

Intellectual Property
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Lecture – 68
IP and Competition

(Refer Slide Time: 00:15)


IP and Competition



Intellectual Property rights and Competition have a very strange relationship. Intellectual Property rights are protected by what we broadly called the IP laws and competition is protected by the Competition Laws. Intellectual Property laws grant exclusivity for products protected or created by; Intellectual Property laws grant exclusivity for products that come out of creative labour, where as Competition law is interested in promoting competition and increasing customer welfare.

(Refer Slide Time: 00:55)

IP Laws	Competition Laws — IP
<ul style="list-style-type: none">• Grants a monopoly (<u>exclusivity</u>)• Different IP Acts: <u>Patents, Designs etc.</u>• Origin: <u>Statute of Monopolies (Patents)</u>• Why: <u>incentivize innovation</u>• <u>Existence of IP</u>• <u>Normal use of IP</u>	<ul style="list-style-type: none">• <u>Abhors monopolies</u>• <u>Competition Act, 2002</u>• Origin: <u>Statute of Monopolies (Patents)</u>• Why: <u>competition & consumer interest</u>• <u>Exercise of IP</u>• <u>Abuse of IP</u>



So, if we compare IP Laws and Competition Laws, you can see that the IP laws grant an exclusivity whereas, or a monopoly if you can use that phrase, whereas Competition laws abhors monopolies they are against monopolies.

The legislations that protect IP laws are as we have seen Patents Act, Designs Act, Trademarks Act, Copyright Act and so, on whereas, Competition laws come largely under the Competition Act of 2002. The origin of IP protection incidentally was through the statute of monopolies. In the United Kingdom there was an exception to a monopoly that the crown granted and patents were seen as an exception to a monopoly. A monopoly is where you allow just one player in the market, the market is dominated by one person there is no competition, the products and services offered by the person has to be purchased at whatever price the person decides.

So, in UK around 1623, the Statute of Monopolies came in to curb the practice of monopolies, which was generally there in all the trade, but the statute made an exception for patterns. So, we can say that the origin of IP came as an exception to Competition law. And it continues even now Intellectual Property right the exclusivity granted by the Intellectual Property right regime is seen as an exception that one way to look at it, is seen as an exception to Competition laws and the origin we can say in India we have legislations, but in the United Kingdom from where we derive our laws it was through

the Statute of Monopolies. Now why do IP laws exist? IP laws the objective of IP laws is to incentivize innovation and creativity.

Whereas, the objective of Competition laws is to promote competition and consumer interest or welfare; so, we understand that now there is an overlap, both the laws are in operation in parallel they protect products and services in the market, they are used in the business. One promotes innovation and creativity the other ensures that there is competition and there is benefit for the end user or the customer. So, we can say that the IP laws concentrate on the existence of IP and Competition laws come into picture at some points in the exercise of IP. So, existence of IP would mean creation, registration, protection, enforcement whereas exercise of IP would mean in the enforcement or in the use of IP certain acts could be attracted by the Competition law.

So, the Competition law has a restrictive operation when it comes to IP its operation is restricted. So, IP laws when they cover the normal use of IP an abuse of IP is covered by Competition laws. So, if you are asked what is the domain of Competition law when it comes to Intellectual Property? One you can say IP laws can be seen or Intellectual Property can be seen as an exception to the competition regime, which does not normally give monopolies it can be seen as an exception, two the Competition laws will kick in, when there is an abuse of Intellectual Property rights.

(Refer Slide Time: 05:13)

Competition Law

Domain:

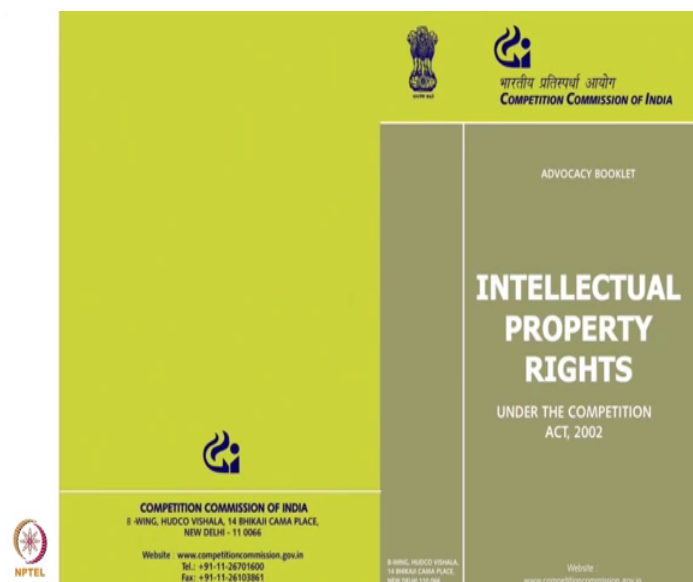
1. Anti-competitive Agreements
2. Abuse of Dominant Position



So, if you look at Competition law the domain of Competition law especially when it applies to Intellectual Property, comes under two broad classes. If there is an anti competitive agreement with regard to Intellectual Property rights, then the Competition law would step in to see what is the anti competitive agreement, what are the classes in it and to read it down or to remedy if there is any loss caused by it.

And the competition commission which is created by the competition act can look into issues pertaining to abuse of dominant position. Dominant position is a position by a player in the market who has a position of dominance. The position of dominance in itself is not bad, but when that leads to abuse and if the abuse is caused by something related to Intellectual Property rights then the competition commission can look into it.

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So, the Competition Commission of India has a booklet on Intellectual Property rights.

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<p>INTELLECTUAL PROPERTY RIGHTS AND MARKET POWER/DOMINANT POSITION</p> <p>Intellectual Property Rights (IPRs) provide exclusive rights to the holders to perform a productive or commercial activity. But this does not automatically include the right to exert restrictive or monopoly power in a market. An Intellectual Property Right generates market power. The potential pejorative character of the power may be unjustifiably great because of public policies like the encouragement of inventions. On the other hand, if investment of resources to produce ideas or to convey information is left unprotected, the competitors may take advantage and benefit by not being obliged to pay anything for what they utilize. This may result in lack of incentives to invest in ideas or information and the consumer may be correspondingly poorer. What is called for is a balance between abuse of market power and protection of the property holders' rights.</p> <p>Intellectual Property Right lessens competition while competition law engenders competition. A workable solution can be predicated on the distinction between the existence of a right and its exercise. In other words, during the exercise of a right, if a prohibited trade practice is visible to the detriment of competition in the market or consumer interest, it ought to be assailed under the competition law.</p>	<p>INTELLECTUAL PROPERTY RIGHTS IN COMPETITION ACT</p> <p>The Indian competition law, namely, the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, (the Act) deals with the applicability of section 3 prohibition relating to anti-competitive agreements to IPRs. An express provision [section 3 sub section(5)] is incorporated in the Act that reasonable conditions as may be necessary for protecting IPRs during their exercise would not constitute anti-competitive agreements. In other words, by implication, unreasonable conditions in an IPR agreement that will not fall within the bundle of rights that normally form a part of IPRs would be covered under section 3 of the Act. The Box below reproduces the operative portion of the relevant provision in the Act.</p> <div style="border: 1px solid black; padding: 5px;"> <p>APPLICABILITY OF COMPETITION LAW ON INTELLECTUAL PROPERTY RIGHTS STATUTES</p> <p>In the Competition Act, 2002, as amended by the Competition Amendment Act, 2007, section 3, sub section 5, clause (i) in chapter II relating to Prohibition of certain agreements, states that:-</p> <p>"Nothing contained in this section shall restrict -</p> <p>(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:-</p> </div>

And it lists all the Intellectual Property rights that we have covered so far.

(Refer Slide Time: 06:23)




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<div style="border: 1px solid black; padding: 5px;"> <p>(a) the Copyright Act, 1957 (14 of 1957);</p> <p>(b) the Patents Act, 1970 (39 of 1970);</p> <p>(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);</p> <p>(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);</p> <p>(e) the Designs Act, 2000 (16 of 2000);</p> <p>(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000).¹</p> </div> <p>An enterprise, which enjoys dominant position by virtue of the IPR, if it engages in conduct considered abuse in terms of section 4, shall not enjoy any immunity. These abuses are in terms of section 4:</p> <ol style="list-style-type: none"> (i) directly or indirectly, imposes unfair or discriminatory condition or price; (ii) limiting or restricting production of goods or provision of services or market; (iii) limiting or restricting technical or scientific development to the prejudice of consumers; (iv) denies market access in any manner; (v) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; (vi) uses its dominant position in one relevant market to enter into, or protect, other relevant market. 	<p>REASONABLE CONDITIONS</p> <p>Section 3 sub section (5) of the Act declares that "reasonable conditions as may be necessary for protecting" any IPR will not attract section 3. The expression "reasonable conditions" has not been defined or explained in the Act. However, by implication, unreasonable conditions that attach to an IPR will attract section 3. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not reasonable with reference to the bundle of rights that go with IPRs.</p> <p>For example, a licensing arrangement may include restraints that adversely affect competition in markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the Research and Development activities of two or only a few entities that could plausibly engage in R&D in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to competition concerns include cross licensing by parties collectively possessing market power and grant backs. A few such practices are described below.</p> <ol style="list-style-type: none"> 1) Patent pooling is a restrictive practice. This happens when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. They may earn supra-normal profits and keep new entrants out of the market. In particular, if all the technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete.

And you can see there Copyright Act, Patents Act, Trademarks Act, GI Act, Designs Act and the Semiconductor layout Act. Now with regard to abuse of dominant position the competition commission says that, the abuses are in terms of section 4 which deals with abuse of dominant position that, they should be directly or indirectly impose unfair or discriminatory condition or price. Or it should limit or restrict the production of goods or it should limit or restrict technical and scientific development to prejudice of consumers

or a denies market access in any manner or makes conclusion of contract subject to acceptance by other party of supplementary obligations which by their nature or according to commercial usage have no connection with the subject matter of the contracts, or reduces its dominant position in one relevant market to enter into or protect another relevant market. Now, if IPR is used in any of these circumstances, then that could be a potential abuse of dominant position. Now, the other thing is that in an agreement regarding or covering Intellectual Property rights, they cannot be any condition that is unreasonable or restrictive.

So, restrictive conditions are not allowed, reasonable conditions are allowed. For instance in an agreement that you have licensing your patent you can tell the licensee to ensure that the patent is not entering by others or to take adequate protection to ensure that infringement does not happen. These are reasonable conditions whereas, a condition saying that one product which is protected by a patent will be tied to another product in such a way that you have to buy them both will become an unreasonable or restrictive condition for which the commission, the competition commission can enquire and take action if a complaint is filed before it. Now let us look at some of the restrictive practices. Patent pooling is a restrictive practice

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<p>2) Tie-in arrangement is yet another such restrictive practice. A licensee may be required to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers. There could be an arrangement forbidding a licensee to compete, or to handle goods which compete with those of the patentee.</p> <p>3) An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.</p> <p>4) There could be a clause, which restricts competition in R & D or prohibits a licensee to use rival technology.</p> <p>5) A licensee may be subjected to a condition not to challenge the validity of IPR in question.</p> <p>6) A licensee may require to grant back to the licensor any know-how or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.</p> <p>7) A licensor may fix the prices at which the licensee should sell.</p> <p>8) The licensee may be restricted territorially or according to categories of customers.</p> <p>9) A licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them. This is known as package licensing which may be regarded as anti-competitive.</p> <p></p>	<p>10) A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent may be an anti-competitive practice.</p> <p>11) Restricting the right of the licensee to sell the product of the licensed know-how to persons other than those designated by the licensor may be violative of competition.</p> <p>12) Imposing a trade mark use requirement on the licensee may be prejudicial to competition, as it could restrict a licensee's freedom to select a trade mark.</p> <p>13) Indemnification of the licensor to meet expenses and action in infringement proceedings is likely to be regarded as anti-competitive.</p> <p>14) Undue restriction on licensee's business could be anti-competitive. For instance, the field of use of a drug could be a restriction on the licensee, if it is stipulated that it should be used as medicine only for humans and not animals, even though it could be used for both.</p> <p>15) Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.</p> <p>16) A condition imposed on the licensee to employ or use staff designated by the licensor is likely to be regarded as anti-competitive.</p> <p>The above list is not exhaustive but illustrative.</p>

Tie in where one patented product or a product that is prescribed by Intellectual Property is tied with a non-protected or a non IP product, and both are sell sold and both are sold




together. An agreement may provide that royalty should continue to be paid even after the IP has expired. So, royalty beyond the IP is again a restrictive condition. If there is a clause, that restricts competition in R and D again that is a restrictive condition that or that prohibits a licensee to use rival technology, there can be an action under the Competition Act. A licence may be subjected to a condition not to challenge the validity of an IPR in question.

For instance in 140 of the Patents Act, we had seen that restrictive condition questioning the challenge to the validity of a patent can also come under the purview of the Patents Act. So, you can see there are some anti competitive provisions, which are in the Patents Act and some of them are in the Competition Act. A licensee may require to grant back to the licensor any know how or IP are required. Grant back is again covered under the Patents Act as well. So, that is a restrictive condition; a licensee may fix the prices at which the licensee should sell again a restrictive condition; if it is the, if the licensee is territorially restricted or in accordance with categories of customers it could be a restrictive condition, but that needs a further enquiry.

Package licensing is again prohibited where in the licensee may be coerced by the licensor to take several licences in intellectual property. A condition imposing quality control on licensed patent products could be a restrictive condition. Restricting the right of the licensee to sell a product of the licence know how to persons other than those designated by the licensor, it is a condition that restricts the sale that could be anti-competitive. Imposing a trademark use requirement on the licensee maybe prejudicial to competition as it could restrict the licensees freedom to select a trademark.

Asking for the licensor to meet the expenses and action in an infringement proceeding can be anti-competitive; normally we call it an indemnity clause in a licensing agreement. Undue restriction of the licence is business could be anti competitive for instance, the field of use of a drug could be restriction on the licensee if it is stated that it can only be used for humans are not for animals, where animals could also be benefited by such use. Limiting the maximum amount of use the licensee may make of the patented invention may affect competition and a condition imposed on the licensee to employ or use staff designated by the licensor, will be regarded as a restrictive condition which is anti-competitive. This is not in exhaustive list as the booklet says they could be more instances.

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<p>PENALTY PROVISIONS</p> <p>The Commission is empowered to inquire into any unreasonable conditions attached to the IPR agreements and can impose penalty upon each of such right holder or enterprises which are parties to such agreements or abuse, which shall be not more than ten percent of the average turnover for the last three preceding financial years. In case an enterprise is a 'company' its directors/officials who are guilty are liable to be proceeded against and punished.</p> <p>In addition, the Commission has the power to pass inter alia any or all of the following orders (Section 27):</p> <ul style="list-style-type: none">(i) direct the parties to discontinue and not to re-enter such agreement;(ii) direct the enterprise concerned to modify the agreements;(iii) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and(iv) pass such other order or issue such directions as it may deem fit. <p>In case of abuse of dominant position under section 4 by virtue of an IPR by an enterprise, in addition to the above penalties, the Commission has the power to order division of enterprise under section 25.</p> 	<p>Member and Acting Chairman</p> <p>Vinod Dhall E-mail: vinodhall@cci.gov.in, dhall.vinod@gmail.com Tel. No. 91-11-26171775, 26761601(1), 23461818(1) Fax No. 91-11-26182278 Mobile: 91-9811222224</p> <p>Officers</p> <p>S. L. Bhatnagar, IAS Secretary E-mail: slbhatnagar@cci.gov.in Tel. No. 91-11-26761601(1), 26123292(1) Fax: 91-11-26123859</p> <p>Aniruddh Kumar, IAS Director General E-mail: aniruddh@cci.gov.in Tel. No. 91-11-26761601(1), 26682813(1) Fax No. 91-11-26123853</p> <p>Aquiline Pinto, IAS Economic Advisor E-mail: pinto@cci.gov.in Tel. No. 91-11-26761601(1), 26682813(1) Fax No. 91-11-26123853</p> <p>K. K. Sharma, IAS Addl. Director General E-mail: kksharma@cci.gov.in Tel. No. 91-11-26761601(1), 26682813(1)</p> <p>Sudh Baruah, IAS Director E-mail: sudhbaruah@cci.gov.in Tel. No. 91-11-26761601(1), 26682813(1)</p> <p>Condi M. H. Sharma, Addl. Registrar E-mail: condi@cci.gov.in Tel. No. 91-11-26761601(1), 26682813(1)</p> <p>Sudh Kumar Director (PR) E-mail: sudhkumar@cci.gov.in Tel. No. 91-11-26761601(1), 22896813(1)</p> <p>R.K. Verma, Director (Admin.) E-mail: rkverma@cci.gov.in Tel. No. 91-11-26761601(1), 22896813(1)</p>

Now what can the competition commission do? It is empowered to enquire into any unreasonable condition, and it is also empowered to look into abuse of dominant position and it can also impose penalty and ask the wrong to be corrected. Now the penalty could be 10 percent of the average turnover of the entity over the last 3 years and it could also make the people who are liable if it is an enterprise, if it is a company.

Now, in addition the commission has the power to pass orders directing the parties to discontinue and not to re enter such agreements, direct the enterprise concerned to modify the agreements, direct the enterprises concerned to abide by such other orders, which it may pass to remedy the situation.