Information and Communication Technology Dossier

A Global Perspective

CUTS International

ICTD-2: October-December 2017

For a lot of people across globe, the dawn of 2018 was associated with warm wishes for the New Year from family and friends, through electronic messages and audio-video calls. This marked an end of greeting cards, and now-a-days, digital images, transmitted through an online application, suffice the requirement. This is also a less expensive and convenient mode to transmit wishes. This is just a glimpse of how deeply we have embraced Information and Communication Technology (ICT), which has also become the core of most social and economic activities in the current scenario. It has changed the way humans socialise, learn, communicate, access information, trade and entertain themselves.

At the same time, technology itself is constantly evolving. The year 2017 witnessed numerous technological interventions, which were also associated with a number of pertinent regulatory and competition issues. However, the debate on big data, artificial intelligence and disruptive businesses, caught the limelight. Some of the major issues were captured in our first edition of the quarterly CUTS ICT Dossier (ICTD),[1] while this edition highlights important stories from the last quarter of 2017.

Like the previous edition, the ICTD (Oct-Dec 2017) focusses on four verticals, namely; IPR and Competition Law; Innovation and Disruption; Connectivity; and Privacy and Data Ownership. The purpose of the dossier is to flag important issues for each of the four verticals, to a layperson as well as policymakers. Each story ends with a few relevant questions for the reader to contemplate and think of the way forward. This dossier may also be accessed at: www.cuts-ccier.org.

Lastly, on behalf of the CUTS family, we wish everyone a Happy New Year.

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[1] CUTS ICT Dossier (July-September 2017) may be accessed at: http://cuts-ccier.org/pdf/Information_and_Communication_Technology_Dossier.pdf

Policy Reforms in US on FRAND Assured Standard Essential Patents

On November 10, 2017, the Assistant Attorney General (AAG) for the Antitrust Division of the Department of Justice, Makan Delrahim, announced a crucial course-correction for policies involving standard-essential patents (SEPs) that a patent holder has voluntarily committed to licence on fair, reasonable, and non-discriminatory (FRAND) terms.

Key takeaways include: 1) FRAND is not a compulsory licencing scheme; 2) Unilateral refusals to licence should be per se lawful; 3) Seeking or enforcing injunctive relief and breach of a FRAND commitment normally raise contract or fraud, not antitrust, issues; 4) Disputes involving FRAND should be resolved through 'freely negotiated licencing agreements'; 5) Antitrust enforcers have likely 'strayed too far in the direction of accommodating the concerns of technology implementers', which risks undermining incentives for innovators; 6) Holdout by implementers is a 'more serious risk' than holdup by innovators.

Source: www.competitionpolicyinternational.com/the-department-of-justices-long-awaited-and-much-needed-course-correction-on-frand-assured-standard-essential-patents/

Food for Thought

As licencing of SEPs remains one of the most contentious issues at the interface of competition law, Intellectual Property (IP) and contract law, these remarks portray a possibly significant shift in perspective from the US. It reinstates trust in business freedom and the power of good-faith negotiations. Thus, it provides primacy to contract and IP law to act as the appropriate defence mechanisms to the underlying legal issues as compared to competition law, which is more of a market regulatory mechanism.

However, this shift might not be transposed to the context of developing nations such as India because of limited domestic innovation and absence of an indigenous patent-pool. This raises a few broad issues, which needs further discussion, such as what policy approach should be taken to balance the interests of IP owners (tech developers) and the users of IP (tech implementers) and to simultaneously benefit the consumer moving forward (bearing in mind industry convergence and a world of hyper-connectivity)?

It is also imperative to gauge how patent, contract and competition laws may be reconciled to work for the common goal of ensuring innovation, especially in the context of developing nations? What kind of approach is necessary to solve the patent-antitrust paradox inherent in the process of licencing of SEPs? Finally, how can developing nations ensure that incentives to invest (required by tech developers or SEP owners) are kept intact while not compromising on ensuring fair access for users?

Net Neutrality Recommended for India

The Telecom Regulatory Authority of India (TRAI) has come out in favour of net neutrality in its recommendation paper. The regulator has mandated that Internet Service Providers (ISPs) should not deploy any discriminatory practices, such as blocking, degrading or slowing down of certain web traffic while giving preferential treatment to any specific content at the same time.

The decision was made after a series of consultations with stakeholders during May 30, 2016-January 04, 2017. The TRAI paper also suggests the formation of a regulatory body to monitor and deal with any such violation of net neutrality. In various countries with no regulation on net neutrality, ISPs are already clubbing content into packages, compelling users to pay for apps and websites which were previously free.

Source: www.livemint.com/Technology/rWh2oMqvXBCtuQmFl8lB1M/Why-Trai-is-backing-net-neutrality-and-how-it-will-affect-IS.html

Food for Thought

Globally, the net neutrality debate has been ongoing for years now. While some countries have supported or rejected the concept of net neutrality, through policies and practice, others are yet to decide. The US Federal Communication Commission (FCC) pioneered the movement by favouring net neutrality and devising appropriate principles and rules for ISPs, in 2015. However, in December 2017, the FCC, under the chairmanship of Ajit Pai, rolled back the net neutrality rules.

Before the FCC's change of stance, India had started moving towards net neutrality, through TRAI's landmark recommendations, which are definitely pro consumers and businesses. The rationale is simple that internet has performed best in the shape it has been, since its advent and the social and economic benefits, it has rendered for consumers and businesses, are unprecedented. Thus, internet should remain neutral and there should be no differentiation or prioritisation of data packets on any aspect. While the recommendations from the telecom regulator of India are laudable, the onus is now with the Department of Telecommunications, Government of India, to draft optimal rules.

The rules would also need to address some of the critical questions, such as, how would the rules, strike a balance between interest of relevant stakeholders, including ISPs' revenues and safeguarding consumes? How can the last mile access of internet be promoted, without compromising on net neutrality? How would the new regulations fare, if the data is routed through a country, which does not support net neutrality?

Uber Ruled as a Transport Service

Uber is a transport services company, the European Court of Justice (ECJ) has ruled, requiring it to accept stricter regulation and licencing within the EU as a taxi operator. The decision in Luxembourg, after a challenge brought by taxi drivers in Barcelona, will apply across the whole of the EU, including the UK. It cannot be appealed against.

Uber had denied it was a transport company, arguing instead it was a computer services business with operations that should be subject to an EU directive governing e-commerce and prohibiting restrictions on the establishment of such organisations. Lawyers for Barcelona's Asociación Profesional Elite Taxi argued that Uber was directly involved in carrying passengers. The ECJ found Uber's services were more than an intermediation service. It observed that the Uber app was 'indispensable for both drivers and persons who wish to make an urban journey'.

Source: www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu

Food for Thought

This ECJ's decision is likely to curb the 'freedom from regulation', previously enjoyed by Uber in EU's single market. Subjecting Uber to tougher national regulations, in various EU countries it operate, will resultantly increase the regulatory compliance burden for the ride hailing app. Despite acknowledging numerous benefits presented by Uber, for urban commuters as well as taxi drivers, the ECJ's decision may adversely impact sustainability of tech driven business model. This will raise concerns over the viability of Uber, in providing its services to European urban commuters.

The convenience brought forth by new age innovative technologies, such as those by Uber, have been embraced by consumers. However, the regulatory uncertainty existent for digital businesses, such as for ride hailing applications prior to ECJ's decision, will keep the digital economy in a state of flux. Such encumbrances highlight an urgent need of devising an optimal regulatory framework, which enables the growth of constantly evolving disruptive technology-driven businesses.

This leads us to a few questions to ponder over, such as, whether the current laws and regulations can optimally regulate new age technology business models? Is there a need for creating regulatory sandboxes[2] for ensuring optimal regulatory frameworks? How can the practice of conducting Regulatory Impact Assessment (Cost Benefit Analysis) be implemented within the process of framing regulations for such businesses?

India Discusses a Legal Framework for Data Protection

The Justice B N Srikrishna Committee, formed on July 31, 2017 to draft a data protection and privacy Bill, released a White Paper recently. The paper suggests setting up a data protection authority, data audit, registration of data collectors, enacting provisions for protecting personal data, defining penalties and compensation in the case of a data breach.

The committee has invited comments from the public on various issues, such as the definition of personal data and proposed penalties for misuse of data. The Committee is of the opinion that both the government and the private entities be brought under the ambit of the proposed law.

The Committee appears to be taking a middle path between the EU privacy law, where protection of personal data is equated with protecting the fundamental right to privacy, and the US law, which focusses on protecting the individual from excessive state regulation.

Source: www.business-standard.com/article/economy-policy/srikrishna-panel-moots-data-protection-authority-117112700908_1.html

[2] Regulatory Sandbox is a set of rules that allows innovators to test their products/business models in live environment without following some or all legal requirements, subject to predefined restrictions. (Source: World Bank Document)

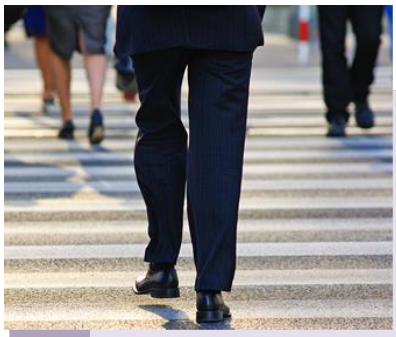
Food for Thought

The Supreme Court of India recently held 'Right to Privacy' as a 'Fundamental Right', guaranteed under the Constitution of India. Therefore, it is the State's duty to safeguard this right of over 1.3 billion citizens, which also account for a substantial portion of the world population.

Not only is the Government of India utilising huge database of Aadhaar, the unique identification number for residents of India, for several welfare schemes, but also mandating its linkage with key services, such as banking and telecom, which are largely privately held. In absence of a suitable data protection law, breaches to right to privacy, are likely to go unnoticed, unpunished and hence, undeterred.

In today's digital economy, access to consumers' data has assumed central place for competitiveness of private companies and is leading to market concentration, dominance and creation of entry barriers. Considering these aspects, the formation of the Committee to draft a data protection framework, is both timely and important. The White Paper, issued by the Committee, has tried to highlight contours of the draft law upon which public comments have been sought.

The deliberations would determine the scope and reach of the proposed data protection law. Some of the pertinent questions, that need to be ventured for clarity on the scope of the proposed law, are: Should the date be classified as sensitive or not? What should be the liabilities of data controller and processor? Will data controller be required to locally store the personal/consumer data? Defining ownership and rights of consumers over their usage data? What would be an appropriate consent mechanism? Should the law facilitate data portability? What type of authority is required to oversee the implementation of the law? Also, adequate data protection measures from offline service providers, collecting consumer data, would also need to be adequately addressed.



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