial teeth to ensure recourse for the South African consumer.

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554 S54 CPA.

555 Tshepiso Scott, 'The Realisation of Rights in terms of the Consumer Protection Act 68 of 2008', University of South Africa 2018) 189.

It should be noted that there is a lack of protection when it comes to a juristic person, as defined in the Act that does not enjoy the CPA's protection. This is a definite legal *lacuna* that would have to be addressed. There is, however, a strong argument to be made that sufficient transparency measures if appropriately enforced could fill this particular gap. Juristic persons who are excluded from the CPA's protection would still be able to freely contract with ISPs with the full knowledge of their (ISPs') disclosed network management practices as well as their data discrimination policies.

5.4.4. Competition law

With the advent of the Competition Act 89 of 1998 (hereafter the Competition Act) a new era of competition law was introduced in South Africa replacing a previous ineffective competition law dispensation.[556]

The purpose of the Act is set out as follows in the Purpose and Definition clause:

> *"The purpose of this Act is to promote and maintain competition in the Republic in order:*
>
> *(a) To promote the efficiency, adaptability and development of the economy;*
>
> *(b) To provide consumers with competitive prices and product choices;*
>
> *(c) To promote employment and advance the social and economic welfare of South Africans;*
>
> *(d) To expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;*
>
> *(e) To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and*

[556] Simon Roberts, 'The role for competition policy in economic development: The South African experience' (2004) 21 Development Southern Africa 227.

(f) To promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged people."

The new legislation focussed on mainly two areas. Firstly, prohibited anti-competitive practices and secondly regulation of mergers.[557] Through the new legislation, the Competition Commission and Competition Tribunal came into existence.[558] Since then, both these bodies have functioned relatively well to ensure that companies do not abuse their dominant positions in the market and generally that competition in the market remains healthy.[559]

The ISP market in South Africa is hugely vigorous in competitiveness and well-functioning. There are 96 nationally licensed electronic communications licensees registered with ICASA.[560] From 2018 to 2019, there was an increase of eight new electronic communications licensees entering the market.[561] Among these licensed electronic communications licensees, there were over 200 ISPs which provided specifically fibre connections for consumers.[562]

Not only has there been a considerable increase in competition amongst ISPs, but the intercontinental internet infrastructure has also experienced an increase in competition. In 2009 South Africa had a single submarine cable connecting the country's domestic internet infrastructure with the international infrastructure.[563] In 2019 South Africa has six which are all

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557 *Ibid* 7.

558 *Deon Prins and Pieter Koornhof, 'Assessing the nature of competition law enforcement in South Africa' (2014) 18 Law, Democracy and Development* 136, 140.

559 Carina Smith, The Rationale for Competition Policy: A South African Perspective (2005)

560 Independent Communications Authority of South Africa, ICASA, The state of the ICT sector report in South Africa (19 March 2019) Available at https://www.icasa.org.za/uploads/files/state-of-ict-sector-report-2019.pdf. Accessed on 2019/10/15.

561 *Ibid.*

562 Andiswa Ntsandeni, 'Innovation-based competitive differentiation amongst South African fibre to the home (FTTH) operators', University of the Witwatersrand 2018) 16.

563 Competition Commission, Competition Commission, "Data Services Market Inquiry: Provisional Findings and Recommendations" (24 April 2019) 158, available at http://www.compcom.co.za/wp-content/uploads/2017/09/Data-Services-Inquiry-Report.pdf 2019/10/15.

owned by different consortiums of telecommunications providers and investors.[564]

Some proponents of internet neutrality argue that a lack of regulation would lead to dominant ISPs using their positions in unfair anti-competitive ways.[565] This fear was quickly addressed. Firstly, specifically within the South African context, there exists healthy competition between ISPs.[566] Should consumers react negatively towards data throttling and network management practices that reduce broadband speed then market forces will ensure that ISPs which offer uncapped and unhindered internet access are more successful. Secondly, South Africa's robust competition law enforcement will ensure that should larger ISPs attain dominant positions, they would be unable to use these positions in a manner harmful for competition.[567] Should the ISPs conduct themselves otherwise, untoward conduct on the part of the ISPs would activate the regulatory bodies to take appropriate action.

It is submitted that the debate regarding internet neutrality has been wrongly, but purposefully, been presented as a tussle between the private interests comprising ISPs versus the public interest favouring internet neutrality. It is of fundamental importance to note that in a competitive market space ISPs can only be successful when they are satisfying the needs of their consumers and not when they are antagonising them.[568] ISPs aim to make a profit by meeting the demands determined by consumers.

564 *Ibid.*

565 Ohlhausen, 'Antitrust over Net Neutrality: Why We Should Take Competition in Braodband Seriously' (2016) 121

566 Andiswa Ntsandeni, 'Innovation-based competitive differentiation amongst South African fibre to the home (FTTH) operators' (2018) 98.

567 Simon Roberts, 'Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth' (2017) 18.

568 Yoo, 'Network neutrality, consumers, and innovation' (2008) 9.

5.4.4.1. Restrictive Practices in terms of Competition Act

In terms of the Competition Act, there are restricted horizontal as well as vertical practices and they are defined as follows in section 4(1) of the Act:

"Section 4(1)

An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

Section 5(1)

An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited. (3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –

(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

(b) if the product has its price stated on it, the words "recommended price" appear next to the stated price."

It is therefore clear that the Competition Act, is already providing protection on a wide front against anti-competitive behaviour. Should ISPs conspire to lower competition, competition law regulations will be there to protect consumers. In a competitive market where ISPs do not offer to consumers good quality services at a competitive price, consumers will change to other ISPs that offer better services and/or disclose reasonable data discrimination policies. This would ensure competition and spur investment by ISPs who are competing for consumers.

5.4.4.2. Abuse of dominant position

Although the South African ISP marketspace is vibrant with healthy competition there are existing mechanisms available within competition law that offers a further layer of protection for internet consumers.[569] Section 7 of the Competition Act sets out the test to determine when firm would be considered to be in a dominant position. This test includes three main elements, namely the definition of the relevant market, the calculation of the market share and the determination of the market power *viz-a-viz* the market share.[570]

An in-depth discussion of the nature of dominant positions as defined in South African competition law, falls beyond the scope of this study and for present purposes the following brief summary will suffice. The Act defines 'market power' in section 1 as "…*the power of a firm to control prices, to*

[569] Ntsandeni, 'Innovation-based competitive differentiation amongst South African fibre to the home (FTTH) operators (2018), 98.

[570] M Neuhoff and others, 'A practical guide to the South African Competition Act' (2017) LexisNexis Butterworths 108.

exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

Should any ISP therefore be in such a dominant position that could unilaterally and independent of its competitors and customers apply data discrimination policies, then the provisions of the Act would be available to protect South African internet consumers.

5.4.4.3. Restrictive vertical practices prohibited

The Act further protects consumers from certain vertical practices.[571] A vertical relationship is defined as "*…the relationship between a firm and its suppliers, its customers or both*".[572] This would therefore include the relationship between ISPs and its consumers.

Section 5 prohibits restrictive vertical practices if:

> "*it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect*".

Should data discrimination or paid prioritisation practices of ISPs therefore be found to prevent or lessen competition, competition law provisions are available for the protection of consumers.[573] Moreover, there is strong evidence indicating that data discrimination and paid prioritisation practices promotes healthy competition and consumer welfare.[574]

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571 S5 Competition Act.

572 S1 *ibid*.

573 Ohlhausen, 'Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously' (2016) 134.

574 Francine Lafontaine and Margaret Slade, 'Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy' (2008) 409.

5.5. Other considerations

As mentioned at the beginning of this paper, internet neutrality stretches beyond mere legal policy. It is a multidisciplinary issue that requires analysis of economics, politics, information technology as well as the law. Each of these fields could be further subdivided into different categories.

One of these categories is dealt with in this paper where it represents a small contribution amongst a multitude of other writings in various fields. Just within the legal field of study, there are numerous topics which are in close relation to internet neutrality. One such topic is the increasingly urgent question of personal privacy on the internet. Although privacy on the internet warrants an entire paper on its own, it is briefly discussed below within the context of consumer protection.

In the USA, the classification of the ISPs either under Title 2 rules or under Title 1, as discussed in the previous chapter at paragraphs 4.2., plays a crucial role with regards to privacy. In South Africa, however, the classification of ISPs on a regulatory level plays a less important role because we have nationally promulgated legislation that addresses personal privacy in particular.

The newly adopted Protection of Personal Information Act 4 of 2013 (POPI Act) aims to protect South Africans from harm through the protection of personal information.[575] Although the entire Act is not yet in force, the Act does already serve as a *de facto* best practice guideline. This Act protects any natural or juristic person who processes personal information, including large companies and the government.[576] Therefore, regardless of whether or not explicit internet neutrality legislation or regulations exist in South Africa, its potential threat that it has in the USA is not applicable in South Africa due to the fact that we have national legislation dealing specifically with the issue of personal privacy.

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575 Preamble to POPI Act.
576 S3 POPI Act.

5.6. Effect of internet neutrality regulation in South Africa

South Africa has been following global trends when it comes to internet access growth rates.[577] South Africa is currently in the phase of internet development that the USA was before internet neutrality was even a consideration. The USA had achieved tremendous growth and development for internet infrastructure when no internet neutrality regulations existed. South Africa would be wise to follow this example to achieve high internet access penetration rates.

It is, however, submitted that internet neutrality regulations pose a threat to achieving these high usage rates. Three specific areas of concern, referred to in this paper as the 'three I's' are discussed below.

5.6.1. Investment, infrastructure, and innovation

When the USA first adopted explicit regulations protecting internet neutrality in 2008, the internet service provision sector saw a marked decline in investment.[578] According to Choi and Kim, ISPs tend to invest less to develop internet infrastructure that increases broadband speeds when they are subjected to stringent internet neutrality regulations.[579] Similarly, Baranes argues that due to the fact that ISPs are not allowed to reduce consumers' broadband speed, ISPs invest less into enhancing broadband speeds and rather attempt to expand broadband capacity to manage the substantial data traffic cause by not being allowed to reduce speeds. When internet

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577 Price Waterhouse Cooper, 'Entertainment and media outlook: 2015 – 2019' available at <https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2015-2019.pdf > Accessed on 12 April 2018.

578 Robert Litan and Hal Singer, 'The best path forward on net neutrality' (2014) Progressive Policy Institute: Policy Brief 4.

579 Jay Pil Choi and Byung-Cheol Kim, 'Net neutrality and investment incentives' (2010) 41 The RAND Journal of Economics 446, 34.

neutrality regulations were in place, it would happen that demand for broadband outstripped supply. Due to the burdensome bureaucracy created by the internet neutrality regulations, ISPs were less likely to invest in order to expand their capacity.[580]

The challenge that faces South Africa in this regard is that investment into infrastructure development is still critically necessary in our market that is not nearly as well developed as in the USA. ISPs should quite obviously be allowed to manage their networks and offer paid prioritisation packages for consumers who are willing to pay for that premium service.

In terms of the harm caused to innovation, internet neutrality regulation prohibits ISPs from offering tailored packages and premium services to consumers that are willing and able to pay for these premium levels of service. What the regulations do is ensure that all consumers have equal access to broadband speeds, which broadband speeds are obviously limited. Broadband capacity and speed are not limitless and abundant resources which can be merely handed out. ISPs invest significant amounts in order to expand their capacity so that more consumers are able to enjoy better broadband speeds and bandwidth capacity.[581]

One of the main concerns with broad overarching internet neutrality regulations and/or legislation is that it is a policy approach that lacks nuance.[582] Enacting full internet neutrality regulations that prohibit any and all forms of data discrimination and prioritisation would stifle innovation and prohibit ISPs from offering packages that suit the needs of consumers.[583] In light of the fact that only a handful of egregious instances of unfair, unjust and unreasonable of data discrimination has taken place in the USA since 2003, Yoo suggests that these cases should much rather be investigated and dealt

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580 Edmond Baranes, 'The interplay between network investment and content quality: Implications to net neutrality on the Internet' (2014) 28 Information Economics and Policy 57.

581 Pil Choi and Kim, 'Net neutrality and investment incentives (2010) 34'

582 Yoo, 'Network neutrality or Internet innovation' (2010) 2.

583 *Ibid.*

with on a case by case basis.[584] The author believes that the same applies in South Africa, where we have not seen any case where internet neutrality has been egregiously overstepped to the detriment of consumers and competition.

According to Faulhaber broad, sweeping and heavy-handed internet neutrality regulation would also adversely affect the quality of service that ISPs are able to provide.[585] Broad regulation would prohibit ISPs from ensuring beneficial traffic flow on their networks because of their inability to use network management practices.[586] The lower quality of service is to the detriment of all consumers. The simple analogy of anarchy on our roads without any control of traffic flow is plainly expounding enough to show why ISPs have to be able to manage their networks.

Weisman shows that wide-ranging internet neutrality regulations would also most likely benefit larger ISPs more and greatly harm competition among ISPs.[587] Larger ISPs have higher broadband capacity than the smaller competitors which entails that larger ISPs would be able to offer higher speed despite the fact that internet neutrality regulations hinder their ability to control data traffic.

Transparency measurements, proper consumer protection enforcement and competition law, have all of the advantages of achieving the goals of consumer welfare and growth in internet infrastructure without any of the disadvantages of explicit internet neutrality regulations, that achieve the exact opposite of the goals that it sought to achieve.

584 *Ibid.*
585 Gerald R Faulhaber, 'What Hath the FCC Wrought' (2015) 38 Regulation 50, 53.
586 *Ibid.*
587 Dennis L Weisman, 'Groundhog Day at the FCC' (2015) 38 Regulation 56.

5.7. Conclusion

The recently adopted position regarding internet neutrality in the USA is to trust existing consumer protection laws and antitrust laws to ensure healthy competition between ISPs which in turn leads to the most significant consumer benefit and the public good. In this chapter, the nature of South African consumer protection and competition law have been discussed within the context of internet neutrality highlighting the fact that the current frameworks already afford adequate protection against unfair, unreasonable, and unjust data discrimination.

South Africa's current position is that internet neutrality is not explicitly and specially protected and that ISPs and internet access providers do make use of network management practices and provide for paid prioritisation. Nevertheless, access to the internet continues to grow and positively impact upon our country's economic development and growth.

It would seem that in order to best serve consumer interests and promote healthy market competition thereby explicitly showing that internet neutrality regulations are not necessarily needed but that the applicable regulatory bodies such as ICASA or the Department of Trade and Industry should rather be allowed to provide the necessary guidelines. These recommended guidelines will be discussed and provided in the following chapter.

Chapter 6 - Recommendations and Conclusions

6.1. Introduction

This chapter will contain abbreviated yet pointed recommendations based on the research in the previous chapters on how South Africa could and, as the writer submits, should approach the question regarding internet neutrality. The central question of this research paper was twofold. Firstly, whether or not the principle of internet neutrality is applied within the South African legal framework. Secondly, the question arises of whether the protection of internet neutrality or lack thereof is recognised within our legal system.

This study confirmed that firstly there exists no explicit protection within the current South African legal framework which protects internet neutrality. Moreover, it is submitted that explicit protection is not required as there already is existing measures that sufficiently protect internet consumers against potential adverse effects of data discrimination and that broad internet neutrality protection is therefore not only unnecessary but would have adverse consequences for the continued development and growth of internet technology, access and infrastructure.[588]

The internet as it stands today is the most essential socio-economic tool and medium employed to promote the protection of fundamental rights that the world has ever seen. The internet has removed physical restrictions and barriers and allowed for the free flow of information, products, services, and people at astonishing rates. Due to the pivotal function that the internet performs in our contemporary world, it is understandable that its functioning and regulation would be the subject of thorough scrutiny and debate.

[588] Such as the example of Denmark as discussed in paragraph 4.2.4.3 above.

Proposed and existing internet neutrality regulations throughout the world affect every internet user regardless of where they access the internet.

This study was aimed at addressing the question of whether or not South Africa had any specific and direct regulations that protected internet neutrality and secondly, whether or not such explicit protection was really necessary in South Africa. In order to answer the primary and central research question the nature of rights, as well as the history of internet neutrality policy, required discussion, albeit in broad outline, in order to provide guidance on how South Africa could and should approach the public policy consideration.

Throughout this paper, legal, political, and economic arguments in favour of and against internet neutrality were discussed and examined, and their different consequences on consumer welfare, economic development were considered. In the end, the writer submitted that the conclusions were predominantly in support of the argument that limited government involvement was necessary and in fact, beneficial.

It became apparent that cumbersome procedures followed in the USA, and the EU had for the retention of healthy competition among ISPs. These consequences must be ascribed to the negative effects which regulation of investment, innovation and infrastructure development had on the internet. The so-called internet neutrality regulation as policy is at odds with its own stated objectives to enhance consumer welfare and market competition.

Since the adoption in the USA of a successful light touch approach to the regulation of data discrimination alongside reliance on already established consumer protection and competition laws, that country experienced a return of investment and innovation last seen before it first adopted internet neutrality regulations.

It is in this light that South Africa should consider its own approach to regulation of the subject matter and hence, the authors recommendations are made below.

6.2. Recommendations

The findings made in this study are that at the time of writing South Africa does not have any specific regulations that explicitly protect or enhance the principle of internet neutrality. What has, however, become apparent is that South Africa does have robust existing consumer protection and competition law framework fully capable of affording protection against unjust and unreasonable data discrimination practices.

It would seem that overarching internet neutrality regulations would harm investment, infrastructure development and innovation in South Africa, as was seen in the USA during the few years that stringent internet neutrality regulations were applied there. In the final analyses, consumer welfare and healthy market competition remain the central objectives of statutory regulations and government involvement. In that light, it is recommended that the applicable regulatory authority ICASA and/or the responsible national governmental department publish guidelines to ensure that consumers are duly informed and that competition between ISPs remain healthy.

These recommendations entail that :

1. It is recommended that it is acknowledged that internet access for all South Africans is an objective that should be progressively realised, particularly with the view to providing the best possible broadband capacity and speed to enable our internet economy to continue to assist economic growth and development;

2. These guidelines reaffirm the position that the internet consists of various stakeholders, including ISPs that provide services to consumers on mutually agreeable terms, and consumers that use the internet in order to access internet content and commercial services online;

3. Stringent transparency requirements be imposed on ISPs to enhance informed consumer choices which would simultaneously lead to better and healthy competition between ISPs in their effort of competing for consumers. The transparency measures referred to in the previous subparagraph should include the following:

3.1. Transparency regarding ISPs policy on network management practices;
3.2. Transparency regarding ISPs paid prioritisation agreements with content providers;
3.3. Transparency regarding ISPs premium services;
3.4. Transparency regarding ISPs data discrimination policy which lists which services and/or content providers the ISPs slows down;
3.5. Transparency on ISPs commercial terms of service;
3.6. Transparency by ISPs regarding the above at the point of sale in understandable, complete and straightforward terms.

All of the above-mentioned transparency measures that require ISPs to disclose their practices must be in plain and understandable language. These disclosures have to be easily accessible and available to consumers, and upon concluding internet access provision contracts, ISPs should be obliged to inform consumers of their business practices. Should ISPs amend their practices, then current consumers should be notified of such changes.

These transparency measures would discourage harmful practices and assist the applicable regulatory bodies in prohibiting questionable practices.

Not only do these transparency measures assist consumers in making informed decisions, it also provides certainty to content providers and businesses that conduct their business using and relying on the internet. This will ensure that small businesses and content creators have the

necessary information that directly affects their content, business and applications that make use of the internet.

4. It is recommended that the guidelines stipulate that the Competition Commission must ensure that ISPs do not use their dominant positions to weaken competition among ISPs or use unfair and deceptive practices to the detriment of consumers.

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