Intellectual Property Rights, And Competition Law
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Lecture - 16
Intellectual Property v. Competition Law (Contd.)

Dear students, in this class we are going to look into the interface between intellectual property law as well as the competition law and what is this interface and whether there is really a conflict or whether it is supplementary or whether it is complementary and what is the relations between these two branches of law i.e. the intellectual property and competition law.

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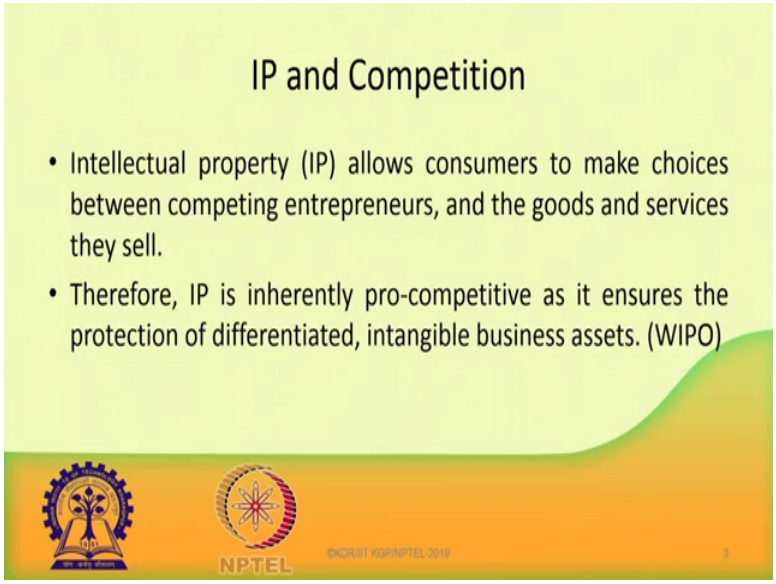

WIPO says that, intellectual property allows consumers to make choices between competing entrepreneurs and goods and services they sell. Does intellectual property really allow or whether the innovative products gives a choice between the products in the market or services between the market? Whether there is an inherent pro-competitive effect of intellectual property in the market on intellectual property or intangible business assets or whether intangible business assets have a direct correlation or connectivity with pro-competitive effects in the market?

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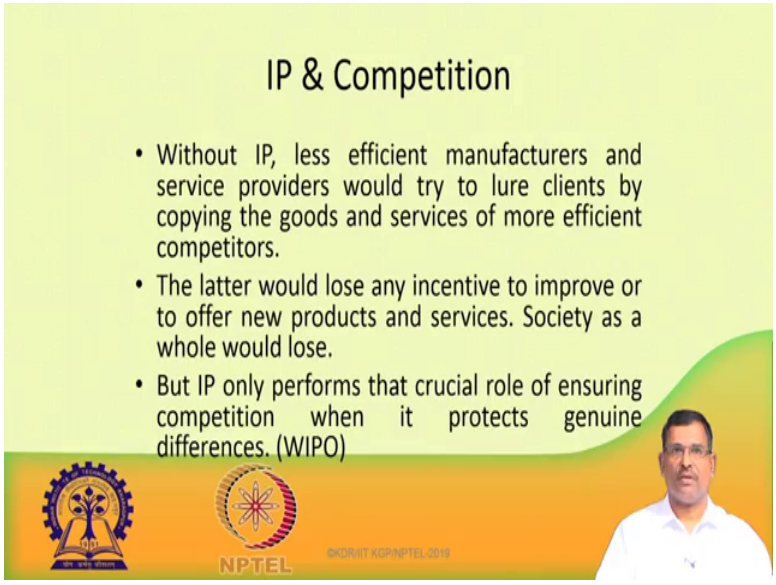

It is said that, without IP the market is going to be highly non-efficient. The efficient manufacturers and service providers are not going to innovate, they are not going to give very good services, they are not going to be very good competitors unless intellectual property is provided. To what extent this argument is correct?

So, if there is an incentive to improve, there will be more number of products and more number of services available. So, if nobody is going to innovate in the market, the society is going to lose. But whether IP has a role of ensuring competition in the market. Whether the intellectual property protection really differentiates between products or whether the intellectual property protection really stops duplication or a free rider in the market?

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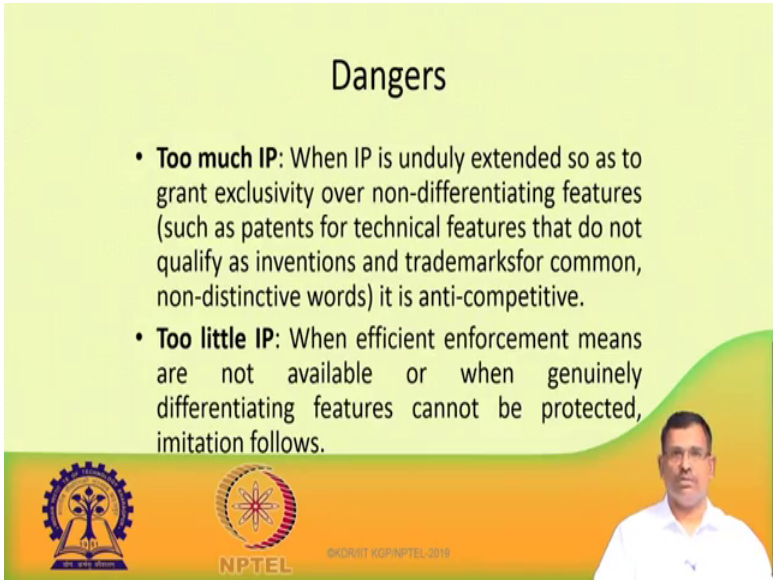

WIPO says that, IP is unduly extended when it is granted exclusivity over non-differentiating features and beyond certain limits, it become anti-competitive. And when efficient enforcement means are not available, when genuinely differentiating features cannot be protected then imitation or duplication follows. There is too little IP. So, too much IP is also harmful to the market, too little IP is also harmful to the market. So, the WIPO studies say that, there must be a balance between these two.

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So, there must be a balance between the intellectual property protection and the competition law restrictions put on intellectual property protection. So, the objective of intellectual property protection is to induce the innovators so that they provide better products for a better price, better quality and diversity of product and availability to the consumers.

What the competition law actually does? The competition law actually looks into the market and promotes competition not the competitors. So, the competition law basically promotes the process of competition, and ultimately promotes the welfare.

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And competition policy sets out tools used by the state for increasing or achieving allocative efficiency. The efficiency of the market decides the choice of products and also the availability of products and prices. When competition is absent there is no equilibrium in the market. If there is no equilibrium in the market for prices there is no equilibrium of the marginal cost as well. It ultimately leads to allocative inefficiency in the market which is not good for the market, which is ultimately not good for the welfare of consumers.

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So, competition is always considered as an important source of productive efficiency. When the firms produce the maximum output for a minimum input, that shows the productive efficiency. At the same time the dynamic efficiency occurs when the society takes full benefit out of the innovations that are economically viable.

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So, there is a connectivity between productive efficiency and dynamic efficiency. Are these two concepts: intellectual property and competition contradictory or whether these

are complementary goals? Whether these have supplementary goals? Whether these have one and the same goal? We are going to look into this.

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Some argue that there is an inherent conflict between intellectual property protection and competition law. There must exist a tradeoff between competition for a short run allocative efficiency and innovation; considered to be long run dynamic efficiency. And the IP, intellectual property always induces innovation by granting market power to the innovator for a limited period of time. At the same time the competition policies aim to restrict the use of the market power, it restricts it. In the earlier classes I said that dominance of a firm is not per se anti-competitive, dominance is allowed.

But when they start abusing the market power or abuse the dominant market power, then it is anti-competitive in nature and the competition law has to step in. So, in some cases when the intellectual property is started using its monopoly power to an oligopoly power, transition from monopoly to oligopoly is definitely going to be per se anti-competitive in nature. And is going to be contradictory in nature. So, in some places we can find a conflicting interest between these two concepts.

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But these two concepts always supplants or are supplementary to each other or complementary to each other. So, if the firms or enterprises are under stronger competitive pressure they innovate rapidly and come out with a product to the market first because they have the pressure from their competitors to innovate.

So, if there is a competitive pressure in the market it is definitely going to be beneficial; the market is going to benefit from the competitive pressure and come out with new innovations. So, the existence of more competitive rivals leads to more benefits, to more intellectual property protection and ultimately benefits the market at large.

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Scherer and Ross in the 1990 study say that "Schumpeter was right in asserting that perfect competition has no title to being established as a model of dynamic efficiency". The economists have different definitions of economic efficiency, but they said "less cautious followers were wrong when they implied that powerful monopolies and tightly knit cartels had any stronger claim to the title".

"What is needed for technical progress is a subtle blend of competition and monopoly with more emphasis in general on the former than the later". They want to establish that when there is more technical progress the monopoly is curtailed with competition or the monopoly is regulated by competition, thus there will be more innovation in the market at the same time there is more competition in the market that is the ideal solution which leads to the dynamic efficiency.

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So, we can see that the interface sometimes leads to two distinct results. The competition authorities should always look into these two branches and the intellectual property. Every country under the WTO agreement (164 countries) has to protect intellectual property under the *TRIPS* agreement.

So, there is an obligation on each and every member to protect intellectual property. Remember the importance of intellectual property, the WTO agreement, the *TRIPS* agreement is that, these 164 countries controls around 99 percent of the world trade which includes all these so-called innovative countries as well those who export the products.

So, everybody should get intellectual property protection under every jurisdiction. So, if there is a tradeoff between intellectual property protection, if the standard of intellectual property protection is lower in some countries, it is directly going to affect the *TRIPS* agreement. Violation of the *TRIPS* agreement under the WTO agreements is a problem and the other countries will take those countries providing less standard of intellectual property protection to the WTO dispute settlement system. And they have to pay for their violation of their commitments in WTO.

So, we can say that in most of the countries the standard of protection of intellectual property is according to the *TRIPS* agreement which provides only minimum standards not the maximum standards. It provides minimum standards. So, these minimum standards have to be provided by each and every country at the domestic level. At the same time if you look into the competition law, there is no common standard other than the popular OACD standards or OACD guidelines which are made by group of some of the countries. So, there must be a balance of outcome between the intellectual property protection and the competition law.

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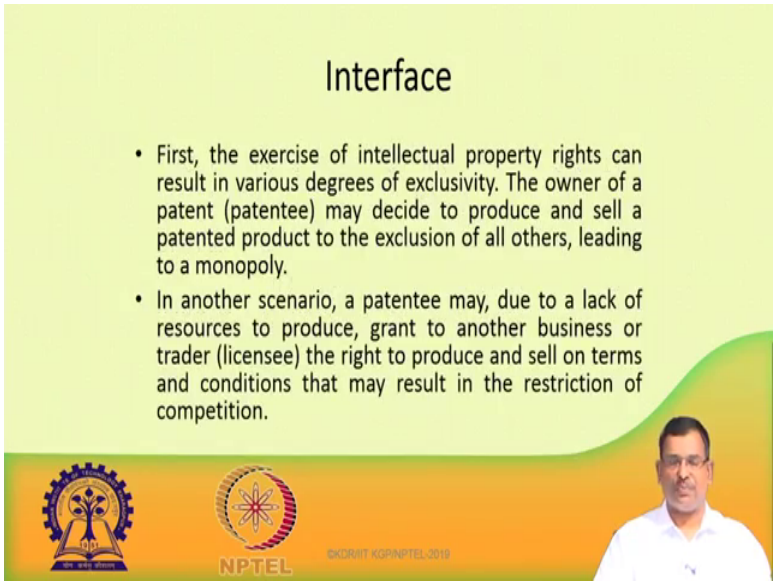

Immense jurisprudence has come out from the United States and from the European Union rather than from the developing countries. So, developing countries are very new to the interface between the intellectual property and the competition law.

They are very new in the sense that it is mandatory to implement the minimum standard of protection of intellectual property from 1995 onwards and the developing countries got a 10 years of transition period to implement the WTO obligations. So, by 2005 that particular period was over. Only the exemption is given to the least developed countries. Now all developing countries like India or Brazil have to fully comply with the *TRIPS* agreement which they say they have complied with.

So, there is a standard of intellectual property protection and we have to look into to what extent the multinational companies or the patent holders or the holders of technology exploiting the market especially in developing countries. So, these conflict not only comes in developing countries, but also in developed countries. Because in a perfect competitive market for example, like United States most of the intellectual property cases and competition law cases are between technology giants. The technology giants are fighting each other to put their claim or one company claims that the other company is exceeding the limits of the Sharman Act, exceeding the limits of competition provisions.

And the authorities have to decide. There must be certain standard of deciding these particular cases. Here we can see that the interface of intellectual property gives certain kind of exclusivity to the owner of the intellectual property. At the same time the owner can decide to produce them himself or he can license that particular right to somebody for excluding all others leading to a monopoly even for a limited period of time.

And on the same scenario we can see that due to the lack of resources to produce these may be granted to another business or to another trader, he may license his technology to somebody else to produce in terms and conditions fixed by the patent owner that may be restrictive in nature. If these are restrictive in nature the authorities have to look into to what extent these are restrictive in nature? Whether it is violating any competition law provisions?

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So, there is definitely a link between the intellectual property protection and the competition regulations in the market. So, this close link is characterised by two factors. On the one hand the patent aims to prevent. The intellectual property does prevent copying or limits the patented goods to complement their competition policies or contribute to the fair market behaviour. So, the objective is very clear that the intellectual property protection is supposed to contribute to the fair market. At the same time if the monopolist is going to exploit the market then the scenario is absolutely different. Then the competition law steps in and tries to limit the patent rights or the patent holder and bars him from abusing his rights, abusing or exceeding his rights.

So, in short we can see that too much protection, too high protection or too low protection leads to trade distortions in the market. So, this is to be avoided. There cannot be trade distortions in a perfect market. The market works when there is a harmonious relationship between intellectual property protection and competition law.

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So, this interface in the sense that the protection of intellectual property or the monopoly granted by the intellectual property is harming consumer welfare. Whether there is any kind of *chilling effect* on the innovation, which discourages further competition in the market or which is harmful to the consumer policies, then there is a role of the competition regulations.

These concerns practices anti-competitive in nature or blocking patents or patent ambush cases, standardisation process, violation of standard essential patents. New concepts are coming up. What are the rules and regulations for the standard essential patents. We have enough jurisprudence from different jurisdictions which we'll see later. There are anti-competitive practices or restrictive practices in licensing agreements, which we have to very closely look into.

And we can always see that the effective competition leads to an effective market performance and to a welfare market or a welfare society. We can say there is a harmonious coexistence between the two branches of law i.e. the intellectual property protection and competition law.

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So, if you look into the objectives of these two laws it is the societal welfare and the interest of the society prevails. To maintain that particular interest there must be competition and competition must prevail or the competitive process must prevail in the market. So, it is said that competition puts a lot of pressure on the innovators, on the product manufactures. And the consumers also respond to these innovations.

These innovations may reduce prices which will be ultimately benefitting for the consumers. And most importantly the efficient allocation of resources is an important economic factor for economic welfare in any perfect market. So, in that case it is possible to be better off than anyone being worse off; that is what the economists say. So, if the society is better off then the market is going to be perfectly alright.

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So, the competition policy and competition laws have primary aim to bring a perfect competition in the market and efficient functioning of the market and the market mechanism working perfectly. And the market mechanism includes the price mechanism, the price systems, the pricing systems distribution systems. The competition is always going to be a driving force of efficiency, the efficiency in the market and the market structure. So IPR is supposed to control or regulate free riding in the market.

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And the right balance between these two is needed. So, the protection as well as regulation leads to greater innovative products in the market and consumer welfare. So, there is more relevance of the theory of complementarity. The theory of complementarity has more relevance when it comes to the interface between intellectual property rights protection and competition law.

So, In the last class we talked about private property owner. The private property owner has every right to sell or license or whatever he wants to do. When it comes to intangible property, he has similar rights, but the similar rights are always restricted or regulated by the competition law. So, certain regulations are put on his rights mainly for the consumer welfare.

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The famous *Adam Smith's Wealth of Nations*. His argument is very pertinent every time we discuss this particular topic of intellectual property and competition. He talked about the perfect market, he talked about the economics of competition law, Adam Smith very clearly says "the people of the same trade can meet each other, seldom meet even for merriment or diversion. But the conversation ends in a conspiracy against the public or in some contrivance to raise prices".

So you have to control such conspiracies against the regulations, you must have provisions against any kind of activities against public welfare, you must have provisions to control the enormous price rising. There the question of competition law comes. The idea was very clear. The output of the firm should be able to take advantage, to add productivity from specialised labor in the form of innovation.

The sweat of the brow-labor theory is also very much prevalent for the justification of intellectual property along with the famous incentive theory. This is a specialised labor. Presently the firms allocate the market and some firms go for monopolization. Monopolization is not against any law, but it is necessary to put control or regulate the misuse of such monopolization for the welfare of the society and welfare of the consumers. So, you require the tools of competition law in order to control the intellectual property protection.

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If you look into the whole history of competition law, we can see some of the countries have competition law from the very beginning. So, the United States came out with the antitrust law in 1890. Canada came out with similar provisions in 1889 itself and some of the countries even before. But the present evidences show that more than 120 countries have competition law presently in the world. It shows that the countries require the help of competition law in order to curb over-exploitation of intellectual property rights.

As I earlier mentioned that more than 164 member countries have intellectual property rights but at least 120 countries have come out with competition provisions in order to curb these monopoly rights.

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We already saw the objectives of intellectual property law. The objective is very clear: to protect the competitive process in the market not the competitors and the second objective is the economic efficiency and thirdly it is the objective of the competition law to prevent harmful effects of monopoly in the market and to ultimately secure consumer benefits.

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The competition law wants to control the market power derived from the application of intellectual property rights and abuse of intellectual property rights and also tries to put curb on unreasonable conditions in licensing of intellectual property agreements. These are also the application of competition law to intellectual property rights.

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So, I can always say that there is no clash between competition law and intellectual property rights rather both are converging to the same objective. So, these are the two

law tools to promote competition in the market and competition law always fight against the monopolies or exploitative practices of monopolies.

And also you can see that these are two separate systems of rules applied to market. For example, the competition and Intellectual law are two branches with specific objectives and work hand in hand to discipline the market and the objective is primarily consumer welfare. There is no question of clash between the two branches of law in the case of consumer welfare.

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The ultimate objective is the convergence between these two branches of law.

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IP licensing is always considered as one of the way of producing new products. The owner has every right to license, but the question is whether he have the right to put unreasonable conditions.The answer is no. These conditions are subject to the market regulations. Market regulations are nothing but the competition law regulations. So, these conditions should not be unreasonable and these conditions should not be unfair, these conditions cannot be against the consumer welfare, these conditions should not be against the market conditions, the market welfare.

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So, the competition law has an upper role to play in regulating intellectual property rights. The technology holders can put lot of restrictions on technology, which may have ultimate effect of distorting the market. There is a requirement of long term contract with the technology licenses or the rival technology licenses is market feasibility.

So; that means, you cannot put conditions in a licensing agreement, which are financially unfeasible. Then non-compete clauses for an unreasonable period of time is also against the existing laws. Then geographical or territorial restrictions, then banning and preventing licensees from selling their products into certain geographical markets which we discussed in the classes the preliminary introductory classes on competition law. Confining to specific geographical areas are against the competition provisions; then unreasonable royalties are also considered to be anti-competitive in nature or against the market.

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The royalty payments are also under the purview of competition law and other limitation is the use clauses. Limiting the use of patents or limiting the use of the technology to specific scientific field, license allowed only in certain areas for example, in the case of pharmaceutical medicinal or confined to specific industrial areas or industrial products are unreasonable in nature.

Then imposition of minimum retail price, minimum resale prices, retail prices, wholesale prices and veto powers in case of future licenses; these also have to be regulated with competition law. Then imposition of penalty clauses where the patentee or patent has to pay cost if it does business with the another firm. All these provisions, which we will deal with examples in the US jurisdiction in the coming classes, are considered to be restrictive provisions for which the competition law has to find solutions.

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Then grant back clauses; grant any kind of developments to the existing technology. The grant back clauses are sometimes anti-competitive in nature. Then exclusive grant back clauses. So, exclusive grant back clauses, non-exclusive grant back clauses and the right to use the patented improvements and exclusive time and buying clauses, tying arrangements and arrangements or mandatory package licensing are considered to be anti-competitive in nature.

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We can see that the compulsory IP licensing provisions are antidote; antidote to the excessive use of monopoly rights. For oligopoly rights the governments can always invoke the compulsory licensing provision which are an antidote for the exploitative use or the abuse of the dominant positions.

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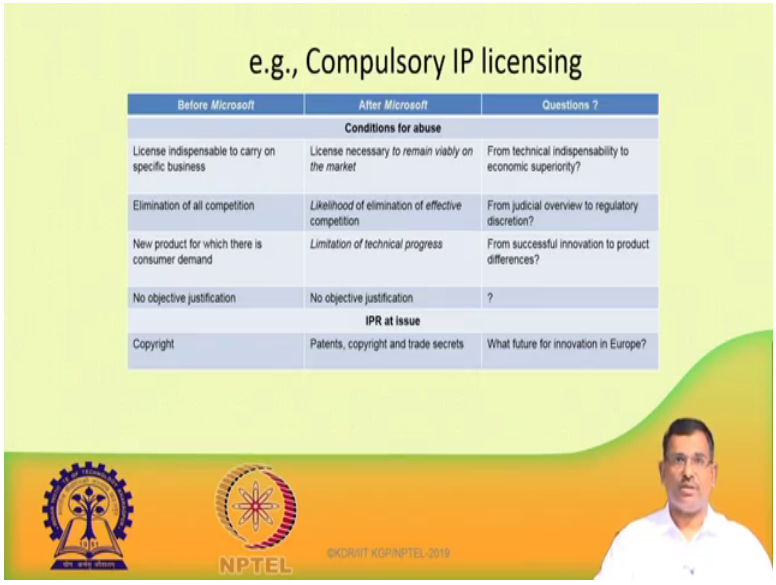

So, here we can see some of the examples where compulsory licensing happened. So, the compulsory licensing is, as I already told, an antidote to the intellectual property

protection. Once the compulsory licensing is issued by the government against any one of the technologies then the market is going to respond to that. The prices are going to be down because the monopoly right is no more a monopoly right, the monopoly right has gone.

The compulsory licensing to any other people is possible. The perfect competition in the market is going to be balanced by the government through the compulsory IP licensing provisions. So, the government can always play a very crucial role in controlling or regulating the intellectual property rights.

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We you look into some of the cases like the Microsoft case and discuss in detail in the coming classes. These are very famous cases. We can see that when some of these technology giants try to exploit the market, the competition authorities step in. So, the federal authorities step in. The response of these authorities in markets is absolutely different. So, if you look into the Microsoft case in the US or in EU, in both the jurisdictions the authorities imposed heavy fines on this technology giant.

But when it comes to India the situation is different. So, one of the example is the recent case of Micromax, Ericsson versus Micromax. The courts are very slow in India and the authorities in India are very slow to respond to these kind of cases. Even though similar

situations in US and India took place, but the Indian courts are very reluctant to grant injunctions or very fast in granting injunctions and very slow in taking remedies. So, the remedies are not correlated with the developed countries.

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So, that is why I said in accordance to the jurisdictional circumstances, the responses may be different. So, we already said that there is a common objective of these two branches of law, but there are different perspectives. So, these perspectives are to enhance the welfare, the societal welfare. And IP may be used as a weapon to restrict competition between licensees which it should not. The competition law should play a very crucial role in anti-competitive behaviour or the appropriation of intellectual property.

So, the IP law and competition law share the same economic objectives i.e. the welfare of society, welfare of the market. I would say that these are complementary, both are aiming at encouraging innovation, industry and competition and innovation in the sense that the intellectual property protection complements the research and development of every company, which ultimately leads to innovation and product verification, product specification and product choice.

Antitrust or the competition law always recognises the critical role of IPR. It tries to regulate anti-competitive practices of innovators or the monopolist. So, in both these areas there are common objectives, but they act differently.

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So, there is a freedom of every country to plan their competition acts based on their economic policies, but it should be in accordance with the modern practices. So, it must be for increasing the process of competition in the market. It must be for the efficient market performance and it must be for the interest of consumers and economy in general.

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So, incentive theory of intellectual property works very well for diversity of products and which ultimately helps the market to find out more and more innovative products.

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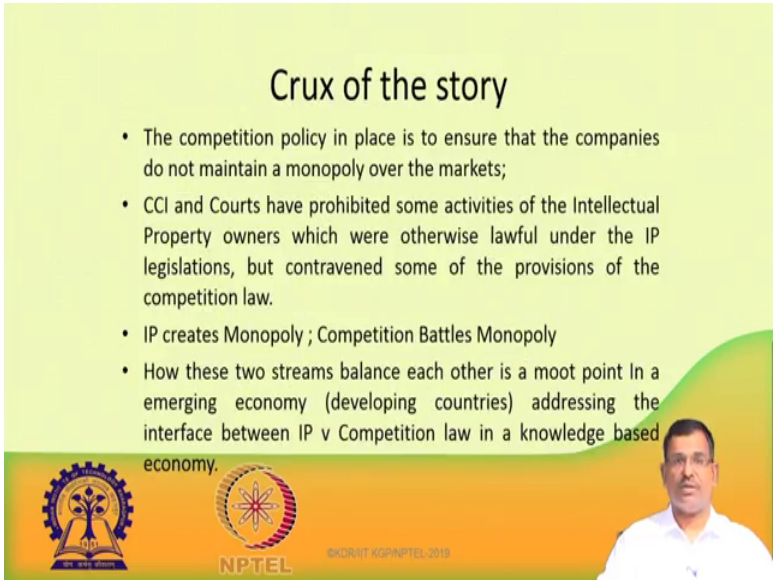

So, we require intellectual property protection, at the same time we require the competition law in order to curb the activities of the monopolist. And the competition commissions all over the world usually always have a watch upon these oligopolistic activities or the monopolistic activities of the technology giants.

So, usually everybody knows that IP creates monopoly even for a small period of time and the competition battles monopolies to the extent of a framework. That framework every country can make for the enhancement of the economy or for the welfare of the consumers.

So, I would say that there is no conflict of intellectual property protection and competition law rather they are very complementary in nature, they are supplementary in nature, they serve the same purpose of the society, enhancing innovation, enhancing the welfare of the market, enhancing competition process in the market so, there is no conflict rather they are supplementary and complementary in nature.

In the next classes we are specifically going to look into the US jurisdiction, the US antitrust law and the practices especially the immense jurisprudence which has emerged for a more than century in the US jurisdiction.

Thank you.