Intellectual Property
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Lecture - 12
Growth of Intellectual Property

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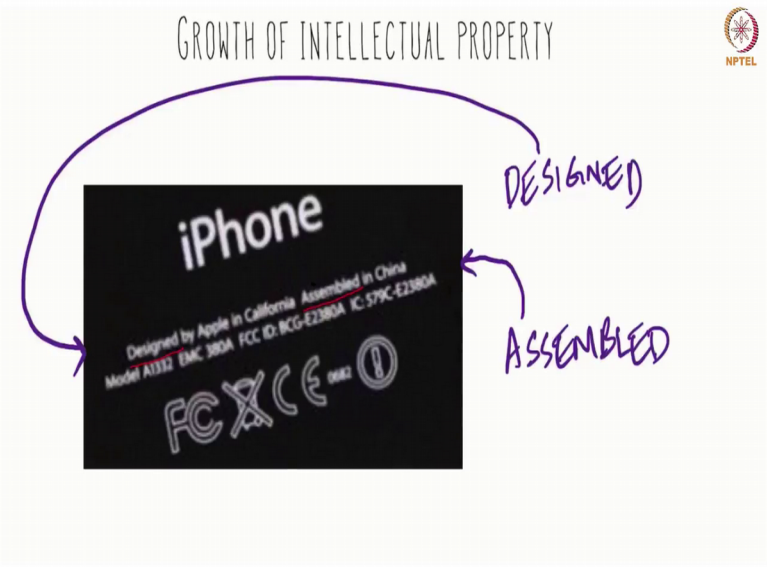

Growth of intellectual property, intellectual property rights has witnessed some phenomenal growth in the recent years. Now, part of this is due to the fact that today we have a connected world where things manufactured from one country can easily be sold in another country. Not just manufactured and sold the fact that we live in a world where things that are created or conceived in a country as now manufactured in another country and sold across the globe. The best example is the iPhone.

Now, if you look at the writing at the back of the iPhone, you will find that the phrase designed by Apple in California and assembled in China is almost common for all Apple products and more particularly for iPhones. You will find that it is the intellectual property rights regime that allows a company like Apple to design its products in one country and assemble it in another country, and sell it throughout the world; in such a way that the royalty or the money for the sale comes back to Apple in the United States.

Now, this is possible because of the intellectual property right regime. The regime where Apple creates these works that is the design for the iPhone and the engineering of the iPhone, the regime protects all of Apples intellectual property rights; in such a way that the international regime recognizes these rights in different countries. So, Apple is able to design the product in US; assemble it in China; sell it in India and across the world. So, this phenomenal growth of intellectual property came through an international and a national arrangement.

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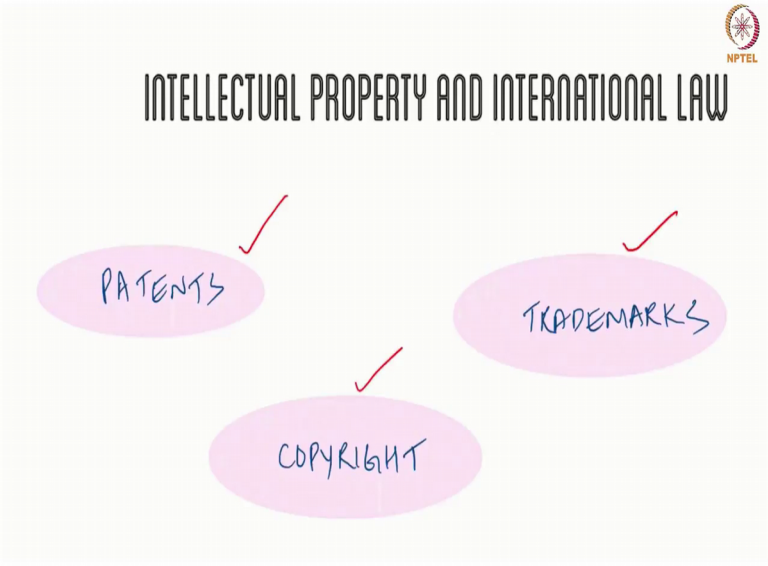

Now, let us look at that. So, when we look at intellectual property and international law, we can look at patterns, trademarks and copyrights. These are the three major branches of intellectual property law there are others as well, but to understand the history and the evolution and the international acceptance of these rights it is sufficient that we look at patents trademarks and copyrights.

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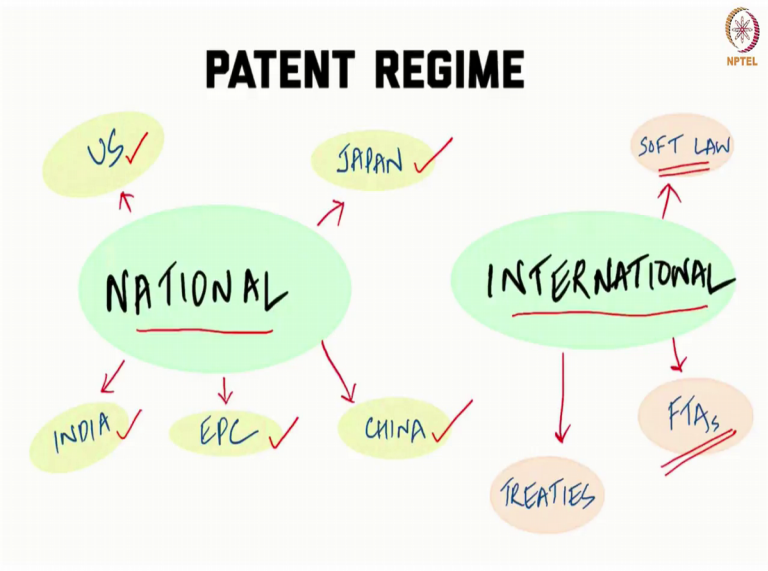

So, the pattern regime can comprises of two broad classification; one you have the national regime and then you have the international regime. The national regime is nothing, but the domestic patent regime. See in the United States, in Japan, China, the European patent convention which is the European Union, India and different countries have their own national regimes. Patents are granted by the national regimes and protected within the boundaries of the national regime.

So, you have a pattern which is granted in India cannot be enforced or protected in the United States. Patents granted in Japan cannot be enforced or protected in China. A Chinese patent cannot be enforced in any other place beyond the boundaries of China. So, patent regimes are largely national regimes, but there are few international arrangements. So, we still do not have something like a global patent or a world pattern that concept is still not there, though people are working towards it. But all that we have today is local rights granted by the local patent office, Domestic or National Patent Offices granting the rights; and some kind of an international arrangement to facilitate rights moving from one country to another.

Now, in the case of the patent regime, the international facilitation is only to the point of enabling applicants to file multiple applications in different countries. But in the case of copyright we have a much more evolved global convention where copyright created in one country is protected across the globe. Now, when you switch over on your Microsoft

PC, you will find the Microsoft trademark and the notice is coming that it is protected by copyright and other laws all over the world. Now, that is the power of the copyright regime you can have a right created in one country and enforced and protected in multiple countries because of certain mechanisms that evolved in the course of history.

Now, coming back to the pattern regime so, you have the national regime by which we mean the National Patent Offices, which grants the patents. And an international regime where in you have treaties which like the World Trade Organization has a agreement on trade related aspects of intellectual property rights, what we call the TRIPS agreement which gives which tells the countries what should be the standard of protection they should have, how long the terms should be, what are the criteria for patentability, enforcement mechanisms and many other things. So, once you have an international agreement, and you have various countries who have signed to that agreement, you can harmonize the loss, loss in one country and the other country can look similar or the same.

Now, apart from the treaties, we also have free trade agreements which countries enter into free trade agreements or bilateral investment treaties, can be bilateral arrangement between countries or a group of countries. Now, this could also allow for recognition of intellectual property rights of one country in another country. And you have something called the soft law. Soft law or nothing but treaties which are not signed by delete last few words; soft law is nothing but an international arrangement where if something has to be accepted as a treaty, you first release it in the form of a soft law. It is a guideline for countries to follow; eventually it may take the shape of a treaty if there is consensus across countries.

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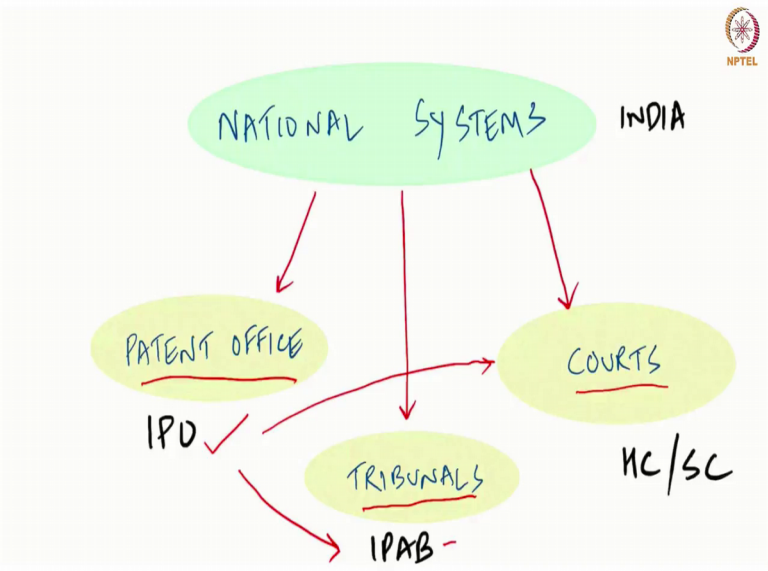

So, a national system, for instance, if you take the India's patent system comprises of the patent office what we call the IPO. And any appeal from the patent office goes to the tribunals; we have the Intellectual Property Appellate Board or the IPAB. And any enforcement mechanism, the patent is granted somebody is infringing the patent goes to the courts. And in India we have the High Court and the Supreme Courts. So, this is the national patent regime.

You have an office, the Intellectual Property Office which grants the patents. If there are appeals over it, it goes to the tribunal which is the IPAB. And if a granted patent is questioned before a court or if there is an action with regard to enforcement say infringement, it goes to the High Courts. And eventually if there is an appeal from the High Court, it can go to the Supreme Court as well.

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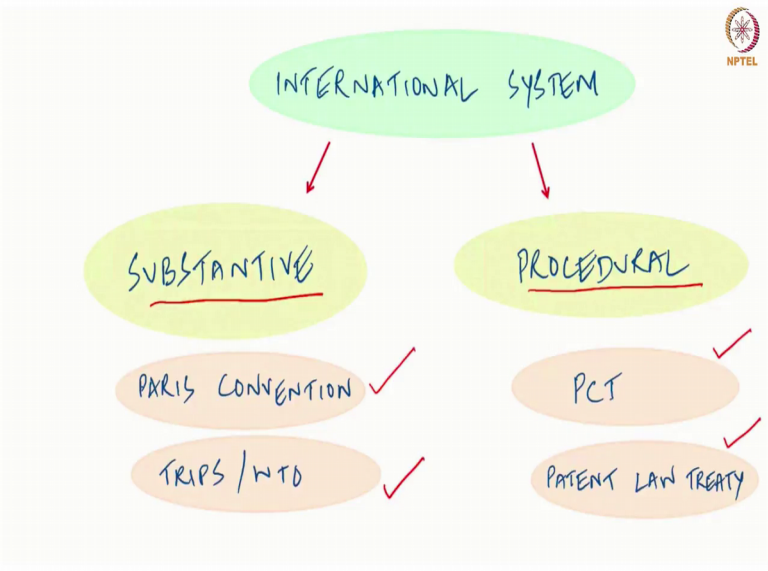

The international system on patents can be divided into two; one you have the substantive regime and you have the procedural regime. The substantive regime is nothing but efforts in substantive in international law which were moved towards changing the substantive provisions of the law. Whereas, the efforts on procedural aspects, there were certain treaties concluded and which only had an effect on the procedural aspect of patent law. This is an important distinction to understand because patent law comprises of stuff substantive provisions for instance what can be patented is a substantive provision. And it also comprises of procedural aspects.

Now, who can file a patent, what should be the criteria for an applicant, what should be the fees that should be paid, how long should be the delete last few words, what are the administrative methods by which you can intervene in the patent office, these are all procedural aspects of the patent system.

Now, the most important agreement is what we call the PARIS convention. The PARIS convention created certain substantive changes in the patent regime. Then we had the WTO and what we call the TRIPS agreement. Now, on the procedural side, we have an agreement called the or the treaty called the patent cooperation treaty which allows applicants from one country to file applications in another country. And we also had something called the patent law treaty, which tried to make some changes, but it was not widely accepted.

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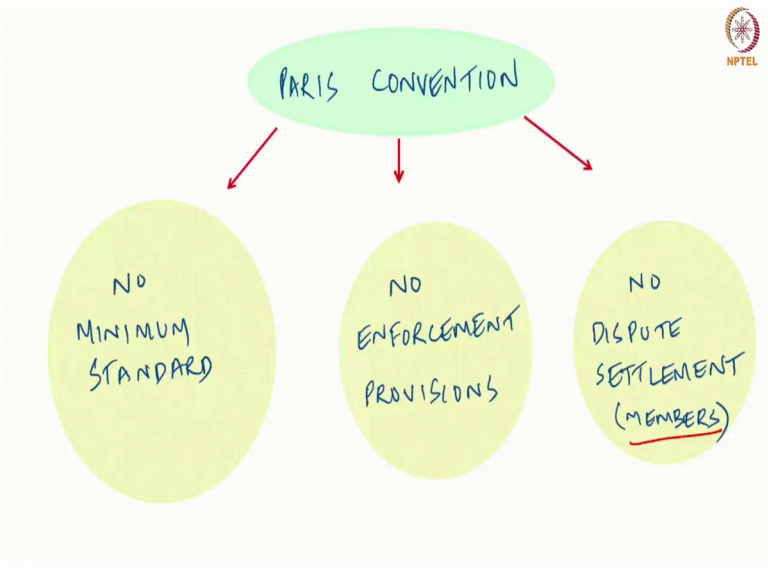

So, the PARIS convention did not set any minimum standard for patents. It did not have enforcement mechanism; and it also did not have dispute settlement mechanism between the members. So, but what the patent PARIS convention did was it brought together the need for having a harmonized pattern regime.

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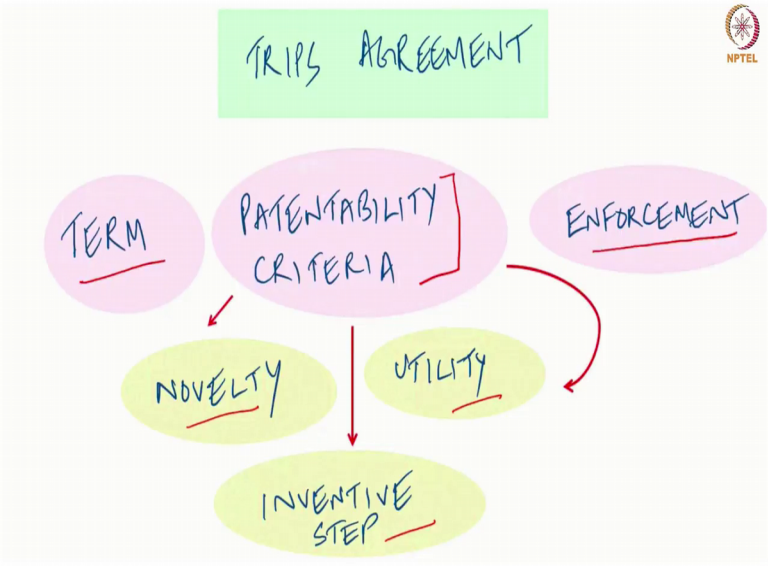

So, when the TRIPS agreement which is a much evolved agreement came after the PARIS convention, we had provisions on the term of the patent the 20 year term for all patterns across technology was agreed upon. We had for the first time, the patentability

criteria that was laid forth that the patent should be granted if it involves novelty, inventive step and utility the three criteria was evolved in the TRIPS agreement. And you also have an enforcement mechanism, what happens if the patent is infringed, how can patent applicants who have a grievance at the patent office agitated in appeal.

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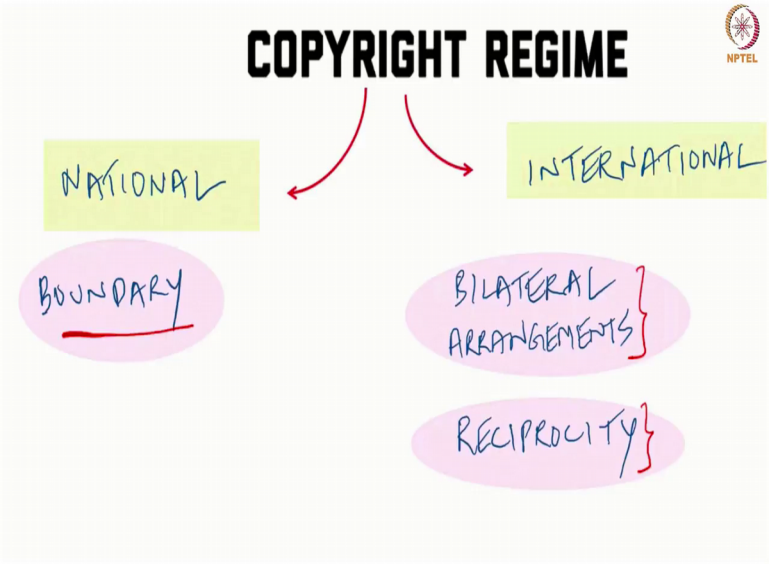

Now, the copyright regime similarly had two parts; there was a national evolution of the copyright regime and also the international evolution. The national evolution largely pertained to the limits of copyright; copyright like patent was enforced only within the boundaries of a particular country. Whereas, the international part was with regard to arrangements with countries act like a bilateral arrangement; and the bilateral arrangement normally came with the, with a provision for reciprocity. Reciprocity is if one country would respect the copyrighted works of another country, the country which is the beneficiary will also extend the same protection to the other country. So, it worked on the principle of reciprocity.

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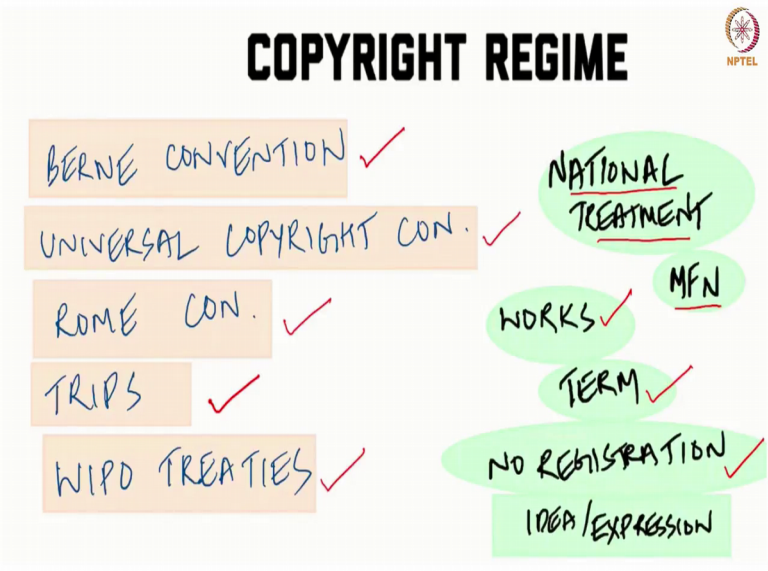

Now, copyright regime in itself comprises of various conventions. First you have the BERNE convention. The BERNE convention made it easy for copyrighted works to be enforced across the globe. It did not make, it did not make registration a mandatory condition for enforcement, so that ensured that copyrights you could get a copy you could have a copyrighted work created in one country, and it could be enforced in another country even without registration. Then we had the universal copyright convention we also have the ROME convention, we had the TRIPS agreement, and a host of WIPO treaties. Now, what did all these arrangements or conventions do.

One they brought in a principle of national treatment; they also brought in the principle of most favored nation treatment. Now, these are two principles in international law, which says that the protection that you offer to your nationals, your citizens should be offered to foreigners as well. So, you treat foreigners as equals when they are within your territory. The most favored nation treatment is another equality principle, wherein if you offer a particular concession or a treatment to one country, you treat that as a most favored country, you should offer similar treatment to all other countries as well. So, this is equality at the global level, whereas national treatment is equality within your country.

Now, the copyright regime described the kind of works that can be subject matter of copyright, the treaties also covered the term of copyright. The term has been an increasing term and it is been constantly evolving and increasing in different

jurisdictions. It also said that there is no need for registration to enforce a copyright. More importantly the TRIPS regime brought the idea expression dichotomy in copyright law which means copyright will not protect ideas; it will only offer protection on expression of ideas.

So, you could if copyright regime were to grant protection on ideas, then all crime thrillers where say a detective solves a crime would technically fall within the category of covered by the same idea. Whereas, expression of an idea, if the expression alone is protected, it gives different authors to come up with using the same thing theme, it allows different authors to come up with different works, oh so that is why you find that the regime protects only the expression of the idea and not the idea itself.

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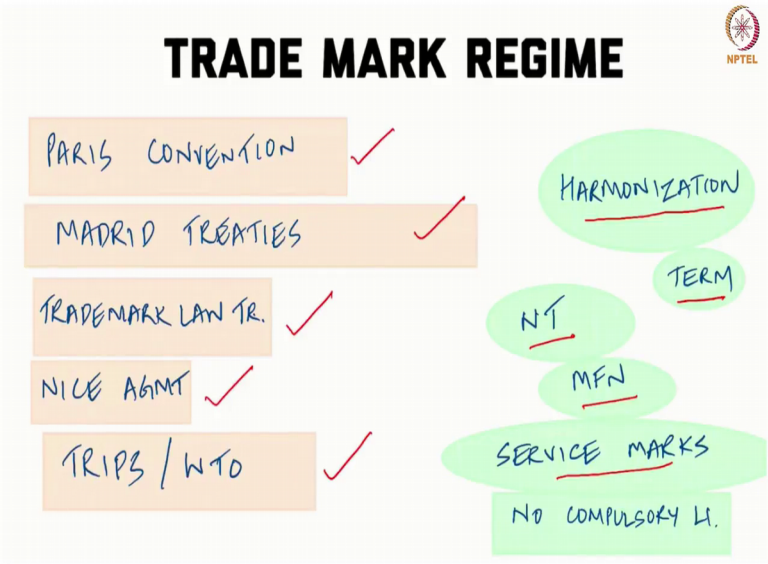

Now, trademark again has different international conventions. We have the PARIS convention which is common for patterns as well. And you have the MADRID treaties; you have the trademark law treaty; you have the NICE agreement on classification and again you have the TRIPS and the WTO. Now, what the trademark regime did at the international event it brought in harmonization, because more than anything else brands are constantly traveling from one country to another, even before we had say the company the Mercedes Benz as a company or an enterprise set its foot in India, they already had their products being sold and serviced here.

So, harmonization was the pre requirement for brands especially brands which had international reputation. These treaties also decided on the term what the term should be trademark unlike copyright and patents which have a limited term, trademarks have an renewable term. So, at every end of every term, you can renew their trademark and keep it alive. For instance coca cola is a trademark which has been kept alive for close to 100 years.

Again you have the national treatment and the MFN treatment, so that foreign nationals are not discriminated within the country; and also foreign countries are not discriminated between each other. And the TRIPS also saw the introduction of service marks. And more importantly when you compare copyright regime and the patent regime, those two regimes allow for the issuance of a compulsory license.

If the right holder refuses to license his work or his invention to another person, both the copyright regime and the pattern regime allow you to seek a compulsory license, which is a license granted by the government. The trademark regime does not have a compulsory licensing mechanism meaning which if somebody else has a mark it is his absolute private property, you get no right to use the mark.