Intellectual Property Rights, And Competition Law
Prof. Niharika Sahoo Bhattacharya
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology, Kharagpur

Lecture – 40
Trademark, Copyright and Competition Law

Hello all. Welcome to this module on Trademark, Copyright and Competition Law. So, in the earlier section, we dealt about patent and the competition law. So, the other forms of intellectual property right which are very important in a transaction of product are trademark and copyright. So, in this section, we will deal about the licensing negotiations regarding trademark and copyright and how the practices may lead to abusive behaviour on the part of IP right holder.

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So, we will deal with aspect of the trademark as well as the copyright in licensing in this module.

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So, a trademark is a kind of intellectual property right which helps the consumer to distinguish the product or service provided by one manufacturer from the other manufacturer. Also it gives certain brand value to the trademark owner and ascertains quality, reputation and a belief is associated with the trademark so that it helps in getting more market for the trademark owner.

So, the common practices by which anti-competitive behaviour may arise in a trademark transaction or trademark licensing negotiation are by anti-competitive restrictive agreement clauses. Clauses in the commercial contracts, for example the prohibition to sell on the online portals like Amazon or on auction-based profiles, auction-based portals such as eBay. There may be certain restrictive agreements in the qualitative selective distribution or there may be vertical restrictive agreements in the case of trademark.

And these kind of cases particularly happen in the luxury or the high technical product, the branded product; so-called branded product. In the trademark licensing negotiation when a trademark owner is giving its license or giving its product to some other company for the purpose of selling or promotion, then in the licensing agreement it places certain clauses by which the licensee is unable to sell the product at certain portals or sell the product to certain customers.

So, these are known as restrictive agreements. The restrictive agreements can restrict the licensee to sell the product in the online portal. Online portal does not mean that any online portal. It may be particularly those portals which are meant for selling everyone's products not only the trademark owner's product. So, for example, Amazon, where we can get all the related product. The company can sell there or allow to sell their product from their own online domain, but not through selling sites like Amazon or eBay.

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The contracts with the online sales restrictions may be claimed as anti-competitive due to their restrictive nature, for example if someone is saying that I am selling, I am giving you my branded product, but you are not supposed to sell it on an online portal. If this condition arises, then the trademark owner relies on his right to protect the reputation or the image of the brand to justify the restriction.

So, when certain clauses to not to sell on the online portals are given in the restriction agreements in those cases, the IP owner or the trademark owner say that my reputation and image of the product is in question or the quality may get damaged because of counterfeiting product or other things. So, I would not allow to sell on the online portals. So, he relies on trademark rights to not to allow to sell or give any other product.

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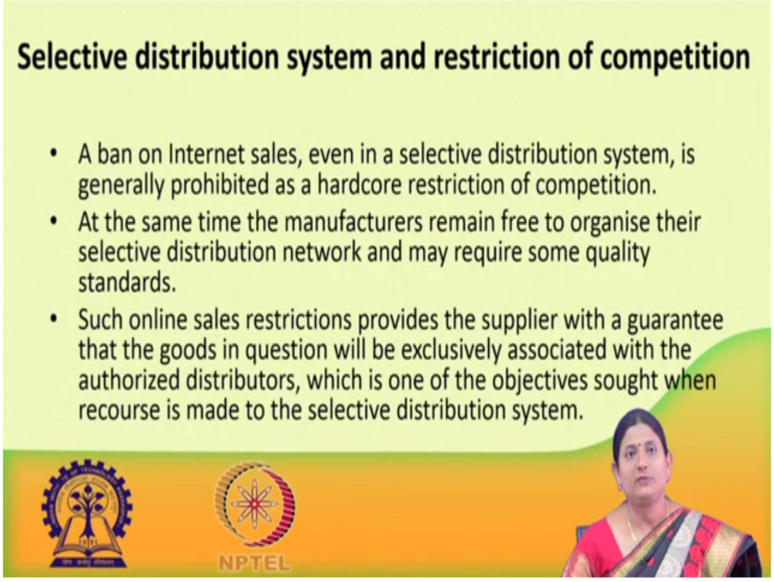

The selective distribution systems and the restriction in the competition arises when there is a ban on the internet sale. The selective distribution system is considered as a hardcore restriction on the competition. So, if you place a ban on online selling, then it is generally considered as a hardcore restriction in the competition act. Even though, this kind of restriction is present, the manufacturers remain free to organise their selective distribution network and may require certain quality standards.

And such online sales restriction provides the supplier with a guarantee that goods in questions will be exclusively associated with the authorised distributors. The conditions in the selective distribution system can be justified by associating the product with its quality or with its nature. So, the restrictive condition cannot be considered as anti-competitive in all the cases.

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When the trademark owner considers that his product's image will be damaged, he gives the luxury image or the aura of luxury as the justification while putting such restrictive clauses in the agreement.

This was first recognised in the Dior case when the CJEU, the court of justice in European Union recognised that the proprietor of a trademark can invoke the rights conferred by the trademark against a licensee who contravenes a provision in the licensing agreement prohibiting him on the grounds of the trademark's prestige, sales to discount stores provided it has been established that the contraventions damage the allure and the prestigious image which bestows on them an aura of luxury.

So, by the virtue of luxury image or aura of luxury a trademark owner can put restrictive conditions. This was first established in the Dior case.

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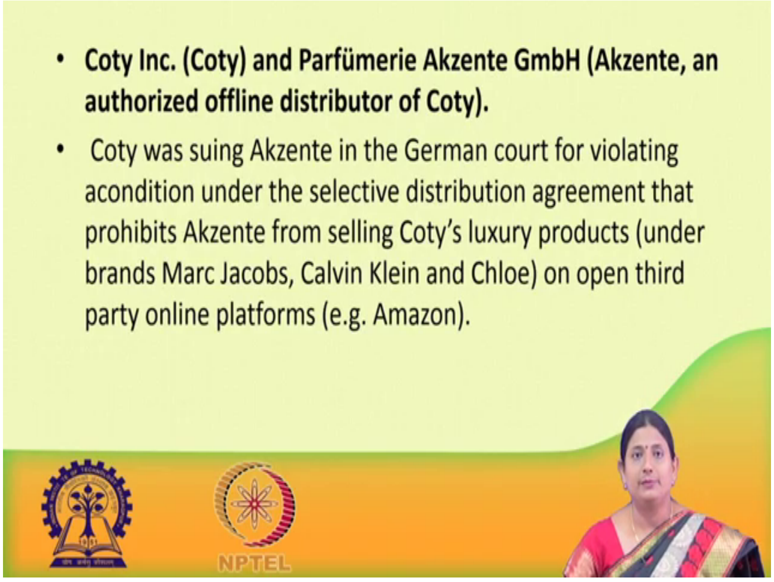

In *Coty Incorporation and Parfumerie Akzente case*, Akzente was an authorised offline distribution to Coty, Coty sued Akzente in the German court for violating the conditions under selective distribution agreements that prohibit Akzente from selling Coty's luxury product which were available under the brand name of Marc Jacobs, Calvin Klein and Chloe to third party online platforms like Amazon. Since Akzente started selling the branded product on the Amazon platform, Coty sued Akzente for violating the selective distribution agreement.

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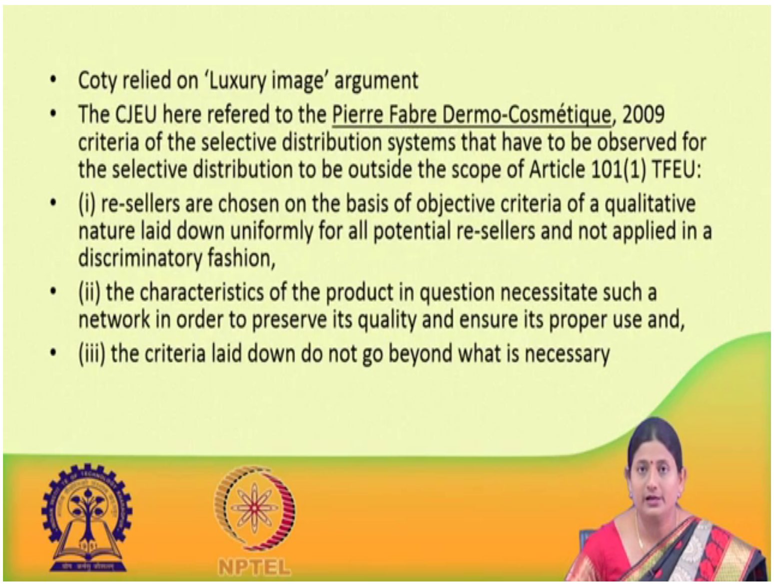

Coty, as in Dior case, relied on the 'Luxury image' argument and the court of justice referred the *Pierre Fabre Dermo-Cosmetique case* of 2009 for determining the criteria for selective distribution systems that have to be observed or to be considered as outside the scope of the Article 101 subsection (1) of the Treaty of Functioning of European Union. In Pierre Fabre Dermo-Cosmetique case of 2009, three criteria were laid down.

First, the resellers were chosen on the basis of objective criteria of qualitative nature laid down uniformly for all potential resellers and not applied on a discriminatory fashion. Then, the characteristics of the product in questions necessitates such a network in order to preserve the quality and ensure its proper use. The third criteria laid down is to not go beyond what is necessary. So, these three criteria had to be observed to determine whether a selective restrictive agreement is outside the scope of Article 101 subsection (1) or not.

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And so, it was determined that because these were branded products and Marc Jacob's branded products being sold on an online portal may lead to damage of their reputation because the very nature of the online portals. The court found Akzente guilty of violating the selective distribution agreement. But in *Adidas case*, the 'luxury image' justification could not hold good and it was not accepted by the competition authority.

It was not accepted by the competition authority in France and Germany. The competition authorities came to the conclusion that the producers cannot prohibit the authorised resellers from selling their product online by relying on the quality standards justification. And consequently, Adidas was asked to modify the selective distribution contracts and online sales policy accordingly.

So, unlike the Coty case where branded products were only available from corresponding retailers; the quality image or the 'luxury image' which was shown by Adidas was not accepted by the European court and it asked Adidas to modify the selective distribution agreement.

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There are few cases related to trademark selective agreement license and violation of the competition policy from which we can infer that an absolute ban on the online sale would be illegal; however, the trademark owner still has a chance to justify such restriction by relying on the quality, brand, reputation, protection argument.

So, if a company, if a firm can show that it's brand, quality or reputation is high and by the way of online sales, it may damage it's reputation; then, in that case it may put a ban on the online sales so far as the restriction does not go far beyond the simple requirement of quality standards. So, these two things have to be kept in mind before a company places certain selective or complete ban on online sales.

So, now moving on to the next important intellectual property right, i.e. copyright. We know that copyright is given for any artistic or literary work. In the technological society, all the technologically developed products are guided by certain programs or databases. All of these come under the purview of copyright. This is becoming an important part of technologically driven society and there are many cases which show how violation can happen with respect to competition policy.

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The copyright owner can abuse his dominant position by the way of tying a product or by refusing the license which forecloses the competition or by charging excessive royalties. Some prominent cases in the copyright violation are: the Microsoft case, where there was a refusal to deal as well as tying.

Then the Intel case, where Intel was charged with asking high royalty and giving certain loyalty rebates. And the latest one is the Google case, where Google was accused of favouring its own content. So, these are few important cases with respect to the copyright licensing that have emerged in the recent past.

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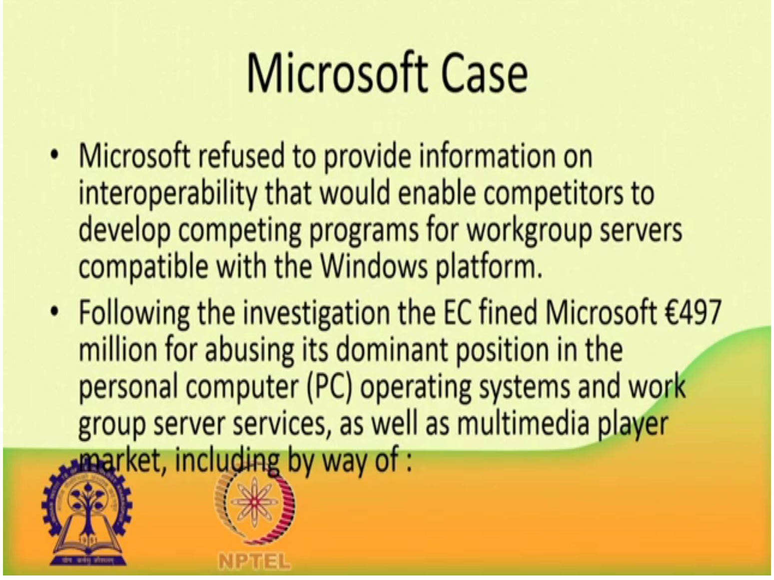

So, we know from the Microsoft case, that Microsoft refused to provide any information on the interoperability of the software that would enable the competitors to develop competing programs for the workgroup servers as well as which will be compatible for Windows platform. So, they had the software, but they did not give the source code for the software by which competitors can develop programs which may work in the windows platform.

An investigation was conducted in this case and the European Commission fined Microsoft about 497 million pounds for abusing its dominant position in the area of personal computer operating system and workgroup; workgroup servers as well as in the multimedia players.

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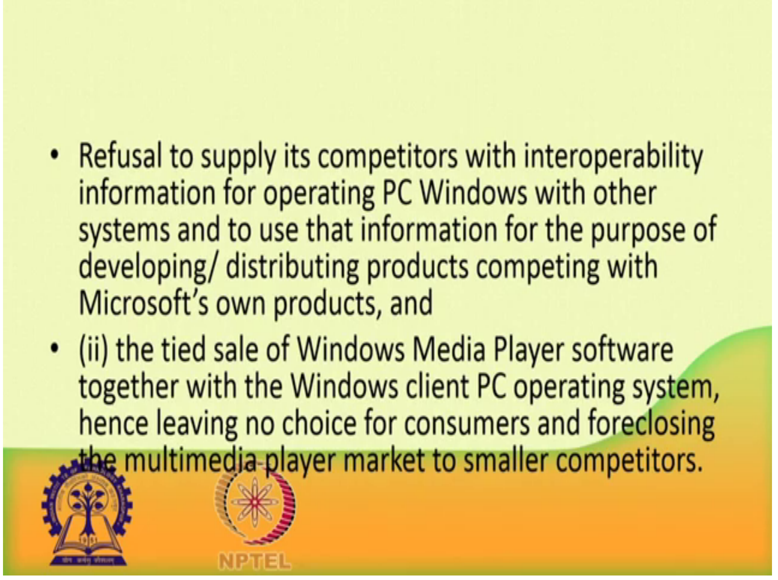

So, this abuse of the dominant position was done by the way of refusal to supply its competitors with interoperability information for operating with windows PCs and to use the information for the purpose of developing or distributing products Microsoft's own product. So, by refusing to give the copyrighted material, Microsoft has stopped or created hindrance in development of the downstream products or the new products which may operate in the windows platform and which will affect the competition with Microsoft.

Again, Microsoft tried to tie the windows media player software together with the Windows client PC operating system and hence, it did not allow the consumers to use any other multimedia player in personal computers. So, it tried to foreclose the competition in the multimedia player market for the smaller competitor. So, by these two provisions, Microsoft showed certain anti-competitive behaviour and tried to abuse dominant position.

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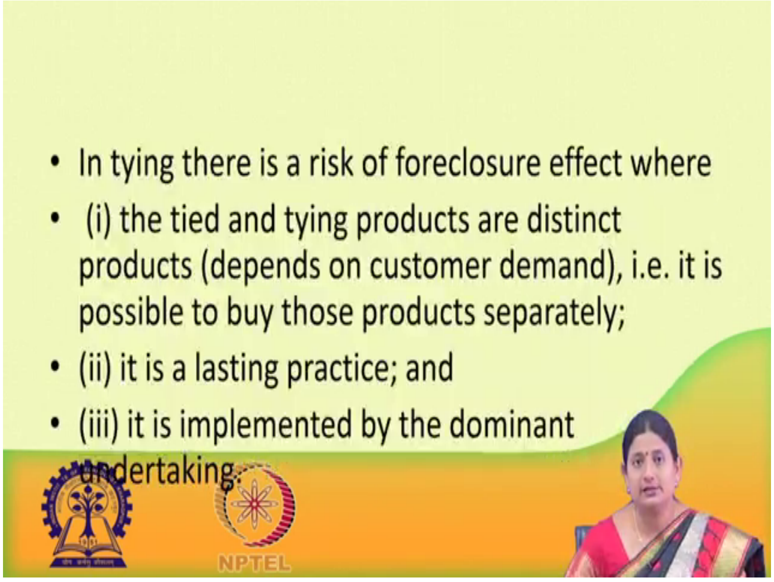

There is a risk of foreclosure in case of tying when the tied and the tying products are distinctly two different products. How it is decided that it is distinctly two different product? It depends on the consumer's demand. If the consumer is able to buy this product separately, then these were considered as two distinctly different products and if it is a lasting practice means it the practice has been carried for a long time and it is implemented by the dominant undertaking.

So, if the player is a dominant market player and it is tying two different distinctive product which is available separately and there are substitutes available for the tied product. In those cases, it may be considered that there is a risk of foreclosure. So, for that reason Microsoft was fined heavily and it is one of the landmark decisions, where abuse of dominant position with regard to copyright licensing was discussed.

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The second case was the Intel case, where Intel was again imposed with a record fine of 1 million pounds by the European Commission and the decision was still pending with the general court and it was transferred to European court of justice. But the European court of justice has remanded the case back to general court for decision. The appeal is under progress. So, in this case the Advanced Micro Devices or the AMD incorporation filed a case against Intel in the year 2000.

The European Commission found that Intel has infringed Article 102 of the treaty of functioning of European Union and abused its dominant position by granting rebates on condition that original equipment manufacturers(OEMs) would purchase from it, all or almost all of their CPUs for example x86 CPUs for the use in their computers. Intel agreed to give certain rebates on the condition that the original equipment manufacturers will buy all the CPU from Intel only.

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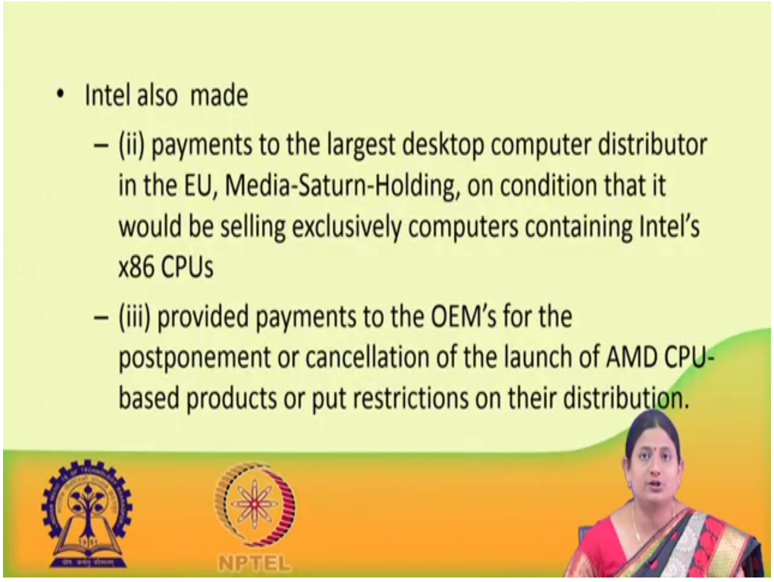

Intel made payments to the largest desktop computer distributor in the European Union which was *Media Saturn Holding* on the condition that it would be selling exclusively computers containing Intel's CPUs only. Thus it tried to enter into a negotiation with the largest computer seller in European Union i.e. Media-Saturn-Holding to sell all the computers with only Intel's CPU.

And it also provided payments to the original equipment manufacturers for the postponement or cancellation of the launch of AMD CPU based products and put a restriction on the distribution. So, all these activities were considered as anti-competitive behaviour and it was considered that it is a kind of abuse of dominant position and heavy fine imposed on the nature of this dealing.

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The court of justice judgment in this case also confirms that the anti-competitive effect of the loyalty rebates should not be resumed, where the undertaking in question argues that its conduct is not capable of restricting competition in the market. In such situations, all the circumstances of the case must be analysed in order to correctly determine whether competition rules have been infringed or not.

So, during the appeal in this court case, Intel argued that the loyalty rebates is a kind of promotional scheme for the licensees. So, it should not be taken into consideration that it would restrict the competition. So, the court held that all the conditions must be, all the circumstances must be carefully analysed so as to understand whether the competition rules have been infringed or not.

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Coming next to one of the recent cases, i.e. the Google case, where EC penalised Google for 2.42 billion dollar pounds for abuse of the dominance power by way of promoting its own comparison shopping services for example its own content in the search results. We know Google is one of the popular search engines which gives the search results in very less time. It has many trade secrets associated with it. Also it has various programs like software codes by the way of which it does the search and gives results.

By Google advertisement, which is distinct from Google, other sites/other companies / other online shopping sites also advertise their thing. But when somebody looks for any shopping thing, Google what it did was it showed its own content at the first place. We all have done Google searches. So, when we do certain Google search, the first page gives us the most relevant result.

So, here when somebody looked for the Google shopping things, the first page gave all the information related to Google even though they were not the top-selling domains in that region. The top-selling domain advertisement came in the fourth page or fifth page or the subsequent pages, but not in the first few pages.

So, Google advertisement enjoyed a higher number of clicks as a result of this better display or the visibility and Google's own services appeared on the top of the search results, while the most highly ranked rival's services appeared on an average only on page four or afterwards in the Google search engine.

So, according to the European Commission such practices significantly affect the competition because as we normal consumer, we get assured by what is shown in the first page. So, as per the European Commission, these kind of practices affect the competition in the market and because such kind of comparison allowed Google to make significant gains in the tariff at the expenses of its competitor that may act detrimental for the consumer.

So, deciding on the software code which showed the result related to Google only in the first page and their rivals contained in the fourth or the afterwards page, it was a kind of abuse of this dominant position and the European Commission fined Google for about 2.42 billion dollars.

These were the three related cases for copyright infringement and copyright licensing particularly, use of copyright and abuse of dominant position and showing anti-competitive behaviour. So, with all these examples we may see how the IP holders can be judged in the eyes of the competition law and under which conditions, the conditions vary from case to case and it will be decided to be anti-competitive.

So, I hope this will be very helpful for you to understand the interplay and the overlapping domain of the intellectual property and the competition law. So, please go through all the cases, that is the best way to learn how things have evolved in the past. In India there is very less development in the copyright and the trademark area, but we have discussed cases related to the patent and anti-competitive practices therein. So, please read through these things, it will help you to understand IP and competition in a greater length.

Thank you so much. Looking forward to meet you in the next session. Thank you.