Intellectual Property
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Lecture – 68
IP and Competition

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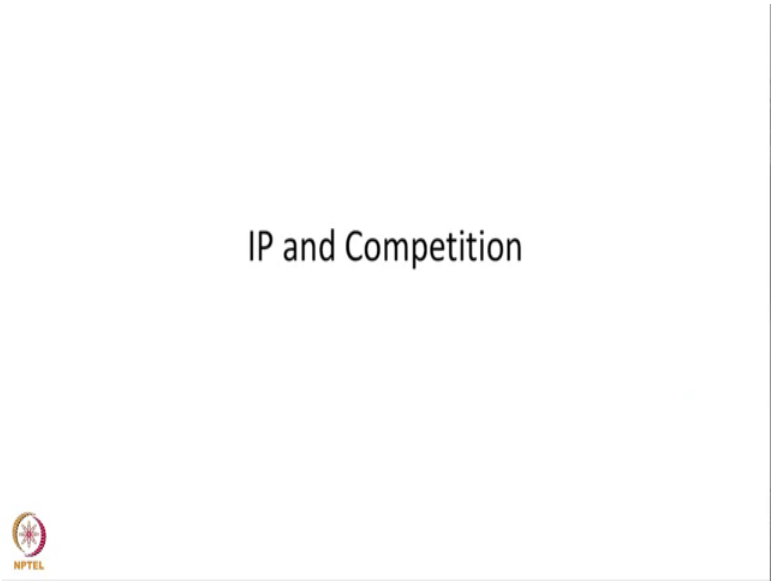

Intellectual Property rights and Competition have a very strange relationship. Intellectual Property rights are protected by what we broadly called the IP laws and competition is protected by the Competition Laws. Intellectual Property laws grant exclusivity for products protected or created by; Intellectual 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.

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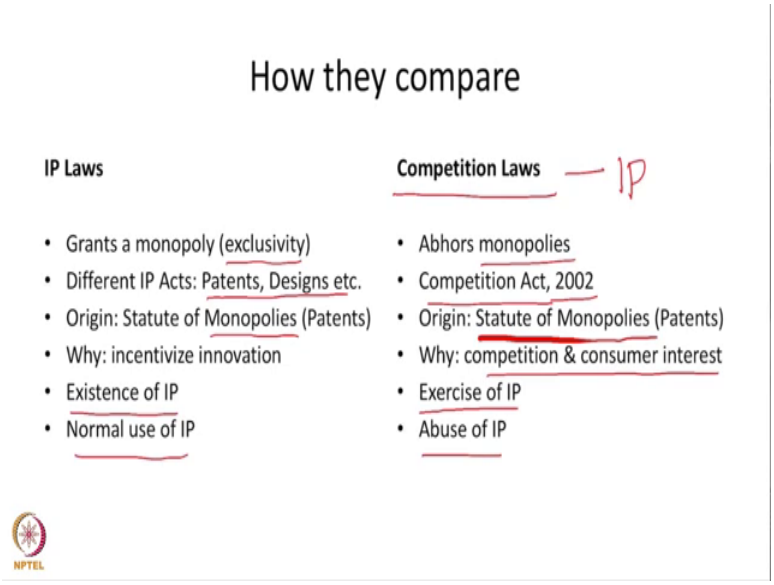

So, if we compare IP Laws and Competition Laws, you can see that the IP laws grant an exclusivity whereas, or a monopoly if you can use that phrase, where as Competition laws abhors monopolies they are against monopolies.

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 thats 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.

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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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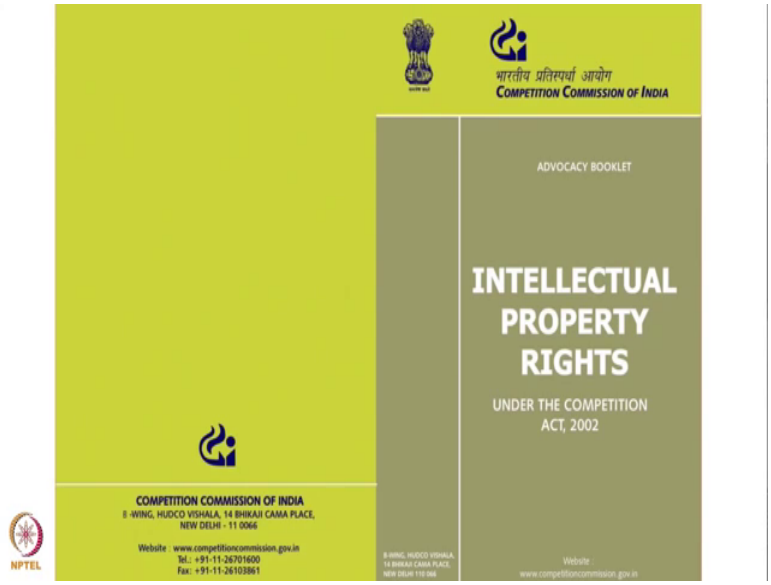

So, the Competition Commission of India has a booklet on Intellectual Property rights.

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

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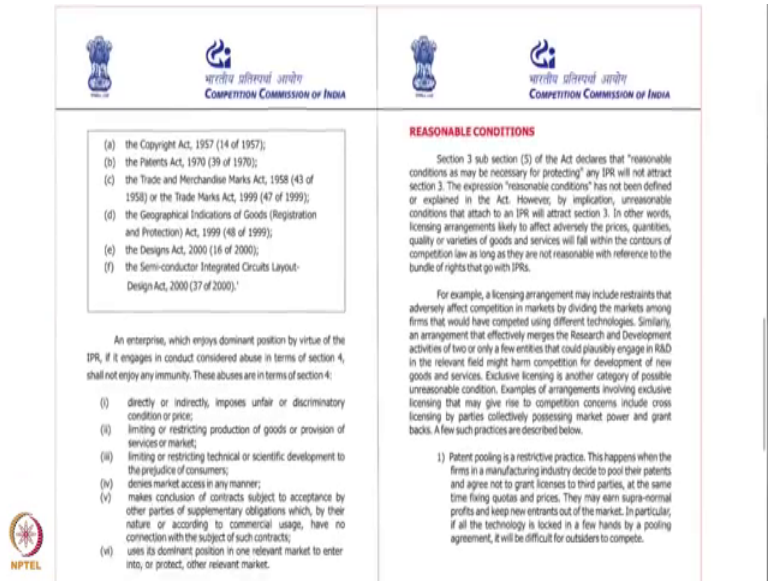

And you can see there Copyright Act, Patents Act, Trademarks Act, GI Act, Designs Act and the Semiconductor layout Act. Now with regard to abuse of dominant position the competition commission says that, the abuses are in terms of section 4 which deals with abuse of dominant position that, they should 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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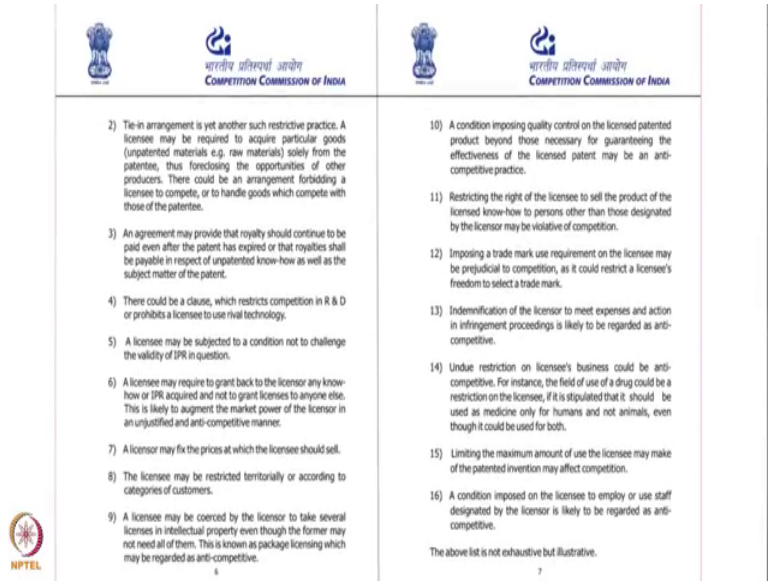

Tie in where one patented product or a product that is prescribed by Intellectual Property is tied with a non-protected or a non IP product, and both are sell sold and both are sold

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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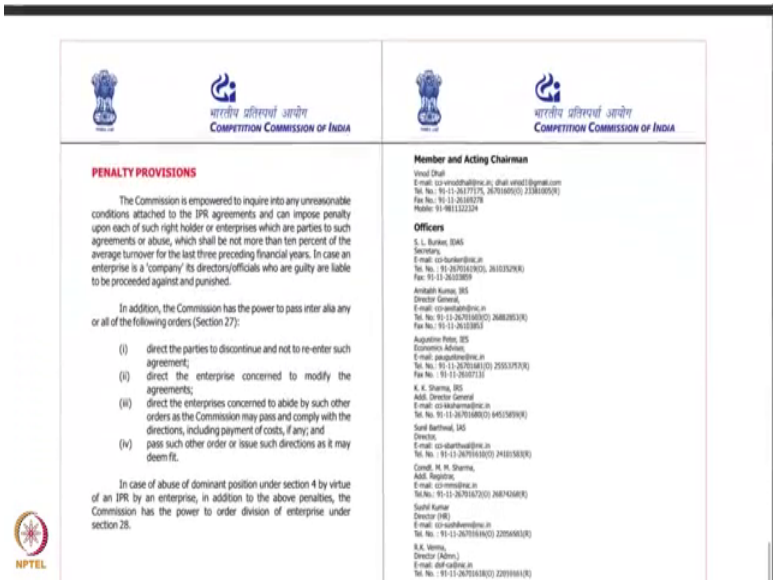

Now what can the competition commission do? It is empowered to enquire into any unreasonable condition, and it is also empowered to look into abuse of dominant position and it can also impose penalty and ask the wrong to be corrected. Now the penalty could be 10 percent of the average turnover of the 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.