Law And The Technology Explosion

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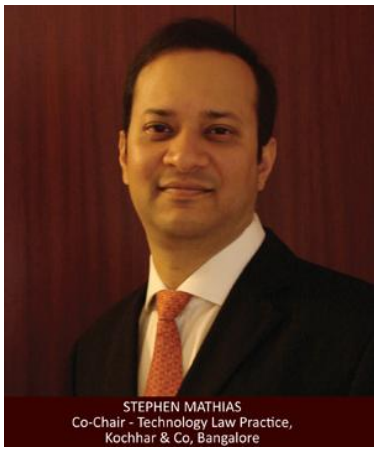
The recently concluded Legal Era Awards 2011-12 saw Kochhar & Co win the award for 'Best Law Firm in the IT and TMT category'. Legal Era catches up with Stephen Mathias, who heads up the firm's Bangalore office apart from being Co-Chair of its Technology Law Practice



What do you see as growth areas of technology law internationally?

The field of technology law has probably never been more exciting than now. You have several industries converging with each other—computers, telecom, television, internet, video, music, books. Some providers who control the ecosystem can act as gatekeepers to others, thereby raising issues of neutrality and competition law. Though SaaS has been around for some time, cloud computing has come into its own only recently—this throws up issues concerning liability, redundancy, loss of data and also taxation.

Then there is user generated content and the kind of content liability issues that arise. Online piracy is still a big issue, especially with the controversy in the US over the proposed SOPA law. Even software licensing has been transformed with the implementation of virtualisation over the last few years.

How about India? Are the issues different here?

Most of these issues are playing out in India also. However, we may be behind, say the US, in some respects. We have our own problems, mostly because of a more rigid regime. I find voice over IP (VoIP) implementation an area that comes up again and again—companies are increasingly implementing VoIP internally. But our rules are very restrictive, resulting in difficulty for enterprises on aspects such as VoIP and PSTN inter-connectivity and sharing of telecom resources. Content liability is a bigger issue here. The liability rules under the IT Act make life difficult for companies that host the content of others.

I would suggest we have one basic privacy law which does not go into too much detail and then have an information commissioner notify rules to deal with different areas. Flexibility is really important because information pervades every aspect of life and it's hard to think of every situation.

Let me take you up on your remarks on content liability. What exactly is the problem here? And what do you see as the solution?

In general, a business that hosts the content of others without participating in it should have no liability for that content. Under section 79 of the IT Act, if you receive notice from any party, including a government agency, that some content may be objectionable, you have to take it down expeditiously. If you don't, you are liable. This is seriously wrong. It forces an intermediary to play the role of a judge and decide whether the content is objectionable or not.

In some cases, it is obvious; in many cases, it is not. Generally, what we have seen is that in India, the intermediary will blindly take it down. Even worse, a government officer can effectively direct the intermediary to take down the content; the government has no right to do this—only a court should decide whether some content violates law or not.

But then, aren't you forcing everyone to go to court? Is that practical?

Good question. Forcing everyone to go to court will result in most people letting harm remain online. You shouldn't make the intermediary liable if he has knowledge and does not take down the content. What you should do is to build a notice and take down procedure—the complainant must notify the host in a prescribed format. The person who posted the content should have a right to defend his position. The intermediary must then make a reasonable effort to decide whether to take down the content or not. If he decides no, then the party objecting has to go to court. If he decides yes, then as long as he does it in good faith, he should not be held responsible for taking down the content.

This allows for a resolution without going to court. The procedure under the DMCA in the US is roughly on these lines. We could also consider a simple arbitration mechanism on the lines of WIPO's UDRP dispute resolution mechanism for domain name disputes or the ebay model for resolving disputes between buyers and sellers. The problem however is also with the courts and with our plethora of content-related penal laws.

Can you explain this further?

Judges are stuck in the "publisher" mentality—that if there is content on your site, it's yours and you are like a publisher, so you are liable if the content is objectionable. Courts haven't appreciated yet that this is user generated content ("UGC")—that it is the user who owns this content not the intermediary, who merely owns the web site. This issue is quite crucial to free speech.

There are few countries in the world with as vibrant a population as India. UGC allows ordinary people to have a voice. Blogs for instance can result in smart, talented people being discovered, who would otherwise have no way to get through to the public. The current legal position and attitude of the courts threatens this. We have very wide provisions under the IPC dealing with content, which can be used to prosecute, put in jail and ultimately convict a person for fairly harmless content—content which disturbs public tranquillity, disrupts harmony, etc. It is also wrong to treat defamation as a criminal offense. These laws needed to be looked at afresh.

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In the VC world, e-commerce is considered a hot area at the moment. What do you see as the legal challenges for e-commerce companies?

After the RBI's compulsory implementation of the Visa Verify and Mastercard SecureCode solutions, credit card usage on the internet is a lot more secure in India. Of course, payment on delivery is still much more popular. There are some issues around payment systems (third party providers who enable payments), Paypal is the best known example internationally.

The terms being offered by payment gateways in India leaves much to be desired—lack of SLAs, commitments on customer servicing, etc. Other than that, the key issue is that foreign investment is not permitted in e-commerce that involves multi-brand retail trading.

There has been substantial VC investment into backend, wholesale companies with commercial arrangements with the Indian owned retail company, but these arrangements are questionable and recent changes in FDI policy make these arrangements extremely difficult.

There has been some controversy over the privacy regulations issued last year.

The rules issued by the IT ministry in 2011 are very disappointing, if not embarrassing. Their very basis is questionable since they come out of the government's power to prescribe reasonable security practices and procedures, which if not followed and resulting in a breach causing wrongful gain or loss, would make one liable. The rules covered more than they should, were badly written and left open possibly dozens of issues. The government then issued a clarification, which is also badly worded, that lifts the uncertainty on some of the crucial issues but leaves too much confusion. By and large, our advice to clients is to understand the background to these rules first and to implement basic principles—informing the subject as to how you intend to use his information, using it only for that purpose, obtaining consent, etc.

Do we need a new law then? What should that law look like?

Stephan Mathias being awarded at the LegalEra Award 2012

Yes, we do need to start afresh rather than rely on these rules. The Ministry of Personnel is believed to have worked on a draft law. I took a look at one of the drafts and it is quite disappointing. I believe the Planning Commission has now appointed a committee to delve into this further. What people don't understand is that privacy law is really a huge area of law. Think of it, every aspect of life involves information. If you want to have a privacy law, it needs to deal with areas like education, elections, banking, employment, healthcare, the interplay between privacy and right to information, etc. There are two approaches globally. You could go with the European approach, which is one law to cover everything. Or the American approach, which is that each agency prescribes privacy rules in its own domain. The European approach is more ambitious.

But in Europe, they have had rules in place for over a decade, they began slowly by drafting only principles and they have made sure there is enough flexibility so that rules can be changed and clarified to deal with a plethora of situations that arise. Despite this, there is widespread criticism that European rules are too stringent. I would suggest we have one basic law which does not go into too much detail and then have an information commissioner notify rules to deal with different areas. Flexibility is really important because information pervades every aspect of life, and it's hard to think of every situation. Also, the law needs to cover more than just sensitive personal information.

A word finally on e-governance. Are we progressing on this?

I would say yes. Company law compliance was the first major experiment. We experienced a lot of difficulty in the initial years as the systems had not considered a variety of unique situations. Most of this has been resolved now and the system is quite stable.

The biggest problem is where the law allows for something but the system has not considered it and so there is no way out. A very interesting development is the Electronic Delivery of Services Bill—this requires government agencies to provide all services that can be delivered electronically through electronic means within five years. This will transform regulatory compliance in India and result in greater transparency, reduction of corruption, increase in efficiency and speed of implementation.

What I feel is required in e-governance is the following—a proper effort in identifying what the system needs to cover, an agency willing to receive feedback and take decisions quickly on changes to be made and side by side existence of both the old and new systems for a reasonable period till the new system stabilizes.
