

International Telecommunication Companies Versus Iranian Internet User

An assessment of network neutrality

Tahereh Miremadi¹

Received: 28/2/2009

Accepted: 23/1/2010

Abstract

This paper aims to probe the nature of possible responses to the actions taken by certain foreign companies to unilaterally terminate their services to the Iranian public and private Internet service providers. The paper examines specifically the procedural aspects of the issue and concludes that due to the lack of the biased nature of relationship between sysops and Internet users and the absence of an effective international body, it is highly unlikely that any legal action could bring about desired results. The paper, in the end, suggests some other non legal strategies as topics for the future research.

Keywords: Cyberspace, Sysops, citizen's rights, Contract, Dispute resolution, Customer-citizens

1. Associate Professor, Iranian Research Organization on Science and Technology, Ministry of Science, Research and Technology

Introduction

From the outset, it was clear that new information technologies should be considered not only as data channels and stocks, but also as a place for social interactions. According to Rheingold's definition [1], online communication has given rise to new global interactions in ideas, information and services, forming virtual communities [2]. In fact, cyberspace covers not only technical but social dimensions. However, the nature of these social connections is impacted by underlying technical aspects, preventing it from completely mirroring real world socialization [3]. For example, as much as the real world is divided in several geographical parts, like the territories of countries and regional unions in the international level and private and public spheres in the domestic level, the electronic messages readily cross territorial borders and cyberspace does not have internally any geographical and politico-social boundaries. Therefore, many online connections do not necessarily have a relationship to any particular physical location or jurisdiction and existing geographically-based legal systems have difficulty regulating this new phenomenon.

Emerging from the first one, the second quintessential feature of cyberspace is that there is no authority to have legitimacy and power to organize and regulate the cyber social interactions. Once users and system operators

(sysops) [4] encounter conflicts, there is no central legitimate authority to resolve disputes. The one and only legal institution that may claim legitimacy to intervene is a contract embodying the agreement between the two parties validated by the contract law. However, it is clear that this contract is not an agreement having two politically and economically equal sides. While the sysop usually is one of the major transnational telecom companies like AOL or Yahoo, the other side is an ordinary Internet user without adequate resource of power and information. Therefore, the contract is doomed to be influenced by the powerful party.

The features of borderless territory and unequal legal requirements leave many issues in the cyberspace e.g. the question of jurisdiction [5] or the dispute resolutions procedures with ambiguity. The controversial literature surrounding these issues generally is, supposed to provide answers for fundamental questions including; how the principle of justice and fairness could be guaranteed in cyberspace, what are the rights and responsibilities of sysops and users, whether the Internet users are just ordinary consumers whose rights are limited to their contract with the companies or they are the citizens of the virtual communities, and finally who can demand their unalienable fundamental rights.

The objective of this paper is to contribute to this literature by presenting the outcome of a

research carried out on the subject of the disputes emerged among foreign sysops and Iranian Internet users in recent years and their possible resolution mechanisms [6]. In fact, these cases in point have created valuable and tangible evidences for any researcher on the subject of sysops-Internet users' relationships in the cyberspace and most of these disputes clearly demonstrate the inadequacy of existing legal mechanism to resolute such disputes and the necessity for a whole new framework to do so.

Description of Problem:

In recent years, the Iranian Internet users ran across the problem of some domestic sites being shut down due to the unexpected termination of services by their foreign hosting companies. The site of ISNA (Iranian Student News Agency) was the first confront with from its foreign service provider that was an America company "The Planet". The Planet, a leading international Web-hosting firm based in Dallas, abruptly terminated its contract with ISNA in January 14, 2005. The ISNA director blamed the company for its violation of information flow [7]. The case of ISNA was not an isolated one. In fact, the short history of internet in Iran bears many cases in which Iranian citizen's freedom of access to the World Wide Web has been breached. For example, as the result of the sanctions and export control of computer software initiated by US government in 1996

[8], the Iranian Internet users have been repeatedly barred from buying or downloading software due to their IP domain showing that they access from Iran. The atmosphere of fear and insecurity intensified when some of foreign private communication companies which happen to be American e.g. The Planet affiliated to the American companies such as Cihost unilaterally terminated their contract with some Iranian public and private Internet users. The many cases of service termination by foreign hosting companies could be considered by many as examples of limiting the access to the Internet. As the number of cases increased [9] the cyber community of Iran, felt threatened and vulnerable to the politically charged unilateral actions of the communication companies in the so called "brave new world" of hi-tech.

The website holders, who were at the time poised for a take off, claimed that there was no prior warning or sufficient time to seek an alternative hosting company, nor to provide themselves with back-ups [10]. Their demand for technological self-sufficiency increased and paved the way for a plan to boost the national infrastructures [11]. In parallel, the idea of legal action, either to defend national communication rights or to seek dispute resolution and appropriate remedy was being entertained. This paper is focusing on the latter (i.e. legal action).

The Main Argument

No one can rule out the fact that the laws and regulations enacted in and impacted by the political atmosphere especially in the aftermath of September 11, 2001 have enormous chilling effects for the American companies to offer their services to the Iranian customers. And considering the major role they play in providing goods and services in the cyber world, this factor could influence enormously the Iranian citizen's access to the Internet. However, the author believes that the role of the political factor should not overshadow other important aspects. In fact, as the question of rights and obligations of net citizens vis-a-vis private companies at the global level, has been raised repeatedly by several legal authors [12], the question of legal factor should be considered as central as political one.

In fact, Cyberspace can be considered as a dynamic system with multi-layers (cultural, political, economical and legal), its discourse revolves around multiple issues (Cyber crime, e-Commerce, Freedom of Information, etc.) and its stake is the ground for different players (international organizations, national states and individuals). Depending on which angle a researcher sees this system through; a different vision for defense of communication rights would be unfolded. However, there is a concern that is shared by every researcher and it is the problem of preserving the principle of "network

neutrality". At its simplest, network neutrality is the principle that all Internet traffic should be treated equally. The advocates of this principle, including Tim Wu[12] contend that Net Neutrality means [the principal of] no discrimination and should prevent Internet providers from blocking, speeding up or slowing down Web content based on its source, ownership or destination [13].

However, the increasing empowerment of big companies in telecommunications threatens the network neutrality and the lack of legal due process in Cyberspace impedes the Internet users to seek justice and exacerbates the unfairness of the situation. In the real space, what one normally means by "due process" is the respect for basic principles of fairness, in the form of procedural safeguards against any one-sided and arbitrary action by any party to a dispute, and the enjoyment of full opportunity to be heard, and the right to defend in an orderly proceeding.

It suffices to know that under the Iranian law, due process is guaranteed by virtue of a directive issued by the head of judiciary entitled the Declaration of Citizens' Rights [14]. It is based upon the key conceptions i.e. the duty of a "State" to preserve the fundamental rights of its citizens in an equitable manner. It upholds and complements the chapt.3 of the Islamic Republic constitution which is devoted to the "Nation's rights" and the article 100 of 4th 5-

years plan of social, cultural and economical development which requires elaboration of the declaration of citizens rights [15].

Nevertheless, none of these regulations covers extraterritorial jurisdictions and their jurisdictional authority limits to the Iranian territory and its citizens and besides, the subjects of the defense is the protection of the users' e-identity, websites and email addresses from arbitrary actions of sysops rather than governments. The upholding of justice and fairness in the cyberspace relies less upon the law of territorially-based jurisdictions and more upon the actions of online communities. It depends upon the will of sysops who control the on-off buttons and the reactions of their customers, wherever they may reside. It is commonsensical to think that the decision of the sysops are not irrational and are based on the majority of users' sanction. Hence, the methods used to seek due process online must differ from those available in established national legal systems.

The need for establishing a solid ground to uphold "due process" in the cyberspace is not a non-controversial matter. Many scholars [16] contend that global online communications might not seem to be in need of special protections for users or specific limitations on the privileges of system operators. Their argument is basically founded on this presumption that decision to sign up with an

online commercial information service or an Internet access provider is clearly voluntary. Therefore, it is not similar to involuntary subjugation to territorial laws imposed by local sovereigns. They believe that the rules of the cyberspace are set, for the most part, by private contracts between two legally equal parties and if a sysops adopts rules that seem oppressive; their customers can leave and migrate to another, friendlier online jurisdiction.[17]

On the other side, there are scholars [18] who are skeptical about this kind of argument, asserting that the check on sysops' power provided by the user's right to abandon an online area is mostly offset by the costs imposed on the user who walks away. Besides, these scholars maintain that the primary reliance on action by private parties is relevant when the concern is establishing the relative freedom of users of cyber social interactions from governmental intrusion. But there still remain important questions raised by the power of system operators, or majority of communities of users, to oppress individuals and minorities. Considering the fact that what in Public Law is essentially condemned as "discrimination", in Private Law should be categorically protected as the right to associate, the shift from the public to the private domain makes the whole discourse turn upside down and despite the fact that those who disagree with local rules are considered free to migrate, many users have

invested very substantial amounts of time and efforts in establishing a particular online identity (building a reputation based on a particular e-mail address or web page location, for example). They clearly will feel victimized in an unjust manner. Therefore, all things considered, the easy exit of Internet users does not seem to be the appropriate solution [19].

Obviously, the injustice will be more felt when a trend seems to be forming to exclude systematically a cultural minority, (in our case, associated with Islamic worldviews) or deprive a specific nationality (the Iranian nationality) to voice their worldviews in the cyberspace. In these cases, the marginalization or rather the imposed absence from cyber communities would inflict a very substantial personal and national loss [20].

Considering the fact that Internet itself is always rightly praised as a powerful enabler for people to participate in different levels of democratic decision making, it is ironic when we discover the undemocratic feature of the procedure of rule- making in the cyberspace. Although the code of online conduct is formally disseminated by common practices of users, they are developed one-sidedly by major communicative companies with little or no opportunity for bargaining from the part of Internet users [21]. Moreover, the companies declare in their virtually uniformed contract, the reservation of their right to deny service to

anyone at any time for any reason in order to avoid any legal action against themselves. There is normally no established procedure or practice of putting suggestion for changes out for comment. To the contrary, many contracts for online services provide that the user agrees in advance to abide by the system's rules however arbitrary they might be or how often they may change in the future [22]. As it is told, the user's only recourse, in extremis, is to quit the system if a new rule change is objectionable.

Clearly, as the number of online services and users increase and the Internet communication expands geographically, hence; intensify the cultural differences among the users residing in all five continents and sysops locating mostly in the North America and Europe. It is obvious that beauty in the eye of one Internet user might be interpreted as obscene by sysops and vice versa. What one praises as freedom of expression, the other might condemn as blasphemy...etc. As number of disputes augments, the magnitude of the interests affected by such disputes will also increases. Today e-commerce's vitality is based on the stability and continuity of the flow of information and anything threatening this flow causing huge loss for communities.

On the cultural aspects, the unwarranted and unduly actions of sysops can make the valuable opportunities of cultural interactions among

cyber communities be lost [20]. In this regard, it suffice to note the famous case of Noah v. AOL. Saad Noah, a Muslim was a subscriber to America Online's (AOL) interactive computer service. AOL operates online chat rooms that enable subscribers to post messages. Two of these chat rooms were named "Beliefs Islam" and "Koran". Noah states that other AOL subscribers posted messages in these chat rooms that insulted, threatened, mocked, ridiculed, and spread misinformation about Islam. Noah's case was dismissed by the court on the ground that the sysop is not liable for the behavior of the other (majority) of subscriber [23]. In this case, we can not interpret result as only personal loss or even national loss but a global failure to have multi-vocal cyber societies.

Unfortunately, the academic concerns for the lack of due process in the cyberspace do not pave any appropriate way out. Avoiding the controversies surrounding the problems like fragment jurisdictions and unbalanced power play, the legal scholars active in cyberspace have tried to test creating a virtual independent self regulator body which attends the cases electronically, sometimes in the name of "Virtual Tribunal Magisterial" [24], other times "Meditations Project" [25] and finally "ombudsman offices"[26]. All these pilot projects failed to transcend beyond testing level and were aborted after a short time.

Since, it is not required for sysop to have justifiable arguments and to use the procedures that lend user a voice to be heard and cyber communities a chance to hear, we can conclude that on the ground of the procedural aspect of the matter, a sysop can act as prosecutor, judge, jury and executioner [27] and therefore, it has the ultimate power of banishing the user's identity. This unbalanced relationship between two parties of the contracts tarnishes the acclaimed principle of "network neutrality" and can produce substantial injustice.

All things considered, we return to our main question of the paper and conclude that the possibility of succeeding the legal maneuver for establishing a case against the sysop, *ceteris paribus*, is virtually implausible and unpursuitable.

Seeking alternatives, first, bi-lateral and multilateral treaties that establish reciprocal arrangements for enforcing cyber laws among nation-states are among the first alternative scenarios that may cross one's mind. Although, multilateral arrangements among the countries that enjoy similar cultural and ethical foundations[28] are not out of question, but they may not help resolving any problem. At the same time, contemplating agreements on judicial co-operations with the countries in which the majority of the sysops are registered and located seems unrealistic.

Second, the most effective means, and at the same time the most difficult one to accomplish, would be an international agreement concerning the rights of consumers online, similar to the international agreements governing transnational postal services and telecommunications. These, of course, depend ultimately on agreement among nation-states and its ratification and implementation at the national level, which, as the Law of Outer Space, for example, demonstrated, takes years to be concluded and promulgated.

Resorting to the World Trade Organization is also the third scenario that one may look at. The WTO is the only authority entrusted with the task of determining discrimination in the area of online service provision, which can be a threat to the viability of international trade, as well. Thus, taking the relevant cases to the WTO's floor could be considered as an option. While negligible is the chance of this option, given the specificity of Internet governance, the complexity of trade issues and the power equation within the WTO, the option could, of course, be seriously considerable only when and if Iran accedes to the WTO and obtains the full membership status.

Conclusion

In searching legal strategies for taking legal actions against foreign sysops that opt not to provide their services to some Iranian Internet

users and/or stop unilaterally the provision of their services to them, we may conclude that due to the lack of an effective international system of dispute settlement in the Cyberspace on the one hand and the contract-based nature of the relationship between the two sides on the other, the possibility for devising a promising legal strategy is negligible under current circumstances. Unfortunately, success is not promising even in exploring other options, including using bilateral and multilateral agreements on reciprocal law enforcement and making recourse to the WTO dispute settlement mechanisms. Of course, each of these alternative scenarios needs to be looked at in detail in future studies [29].

References

- [1] Virtual communities are social aggregates that emerge from the Net when enough people carry on those public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace
- [2]H. Rheingold (2000): *The Virtual Community: Homesteading on the Electronic Frontier*. Rev., 1st MIT Press., p. xx
- [3] At the outset, many scholars assimilated cyberspace as a mirror world, including David Gelernter, see David. Gelernter, David-(1992). *Mirror Worlds: or the Day*

Software Puts the Universe in a Shoebox...How It Will Happen and What It Will Mean. 1st ed. Oxford Univ. Pr.,

- [4] In the literature of the cyberspace, “sysops” is called for the mediators of chat rooms and billboards but here for the sake of sanctity we use the expression of sysops to call variety of technical middlemen or service providers in the web including, web host, broadband provider, system operators, .etc.
- [5] For study the problem of cyber jurisdiction, Menthe Darrel, *Jurisdiction in Cyberspace: A Theory of International Spaces*, MICH.TELECOMM.TECH.L.REV. 69 (1998), available at <http://www.mttl.org/html/volume4.html/menthe.html>
- [6] The research was commissioned by Islamic Republic of Iran ITRC and done in IROST 2006-2007. For the complete result, see Miremadi: *Tadvin-e-ghavanin va moghararrat-e-Hoghogh-e-Shahrivandi va Melli Mortabet-ba Internet* . Tehran ITRC, 1386
- [7] <http://www.payvand.com/news/05/jan/1254.html>
- [8].The Iran and Libya Sanctions Act of 1996 (ILSA) was a 1996 act of Congress that imposed economic sanctions on firms doing business with Iran and Libya. On September 30, 2006, the act was renamed to the Iran Sanctions Act (ISA), as it no longer applied to Libya, and extended until December 31, 2011. As at March 2008, ISA sanctions had not been enforced against any non-US company; the act allows the president to waive sanctions on a case-by-case basis, though this waiver is subject to renewal every six months. Despite the restrictions on American investment in Iran, FIPPA provisions apply to all foreign investors, and many Iranian expatriates based in the US continue to make substantial investments in Iran. For more information see: Iran", Investment regulations, Economist Intelligence Unit, 19 March 2008
- [9] The other important event was the closure of 4000 of servers by the C/Host a Canadian affiliate of a telecommunication company of USA. For further information, See the Tahereh Miremadi “Tadvin Ghanoon Shahrivandi Va Melli Mortabet Ba Internet ” Tehran, ITRC, 1386
- [10] Among the texts citing this incident, for example see: <http://www.ariantalk.com/viewtopic.php?p=70995&sid=2787f950610ca454735381276bfbf585>
- [11]According to the policy makers the principle of “ Self-Sufficiency” is the main reason of following the plan of “intranet” or “the National internet ” Internet , see for example : The interview with Mr. Riazi The deputy ministry of ITRC ,

<http://www.iritn.com/?action=show&type=news&id=10532>, and

<http://www.itiran.com/?type=article&id=5862>

[12] Cyber lawyers and activists have recently reemphasized their concern for biased sysops- Internet user relationship under the title of "Network Neutrality initiative". For more information see http://www.timwu.org/network_neutrality.html

[13] www.savetheinternet.com

[14] Directive No-1-83-716 dated 20-1-83 issued by the Judiciary of I.R.Iran

[15] The Law of 4th 5-year plan of Social Cultural and Economical development of I.R.IRAN

[16] Post David and David Johnson are two scholars that more than the other cyber scholars focus on this subject. See for example Post David and David Johnson: *Anarchy, State, and the Internet : An Essay on Law Making in Cyberspace*, 1995. downloadable on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943456, 1995, and 'Against Cyberanarchy ' -- a reply to Jack Goldsmith in Berkeley Technology Law Journal, 2002 17: 136517

[17] Johnson David and David Post: The New 'Civic Virtue' of the Internet , http://www.firstmonday.org/issues/issue3_1/johnson/#

[18] Johnson David: *Due Process and Cyberjurisdiction*, *Cyberspace Law Institute, Journal of Computer-Mediated Communication*: Volume 2, Number 1: Part 1 of a Special Issue June, 1996

[19] Ibid.,

[20] The closures of Iranian websites have not been the only incidents which imply the cultural marginalization from the cyberspace. For having a list of Private companies' mechanisms to block the access of the Internet users with Iranian IP address, see Miremadi, Tahereh: Op. cit. Vol.1, p.161-165

[21] Microsoft reserves the right to immediately terminate or suspend a users' Zone.com account for the violations of the code of conduct. America Online reserves the right, in its sole discretion, to terminate your access to all or part of this site, with or without notice.

[22] Microsoft reserves our right to amend or change the code of conduct at any time without notice. You agree to periodically review this document to ensure you are doing your part

[23] <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aoltime/warner/noahaol83001cmpt.pdf>

[24] For more information, go to: http://www.eff.org/legal/Arbitration/virtual_magistrate.

- [25] For more information go to Katsh Ethan, *Dispute Resolution In Cyberspace* in Symposium: Legal Regulation of the Internet the Connecticut Law Review , 28 Conn. L. Rev. 953 ,1996
- [26] Devashish Bharuka and William Fisher, *Dispute resolution in cyberspace* , Berkman center for Inernet and Society , Harvard Law School, last Modified 2001, available in <http://cyber.law.harvard.edu/ilaw/Jurisdiction/#ADR>
- [27] There are some exceptions to this rule such as the famous case of the multi-user domain (LambdaMoo) whose users called for the creation of an independent judiciary after one member had his ID rendered nonfunctional by the "wizard" on the basis of a public outcry against anti-social conduct by that user. See www.LambdaMoo.com
- [28] I have already elaborated this scenario in another paper, entitled “ A proposal for a convention of cyber laws among Islamic countries in the regions” the first Regional conference of ethics and ICT Technology , Feb. 2007
- [29] For more analysis on the alternative scenario, See Tahereh Miremadi “ *Mabani Hagogh –e-e Sharvandi and Melli* in Fazaye Tabadol-e- Ettelaat.(*The Basics of Citizens and Nations Rights in Cyberspace*), Tehran, Moasseh Toseh Oloum Ensani, 1387

شرکتهای چند ملیتی مخابراتی در مقابل کاربران اینترنتی ایرانی بحثی در باب بی طرفی فضای تبادل اطلاعات

طاهره میرعمادی^۱

تاریخ دریافت: ۱۳۸۷/۱۲/۱۰

تاریخ پذیرش: ۱۳۸۸/۱۱/۳

این مقاله در رابطه با احتمال اقدام حقوقی علیه شرکتهای بیگانه خدمات اینترنتی که به دلایل مختلف با قطع ارائه خدمات به شهروندان ایرانی موجب تضییق حقوق آنها می گردد، نوشته شده است. مقاله تنها بعد شکلی موضوع را بررسی می کند و نتیجه می گیرد که با توجه به دلایل متعدد از جمله عدم وجود یک مرجع رسیدگی بین المللی و نوع ماهیت رابطه قراردادی بین شرکتهای ارائه دهنده خدمات اینترنتی و مشتریان به نظر می رسد که احتمال نیل به مقصود که همانا احقاق حقوق شهروندان ایرانی است، از طریق طرح دعوا حقوقی علیه شرکتهای اینترنتی وجود ندارد.

واژگان کلیدی: فضای تبادل اطلاعات، حقوق شهروندی، اپراتورهای سیستم، فرایند حل اختلاف، قراردادهای الکترونیکی.

۱. دانشیار، پژوهشکده علوم و فناوری ایران، وزارت علوم و فناوری