Intellectual Property Rights, And Competition Law
Prof. K D Raju
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology, Kharagpur

Lecture - 20
Price Fixing and Antitrust Law

Dear students, yesterday we were discussing about tying arrangements and intellectual property. Today we are going to discuss about the Price Fixing and Antitrust Law. How prices are fixed of say intellectual property on products and how it is interacting with the competition law and the Sherman Act, what the Sherman Act provides for and what are the restrictions under the Sherman Act on price fixing. Today we have enough jurisprudence available under the Sherman Act.

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And we will discuss, especially the price fixing by cartels and also about the effects of patent pools and price fixing then how it is interacting with the Sherman Act.

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Price fixing is basically in different modes. In the beginning classes we were discussing about what is a cartel. Cartel is nothing, but combination of two or more enterprises or two or more persons, they come together to the same table and fix the agreements, fix the terms and conditions, fix prices either to limit the production or supply or to allocate a geographical market, sales quotas and engage in collusive bidding, bid rigging of one or more markets or even international markets.

It need not be within the premises of one country, it can cross over to other country's borders as well. Cartels are always considered to be pernicious and considered to be not good for the market so the competition law will always act upon cartels and even the Sherman Act, Antitrust Act itself was formed to curtail or to limit or to control the trust which was formed by those who were controlling the entire business in the United States.

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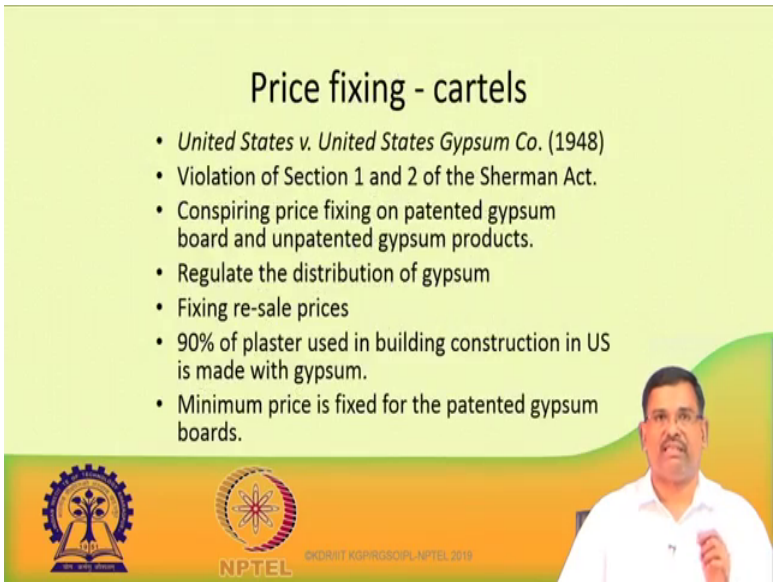

So, cartel is absolutely against the competition law. We can see how the price fixing is done in one of the famous cases the *United States versus United States Gypsum company, 1948*. Unlike India, in United States Gypsum is one of the building construction product, one of the most important building construction product in the US which constitutes almost 90 percent of the building materials.

So, this particular material is very important for the construction of each and every building in the United States and this Gypsum extracted and used for these buildings were controlled by this particular company United States Gypsum company from day 1.

From time to time they developed different technologies. The main allegation was that the United State Gypsum company was controlling the market as well as violating the Sherman Act's Section 1 and 2 and conspiring with its dealers and other licensees and then price fixing. They had a patent and they were tying up the patented product with the non-patented product, Gypsum products.

Thus they controlled entire production, distribution, resale prices and everything was fixed in the market. This was the allegation in the case of United States Gypsum company. They even decided the minimum prices for the patented Gypsum boards to be sold by the distributors.

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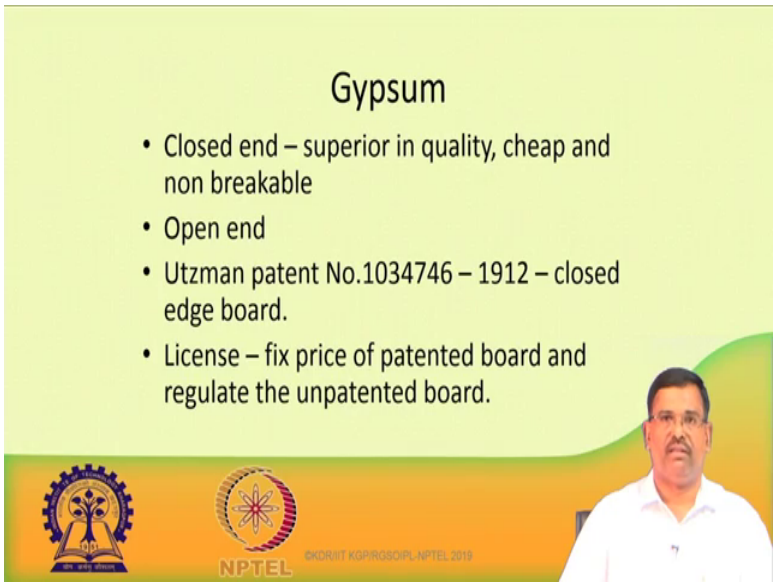

Here you can see that, there are two types of Gypsum boards mainly produced by this particular company, i.e., the closed-end and the open-end; two boards. So, the closed end is very superior in quality, cheap and non-breakable and the other one is the open-end. So, in 1912 this particular company, very old company, got a patent which is known as the Utzman patent. Utzman patent is for the closed-end board which is very cheap and also superior in quality. So, it has a larger market in the United States. This company was licensing to two different people and they fixed the prices for the patented board.

But the allegation was that through this particular Utzman patent which is owned by this particular company, they tried to control, regulate the prices of non-patented boards as well. This was the allegation.

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So, here mainly the price fixing is by the licensor, the Gypsum Company through the license agreements. So, the main allegation was that the licensor and the licensees conspired together to eliminate the production of open-end board and fix the prices of the patented board. We know that through the patent protection, you can protect the technology for a limited period of time, but at the same time for the non-patented products you do not have any control.

If you tie up the patented product with a non-patented product, in the last class we saw that tying is against the Sherman Act. So, through this price fixing, you, the company is going to monopolize the market of two different boards; patented as well as non-patented board. So, it will have a pernicious effect on the market and consumers are going to be affected and the prices are going to be fixed by these particular companies.

And so, the price fixing is always considered to have evil consequences on the consumers, on the public and specifically the cartel's main objective itself is to not only control the market, but to increase the prices or fix the prices. And cartels are considered to be always less productive and that they fix very high prices, which are always considered to be against the Sherman Act.

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So that means, Gypsum company produces boards with a patent and through this particular intellectual property protection, through this particular patent, the company tries to control the entire market of Gypsum board which is a very important material in the American market.

The court found evidence against this particular company, that they are trying to control the particular market through this particular intellectual property protection. Here the again, the distribution, the plan, the complete conspiracy to protect the market is not within the purview of patent protection at all.

The monopoly power through the intellectual property protection is only given for a limited period of time, which we have seen in the incentive theory. So, this is only for a short period of time. So, the court very clearly said that the conspiracy to control the prices are against the Sherman Act while referring to an earlier case *United States versus general electric company*. It is absolutely against the Sherman Act. So, the licensing agreements and the terms always cause or play a very crucial role in controlling the market.

Because the licensees can never violate these license provisions so that the company takes action against them. So, through these licensing agreements, the conspiracy of

controlling the prices and the methods of distribution prescribed by this particular company, it was established that there is a prima facie case of conspiracy to control this particular market. We know that the intellectual property protection is given only for a limited period as it is only an incentive, it is not to exploit the entire market. Whenever the exploitation of this intellectual property crosses the limits, then the competition law will come into play. Here the motives are absolutely different.

So, there are two theories, which we will see later on, i.e., the prima facie evidences as well as the per se rule. And here it is for the company to take the defence or to justify their action, then the per se rule as well as the other rule will be applicable but no intellectual property owner can exploit the market beyond the limits of intellectual property protection. So, the Gypsum company cannot control the non-patented Gypsum boards market through the patent which they owned. So, the court very clearly held that the company violated the provisions of the Sherman Act.

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If you look into this particular case, many principles emerged, i.e., a group of competitors enter into a series of separate but similar agreements with the competitors. So, definitely there is some smell of competitors coming to the same table, there is a smell of cartel. Cartels are against the competition provisions. So, there is an inference of cartelization or concerted action to control the market or fix the prices.

Then again, the provision in the patent licensing agreement on payment of royalties for the patented board as well as the non-patented board is again an indication of agreement not to manufacture that particular board, not to manufacture the non-patented board as well. So; that means, a company who owns the intellectual property tries to extend the protection of their intellectual property to a non-patented product as well through a licensing agreement which is absolutely against the competition provisions, against the Sherman Act.

To increase the competition in the market is the purpose of competition law, but these kind of activities are absolutely preventing it. Then the rule of reason. The rule of reason principle is applicable to efforts to monopolize through patents. So, the rule of reason is one principle where you can analyse whether the action of this particular company is violating the competition law or not. So, if the company is found to be violating, abusing the market power, then definitely it will come within the purview of the provisions under the Sherman Act.

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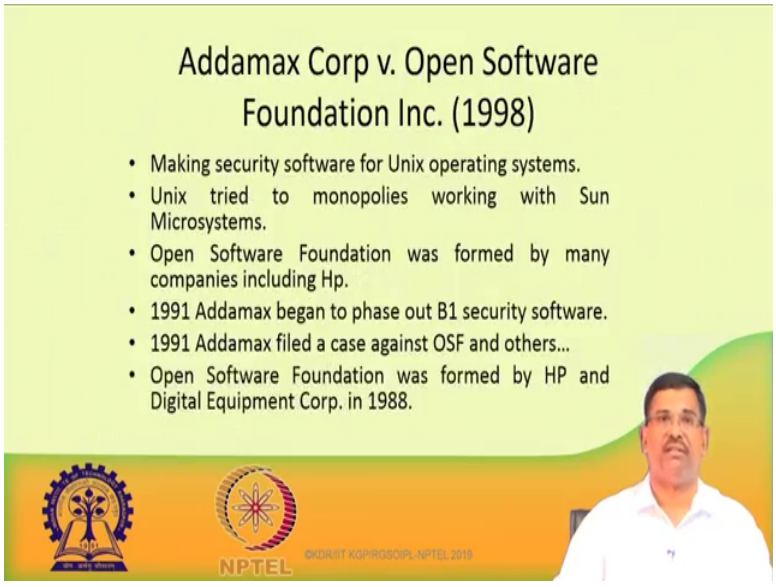

This is the first case and we come to another famous case of 1998. I have selected some old cases, some new cases so, that we can understand the attitude of the courts, how they have taken different stands. *Addamax corporation versus open software foundation,* a

1998 case. Here also, this one company used to make security software for Unix operating systems.

Unix, at that particular point of time, monopolised with sun-microsystem, another company. Other 2-3 companies came together and formed open software foundation. The main sponsors of this open software foundation was HP, Picard.

Addamax which was making B1 security software were phasing out this particular software from 1991 and they were developing a higher version of the security software in 1991. In the same year they filed a case against this open source foundation because they found that this open source foundation was in parallel making these software, the security software which is going to be a threat in the future.

As I told you this open source foundation was founded by Hobart Picard and digital equipment corporation in 1988 to make these security softwares.

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And they claimed that there is a price fixing, there is a horizontal price fixing boycott. So, the allegation was that there is horizontal price fixing boycott, unlawful joint venture. Whether the joint venture itself has the behaviour of cartelization, this is one question.

So, is forming a joint venture company per se illegal? Absolutely not. Any company, companies or any person can come together and form joint venture which is absolutely within the purview of the law to form new products, new processes and new innovations. So, but it is alleged that this particular open source foundation and these companies came together and formed this particular company as a cartel to fix the prices. We know that in the market boycotting a company, boycotts and concerted refusal to deal is also a violation of the Sherman Act. But terms like cartel, boycott do not convert a rule of reason claim into a per se one, this is the court's finding.

That means, boycott itself or converting the rule of reason claim to per se, per se forming a foundation or a joint venture per se is not violation of competition law. The joint venture per se is not illegal, it is legal. The cloud of doubts will come only after activities are analysed. So, we can condemn such foundations only when foundation is going ahead with any anti-competitive effects. We will see this particular case for other activities.

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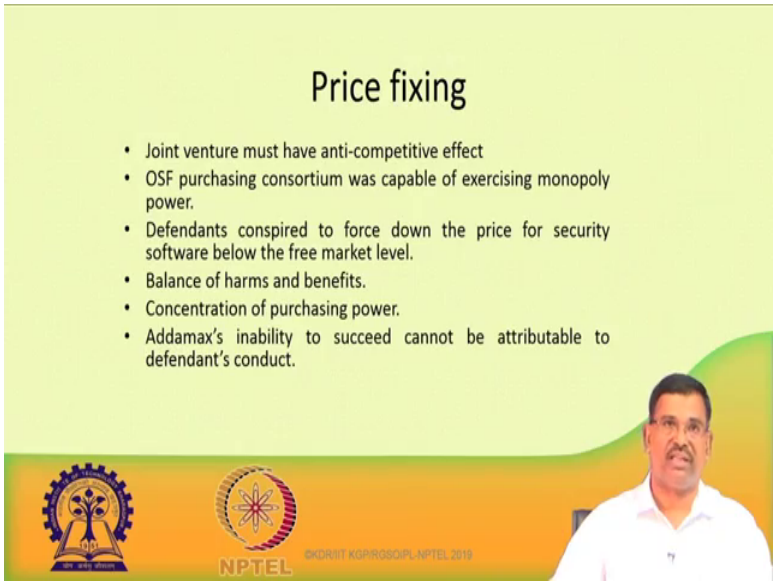

So, the main allegation by this company is that this new open source software foundation is a joint venture and their activities are anti-competitive in effect. Every time we were talking about companies who are selling and their anti-competitive practices and here for

the first time the question arises about purchasing. The purchasee comes together and form a cartel in order to fix the prices or in order to bargain the prices.

So, here the consortium has a monopoly purchase power. This was another deviation in this particular case. And they said that the defendants conspired to force down the price for security software below the free market level because of their purchasing power. Then the question is you have to analyse the balance of harms and benefit; what is the harm and what is the purchasing power. So, if it is beneficial to the society as we saw in the earlier cases that the main objective of the competition law is the welfare of the market, welfare of the consumers.

So, you have to analyse when the defendants, purchasers came together whether it was good for the consumers, good for the society, good for the market or whether it had an effect on the particular market. Concentration of purchasing power is also one of the important factor which was raised in this particular case. But unfortunately in this particular case the plaintiffs Addamax did not succeeded because the conduct of the defendants was only to come together for some kind of research. The court found that you cannot allege forming a joint venture itself is per se illegal. You have to prove the illegality or anti-competitive practices.

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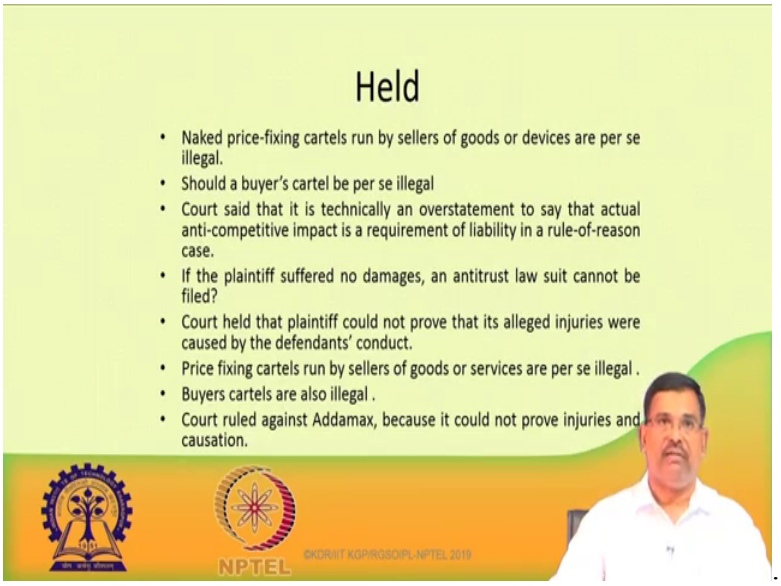

And here the court found that the naked price fixing cartels run by sellers of goods or devices are per se illegal. So, if anybody has formed cartels for price fixing and selling goods that is per se illegal. Then buyers cartel not only sellers cartel is, the court held that, per se illegal. If you look into this particular case, to find the anti-competitive impact rule of reason analysis or application of rule of reason is done to find whether it is good for the analysis of the beneficial effects on the society.

So, the court found that here because of the activities of the defendant i.e., open source software foundation, the plaintiff have suffered no damage. The antitrust law suit cannot be filed because there is no damage to the plaintiff at all. The plaintiff failed to prove the alleged injuries to their particular company.

If your company is not doing very well you cannot allege that the other company is abusing the market power or that your failure cannot be attributable to conduct of the defendant and you absolutely fail in that particular term. Price fixing cartels are always held to be illegal and buyers cartels are also held to be illegal. Unfortunately in this particular case it is the Addamax who wanted to prevent the open source foundation from their research activities which have a future impact on Addamax but failed because of all the court findings and the court ruled against Addamax.

The rule is very clear that if somebody is your competitor, is doing your business, you cannot stop them by filing antitrust cases, you have to prove the antitrust violations of Section 1 and 2 of the Sherman Act. There must be restraint of trade and abuse of the market power, fixing of prices or tying arrangement. So, there are no circumstances under which this was proved by Addamax and the case was rejected by the court.

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Next we will see another concept which is known as patent pooling i.e., many patent owners coming together with their own patents and pooling their patents in order to maybe capture the market, the smooth functioning of the product.

So, the question is whether the patent pooling itself is for price fixing or patent pooling itself is per se illegal or patent pooling is good for the society or patent pooling is good for making innovations. So, we will discuss licensing, cross licensing, whether they have anti-competitive effects or competitive effects on the market and integrating complementary technologies.

So, many people come together in the complementary technologies, they come with their complementary technologies and their product, their innovation and pool it together and form a particular product and they divide the royalties, is that good for the consumers or not? These are integrating complementary and supplementary technologies.

The economists say that this reduces the transaction cost. This clears blocking positions or blocking patents and avoids costly infringement litigation between companies and is pro-competitive in nature.

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We will see some of them. So, collective price; collective price whether this is a restraint of trade, whether it is anti-competitive in nature? Then output restraints, joint marketing of pooled IP with price setting. I would say that pooling is none of these, but if it has any conduct of cartelization then the scenario will be different because many people come together and pool their technologies, supplementary technologies or complementary technologies, and they come out with the product and fix prices. Whether this is per se anti-competitive? The answer is no.

So, here again we have to look into the transactions whether there is a collective pricing, whether there is any output restraints, whether there is a joint marketing of pooled IPs by setting the prices. In *singer manufacturing company versus United States* it was very clearly said that cross licensing agreement was part of broader combination to exclude competitors.

Cross licensing may not be always anti-competitive in nature. Cross licensing may be good for both the companies in order to avoid litigation in the modern times. Again the question is if five people come together and they exclude two other collectively, exclusion from pooling, exclusion from cross licensing. Then we have to look into the market power; market power of the people those who came together, whether they can harm competition.

If these people, those who came together, can harm competition in the market then this pooling can violate or attract the provisions of competition law. So, the pooling should non-discriminatory and whoever would like to join, anybody who wants to join should be allowed to join the pool. It should be non-discriminatory.

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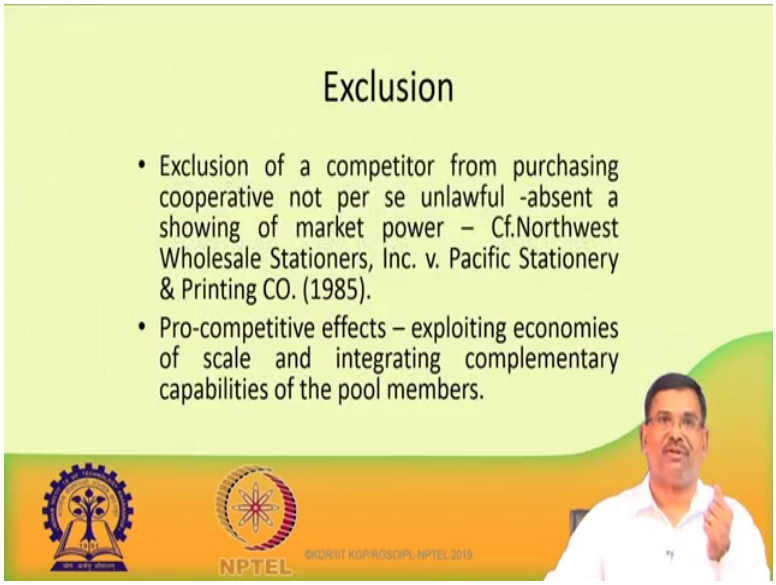

It is not going to violate any of the competition provisions. Exclusion clause is when exclusion of competitor from being in the cooperative. In cooperation of competitors they come together and they become the market power. So, if you can show that the market power is absolutely controlled by this pooling of these particular innovators, the pooling of intellectual property and you have to prove it is unlawful and violating the competition law provisions or the antitrust provisions.

If you can prove that there are pro-competitive effects, it is helping the economies and integrating supplementary and complementary technologies and the pool members are benefited as well as the society is benefited out of the patent pooling, then there is no violation of the competition provisions i.e. the Sherman Act.

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But if the excluded firms cannot effectively compete in the relevant market of good for incorporating the licensed technologies and when the participants collectively possess the market power in the relevant market then the case will be different. Then efficient development and exploitation of pool technologies is one of the justification. Then any kind of pooling retarding innovation; is going to affect the market and is going to be violative of the Sherman Act.

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So, then another is excess royalties. The patent owners, with their combination of patents in pooling, if they dominate the particular market, if the quantity is fixed, if the price is fixed, if the marketing terms are fixed, if the condition, terms are fixed, and if they divide the territory then all the conditions constitute the controlling of the particular market, then there is an inference or evidence of elimination of competition from the market to fix higher prices which will be considered as unlawful combination.

It will be violating the provisions of the Sherman Act and this was held in 1931 in the *standard oil company versus United States case*. So, if you look into all these parameters you have to prove that, the patent pooling is violative, it is pernicious or it is against the market. The symptoms are very clear for that.

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So, then you can prove the violation of Sherman Act, Section 1 and Section 2. I told you that the licenses, licensing agreement and contracts play a very crucial role in patent pooling. It may control the entire industry. The royalty rates control the prices, if the royalty rates are very high, then the prices are going to be very high.

Many writers like *Roger B Andewelt* and others argue that patent pool may have a positive effect on the consumers and a negative effect on consumers.

It will depend upon the objective. What is the objective for which people came together? What is the objective of this patent pool? Are they originally for reducing the competition in the market or are pro-competitive in effect. We have to analyse that.

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We can say that cross licensing are mostly pro-competitive in nature unless and until you have to prove certain conditions because those companies who are cross licensing can use IP effectively and avoid litigation because there is a huge cost involved in litigation. You can very well reduce the litigation cost through cross licensing.

There is a possibility of collusion in the collective pricing, the pricing may not be fair in the market, there may be higher prices. So, you have to very closely look into the collusion, what is the objective of the collusion and pooling is nothing, but collusion, but all collisions are not against competition, all collusions are not anti-competitive in nature.

If there are a larger number of market participants and there is a pro-competitive effect in the market then this pooling has a welfare effect on the market. And bundling; bundling of patents or pooling of patents reduces transaction cost. This was held in the *US Microsoft case*, but Microsoft lost this particular case. The court held that bundling must be for reducing the transaction cost, it should not increase the transaction cost. So, that is

why I said in the Microsoft case that tagging an unwanted product with another product is against the competition law.

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Pooling benefits: the consumers may benefit from combining different technologies which is the objective of pooling. The consumers must get the benefit out of the particular pooling. The joint sale of compliments will reduce the price than independent sale. So, if 10 people come together and sell, the prices are going to reduce compared to independent sale where there is a possibility of increase in the particular price. Blocking patents.

You have to always look into what exactly is happening on a case to case basis. If you can prove that there is a pro-competitive effect then it is not going to be against any competition law, no Sherman Act provisions will be attracted by it. If the patent pooling benefits are being passed on to the society then definitely it is pro-competitive in effect.

So, in this class we saw that the patent pooling may have a pro-competitive effect. If you can prove that there is a pro-competitive effect then it is not violative of any competition law provisions, it is not violative of any of the provisions of the Sherman Act. But if there are no pro-competitive effects, it is only for making cartelization and fixing prices then it will attract the provisions of the Sherman Act.

So, in the interaction between intellectual property and competition law, the border line is very thin. So, you have to prove the anti-competitive effects on the market in whatever you do; whether it is pooling or the cartels because cartelization per se is not illegal, you have to prove the ingredients of cartelization i.e. for increasing the prices or fixing the prices or limiting the market or limiting the sales. So, intellectual property is providing you a protection for a limited period of time.

Monopoly is given to you only for a limited period of time and if you exceed that particular limit, then the competition law is going to come into play, then competition law will visit you with the provisions of the Sherman Act Section 1 and 2. You can very well act within. You can pool your technologies together, if your objective is good, if it is good to the market, if it is good for the consumers and good to the society then the competition law is not going to visit you otherwise the anti-competitive effects will be proved and the Sherman Act is going to be in place and you are going to be fined accordingly.

Thank you.