A REPORT OF THE ROUNDTABLE

ON

COMPETITION LAW AND PRIVACY CONCERNS IN EMERGING DIGITAL ERA

HELD ON 3rd JUNE 2011

AT

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE
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Background

Amidst the world witnessing divergence in many ways, in the last few decades it has converged dynamically in few respects, most significant among them being digital technology with a rapid growth of its market. The advancement in technologies solves many of the existing problems and gives an impetus to mankind for steady progress. In view of the fact that the pace of development of technology has been gaining exponential rate of acceleration in last two-three decades, there is equally strong pressure mounting on the regulation of its use in the society. Keeping pace with the changing market, competition laws have also been responding at a rapid pace, supported by technical assistance and recommendations from diverse international institutions and domestic jurisdictions. There is no doubt that Competitive environments provide value and quality and most importantly they provide larger markets than those characterized by protection. The touchstone of competition law is the protection of consumer welfare and promotion of competition without making any special deference for particular competitors. Principles of competition policies must be maintained in the digital economy also with the same intensity that they are imposed elsewhere.

With the acceleration of the dynamic nature of technology development at an exponential rate, opponents of competition laws contend that whatever merit competition laws may have had in the past, they have no place in the digital economy. According to them rapid innovation has made the accumulation of market power practically impossible. Whatever would be the pace of technology, the markets including the digital market cannot be left as a chaotic place, which may throw a challenge to the ordered society. We must therefore create the conditions for new economic activity to flourish with sound and careful regulatory policy support and complementary competition policy in creating the appropriate environment for the digital economy.

In the backdrop of world wide growing concerns over concentrating of online and mobile advertising due to alleged anti-competitive practices and convergence of digital market, the Centre for IPR Research and Advocacy (CIPRA) and MHRD Chair on IPR, National Law School of India University, Bangalore organised this conference on “Competition Law and privacy concerns in Emerging Digital Era”. The objective of the conference was to evaluate the world wide position of antitrust regulators and regulations to deal with the new technologies evolving in the digital marketplace and try to find solutions regarding those with special reference to the recent developments.
CIPRA as a very active and prominent role player in IPR Research in India, under its auspices has distinctly been working in the said area. Feeling the need to address the issues under the above objective, the IPR Chair at NLSIU has taken this initiative to discuss multidimensional issues arising out of the advent of new digital technologies and searching the possibilities of balancing the societal norms with the pace of advancement of digital technology with specific reference to antitrust law for a conducive environment for new innovations.

Prof.(Dr.) T. Ramakrishna
MHRD Chair Professor on IPR
National Law School of India University
Bangalore
E-mail: ramakrishna@nls.ac.in
Proceedings of Inaugural Session

In the august presence of the chief guest, former Supreme Court Judge, Justice Arijit Pasayat, the conference commenced with an introductory address by Professor Dr. T. Ramakrishna, Chair Professor, MHRD chair, NLSIU. In his succinct introduction, professor Ramakrishna detailed the underlying concept behind the roundtable conference. Exponential technological growth poses various challenges inclusive of privacy and IPR concerns to the policy makers. Herein, policy objectives should balance incentivization of the creators with social welfare. Having thus laid the framework, professor Ramakrishna detailed the procedure of the roundtable conference apart from noting the efforts of a few individuals without whose efforts the conference would not have been a reality and calling upon the vice-chancellor of NLSIU, Professor Dr. R. Venkata Rao to welcome Justice Arijit Pasayat. The traditional lighting of the lamp ceremony by Justice Pasayat was followed by releasing of the book “Join the Bar” authored by a fourth year student of NLSIU, Brajesh Rajak. The chief guest then held the audience captivated in his address by highlighting several issues with regard to competition law. The quote that the “poorer a country is, the more the competition it needs to ensure the welfare of its citizens” rings true in the present context of globalized trade where international challenges have necessitated the creation of a world class legal system in India. Further, the historical basis of competition law i.e. to prevent monopoly of trade, foster economic fairness and the consequential deflationary effect of competition was highlighted by Justice Pasayat. The chief guest’s informative address was followed by Professor. Dr. R. Venkata Rao’s speech. The vice chancellor underscored data privacy’s increasing importance in today’s legal system apart from opining that “while competition might bring about the worst in the human being, it should be aimed at bringing the best in the product”. Professor Rao introduced privacy as a non-price factor while examining the interface between consumer law, privacy, transparency and choice of an individual. The crucial question of equipping authorities in terms of information as a concomitant requirement for providing improved answers manifested the contrasting nature of the concerns to be explored in the roundtable conference. The introductory session concluded with a vote of thanks delivered by Mr. Satyadeep Singh, researcher at the MHRD chair on IPR at NLSIU.
People of the same trade seldom meet together, even for merriment and diversion but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices observed ADAM SMITH in the WEALTH OF NATIONS in 1776.

Basis of the law for competition is the rule that ensures the survival of the fittest in every department; said Andrew Carnegie. M. Hoffman described antitrust jurisprudence as a kind of poetry of law, where the triers of the facts have to be discerning to make judicial findings from moving shadows.

The need for Competition Law is nothing new. As Lambros E. Kotsiris wrote in his work on Anti Trust Law in ancient Greece, competition arises from the negative inclination in human nature under which men throughout the ages have sought to advance their own pecuniary interests by taking advantage of the necessities of their followmen. Man’s resourcefulness being unlimited, unnumbered and unclassified methods and mechanisms have been used over the years to achieve the purpose.

The earliest reference to Competition Law can be found in Hammurabi’s code in Babylon which, in 1792 BC, protected the populace from those seeking unreasonable profits by regulating prices. Even in the times of Roman Republic, heavy fines were imposed on anyone directly or indirectly, deliberately and insidiously stopping supply ships.

Aristotle, in his work titled “Politics” (dated around 350 BC) wrote about monopoly. He described the “Thales of Miletus” cornering of the market in olive presses as a monopoly. Monopoly stands in contrast to monopsony which refers to a single entity’s control over a market by cornering goods or services.

All over the world competition is acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices. It also provides incentive to innovate, reduce the cost and meet the ever increasing consumer demand. In that sense competition promotes the requisite allocative and competitive efficiency to ensure a fair competition, healthy market conditions. Regulatory measures are necessary in different sectors to promote competition. Competition Act, 2002 as amended by the Competition Amendment Act 2007 follows the
philosophy of modern competition law and aims at fostering competition and at protecting markets against anti-competitive practices by various business concerns and enterprises. Securing economic well being of the citizens is the concern of every Government. Competition Law focuses on ensuring that there is best allocation of economic resources, lower prices, improvement in quality and maximum material progress for the citizens. It is often said that paradoxically, the poorer a country is, the less resources it has and there is a greater need of competition. Only competition can ensure proper and most efficient use of scarce resources, maximization of output and welfare of citizens. A world class legal system is absolutely essential to support an economy that aims to be world class. Therefore, there was need to take a hard look at the country’s laws and the system of dispensing justice in commercial matters. The substance and practice of competition law varies from jurisdiction to jurisdiction. Consumer welfare that is protecting the interest of the consumers and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important objectives. Competition Law is closely connected with law of deregulation of access to market, state aids and subsidies, the privatization of state owned assets and the establishment of independent sector and regulators.

As markets become more international and the pace of technological change quickens, because of liberalization and globalization, the challenges become more complex. Sound economic analysis is necessary to take the right cases and the right decisions. It is crystal clear that sound economic analysis is central to competition policy. It is equally true that competition policy shapes fundamental economic decisions on investment, consolidation and most significantly on pricing. Competition law aims to promote healthy competition; it bans competitive agreements, such as agreements to fix prices and makes it illegal to abuse a dominant market position, and to protect interests of consumers.

It is of significance that though the Competition Act, 2002, provides definition of various expressions, it does not define “competition”. The preamble of the Act states that it is enacted to prevent practices having adverse effect on competition, to promote and sustain competitions in markets.

The World Bank, in 1990 adopted the following definition of Competition.

“Competition is a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales or market share.”

In 1980, less than 40 countries had Competition Laws. However today more than 100 countries have competition laws and the number is increasing.
In the celebrated anti-trust case, United States v. Topco Associates. Inc. 405 US 596, it was held that “Anti-trust Laws are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprises system as the Bill of Rights is to the protection of our fundamental personal freedoms”.

In the pursuit of globalization, India has opened its economy primarily removing controls and resorting to liberalization. Consequently, the market in India should be geared to face competition from within the country and outside to take care of the needs of the trading, industry and business associations. When the Central Government decided to enact a law on competition, the need to have a strong legal system was highlighted and it was stated that a world class legal system is absolutely essential to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters. Recently the idea of having courts dealing with commercial disputes expeditiously was discussed. With this idea in the background, the Competition Act, 2002 came to be enacted.

All over the world, it was found that private monopolies can be detrimental to national economy and control is required. It was therefore felt that fair and free competition is required for growth of healthy economy. Hence, need was felt to make provisions to ensure that there is free and fair competition and there is no abuse of dominant position. Competition Act was enacted in 2002 with this view. The MRTP Act was considering the problems of monopoly and anti-competitive practices as a legal issue to be considered from legal angle while Competition Act considers these issues as economic issues to be considered from the economic point of view in addition to the legal issues involved. Competition Commission is conceived as a regulatory body of experts in economic affairs looking at the issue from economy impact of business action. Of course a judge cannot ignore legal aspects, and an economist cannot ignore legal aspects; but the point is of emphasis and basic outlook towards economic activity. To ensure that legal issues are not sidetracked, appeal to the Competition Appellate Tribunal and further appeal to the Supreme Court have been provided.

The aims of competition (anti-trust) laws are to ensure that consumers pay the lowest possible price, commonly called ‘the most efficient price’ coupled with the highest quality of the goods and services which they consume. This, according to current economic theories, can be achieved only through effective competition. Competition not only reduces particular prices of particular goods and services - it also tends to have a deflationary effect by reducing the general price level. It pits consumers against producers, producers against other producers (in the battle to win the heart of consumers) and even consumers against consumers (for example in the
healthcare sector in the USA). This everlasting conflict does the miracle of increasing quality with lower prices.

Competition is an instrument of national, economic and social transformation. It awakens incumbents, spurs innovation and boosts entrepreneurship thus making markets work equitably for everyone.

The Competition Act is a modern competition law based on International norms. It is grounded in sound economy prices, and in most matters is very similar to EC Law. According to WTO, the law is broadly comparable to those of other jurisdictions with effective laws in this area and for the most part embodies the modern economics best approach. Basically modern Competition Law aims to “bust the trusts” in terms of the United State’s Sherman Act.

It is sometimes doubted whether competition policy has a sensible role for government in developing, particularly low-income countries. In these countries the markets are usually very small and fragmented so that developing scale sufficient to raise competitiveness and engage in international markets is a major challenge. The bigger problem is however poor governance. In societies with widespread corruption, inadequate public finances, and weak judiciary and oversight institutions, competition policy may become another tool for capture by vested interests - becoming in itself a barrier to entry.

The history of competition law goes back to the Roman Empire. The business practices of market traders, guilds and governments have always been subject to scrutiny, and sometimes severe sanctions. Since the twentieth century, competition law has become global. The two largest and most influential systems of competition regulation are believed to be United States antitrust law and European Community competition law. National and regional competition authorities across the world have received international support and enforcement networks.

In the Middle Ages, legislation in England to control monopolies and restrictive practices were in force well before the Norman Conquest. The Domesday Book recorded that "foresteel" (i.e. forestalling, the practice of buying up goods before they reach market and then inflating the prices) was one of three forfeitures that King Edward the Confessor could carry out through England. But concern for fair prices also led to attempts to directly regulate the market. Under Henry III an act was passed in 1266 to fix bread and ale prices corresponding to corn prices laid down by the assizes. Penalties for breach included amercements, pillory and tumbrel. A fourteenth century statute significantly labeled forestallers as "oppressors of the poor and the community at large and enemies of the whole country." Under King Edward III the Statute of Labourers of 1349 fixed wages of artificers and workmen and decreed that foodstuffs should be sold at reasonable prices. On top of existing
penalties, the statute stated that overcharging merchants must pay the injured party double the sum he received, an idea that has been replicated in punitive treble damages under US antitrust law. Also under Edward III, the following statutory provision outlawed trade combinations.

"...we have ordained and established, that no merchant or other shall make Confederacy, Conspiracy, Coin, Imagination, or Murmur, or Evil Device in any point that may turn to the Impeachment, Disturbance, Defeating or Decay of the said Staples, or of anything that to them pertaineth, or may pertain."

Examples of legislation in mainland Europe include the constitutiones juris metallici by Wenceslaus II of Bohemia between 1283 and 1305, condemning combinations of ore traders increasing prices; the Municipal Statutes of Florence in 1322 and 1325 followed Zeno’s legislation against state monopolies; and under Emperor Charles V in the Holy Roman Empire a law was passed "to prevent losses resulting from monopolies and improper contracts which many merchants and artisans made in the Netherlands." In 1553 King Henry VIII reintroduced tariffs for foodstuffs, designed to stabilise prices, in the face of fluctuations in supply from overseas. So the legislation read here that whereas,

"it is very hard and difficult to put certain prices to any such things... [it is necessary because] prices of such victuals be many times enhanced and raised by the Greedy Covetousness and Appetites of the Owners of such Victuals, by occasion of ingrossing and regrating the same, more than upon any reasonable or just ground or cause, to the great damage and impoverishing of the King's subjects."

The next significant stage of developments are the “Renaissance developments”.

Elizabeth I assured monopolies would not be abused in the early era of globalisation.

Europe around the 16th century was changing quickly. The new world had just been opened up, overseas trade and plunder was pouring wealth through the international economy and attitudes among businessmen were shifting. In 1561 a system of Industrial Monopoly Licences, similar to modern patents had been introduced in England. But by the reign of Queen Elizabeth I, the system was reputedly much abused and used merely to preserve privileges, encouraging nothing new in the way of innovation or manufacture. When a protest was made in the House of Commons and a Bill was introduced, the Queen convinced the protesters to challenge the case in the courts. This was
the catalyst for the Case of Monopolies or Darcy v. Allin (77 Eng. Rep. 1260). The plaintiff, an officer of the Queen's household, had been granted the sole right of making playing cards and claimed damages for the defendant's infringement of this right. The court found the grant void and that three characteristics of monopoly were (1) price increases (2) quality decrease (3) the tendency to reduce artificers to idleness and beggary. This put a temporary end to complaints about monopoly, until King James I began to grant them again. In 1623 Parliament passed the Statute of Monopolies, which for the most part excluded patent rights from its prohibitions, as well as guilds. From King Charles I, through the civil war and to King Charles II, monopolies continued, especially useful for raising revenue. Then in 1684, in *East India Company v. Sandys* (90 ER 62), it was decided that exclusive rights to trade only outside the realm were legitimate, on the grounds that only large and powerful concerns could trade in the conditions prevailing overseas. In 1710 to deal with high coal prices caused by a Newcastle Coal Monopoly the new Law was passed. Its provisions stated that "all and every contract or contracts, covenants and agreements, whether the same be in writing or not in writing... are hereby declared to be illegal." When Adam Smith wrote the Wealth of Nations in 1776 he was somewhat cynical of the possibility for change.

"To expect indeed that freedom of trade should ever be entirely restored in Great Britain is as absurd as to expect that Oceana or Utopia should ever be established in it. Not only the prejudices of the public, but what is more unconquerable, the private interests of many individuals irresistibly oppose it. The Member of Parliament who supports any proposal for strengthening this Monopoly is seen to acquire not only the reputation for understanding trade, but great popularity and influence with an order of men whose members and wealth render them of great importance."

Judge Coke in the 17th century thought that general restraints on trade were unreasonable.

The English law of restraint of trade is the direct predecessor to modern competition law. Its current use is small, given modern and economically oriented statutes in most common law countries. Its approach was based on the two concepts of prohibiting agreements that ran counter to public policy, unless the reasonableness of an agreement could be shown. A restraint of trade is simply some kind of agreed provision that is designed to restrain another's trade. For example, in *Nordenfelt v. Maxim, Nordenfelt Gun Co.* (1891-94) All.E.R. Rep. 1), a Swedish arm inventor promised on sale of his business to an American gun maker that he "would not make guns or ammunition anywhere in the world, and would not compete with Maxim in any way."
To consider whether or not there is a restraint of trade in the first place, both parties must have provided valuable consideration for their agreement. In *Dyer*’s case a dyer had given a bond not to exercise his trade in the same town as the plaintiff for six months but the plaintiff had promised nothing in return. On hearing the plaintiff’s attempt to enforce this restraint, Hull J exclaimed,

"per Dieu, if the plaintiff were here, he should go to prison until he had paid a fine to the King."

The common law has evolved to reflect changing business conditions. So in the 1613 case of *Rogers v. Parry* (1613) 2 Bulstr. 136 a court held that a joiner who promised not to trade from his house for 21 years could have this bond enforced against him since the time and place was certain. It was also held that a man cannot bind himself to not use his trade generally by Chief Justice Coke. This was followed in *Broad v. Jolyffe* (1620) Cro.Jal 596 and *Mitchell v. Reynolds* (1711) 1 P.Wms 181 where Lord Macclesfield asked, "What does it signify to a tradesman in London what another does in Newcastle?" In times of such slow communications, commerce around the country it seemed axiomatic that a general restraint served no legitimate purpose for one’s business and ought to be void. But already in 1880 in *Roussillon v. Roussillon* Lord Justice Fry stated that a restraint unlimited in space need not be void, since the real question was whether it went further than necessary for the promisee’s protection. So in the *Nordenfelt* case Lord McNaughton ruled that while one could validly promise to "not make guns or ammunition anywhere in the world" it was an unreasonable restraint to "not compete with Maxim in any way." This approach in England was confirmed by the House of Lords in *Mason v. The Provident Supply and Clothing Co* (1911 (13) All I.E.R Rep.400).

Modern competition law begins with the United States legislation of the Sherman Act of 1890 and the Clayton Act of 1914. While other, particularly European, countries also had some form of regulation on monopolies and cartels, the US codification of the common law position on restraint of trade had a widespread effect on subsequent competition law development. Both after World War II and after the fall of the Berlin wall competition law has gone through phases of renewed attention and legislative updates around the world.

John Stuart Mill believed the restraint of trade doctrine was justified to preserve liberty and competition

The classical perspective on competition was that certain agreements and business practice could be an unreasonable restraint on the individual liberty of trades people to carry on their livelihoods. Restraints were judged as permissible or not by courts as new cases appeared and in the light of changing business circumstances. Hence the courts found specific categories
of agreement, specific clauses, to fall foul of their doctrine on economic fairness, and they did not contrive an overarching conception of market power. Earlier theorists like Adam Smith rejected any monopoly power by observing:

"A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures. The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate."

Competition Policy refers to the measures that are taken in order to ensure that economy players in a market compete with each other, innovate and charge fair prices from consumers for their products and services. It includes specific competition legislations, laws against unfair competition, enforcement mechanism, policies that encourage investment and development in particular industries as well as IPR. As Pope Paul VI said “if you want peace, work for justice” Competition law is essentially an instrument that helps us to achieve that elusive goal.

It is interesting to note that the ambivalent approach towards the law of competition is of assessment of the need to curb the monopolies.

The origin of the expression “anti-trust” is not well known. The American term “anti-trust” arose because of large American corporations which used trusts to conceal the nature of their business arrangements. That is why the Sherman and Clayton Acts expressly prohibited the combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. This was held to be a felony punishable with a fine.

However the finest statement of the need to have a balance is to be found in the decision of the US Supreme Court in Spectrum Sports Inc. v. Mc Quillan 506 US 447 (1993).

“The purpose of the (Sherman) Act is not to protect business from the working of the market, it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. This focus of U.S. Competition Law, on protection of competition rather than competitors, is not necessarily the only possible focus or purpose of competition law. For example, it has also been said that competition law in the European Union (EU) tends to protect the competitors in the market place even at the expense of market efficiencies and consumers.
The substance and practice of competition law vary from jurisdiction to jurisdiction. Consumer welfare, that is protecting the interest of the consumers and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important objectives. Competition Law is closely connected with law of deregulation of access to market, state aids and subsidies, the privatization of state owned assets and the establishment of independent sector and regulators. Competition Law appears to have the foundation in Articles 38 and 39 of the Constitution of India, 1950 which form part of the Directive Principles of State Policy. There is no growth without competition and to advocate the message amongst one and all there must be what is conceived as “Competition brings prosperity”.

Dr. Justice Arijit Pasayat  
Former Judge, Supreme Court of India,  
Chairman, Competition Appellate Tribunal
Session on

CONCERNS IN THE DIGITAL MARKETPLACE

Chairperson for the Session: Mr. S.V. Divvaakar (Executive Director, ICOMP India)
Speakers of the Session: Mr. Sandeepan Chatterjee, CTO, Justdial, Mumbai, Mr. G. R. Bhatia, Partner, Competition Law Practice, Luthra and Luthra Offices, Mr. Siddartha Arya Managing Partner, SURVAN, Mr. Saurav Sen senior digital media professional
Discussant: Mr. Sridhar Vardarajan, SASKEN Communication Technologies, India

Presiding notes:

The session started with Presiding note “Nothing has changed our lives as much as the internet in the last 10 to 15 years…”, by the chairperson of the session, Mr. S.V. Diwakkar. Further he expressed that the digital technology is no longer just a fringe business, but a very much main stream business nowadays, continuously booming. Online advertisement, which is the lifeblood of digital market, is already a $61 billion business. Online business in India is already over $10 billion.

The other most important feature of internet he expressed is the search engine, whereby people can search without actually paying anything. There are two other factors also which should be into consideration, i.e. Convergence and Divergence. According to Mr. Divvaakar convergence is the result of growing technological advancement, through which you can pause a running program on the television and after some time resume the same. It does not mean that the device itself is going to be withered away because of the convergence. It is merely the transformation of the technological device into a more and more advanced device. He exemplified in a practice in which the computer has transformed itself from the mainframe to desktop, laptop, palmtop, etc. The computer has never withered away, but it has remained as a computing device.

Further he expressed that the Divergence is actually a market response to the technological development. Hence it is most important to have knowledge of the technological advancement happening in the country to ensure that the economy keeps pace with it. He emphasized that India is a country with very strong entrepreneurship at the small scale sector.
Mr. Sandeepan Chatterjee:

Mr Chatterjee focusing on Indian digital market and SMEs market in India put forth some of the important facts regarding the SMEs in India:

1. According to the statistics provided by the labour minister, there are 29 million SMEs registered in India.
2. These SMEs contribute about 45% of the total GDP from non-agricultural sector in India, excluding the portion contributed by the agricultural sector.

Contextualising the present digital market with the past Mr. Chatterjee expressed that the Internet was just like the Doordarshan channel 20 years back, it was just one option.

Mr. Sandeepan was apprehensive with the rapid growth of this market and highlighted some of the fear factors attached with digital market:

1. The exposure to the internet, if not equal, will start giving an undue advantage to the people to whom it is available over those who are not aware of it. It gives advantage in terms of reaching out the people, creating a competition policy issue.
2. Competition law regarding the role of intermediaries in the internet market is also not clear. For example, if a person is not in the business but only concerned with providing the information, like a T.V. Channel. If such a T.V. channel starts propagating for some person’s business; it is a sort of malpractice in terms of competition policy.
3. Internet does not play any role in production. This is in terms of core production of goods, where the internet does not play any role. So entry barriers in the internet market business are much important in terms of competition policy.

Mr. Siddhartha Arya:

Mr Arya focusing on Google Book issue pointed out that a person who is an innovator has to put various resources for developing a particular work, reaching up to a level and succeeding in the market. In case of a book, the author puts a lot of labour for writing it and then getting it published. He now wants some reward. But the case of Google Book is of much concern in this regard.

The main antitrust concerns that arise out of the settlement agreement have been enumerated below, followed by the pro-competitive benefits that are purported to ensue from the agreement:

1. The modified agreement of the Google Books introduced an ‘opt-out’ option. According to which the terms and conditions entered into between Google and a few publishers would apply to the authors all-
over the world. And whoever is not ready to accept the agreement, has to opt-out from the agreement, which is actually against all the established copyright laws.

2. Allowing Google to acquire exclusive access to content and withhold it from other search engines – as Google threatens to do with ITA Software in online flight search – raises serious antitrust concerns.

3. Google being a dominant enterprise in the field of online search engines, it is believed that the agreement would allow Google to create a de facto monopoly for itself, due to already high entry barriers to the market of digitized books in the form of high digitizing costs, costs of purchasing licenses and risks related to purchase of license of invalid or invaluable works.

4. The proposal of creating a digital library would further entrench Google’s market power in the online search market. The deal would let Google be the only competitor in the digital marketplace with the rights to distribute many works in multiple formats.

5. The settlement will actually result in the cartelization of authors and publishers within the registry that will operate with no restrictions and could raise book prices or reduce output at will, the company argued.

6. Further, the Google Registry will be allowed to license its rights to other players “to the extent allowed by law”.

7. Further, in case the law allows the Registry to license the rights it has received from the copyright owners, then it would create significant antitrust concerns.

8. It gives Google a right to digitize and display unclaimed and out of print works as well.

9. Lastly, the clause in the agreement reserving thirty seven per cent of the revenue generated from such digitizing for Google has been claimed to be a major antitrust concern.

Mr. Siddartha was of the view that the people in India are not much concerned about the privacy concerns. He shared his experiences with some of the movie producers in India, who were not in any way concerned with the privacy and piracy of their work. Because they are actually earning in spite of piracy practiced in India.

Mr. G.R. Bhatia:

Mr. Bhatia is the partner & head of the competition law practice in 'Luthra & Luthra' Law Offices. He has also been the additional director general in the Competition Commission of India. He highlighted on the ‘Anti Competitive Agreements and Abuse of Dominance in the Digital Technology Market’. He compared the current competition law in India with the MRTP Act. MRTP Act was based on the reformative theory, while the competition law is based on the reformative cum deterrent theory.
Competition is benign for consumers, business as well as the economy. Monopoly is never going to help the economy, because a monopolist becomes complacent. But maintaining healthy competition in the market is a big challenge, because, nobody wants competition. For that, the law and an umpire are imperative.

Indian Competition Act seeks to protect consumers and ensure freedom of trade to others in market. He explained the various dimensions of the Indian Competition Act and the institutional framework in India for regulating the competition. Enforcement of the Act is primarily by the Competition Commission of India (CCI).

Every time while entering into a contract, we have to see to the terms and conditions of the contract, whether they are anti-competitive or not.

He explained various benefits of Digital Technology:
   a. Enhanced competition in Market by bringing together large number of buyers & sellers on one platform
   b. Paved the way for broad range of communication channels through internet services, mobile phones, emails, video conferencing and web-casting, etc.
   c. Easy accessibility
   d. Additional option to consumer and industry
   e. Reduced cost of distribution
   f. Tames the dominance of distribution channel
   g. Gives sellers to customers directly

Some competition concerns in Digital & Internet Market:
   a. It is a passive sale as customer visits the seller’s web-site
   b. Such markets are causing controversy on the notion of exclusive territories/jurisdictions
   c. Internet sellers undercut other resellers who have invested
   d. Prone to free riding which discourages investments in retail stores, distorts competition
   e. Less predictability in sales

Mr. G.R. Bhatia also mentioned about the EU reforms in distribution channel: DOs and DONTs – 2010. While explaining the jurisprudence developed by CCI so far in India, he highlighted the following cases decided by CCI:
   a. DTH v. Prasar Bharti
   b. Travel Agents v. Lufthansa Airlines

He identified Challenges for the Competition Law in Digital Technology Market in respect of following browsed areas.
   a. Relevant Market
   b. Jurisdiction
   c. Anti-competitive Agreements
   d. Dominance and its abuse
   e. Mergers & Acquisitions in Digital Market
f. Redressal Mechanism

Mr. Saurav Sen:
Mr. Sen is a senior digital media professional. Explaining the benefits of the digital market Mr. Sen identified following benefits in this market.
1. You need not be a ‘Big Brand’ to succeed. Internet is a level playing field.
2. Revenues are comparatively easier to generate. Distribution cost is zero.
3. Why toil for 50 years, when you can sell out and make your millions in 5 years?
4. Digital Marketplace’s biggest boon is measurability.

Mr. Saurav Sen was also concerned with some issues attached with the digital market in following terms:
1. The biggest bane for the digital marketplace is measurability.
2. Unfortunately, IPR in the digital realm is largely getting confined to measurable limits.
3. Excellence plays little or no role.
4. IPR violation is nothing new. In the digital era, the malaise has grown exponentially.
5. Digital Marketplace doesn’t just sell a company’s wares..., it often sells the company itself. For example, ‘India World’ was acquired by ‘Sify’ for ₹499 crore, in 1999; AOL bought Huffington Post for $315 million, in 2011.
6. SEO (Search Engine Optimization) has undoubtedly created value in a search-dominated internet; but misuse has created monsters too.
7. Can technology protect IPR, when business models lack conviction?
8. Territory Mismatch – In a geography-agnostic global marketplace, laws are restricted to national jurisdiction. Disunity impedes justice and fair play. Digital medium is no different.

Mr. Saurav Sen concluded with the words – “Make yourself heard and force the change”. He gave the example of Jonathan Tasini’s class action suit, which downed the mighty New York Times in 2001. Tasini has yet again raised his voice to defend the rights of Huffington Post’s unpaid bloggers in 2011.

Conclusion
After the enlightening speeches by the honorable speakers, the chairperson started with a quick questionnaire, and then the session was concluded.
Session on
ROLE OF COMPETITION POLICY IN THE DIGITAL TECHNOLOGY MARKET

Chairperson for the Session: Mr. S.V. Divvaakar, Executive Director, I-COMPIndia
Speakers of the Session: Mr. Arshad (Paku) Khan, Amarchand & Mangaldas
Mr. Navneet Sharma, CIRC CUTs, Delhi, Dr. V.C. Vivekanandan MHRD IP-Chair Professor and Coordinator, NALSAR Proximate Education and Dr. Dhanpat Ram Agarwal, Director, ITAG Business Solution Ltd.,

Presiding notes:
The session was again started by Mr. S.V. Divvaakar with a request to the respective speakers for making their presentations specific and precise, considering the shortage of time.

Mr. Arshad (Paku) Khan:
Mr. Khan is the Director, Competition Law Practices, in Amarchand Mangaldas. He practiced anti-trust laws in U.S. and Competition laws in E.U.

He started his speech with a comparison of Indian Competition Law with the Anti-trust laws in U.S. He was of the view that anti-trust laws in U.S. are very much developed as compared to India where the competition laws came into being in 2002 only, with the merger regulations coming into existence just two days back.

Even then, he was not in favour of applying E.U. Competition cases as a rubber stamp in India. CCI plays a major role in India for the purpose of developing competition law jurisprudence in India.

Wherever required, the amendments should be made in the Indian Competition laws. India should focus on maintaining a healthy competition regime, because competition ensures growth. Misuse of dominance in the market is always going to be concern for privacy as well as for the growth.

Dr. Navneet Sharma:
He focused mainly on the relevant product market. He started his speech with the words that digital technology market in India is no more a small market, and it is actually growing at a constant pace. In such a scenario, the competition law issues become much more relevant.

Mr. Sharma highlighted that competition law is different from competition policy. Competition law deals only with specific infringement of the competition law or a particular statute enforced in India. While the competition policy is a much broader thing, Competition policy includes every policy, guidance, executive instruction which has an impact on the
competition in the market. And here we are concerned with the competition policy as a whole and merely the competition law.

Relevant market is of two types – relevant product market and relevant geographical market. Mr. Sharma did not touch upon the relevant geographical market, but only the relevant product market. Law provides six parameters on which the commission decides which is the relevant product market. They include price of the product, end-use of the product, preference of the consumers, etc. If we just focus on the provider, medium and service, we will find a number of players and a number of interfaces happening among these players. This actually makes the determination of relevant product market a tough task. Using economics for determining relevant product market also carries a lot of problems.

The other very fundamental question which arises is that whether the innovation is better served in an open environment or a concentrated or closed environment.

**V.C. Vivekanandan:**

‘Hungry people are the angry people’ were the words with which he started his speech, as the time had come for the lunch. He said that in India, we are dealing with 21st century technology, 20th century governance structure and 19th century legal system.

Indian Competition Act seeks to protect consumers and ensure freedom of trade to others in market. He explained the various dimensions of the Indian Competition Act and the institutional framework in India for regulating the competition. Enforcement of the Act is primarily by the Competition Commission of India (CCI).

Principles of competition should be applied in the digital technology market with the same intensity as they have been applied in the traditional markets so far. But how to focus and ensure such intensity is an issue. It has to be remembered that competition provides value and quality to the product. And most importantly, it provides larger market as against the protected economy, as has been proved by the theories so far.

He focused over the ‘net-neutrality’ and the ‘next generation networks’. ‘Net-neutrality’ means the services provided by a player without any sort of differentiation among the consumers. As an ISP who operates in the net-neutrality business, has to make significant amount of investment which he may not able to recover from the end-users. Because these end-users also keep on decreasing because of the increasing number of players and the heightening competition as we can see the situation in the current telecom market. They argue that this net-neutrality should be broken as soon as this next generation networks comes, where they can maintain a price differentiation in the market.
‘Customer should be at the central point in the competition policy’, should be the principle on which the competition policy in India be based.

**Dr. Dhanpat Ram Agarwal:**

He is the Director at ITAG Business Solution Ltd. The topic of ‘competition policy in the digital technology market’ is a synthesis of technology, law and the commerce. We are definitely in the digital era. In India, liberalization was started from July 1991 onwards. The issues regarding the competition after the WTO negotiation happened included mainly the maintenance of healthy competition, investment, transparency in government procurements and trade practices. But the question that arises is, whether the competition policy implemented in India is going to address these basic challenges or not.

Dr. Dhanpat also highlighted some of TRIPs provisions including the provision of compulsory licensing. When we come to Indian Competition law, we find that, on the one hand competition law gives power to the CCI to impose fine over any entity found in violation of the competition law provisions and on the other hand some exceptions have also been provided under sections 3 and 5 of the Competition Act. But in case of exceptions relating to IPR in the Competition Act, only in case of reasonable circumstances; unfortunately the reasonableness has not been spelled out. It is not certain what will be termed as reasonable or unreasonable.

The judgment on the Google book case is definitely going to be a landmark judgment in relation to the subsistence of healthy competition in the economy. ‘Competition is good, but it should not be in the guise of bringing more and more monopoly. It should be ensured that in the guise of competition, we are not allowing only a few players to enter into the market, thereby creating a monopoly.’ These were the words with which Dr. Dhanpat concluded his speech.

**Conclusion**

After the enlightening speeches by the honorable speakers, the chairperson started with a quick questionnaire, and then the session was concluded. During the questionnaire, the issue of anti-dumping duties being anti-competitive was also raised. It was argued that imposition of anti-dumping duties are nowhere in contravention with competition policy. Anti-dumping duties are not something imposed arbitrarily on the industry. It is based on the need of the industry. It is not a permanent solution, but only a temporary measure hardly for 2 to 3 years. But actually the strategic abuse of this anti-dumping duty is what defeats the competition policy; as has been experienced in India.
Session on
EVALUATION OF JURISDICTIONAL APPROACHES-USA, EU-vis-a-vis APPLICATION OF COMPETITION LAW IN THE DIGITAL TECHNOLOGY MARKET

Chairperson for the Session: Prof. N.L. Mitra, Former Director of NLSIU, Bangalore and Former Vice Chancellor NLU Jodhpur.

Speakers of the Session: Mr. Arshad (PAKU) Khan, Director, Competition Law Practice, Amarchand Mangaldas, Mr. G. R. Bhatia, Partner, Competition Law Practice, Luthra and Luthra Offices, Mr. Sajjan Poovayya, Poovayya and Company Advocate, Saurab Malhotra, Intel, Bangalore

The session started after the break for Lunch at 02.30 PM. This session started with a small remark by the chair for the session Prof. N.L. Mitra, Former Director of NLSIU, Bangalore and Former Vice Chancellor NLU Jodhpur, he humorously remarked that Technology and Law are like traditional Hindu Husband and wife where law as Hindu wife follows the husband as technology. He raised a question regarding India that are we ready for these technology advancements, are we equipped with the prospective challenges?

Mr. Arshad (PAKU) Khan, Director, Competition Law Practice, Amarchand Mangaldas

Mr. Arshad (PAKU) Khan initiated the session by addressing the session on Competition and antitrust law and its practice in EU and USA respectively today. Mr. Khan being the a practitioner of competition law under EU and USA gave a comparative perspective of law in case of leveraging, dominance etc. in case of technology cases.

Mr. Khan also went into comparative dimensions of different jurisdictions with India and discussed the Bollywood case decision by Competition commission of India with reference to cartelization.

Mr. G. R. Bhatia

Mr Bhatia started his address with expressing an apprehension that maintaining competition is the biggest challenge in today’s world. According to him to bring and maintain just competition there is need for law. He emphasised on three enforcement dimensions of the Competition Law: Anti-competitive agreements; Abuse of dominance; and Regulation of Combinations. He not only discussed the Institutional Framework but also about the unique features and benefits of Digital Technology Market and explained the dos and don’ts in relation to EU Reforms in Distribution Channel. He further explained different challenges before competition law especially in reference to digital market place in reference to the jurisdiction
issue, anti-Competitive Agreements, Dominance and its Abuse, Mergers & Acquisitions in Digital Market Redressal Mechanism. With regard to jurisdictional approaches vis-à-vis application of competition law in the digital technology market there are divergent approaches in determination of “dominance”, criminal & civil sanctions, institutional divergence. He exemplified with the overlap between Competition Commission of India and Sectoral Regulators, divergence in Remedies/Penalties and divergence in Investigations in reference to Indian competition Law.

As we know he further explained, that the existence of Agreement is must but Anti competitive Agreements (ACA) are void and prohibited if they have or are likely to have Appreciable Adverse Effect on Competition (AAEC) in market within India. However, AAEC has not been defined but its parameters have been laid down which includes creation of barriers to new entrants in the ‘market’, driving existing competitors out of the ‘market’, foreclosure of competition by hindering entry into the market. He further explained that Joint Ventures are not presumed to have AAEC in case they are efficiency enhancing in production, supply or distribution and export business outside the purview of CCI as effect is not within India. He further said that, existence of dominance is not bad but its ‘abuse’ is prohibited which can be done by operating independently of competitive forces prevailing in the relevant market; or by affecting its competitors or consumers or the relevant market in its favour. He also recommended that CCI needs to put in public domain guidelines and cases of potential pitfalls and required to offer education program with few research places.

Mr. Sajjan Poovayya
Mr. Poovayya concentrated on the practical aspect of the working of competition, how it operates in Indian jurisdiction when multi-agency and sectoral regulators and now the competition commission is also involved. Mr. Poovayya was concerned about the procedural complexities and non certainty of the regulators role in Indian jurisdiction.

Mr. Poovayya explained the problems in Indian digital market and competition law practice in India today. He had his concerns about pendency of cases in India.

Saurab Malhotra
Mr. Malhotra taking part in the conference and explaining the worldwide condition regarding competition law remarked that more than 100 Countries / 6 continents around the world have competition laws in place including (In ASIA): India/ China/ Japan/ Korea/ Taiwan/ Thailand/ Vietnam/ Singapore/ Mongolia/ Pakistan. However, it should be noted that there is no one standard competition law around the world. Its jurisdiction is country specific.
He further suggested that there should be clarity and consistency in the legal framework to bring predictability in law enforcement, encourage Competition Advocacy in the Country and well aligned rules, regulations and guidelines at national and International level which can be useful for companies in multi-jurisdictional market.

Conclusion

After the enlightening speeches by the honorable speakers, the chairperson Prof. Mitra expressed his view that in India, law makers have been deficient in contributing the essentials of law i.e. Law must be definite, it must be predictable and it must be certain but in respect of regulating laws these are neither definite and predictable nor certain and competition laws are not exception to the same. Prof. Mitra advocating for macro regulating of market, pleaded for super-regulator instead of several independent regulators.
Session on

PRIVACY CONCERNS IN THE CLOUD COMPUTING

Chairperson for the Session: Dr. Justice S. Rajendra Babu, Former Chief Justice of India & Former Chairman of National Human Rights Commission of India

Speakers of the Session: Dr. Vishnu Bhat, Vice President and Head Systems Integration, Infosys Technologies, Mr. Pranesh Prakash, CIS, Bangalore, Ms. Malvika Jayaram, partner at Jayaram & Jayaram, Bangalore

Discussant: Mr. Srinivas, Head Data Privacy Infosys Technologies, Bangalore

This session started after a short tea break at 04:15 PM. The session was chaired by former Chief Justice of India Dr. S. Rajendra Babu. After a brief introduction to the session he started the panel discussion with Dr. Vishnu Bhat.

Dr. Vishnu Bhat

Dr. Bhat describing the sphere of cloud computing as an example of a progressive technology, expressed that the need of information management system brought this technology. Further describing the need based development, Mr. Bhat expressed that business became easy by connecting the computer to each other and the advent of internet, which brought World Wide Web (www), extended the scope of the internet which was earlier restricted to computers to computers. Anyone can download and upload the data through internet. The data which is required for the business stays within the organization. To prevent the breach of data, companies install firewalls and other security process.

Further explaining the development of cloud computing, he expressed that Hotmail was the first one to offer cloud services. According to him, for that large data centre was setup and in consequence it attracted the organizations. One can transact through it with other people free of cost and data can be transmitted through the data centre. He further explained that it facilitates the company, providing different kinds of application software like core banking system, supply chain management system etc. To start a business, organization requires business centers which will include hardware and software. Cloud provides hardware and software over internet by paying. That is a fundamental element of cloud computing. It is cost saving because you don’t have to buy software and hardware at front. It is very helpful for the small enterprises.

Mr. Pranesh Prakash

Mr. Pranesh presented a very careful and focussed presentation regarding protection of consumer and privacy issues in cloud computing. Mr. Pranesh expressing the nature of law which may affect privacy in using cloud computing technology stated that organisations have their offices across the world and operate their business. It involves various jurisdictions and accordingly is subject of various countries’ law which will effectively apply for the protection of data. He discussed the privacy in cloud from the consumer prospective. Privacy in clouds has existed since 1960. It is
not a new phenomenon. IBM has been doing the outsourcing of computing from a decade now. Cloud provides software and platform as service for storing data for example Amazon. According to Mr. Pranesh, privacy is of different kinds, one is right to privacy against state and other is against individual. Privacy is needed for the security and encryption is help in security. One can interact with cloud through intermediary. Expressing the apprehension and possible subjects of looking after, Mr. Pranesh expressed that the data is also held in individual custody, therefore it should not only be limited to the companies or cloud service providers but also should be focused on individuals who are holding the information.

Ms. Malvika Jayaram

Ms. Jayaram addressed the roundtable in regard of contractual status of cloud computing service. While dealing with the contractual nature she touched upon the areas which should be looked into the contract of cloud computing including the area of services, expected types of clauses, interpretation of those clauses and the contractual issues which may come in future and affect the market and society. Explaining the issues related to the contract for cloud computing services, she discussed the issues which may be of concern to look upon, including services required and involved, applicable law, jurisdiction, data clauses, liability clauses and the promises made. According to her, fundamental clauses for the cloud contract can be contract involving services, the dispute resolution mechanism, conducive to the possible variations of future, applicable law and jurisdiction.

Whereas data clause may include privacy laws, accessibility, control mechanism, and security issues. Further explaining the types of loss and liability clause of a cloud contract, she explained the liability cap and indemnity issues.

Mr. Srinivas

Participating in the discussion explained the privacy of data in simple terms as it is a prerogative of an individual that how much data he or she wants to disclose in public domain. He raised certain issues which he found as matter of concern and were still not very clear in reference to the laws such as: presence of data still in cloud even when the contact is terminated, data security, data linkages, data subject access, case of sub contracting etc. He suggested the requirement of certain guidelines to ensure the coming back of data once the contract is terminated, and further more he wanted to ensure the auditability of function.

Conclusion: The chairperson after a quick discussion with other participants with Intervention of their few questions concluded the session. After thanking to all guest speakers, Vice chancellor, NLSIU, participants and students, the roundtable ended at 06: 30 PM.
Media coverage

Deccan Herald 04th of June 2011

NLSIU Meet on Competition Law

Bangalore: In an attempt to bring the digital market under the purview of competition policy and law, National Law School of India University (NLSIU) hosted a conference, on Friday.

The conference titled, Competition Law and Privacy concerns in Emerging Digital Era, was an attempt to encourage a healthy debate on regulating the digital market and ensuring data privacy. The conference was chaired by Prof T Ramakrishna, the MHRD Chair Professor on IPR, NLSIU.

The keynote address was delivered by Dr Justice Arijit Prasayat, Former Judge, Supreme Court of India and Chairman, Competition Appellate Tribunal, in which he traced the history of competition law in the world. He explained the need for such a law in economies like India and pointed out some incentives it offers.

The panel consisted of speakers from the digital world who spoke about their experience with data privacy, anti-competitive practices, copyright and Intellectual Property Rights (IPR) related issues.

Embracing the fact that the internet economy is no longer a fringe economy but in fact a significant part of the mainstream economy, S V Divakar, Executive Director, ICOMP India, listed privacy, data security and sharing of revenue as the prime concerns in the digital market.

Saurav Sen, Columnist, questioned whether the extent of IPR is restricted only to online content or also to the idea behind. He pointed out other concerns such as anonymity being unpunished in the internet and governance being excessively dependent on the 'digitally challenged'.
'ವೃಕ್ಷ ಕುಲಕೋಶ 100 ವರ್ಷಗಳಿಗೆ ಹೋಟೆ ಹೋಟೆ' ತಮ್ಮ ಪ್ರಭಾವಕ್ಕೆ ರೂಪಿಸಲು ಒಂದು ಸ್ಥಾನ

ಎಲ್ಲಾ ಕುಲಕೋಶಗಳಿಗೆ ಸಮರ್ಥವಾಗಿ ಬೇಡುವ ಮುಖ್ಯಪಾಲಿಗೆ ಬುದ್ಧಿಯಾರರು ಮತ್ತು ಹಿಂದಿಗಳಿಗೆ ಒಂದು ರೈಲ್ವೆಗಳಿಗೆ ಸೇರಿಸಲಾಗಿದೆ. 1980ರಲ್ಲಿ 40 ಭಾಗೀಡರ ದೇಶದ ಸ್ಥಳವನ್ನು ಬಟ್ಟಣಿಯಾಗಿ ಬಿಡುವ ಮೇಲ್ಮೈಯ ರೈಲ್ವೆಗಳಿಗೆ ಸೇರಿಸಲು ಸಾಧನವಾಗಿದೆ. 2002ರಲ್ಲಿ ಉಪನ್ಯಾಸಕ ದಿಗೆ ಬಟ್ಟಣಿ ಕೊಡು ಬೇರೆ ಕೆಲಸವನ್ನು ಸಹಾಯ ಮಾಡಿದ್ದು, "ಇದು" ಅದುಗೊಡ್ದ ವ್ಯವಸ್ಥೆಯ ಮೇಲ್ಮೈಯು ದೇಶದ ಸ್ಥಳವನ್ನು ಬೇರೆ ಕೆಲಸ ಪಡೆಯಲು ಸಹಾಯ ಮಾಡಿದ್ದು, ಹೀಗೆ ಬೇರೆ ಕೆಲಸ ಪಡೆಯಲು ಸಹಾಯ ಮಾಡಿದ್ದು, "ಇದು" ಅದುಗೊಡ್ದ ವ್ಯವಸ್ಥೆಯ ಮೇಲ್ಮೈಯು ದೇಶದ ಸ್ಥಳವನ್ನು ಬೇರೆ ಕೆಲಸ ಪಡೆಯಲು ಸಹಾಯ ಮಾಡಿದ್ದು, ಹೀಗೆ ಬೇರೆ ಕೆಲಸ ಪಡೆಯಲು ಸಹಾಯ ಮಾಡಿದ್ದು.
Supreme Court judge Arijit Pasayat releasing the book, *Join The Bar* by Brajesh Rajak (second left) on Friday. Vice-chancellor of National Law School of India University Dr R Venkata Rao and professor T Ramakrishna look on.

—Anantha Subramanyam K

Prof.(Dr.) T. Ramakrishna
MHRD Chair Professor on IPR
National Law School of India University
Bangalore