

THE CONTEMPORARY COMMONS THEORY: A DEBATE IN MODERN TELECOMMUNICATION LAW

*Apoorva Anubhuti** & *Rashmi Bothra***

The word ‘Commons’, traditionally has been used to connote the joint ownership of certain resources by the people. Such resources include gifts of nature and other ‘free’ resources like water, air and land. Today however, the concept of Commons has been given a new connotation so as to propound a movement that envisages more public participation in the management of things and systems other than just natural resources. In the legal realm, this translates into a movement for decentralization of law. In other words, it talks of decentralization of law from the realms of State domain to that of Public domain so as to bring in more public participation in the formulation and implementation of law. This is what is posited to be the central theme of the Contemporary Commons Theory.

Of late the Commons theory has come into prominence primarily as a result of the effect of technology on State Power. Global Communications have greatly eroded the State Power. It is this failure of the State power that lays great promise for the Commons Perspective to Law which calls for a laissez faire vision to law, thus bringing about a “bottom –up” regulation by non- state actors. In other words, the Commons perspective calls for the freedom of private entities to generate their own law – i.e. the law of Google, or the Terms of Service imposed by MSN Online. The Commons Theory debate of today has been brought about by debates in the areas of Privatization of the Internet, Network

* 4th Year, B.A./B.Sc. LL.B.(Hons.), W.B. National University of Juridical Sciences, Kolkata

** 1st Year, B.A./B.Sc. LL.B.(Hons.), W.B. National University of Juridical Sciences, Kolkata

Neutrality rules in telecommunication law, Propertization of the radio frequency spectrum and as well on media concentration. It is these issues that will form the core focus of the research in the present context.

I. INTRODUCTION: A DEBATE BETWEEN LUTHER AND COASE

If Martin Luther was remotely interested in Economics then we would have enjoyed a healthy debate between him and Ronald Coase. For if the debate between them focused on the distribution of ‘Salvation’, which for our purpose is presumed to be a resource, that is to be distributed amongst people to save them from destruction¹, then Coase would have advocated its selling to the highest bidder i.e. to the person who valued it the most for it to meet the economic touchstone of what is right - *Efficiency*.² For it was only by propertization of common resources³ could resources that are accessible to all be best managed. The person who valued it most would thus achieve Salvation, which in turn, would be managed by the *most efficient* few. In other words, salvation would be a prerogative of only a few, the ‘efficient’ few. Luther on the other hand, would treat Coase as the greatest offender in the Catholic religion, a Father Tetzl to be more precise⁴, who sold the privileges and guarantees of eternal salvation only to the highest bidder. Coase would thus have been the most prominent figure in Luther’s Ninety – Five Theses’, where Luther would have cited Coases’ suggestions as one promoting corruption in the Catholic Church, the corruption being the practice of selling indulgences to a limited few - for the acquisition of the benefits of salvation was something that was not to be limited for the enjoyment of the “highest bidder” only. It was meant for everyone and anyone who possessed the devotion, drive and faith demanded by religion. In other words it was not something that could be enjoyed only by the man who could pay the most for it.

¹ Salvation in the Christian religion is a belief in the supremacy of life, truth and love and in their destruction of such illusions as in, illness and death. See ENCARTA, WORLD ENGLISH DICTIONARY, (Macmillan India, Chennai, 1999)

² Ronald H. Coase, *The Federal Communications Commission*, J. L. & ECON. 2,1(1959); Ronald H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713,715 (1992); RONALD H. COASE, NOTES ON PROBLEM OF SOCIAL COST, THE FIRM, THE MARKET AND THE LAW 157 (1988).

³ A common resource is a an open access resource which is owned in common and accessible to the public in general. See ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (4th ed., 2004).

⁴ First public antagonist of Luther. He was the priest of the Dominican church in Rome. See Henry G. Ganse, *Johann Tetzl*, THE CATHOLIC ENCYCLOPEDIA (1912) as cited in *Johann Tetzl*, NEW ADVENT, at <http://www.newadvent.org/cathen/14539a.htm> (last visited Jan. 1, 2008).

The debate between Luther and Coase is one which embodies Modern Telecommunication Law today. The Lutherians of Telecommunications, being the Digital Commons, arguing that the ‘Media’ is not to remain the sole prerogative of the few, while the Coasians arguing in terms of Neoclassical Economics, hailing the need of a market structure in communications and that everything comes for a price. There is no such thing as a free lunch or a free beer the Coasians claim⁵. The Lutherians however maintain that ‘free speech’ cannot be equated with ‘free beer’ and that payment required for beer should not imply that payment is required to speak. It is the arguments of these Lutherians that forms the focus of this paper.

To begin with, the debate between Luther and Coase arises fundamentally from the way they view ‘Salvation’. Whereas Coase treats it as a limited resource, Luther on the other hand views it as something that should not be the sole prerogative of a few. The debate in Media lies no different. The crucial issue at stake in Media is, as Lawrence Lessig, the founder of the Contemporary Commons, puts it, not which system of exclusive control—the government or the market—that should control a given resource in telecommunications . . . but whether that resource should be *controlled* or *free*.⁶ The domain of free resources is what Lessig means by the Commons, and it is the commons that Lessig strives to protect.

II. WHAT IS MEANT BY THE COMMONS?

Management systems that govern property are broadly characterized into three types of models: Private form of ownership, State ownership and Common or Community ownership.⁷ The Ancient Romans too distinguished property management systems in the same way. Their three delineations were *Res privatae*, *Res publicae* and *Res communes*.⁸ The first consisted of things capable of being possessed by an individual or family.⁹ The second consisted of things built and set aside for public use by the state, such as public buildings and roads, owner by the State however.¹⁰ The third consisted of natural things used in ‘common’ by all, such as air, water and wild animals.¹¹ Thus, the word ‘Commons’ is a generic word that essentially symbolizes gifts of nature such as air, water, land and other shared

⁵ Free Software Foundation, *The Free Software Definition*, at <http://www.fsf.org/licensing/free-sw.html>.

⁶ LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 12(2002) [hereinafter LESSIG, THE FUTURE OF IDEAS].

⁷ See GOPAL K. KADEKODI, COMMON PROPERTY RESOURCE MANAGEMENT: REFLECTIONS ON THEORY AND THE INDIAN EXPERIENCE (2004).

⁸ See generally ALFRED ALLAN SCHMID, PROPERTY, POWER AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND ECONOMICS (1987).

⁹ See generally KANCHAN RATNA CHOPRA ET AL., PARTICIPATORY DEVELOPMENT: PEOPLE AND COMMON PROPERTY RESOURCES (1995).

¹⁰ *Id.*

¹¹ *Id.*

“assets” which the human kind hold and access commonly.¹² The Commons Theory is therefore a new way to express a very old idea — that some forms of wealth belong to the public, and that these community resources must be actively protected and managed by all for the good of all.

A. THE CONTEMPORARY COMMONS: A STEP AHEAD OF THE COMMONS

There is a however a noteworthy, significant addition to this theory in the form of the movement of the *Contemporary Commons* or *Digital Commons*. The Creative Commons argue for a movement of “free culture”¹³ which is something more than just the use of common resources by all. This movement of the Creative Commons lies heralded by a group of lawyers and law professors in the West, the noteworthy ones being Lawrence Lessig, Siva Vaidhyanathan, Shubha Ghosh & Tim Wu to name a few. As per the old theory, a “Commons” is a governance structure in which no one has the right to exclude anyone from *access*.¹⁴ The new definition that the Creative Commons use while calling for a freer form of Communication is largely in terms of *control*: no one controls the commons and hence it is free for all to use¹⁵. It thus speaks of how a resource that can be accessed by all should not be controlled by anyone in particular. The Media is one such form of the ‘Commons’.¹⁶ It should not be controlled by anyone. This ‘back route’ or decentralization of Regulations or law from the realms of State domain or from practices prevailing in the Market domain, characterized with a private form of ownership to that of Public domain which is more Consumer Centric is what is posited to be the central theme of the Contemporary Commons Theory. What ought to be noted out here is that the Creative Commons argue that even the action of Private Entities in Market can act as a form of regulation which can choke the vary same freedom that markets desire.¹⁷ Put another way, too much privatization

¹² Peter J. Richerson et al., *An Evolutionary Theory of Commons Management* (May 2001), <http://www.sscnet.ucla.edu/anthro/faculty/boyd/EvolCommons.pdf>.

¹³ See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004)[hereinafter LESSIG, *FREE CULTURE*].

¹⁴ See LESSIG, *THE FUTURE OF IDEAS*, *supra* note 6.

¹⁵ Viktor Mayer-Schonberger, *In Search of the Story: Narratives of Intellectual Property*, 10 VA. J.L. & TECH. 11 (2005); David S. Evans & Anne Layne-Farrar, *Software Patents and Open Source: The Battle Over Intellectual Property Rights*, 9 VA. J.L. & TECH. 10 (2004); Patrick S. Ryan, *Application of the public-trust doctrine and principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. TECH. L. REV. 285,15(2004); Klaus M. Schmidt & Monika Schnitzer, *Public Subsidies for Open Source?: Some Economic Policy Issues of the Software Market*, 16 HARV. J. LAW & TECH. 473 (2004).

¹⁶ See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)[hereinafter LESSIG, *CODE*]; Timothy S. Wu, *Cyberspace sovereignty?: The Internet and the International System*, 10 HARV. J. L. & TECH. 647(1997).

¹⁷ See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998). See also LESSIG, *CODE*, *supra* note 16.

can be as problematic as state control and ownership.¹⁸ The motto of the Creative Commons thus to conclude emerges as ‘*Limit Control, Narrow Protection and Liberate Users*’.¹⁹

B. THE NEED FOR CREATIVE COMMONS: WHY FREE SPEECH CAN'T BE EQUATED WITH FREE BEER.

Freedom has a dual meaning.²⁰ The first sense of it is when the individual is free from any form of coercion or undue influence. The first sense thus addresses excessive, undesired State Regulation. The other sense of freedom has a positive connotation i.e. the right to undertake an activity without the permission of another.²¹ It is this definition of freedom that is being threatened by free markets.²² If everything in a connected world, if all the connections we make with other humans are connections that we must pay for, then a greater freedom is sacrificed and eventually lost. This greater freedom is nothing but the very freedom of speech and that of future development. It is the loss of this greater freedom with which the Commons are concerned with and which rightly needs to be protected in the mad race of privatization and profit maximisation.

To further illustrate, the concept of this greater freedom, the delineation between “free speech” and “free beer” can be drawn²³. Market enthusiasts say that there is no such thing as a free lunch or a free beer to go with in ‘markets’ and the existence of markets are every important in a connected world.²⁴ However what needs to be understood here is that payment required for beer does not imply that payment is required to speak. Individuals can connect in ways other than through markets. For e.g. the ‘internet’ is a free mode of communication, however if users are discriminated on the basis of their usage of the internet which is itself an open network then the discriminated users have to bear an additional cost.²⁵ Sometimes these connections complement markets as anyone who has haggled would recognize.²⁶ Being forced to bear ‘beer’ costs for the same is thus deviant from the very concept of what is meant by freedom of speech, which probably would be the

¹⁸ Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property*, 15 HARV. J. L. & TECH. 453-496 (2002). See also LESSIG, THE FUTURE OF IDEAS, *supra* note 6; SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS (2001).

¹⁹ *Id.*

²⁰ TIM GRAY, FREEDOM : ISSUES IN POLITICAL THEORY 3(1991).

²¹ See LESSIG, THE FUTURE OF IDEAS, *supra* note 6.

²² See C. EDWIN BAKER, MEDIA, MARKETS AND DEMOCRACY (2002).

²³ Free Software Foundation, *supra* note 5. See also Brian Griffiths, *The Business Corporation as a Moral Community*, in MORALITY OF MARKETS 211(Parth J. Shah ed., 2004).

²⁴ *Id.*

²⁵ See Lessig, *supra* note 17.

²⁶ Davina Sashkin, *Failure of Imagination: Why Inaction on Net Neutrality Regulation will Result in a de Facto Legal Regime Promoting Discrimination and Consumer Harm*, 15 COMMLAW CONCEPTUS 261(2006).

‘free air’ required to survive. The domain of these free resources is what the commons strive to protect.²⁷

III. FACETS OF THE CONTEMPORARY COMMONS DEBATE

The Creative Commons Theory debate today centres around the areas of *Internet Regulation*, *Network Neutrality* rules in telecommunication law, *Propertization of the Radio frequency spectrum* and as well on *Media Concentration*. The Contemporary Commons maintain that these commons, over which the debate has arisen, are to be managed in a way so that they essentially remain free. The most advocated way being the usage of a mix of Market and State intervention.²⁸ This is so as an absolute State control would run up against the restrictions meant to ensure the freedom of Speech and our political commitment to democracy and participation. A pure market management, on the other hand, is also undesirable for it will allow only those willing and able to pay to speak. An analogy in this regard can be drawn from the prevailing Environmental law in the United States where environmental law has evolved from a centralised command and control regulation to incorporate a market based system resulting into a mixed based system having a mix of both Market and State intervention. It is with this understanding of a mixed form of regulation as advocated by the Commons, the above mentioned areas of debate are analysed in a more detailed manner so as to appreciate the movement of the Contemporary Commons in an exhaustive and fruitful manner.

A. NETWORK NEUTRALITY

Network Neutrality is a debate that has arisen in the context of openness of the Internet. Recent Internet Technology has permitted the Internet Service Providers or the Network service providers providing internet connection to identify and distinguish the type of traffic or application carried over the internet and to prioritize a certain type of traffic or application over another.²⁹ In other words the internet service providers can now favour a certain type of application over another while providing their service primarily because the Internet of 2007 is comprised of application-aware (“sensitive”) networks capable of exerting varying amounts of control over transiting applications and content.³⁰ Hence the internet of 2007 no longer remains “neutral” given the availability of technology to discriminate and favour one application over another.³¹ This is being done especially in cases of applications like the Voice over Internet Protocol (VoIP) wherein the delivery of

²⁷ *Id.*

²⁸ See Ghosh, *supra* note 18.

²⁹ See Christopher Stern, *The Coming Tug of War Over the Internet*, WASH. POST., Jan. 22, 2006.

³⁰ Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 321-91(2007)

³¹ Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L. J. 103 (2006).

sequenced packets of voice calls have been prioritized over other applications of the internet like e-mail.³² In other words, internet connections available today are now available in such a form that connections favour VoIP, or voice – exchange programs over the more general e-mail discriminating the users using the email against those using the VoIP, the latter being favoured over the former.

The issue of network neutrality thus holds great bearing to the commons perspective in the sense that it envisages regulations for the effective and efficient use of the internet barring all forms of control by the internet service providers; in terms of source, ownership or destination.³³ The consequence of the loss of this “network neutrality”, where one application is favoured over another, is that the network operators can now discriminate to protect and advance dominant positions in the telecommunications, video, and broadband marketplaces at the expense of consumer freedoms and the chilling of innovation.³⁴ Unless Net Neutrality is preserved, startups and entrepreneurs will be driven out of the marketplace by big corporations that pay for a top spot on the Web. On a tiered Internet, controlled by the phone and cable companies, only the content and services as promoted by them will enjoy existence on the Internet. Since the majority of their consumers have little or no choice in broadband providers, permitting the use of such technology for non-neutral purposes, such as to discriminate among applications or content, is hence akin to ceding control of individual online activity to the commercial interests of network providers.³⁵ There is plenty of evidence that such a form of discrimination is already in place. In 2005, Canada’s telephone giant Telus blocked customers from visiting a Web site sympathetic to the Telecommunications Workers Union during a contentious labor dispute.³⁶ Another conspicuous example was in April 2006, Time Warner’s AOL blocked all emails that mentioned www.dearaol.com - an advocacy campaign opposing the company’s pay-to-send e-mail scheme³⁷

The solutions to such form of Network Discrimination lies either in technology or in State Regulation. The technological solution lies in the development of either the WiMAX or the Wi-fi that would deliver internet connection at home³⁸. This technological shift is welcome primarily because it limits the content – control by Broadband Service Providers as the new technology does not permit the favouring of one application over another, which is otherwise

³² Tim Wu, *Network Neutrality, Broadband Discrimination*. 2 J. TELECOMM. & HIGH TECH. L. 142(2003).

³³ *Id.*; Sashkin, *Supra* 31.

³⁴ *Prepared Statement of Vinton G. Cerf, Vice President, Google Inc., U.S. Senate Committee. on Commerce, Science & Transport: Hearing on Network Neutrality* (Feb. 7, 2006), <http://commerce.senate.gov/pdf/cerf-020706.pdf>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103

prevalent in broadband services. Solution by way of State regulation is inspired from American Senator Ron D. Wyden's net neutrality bill, i.e. the Internet Non-Discrimination Act of 2006.³⁹ Wyden's measure presents a framework whereby discrimination by network operators is *per se* illegal and explicit obligations of broadband network providers in ensuring net neutrality are provided for.⁴⁰ A clear requirement that network operators "treat all data travelling over or on communications in a non-discriminatory way" is hence stipulated⁴¹

B. INTERNET REGULATION

As regards to the regulation of Cyberspace, the Contemporary Commons first maintain that the Internet is a medium that can be regulated as opposed to the view that it is an entity that cannot be regulated, where individuals are simply outside the purview of State Control.⁴² In other words its freedom and its open-ended nature can be challenged and such a challenge has to be prevented. The Commons maintain that such challenges can arise on account of four forces, namely:

i. Prevailing Laws: The various laws by which a curtailing effect can be had are Copyright Law, Defamation Law and Sexual Harassment Law to cite a few. These laws bring a top-down regulation to all online activities.⁴³

ii. Prevailing Norms in Cyberspace: These include rules that govern behavior, and expose individuals to sanction from others. They too function in cyberspace as norms function in real space, threatening punishments *ex post* by a community. One example would be the removal of particular user from the server is he/she posts up a message deemed to be obscene by the authorities managing the website/ online billboard.

iii. Market Constraints: The market constrains in cyberspace, function just as they function in the real world.⁴⁴ In fact, the price of access in Cyberspace is one such example. Lower the price, greater is the constraint on access. Another example of market constraining the open-endedness of the internet can be that of

³⁹ Internet Non-Discrimination Act of 2006, §2360, 109th Cong. (2006)

⁴⁰ *Id.* at §2360, para.4,

⁴¹ *Id.* at §.2360, para.4(6).

⁴² Lawrence Lessig, *The Laws of Cyberspace*, in READINGS IN CYBERETHICS (Richard A. Spinello & Herman T. Tavani eds., 2004)[hereinafter Lessig, *The Laws of Cyberspace*] (This essay was presented at the Taiwan Net '98 conference, in Taipei, March, 1998).

⁴³ See CNN, *The case against the Communications Decency Act*, <http://cnn.com/US/9703/cda.scotus/against/index.html> (last visited Sep. 27, 2007); Center for Democracy & Technology, *Issue Brief: Blocking and Filtering Content on the Internet after the CDA*. (Oct. 15, 1997), http://www.cdt.org/speech/rating_issues.html. Peter H. Lewis, *Judges Turn Back Law Intended to Regulate Internet Decency*, N.Y. TIMES, Jun.13,1996. Pamela Mendels, *Supreme Court Throws Out Communications Decency Act*, N.Y. TIMES, Jun. 26. 1997.

⁴⁴ See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999)[hereinafter Lessig, *The Law of the Horse*].

online MP3 file sharing by users. This can more particularly be seen in the case of the Recording Industry Association of America launching a series of law suits against individuals sharing content online. This move not only affected the ability of the users to transfer files but also made their privacy on the internet more vulnerable. The ability to recognize these users lay only with the Internet Service Providers like Verizon etc. who were later forced by subpoena to monitor the behaviour of internet users and spot those who indulged in file sharing.

iv. Architecture or Code Constrains: The Commons feel that this can constitute the most important constraint on the openness of the Internet.⁴⁵ The Commons maintain that the Code constituting the internet, i.e. the software and hardware that constitutes cyberspace —the set of protocols, the set of rules, implemented, or codified, in the software of cyberspace itself determines how people exist in Cyberspace. This code, like architecture in real space, sets the terms upon which a person enters or exists in cyberspace. It is not optional as one doesn't choose whether to obey the structures that it establishes or not. Now the code or protocols of cyberspace, selected by code writers, set features that constrain some behavior by making other behavior possible. And it is in this sense, that codes, like boundaries in real space, regulate behavior in cyberspace.

Hence the Code constituting the Internet, the Market supporting it, the Norms influencing it and the Laws controlling it together regulate Cyberspace as a whole. The Commons theory is thus fundamentally premised on the fact that the internet is an entity that can be regulated and in fact it is increasingly being transformed into a regulated one.⁴⁶ This is being done indirectly by the government.⁴⁷ Those contending that the internet cannot be regulated essentially maintain that the internet is very different from the real world as the ability of the Government to regulate the internet is far lesser in comparison with its ability to regulate activities in the real world. The Commons challenge this on the ground that this represented a fact which is no longer true. This is so as the initial basic structure with which the internet had begun with and which had made it difficult to regulate, has now changed.⁴⁸ The Commons point out that the internet is a medium which can have many structures i.e. it can have a structure that is inherently free to a structure that is whole controlled. In other words it can have a Type A structure (that is free) and/or a Type B structure (that is controlled). Therefore the choice of the structure which constitutes the internet is very important for it would determine the nature and extent of control that would exist on the internet. It is, in other

⁴⁵ Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 *LOY. U. CHI. L. J.* 1-14(2003)[hereinafter Lessig, *Law Regulating Code Regulating Law*]. See also Lessig, *The Law of the Horse*, *supra* note 44.

⁴⁶ Lawrence Lessig, *The Laws of Cyberspace*, *supra* note 42. See also James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty and Hard Wire Censor*, 66 *U. CIN. L. REV.* 177-205. (1997).

⁴⁷ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, *U. CHI. L. F.* 207, 209(1996).

⁴⁸ Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 *GEO. L. J.* 357, 362-63 (2003).

words, as important as framing the Constitution of a country.⁴⁹ The Commons further state that this choice of selecting a constituent structure is political in nature. This is being exploited by the government to its benefit. Thus in this way the Government essentially controls the internet and determines the structure it has. In other words the Government determines and regulates the very constitution the internet has. It is this form of State control whereby the very structure of the internet is being changed is challenged by the Commons.

The commons say that the government determines the structure of the internet by deciding what permissible internet technology is and thereby allowing for the creation of only that which the law permits.⁵⁰ For E.g. Creation of technology like that of Napster is forestalled as that lies impermissible by Copyright law. Browsers like version 2.0 of Netscape Navigators are now the standard web browsers that have cookies which help locate where the person accessing the server is located.⁵¹ Such features e.g. that of cookies and encryption technologies curtailing the copying of data were not a feature of the original structure of the internet. Laws framed by the Government are thus bringing about a change in the very components of the Internet.

The solution to this is either laying down certain restraints upon government power in a manner in which the Constitution does. Another solution is that which the standard Commons model prescribes that being to use a mix of State and Market Intervention.⁵² For the Internet this would translate into having a top – down approach to law. In other words, the Commons perspective calls for the freedom of private entities to generate their own law – i.e. the law of Google, or the Terms of Service imposed by MSN Online and which ultimately lies overseen by the Government. In addition to this the model also envisages regulation by the User himself specifically in the context of Content based regulation.

C. SPECTRUM ALLOCATION

Under this model, the command – and – control theory used to manage the spectrum is challenged. In other words, the Commons perspective holds the propertization of the spectrum to be inefficient.⁵³ The radio spectrum, it is wished to be added here, is the range of electronic or radio frequencies that run wireless and satellite communications.⁵⁴ In other words, it is the lubricant that enables their

⁴⁹ Kerr, *Id.* See also Aaron Burstein et al., *Foreword: The Rise of Internet Interest Group Politics*, 19 BERKELEY TECH. L.J. 1 (2004); Marcus Maher, *An Analysis of Internet Standardization*, 3 VA. J.L. & TECH. 5 (1998).

⁵⁰ *Id.*

⁵¹ See generally Lessig, *Law Regulating Code Regulating Law*, *supra* note 45.

⁵² See Ghosh, *supra* note 18.

⁵³ Stuart S. Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2 STAN. TECH. L. REV. 2 (2002)

⁵⁴ See VIKRAM RAGHAVAN, COMMUNICATIONS LAW IN INDIA: LEGAL ASPECTS OF TELECOM, BROADCASTING AND CABLE SERVICES (2007).

smooth functioning.⁵⁵ Cellular networks, FM radio stations, television channels, air- traffic control facilities and even baby monitors use spectrum for their operations.⁵⁶ Under the Commons Spectrum model, the spectrum should be left a 'free', 'public' space like a freeway or a public park that does not lie *propertized*, which however, is subject to a minimum set of co-coordinating rules.⁵⁷ The Commons advocate that the Spectrum should be left a freeway primarily because propertization of the Spectrum would lead to its being exploited only by a limited few as opposed to a countless magnitude of players who could exist and collectively use the Spectrum simultaneously if the Commons model of management be adopted.

Those advocating the *propertisation* of the Spectrum, contend that selling off the spectrum to private parties would ensure both co-ordination⁵⁸ and allocation⁵⁹, amongst the various Spectrum users, something which would not exist if the Spectrum is treated as a Commons.⁶⁰ This co-ordination would not exist if the Spectrum is a freeway as multiple and competing spectrum users of the same frequency band could potentially interfere with each other's transmission and reception of signals.⁶¹ The end result is, as the US Supreme Court puts it, 'confusion, chaos, and a cacophony of voices, none of which can be heard clearly.'⁶²

In response to this, the Commons model contends that co-ordination is something that cannot be achieved by the exclusion of Spectrum users alone and can be achieved by new- age technology also.⁶³ The technology being talked about here is something on the lines of the Spread Spectrum Technology, which lies similar to the technology that runs the Internet.⁶⁴ Such a technology, thus reflects a 'new- age' technology as it enables two transmitters to use the same

⁵⁵ KENNETH C. CREECH., *ELECTRONIC MEDIA LAW AND REGULATION* 3rd ed..

⁵⁶ See Rekha S. Jain, *Spectrum Auctions in India: Lessons from Experience*, 25 *TELECOMM. POL'Y* 671, 676 (2001)

⁵⁷ Lawrence Lessig, *Code Breaking: Spectrum for All*, *CIO INSIGHT.COM* (MAR. 14, 2003) at <http://wirelesscommons.org/node.php> (last visited Sep. 22, 2007).

⁵⁸ The users of the spectrum would co-ordinate with each other so as to promote their private interests.

⁵⁹ The spectrum is given to the highest value user thereby ensuring its usage in the most efficient manner, a proposition that lies in consonance with the Coase Theorem

⁶⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

⁶¹ Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 *HARV. J. LAW & TECH.* 33 (2001). See also CEN TO VELJANOVSKI, *ECONOMIC PRINCIPLES OF LAW*(2007).

⁶² See *Red Lion Broadcasting v. Federal Communications Commission* 395 US 367(1969).

⁶³ Lawrence Lessig, *Spectrum Policy: Property or Commons?*, at <http://cyberlaw.stanford.edu/spectrum>,(last visited Sep. 22, 2007).

⁶⁴ See Buck, *supra* note 53. Data is broken into chunks that are then transmitted on many different frequencies at essentially the same time. Each chunk is marked with a code that the receiver is able to detect. The receiver listens to all of the transmissions with that code and then collects them to "receive" the message.

frequency channel at the same time.⁶⁵ This was not so earlier, where, if two transmissions were sent on the same frequency, the radio/transistor – receiver would not know which one to receive and the confusion would result in what is known as “interference”. Hence with such types of new – age technology, a channel need not have an ‘exclusive frequency’ for it to be heard, thereby enabling many such channels to co-exist in the same frequency spectrum. However to send these “data chunks”, the mode by which the Spread Spectrum Technology functions, access is to be had to the Spectrum as a whole, which would not be possible, under the Property-based set-up, under which the Spectrum is divided and sold off to a limited few.

The Indian Stance on Spectrum Allocation

In India, we follow the *Property-based* model of Spectrum management. The Wireless Planning and Coordination Wing (the WPC wing) of the Department of Communications (DoT) is responsible for the assignment and allocation decisions concerning the Spectrum. This power flows from the government’s exclusive privilege under the Telegraph Act to establish, maintain and work telegraphs.⁶⁶ In addition to making spectrum allocation and assignment decisions, the WPC Wing is responsible for issuing operating licences under the Wireless Telegraphy Act for various types of telecom and broadcasting services.⁶⁷ The WPC Wing is assisted in technical and monitoring matters by the Wireless Monitoring Organisation. The TRAI, however, in this regard has no powers to make allocation and assignment decisions.⁶⁸ But it can significantly influence spectrum management policies through recommendations to the government. As part of its Spectrum- Management functions, the WPC Wing is responsible for formulating and maintaining the National Frequency Allocation Plan. The plan includes a detailed chart that depicts various frequency allocations among different classes of spectrum users.

Spectrum management in India was clearly not a high priority on the reform agenda.⁶⁹ The Government was however forced to confront the matter in 1995 following a historic Supreme Court decision, viz. *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*⁷⁰ In that case, the court unequivocally declared that the government had no monopoly over radio frequencies and the spectrum. It held that the radio frequencies and the spectrum were public property. In fact, if this Supreme Court case be properly interpreted it stands to advocate the stance of the Contemporary Commons wherein control

⁶⁵ Jerry Brito, *The Spectrum Commons in Theory and Practice*, STAN. TECH. L. REV. 1 (2007).

⁶⁶ This exclusive privilege is codified in Section 4(1) of the Telegraph Act.

⁶⁷ Raghavan, *supra* note 54.

⁶⁸ A. Gaiwak, et al., *Spectrum management for wireless communication an overview*, International Conference on Personal Wireless Communications (23-25 Jan., 2005), at 441 – 445, http://www.ieeexplore.ieee.org/xpls/abs_all.jsp.

⁶⁹ A.R. Sihag & Satnam Singh *Spectrum management: the telecom lifeline*, THE HINDU BUSINESS LINE, Aug. 13, 2003.

⁷⁰ AIR 1995 SC 1236.

should not be concentrated in the hands of a select few. For this case held in unambiguous terms that “the broadcasting media should be under the *control of public* as distinct from Government. It must be required by law to present news, views and opinions in a balanced way *ensuring pluralism* and diversity of opinions and views. It must provide *equal access to all citizens and groups* to avail of the medium.”⁷¹

Another area of contention is also that of 3G spectrum which is used for operating cell-phones. The 3G spectrum forms that medium through which the waves operating our cell phones are transmitted. The Digital Commons of India, maintain that instead of auctioning this spectrum or auctioning off to leading players of the market like Airtel, Hutch etc., a newer technology by the name of WiMAX (Worldwide Interoperability for Microwave Access) should be used. WiMAX promises wireless internate and telecom services over a larger area and with a data transfer rate which is greater than that which is done with 3G. Infact, in India itself, there are many voices vouching for the shift to WiMAX. Says Prashant Singhal, telecom industry practitioner, Ernst and Young, “*India will wait for WiMAX to happen because sevicees on WiMAX would be 10 times faster than 3G and since the communication minister is pushing wireless broadband, that would be the order of the future. Testing of devices is already on.*”⁷² The best bet about using technology like WiMAX is that it does not use the spectrum as a limited resource as it imposes no limit to the number of players operating cellular services. Under the existing system only those cell – phone operators that have been granted permission to use the limited 3G spectrum operate in the market, simply because the resource is not a free for all. Also, the WiMAX proves cheaper. According to Trai’s recommendation on WiMAX, operators would have to pay around Rs. 120 crore for a pan- India coverage. Against this the ‘reserve price’ i.e. the price for reserving a particular space in the 3G spectrum, would be about Rs 1,400 crore.⁷³ Infact, even the whole of the Telecom industry, excluding Ratan Tata, welcomes the shift to the WiMAX as against the auction system for the 3G. Also, many companies like Alcatel, BSNL, Intel, Idea and Aircel have already started in with planned trials in many cities like Chennai.

IV. TRACING THE COMMONS THEORY IN A JURISPRUDENTIAL MILIEU

Although the Contemporary Commons theory may seem to be *just* another interpretation of the Commons form of Property Management, the idea that it seems to embody with has been iterated by a number of jurists and thinkers. The Contemporary Commons essentially talk about the how control of resources, especially the media, needs to be diffused in the hands of several market players

⁷¹ *Id.* at para 13 (b).

⁷² See Arindam Mukerjee, *WiMAX throwers spanner in Spectrum Works*, THE ECONOMIC TIMES, Jan. 19, 2007.

⁷³ *Id.*

on one side and the State on the other. This diffusion of power and control has been advocated by other thinkers in legal sciences as well, these are enunciated below.

A. ROGER COTTERRELL

Roger Cotterrell talks of any legal system consisting of two basic elements- '*Voluntas*' and '*Ratio*'.⁷⁴ '*Voluntas*' implies an Austinian concept of law i.e. it is reflective of the sovereign will, coercive power, or in colloquial terms the unchallengeable political authority that shapes the entire legal system. As for '*Ratio*' it is nothing but the 'reason' or principle which exists in the form of persuasive, consistent and rational ideas that ultimately influence, bind and convince the citizens or the subjects of law. Cotterrell then propounds how the two, '*voluntas*' and '*ratio*' are inter connected. The '*voluntas*' promotes peace, order and security in the society by the sheer power and authority that it has, whereas the '*ratio*' provides principles of justice in social relationships. Also it is the values embedded in the element of '*ratio*' that provide legitimacy to coercive element of law which is the '*voluntas*'.

It is in this milieu that Cotterrell talks about need for retrieving the '*ratio*' from its subordinate position so as to make legal regulation more on what may be called a 'community basis' i.e. in accordance with the 'reason' that is prevalent in the people (in this model the communities, the products of which are individuals) and not on the basis of coercion or on '*voluntas*'. The 'community basis' model of regulation hence ensures an elevation of the element of '*ratio*' to that of the '*voluntas*', bringing a more decentralized form of administration, thus recognizing diversity in social arrangements and initiating moral cohesion in legal regulation. The stress given to the regulation of law on a 'community basis' is needed because the no individual in the society can be construed as something distinct from the society. Hence it can be safely said that it is the nature of the community in which the individual exists that is fundamental in determining the nature their character as rational beings and what political and moral choices they make.

Thus what Cotterrell essentially suggests is regulation of the society brought in by through what he essentially calls 'Community Regulation'. Cotterrell therefore essentially talks about the devolution of regulatory powers to a range of communities. The nation as a consequence, is to be viewed as a 'community of communities' with the State performing three basic roles in the Cotterrell model. Firstly, it is the State that is to ensure cohesion between the several communities, i.e. it has the task of coordinating relationships between the various communities. Secondly, it is the State that is to guarantee order, which Cotterrell feels is better

⁷⁴ See ROGER COTTERRELL, *LAWS COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* (1995).

with a centralized state legal regulation. Thirdly the State also has the duty to ensure the participation of 'specific communities'. This model of the 'State' being a 'community' is in consistence with Eugen Ehrlich's model of 'Social Association'.

Thus the community participation, what Cotterrell essentially talks of in the formulation of laws is nothing but a different form of the Commons perspective to law which calls for a 'bottom – up' regulation of law. Like the Cotterrell model, even the Commons perspective lays focus on 'people-participation' at the ground level, while laws are being formed. What makes the two theories strikingly similar is the duplicate resemblance in the role of the State in the two models. Both the models envisage as the over-seer in the law formulation process than as an active participant. Both the two models talk off the diffusion of power amongst the people as opposed to the State singularly and speak against the segregation of the control from the communities to an entity that lies distinct from it.

Characteristics of a Community in Cotterrell's model: The unit of administration in the commons model:

In his model, Cotterrell advocated such a form of community that has a high degree of mutual inter personal trust. This trust is bought about by having a shared system of values and beliefs. The other required elements are Collective Participation⁷⁵ and Public Altruism⁷⁶.

The Community Model provided for by Cotterrell serves as a much desired institutional arrangement for heralding in the Commons form of legal formulation. In other words, in the opinion of the authors, it serves as workable model, which lies much in consonance with the Commons Theory. This is so because the Cotterrell model advocates.

⁷⁵ Collective Participation on the other hand talks about the opportunity and freedom for all members to be involved fully and actively in determining the nature and projects of the community as a whole- as a means of stabilizing and reinforcing mutual trust through the continuous ongoing negotiations of its consequences and its conditions of existence. Collective participation facilitates discussion and debate, the sharing of experiences and the development of collective understanding. In this way it ultimately helps in the integration of 'ratio' with the 'voluntas' i.e. in the evolution of the principles of justice and merging it with the principles of regulation. The end result is therefore the guaranteed inclusion of all members in collective welfare thereby stabilizing the society and serving the values of order in it.

⁷⁶ Public Altruism in this case refers to the provision by a community of sufficient material and cultural resource for each of its members to ensure their ability to participate as members in the collective life of the community. Both being elements which are essential to the structure of any community that serves as a unit of regulation and/or management in the Commons theory as well.

Collective participation facilitates discussion and debate, the sharing of experiences and the development of collective understanding. In this way it ultimately helps in the integration of 'ratio' with the 'voluntas' i.e. in the evolution of the principles of justice and merging it with the principles of regulation. The end result is therefore the guaranteed inclusion of all members in collective welfare thereby stabilizing the society and serving the values of order in it.

B. MICHAEL FOUCAULT

Michel Foucault, the French philosopher, through his works challenged a particular notion of power which was largely sovereign centric. He sought to juxtapose against the sovereign centric model, a "surveillance" and "discipline" model. He therefore argued focusing on a series of subtler private, informal and material forms of coercion organized on the concepts of surveillance and discipline rather than on the formal triangle of sovereign, citizen and right. He thus, says that power is operative at every level and hence cannot be reduced to the power of a state or ruling class alone. He talks of a 'microphysics' of power, i.e. power being disseminated through the whole society. Power according to him, is exercised by institutions, by virtue of the strategic position they hold in the society. This strategic position is held forth by the institutions by virtue of the 'knowledge' they deal with in the society. Since these institutions cannot exist without the exercise of power, it makes it more sensible dealing with the exercise of power by such institutions rather than by the State alone.

Foucault's model of power is thus very similar to the Commons perspective of law, which recognizes that a series of non- state actors possessing the requisite knowledge and means, are responsible for control, discipline and surveillance of the activities of all the members of the society and hence 'control' and regulation should be divided between the State and a series of private players. Such a model assumes a special significance in the 21st century when modern day communication technologies like the internet seem to underpin the efficacy of the Austrian, state – centric model of enforcement of law. Taking the example of the internet, it is but unfair for a single sovereign to prescribe a set of rules regulating all forms of speech and expression on the internet primarily because it does not have the required locus and jurisdiction for prescribing the norms on a global scale. It is for this very reason that the United States Supreme Court struck down the Communications Decency Act of 1996 wherein the US government had the ambitious plans of regulating speech and expression on the internet in the case of *Reno v. American Civil Liberties Union*⁷⁷

It is in such a scenario that Foucault's model of regulation bears much significance as it calls for recognition of diffusion of power between several agencies and suggests that control be shared between the State and several other

⁷⁷ 521 U.S. 844 (1997)

private agencies and regulation be done by both simultaneously. Thus in accordance with Foucault's – Commons model, rather than have the State prescribing what is obscene, as was done in the Communications Decency Act, it is more pragmatic to have, in case of the internet, say something like the Platform for Internet Content Selection (PICS), that serves as the technological alternative to the CDA model⁷⁸. PICS allows tags rating a web – page, to be embedded within a “meta-file” information provided for by the page, about the page. It thus provides a labeling and rating for the content in the page, from the “speaker end” i.e. from the site- builders themselves or third party rating systems. Also apart from the PICS, there are other software that allow control at the “listener end” that allows computer users to protect their families from unwanted content by using software filters. Thus the Foucault model increases surveillance from two ends, the speaker end as well as listener end, as opposed to the Austrian model of surveillance, i.e. the CDA model, which is one-sided, and without jurisdiction and hence proves more effective.

V. THE INDIAN STANCE ON THE COMMONS THEORY

A. KAUTILYA'S ADVOCATION OF THE COMMONS FORM OF OWNERSHIP

As far as the Commons theory goes in India, one has to look back at least two thousand years, to the time when Kautilya (advisor to King Chandragupta Maurya of the Magadh dynasty) made several observations on property rights and the management of common land, minerals, water and forests. He advocated that arable land should be of three types – Crown land (which belonged to the State), Private land (which is privately held by the people of the State) and Pastures (which are held in common). Kautilya further proposed that certain lands like the pasture lands should be held in common by the people because they are so essential that if they are owned privately, utility would not be best served, as the maximum number of people would not be able to draw benefits out from them. Thus the system advocated by Kautilya then remains essentially the same as what is propounded by modern day common theorists in telecommunications law today viz. certain resources which are ‘essential’ to the people should be bestowed with the freedom of ownership from both the State as well as from Private hands. They should not be held by the State as their access would be curtailed and privatization, would make the retrieval of lands difficult as well as make those in control of them too powerful. Hence to draw an analogy, what thus lay preached by Kautilya for ‘Common’ Agricultural lands can be drawn as applicable to the essential channels of media and telecommunications as well.

⁷⁸ See Boyle, *supra* note 46.

B. SUPREME COURT ON THE COMMONS THEORY

The Supreme Court of India, has in a number of cases, advocated the commons model of ownership through what is called the Public Trust Doctrine. The important cases discussing this doctrine are *M.C. Mehta v. Kamala Nath and others*⁷⁹ and *M.I. Builders v. Radhey Shyam Sahu*⁸⁰.

M.C. Mehta v. Kamala Nath and others: In the instant case, the Supreme Court, very tacitly, accentuated the Public Trust Doctrine, which the court declared to be the law of the land. About the Public Trust Doctrine the court observed and declared the following:

i. The Public Trust Doctrine rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people and that it would be unjustified to make them a subject of private ownership.⁸¹

ii. The doctrine enjoins upon the Government a duty to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.⁸²

iii. Three types of restrictions on governmental authority are imposed by the doctrine: (i) the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; (ii) the property may not be sold, even for a fair cash equivalent; (iii) the property must be maintained for particular types of uses⁸³

iv. Our legal system-based on English Common Law - includes the public trust doctrine as part of its jurisprudence.⁸⁴

v. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment and therefore is under a legal duty to protect the natural resources. Public at large is beneficiary of these resources.⁸⁵

⁷⁹ (1997)1SCC388

⁸⁰ AIR1999 SC 2468

⁸¹ *Id.*, at para 13.

⁸² *Id.*, at para 13.

⁸³ *Id.*, at para 13.

⁸⁴ *Id.*, at para 22.

⁸⁵ *Id.*, at para 22.

What can thus be appreciated from the instant case, is that the Court subscribes to the Commons model of public ownership, as was first propounded by Kautilya. Under this, the State, as has been enunciated by Kautilya, is observed to be a mere trustee of a property that is essential to the people, and not its owner. The Indian stance on the Commons theory is therefore similar to that as prevalent in other parts of the world. This can be said as the Supreme Court of India, while defining the ambit of the Public Trust doctrine, in numerous decisions, has always resorted to the Common law version of Commons, and has used American Court case decisions and legal articles to enunciate the same⁸⁶. The success of the contemporary commons movement in India, i.e. the movement of the Digital Commons who seek to bring a bottom up regulation in the key sectors of Media and Communication and the creation of a public domain in the realm of intellectual property, accordingly depends on the success of the movement in the prominent common law countries like the United States and United Kingdom given the courts predilection to follow public doctrine illustrations only after they have been applied successfully abroad. Such a move lies welcome as it lies supported by both economic and humanitarian considerations.

C. SUPREME COURT ON FREE MEDIA AND THE COMMONS:

Lastly, as has been mentioned before in this article, the Supreme Court in the decision *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*⁸⁷ has in unequivocal terms said that the broadcasting media should be controlled by the public as against a handful of people. The decision also mandates providing equal access to citizens belonging to diverse groups as opposed to a select few. Thus an analogy can be drawn successfully with the contemporary commons. The commons also advocate for public control and envisage the people's participation. The commons in addition envision equal access with the barring of all forms of discrimination and thereby leading to a society governed by the people. Thus, it is contended that, if spectrum be made available only to a select few, it will not just be in opposition to the commons theory but also to the ruling of the hon'ble Supreme Court of India.

VI. CONCLUSION

It thus seems that in today's technology driven world, 'Salvation' can be purchased. However the price being paid is too high not only in Lutheran terms but in Coasian terms as well. For the features of communication that are being traded today are the very features that would keep it sustainable in the long run. The basic structure of Communications has to be kept free otherwise its privatization would put a price to entry and access which would defeat the very purpose of communicating itself. In fact, speaking in the same context, Shubha

⁸⁶ See *M.C. Mehta v. Kamala Nath and others*: (1997) 1 SCC 388; *M.I. Builders v. Radhey Shyam Sahu* AIR1999 SC 2468.

⁸⁷ AIR 1995 SC 1236.

Ghosh, draws an illustration from a Roman Polanski movie, China town wherein the protagonist confronts the evil land developer who has been deliberately flooding land in order to lower its cost for acquisition and asks him: “*What is it that you want? How much better can you eat? What can you buy that you cannot already afford?*” The developer replies, smiling: “*The future*” Those opposing the Commons are doing just that.⁸⁸

⁸⁸ Ghosh, *supra* note 18. See also LAWRENCE LESSSIG, *THE FUTURE OF IDEAS*, *supra* note 5.