

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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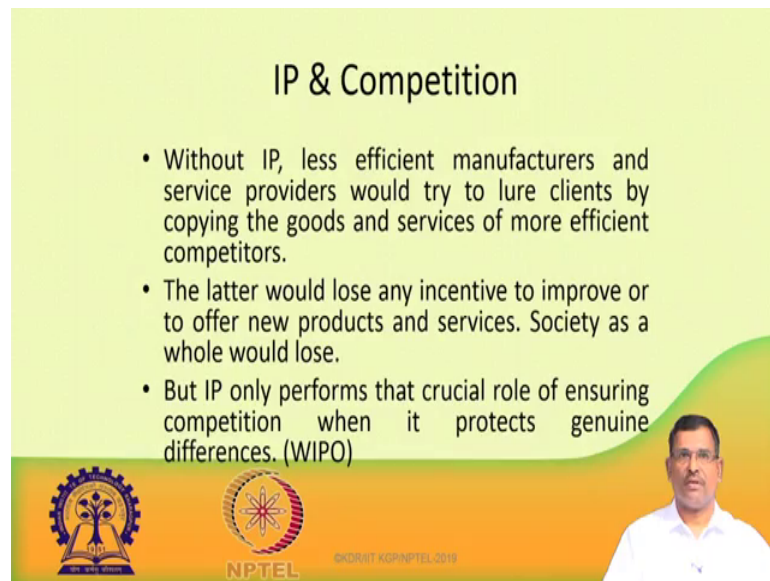
IP and Competition

- Intellectual property (IP) allows consumers to make choices between competing entrepreneurs, and the goods and services they sell.
- Therefore, IP is inherently pro-competitive as it ensures the protection of differentiated, intangible business assets. (WIPO)

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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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IP & Competition

- Without IP, less efficient manufacturers and service providers would try to lure clients by copying the goods and services of more efficient competitors.
- The latter would lose any incentive to improve or to offer new products and services. Society as a whole would lose.
- But IP only performs that crucial role of ensuring competition when it protects genuine differences. (WIPO)

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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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Dangers

- **Too much IP:** When IP is unduly extended so as to grant exclusivity over non-differentiating features (such as patents for technical features that do not qualify as inventions and trademarks for common, non-distinctive words) it is anti-competitive.
- **Too little IP:** When efficient enforcement means are not available or when genuinely differentiating features cannot be protected, imitation follows.



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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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Objectives

- As the objective of IP is to induce innovations that will ultimately provide better conditions for price, quality and diversity of products available to consumers, it possesses the same final goal as competition policy, which is to promote welfare.



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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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Competition policy

- Competition policy is a set of tools used by the state in order to protect and promote the process of competition, with the aim of achieving allocative efficiency.
- When competition is absent, market power is exercised and the equilibrium price obtained is at a level above marginal cost.
- This creates allocative inefficiency.

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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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Competition – efficiency

- Competition is also regarded as an important source of productive efficiency (x-efficiency), which occurs when firms produce the maximum output possible from a given amount of inputs,
- and dynamic efficiency, which occurs when society takes full benefit of innovations that are economically viable.

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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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Conflict?

- The application of competition law to intellectual property related cases may be regarded as one of the most complex and critical field of competition policy.
- Is it really both concepts are contradictory?
- They are promoting complimentary goals, innovation and dynamic concepts of competition.

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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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The slide is titled "Conflict" and contains two bullet points. The first bullet point states: "i. There must exist a trade off between competition (or short run allocative efficiency) and innovation (or long run dynamic efficiency)." The second bullet point states: "ii. Since IP induces innovation by granting market power to innovators and competition policy aims at restricting the use of market power, the policy objectives may be contradictory at some point in time." At the bottom of the slide, there are three logos: the Indian Institute of Technology (IIT) logo on the left, the NPTEL logo in the center, and a portrait of a man on the right. The NPTEL logo includes the text "© IIT KGP/NPTEL 2019".

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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Market power induces innovation

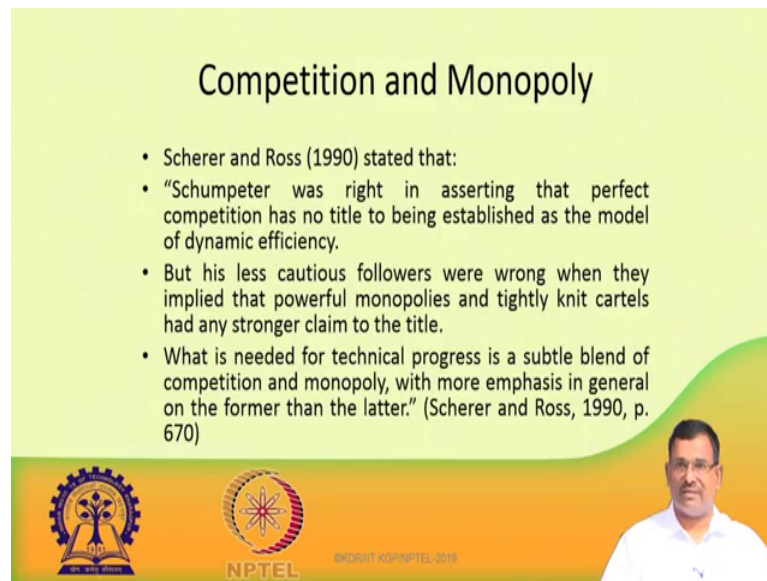
- Firms under stronger competitive pressure innovate rapidly in order to be the first with the new product; and
- The existence of more rivals split the potential benefits into more parts.

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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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The slide features a light green background with a white title 'Competition and Monopoly' at the top. Below the title is a bulleted list of four points. The bottom of the slide contains three logos: the Indian Institute of Technology (IIT) logo on the left, the NPTEL logo in the center, and a portrait of a man in a white shirt on the right. A copyright notice '©KORVIT KGP/NPTEL 2019' is visible at the bottom center.

Competition and Monopoly

- Scherer and Ross (1990) stated that:
- “Schumpeter was right in asserting that perfect competition has no title to being established as the model of dynamic efficiency.
- But his 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 latter.” (Scherer and Ross, 1990, p. 670)

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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Interface

- The interface between intellectual property rights and competition law may lead to two distinct results, and it is necessary for a competition authority to seek the appropriate balance of outcomes between them.

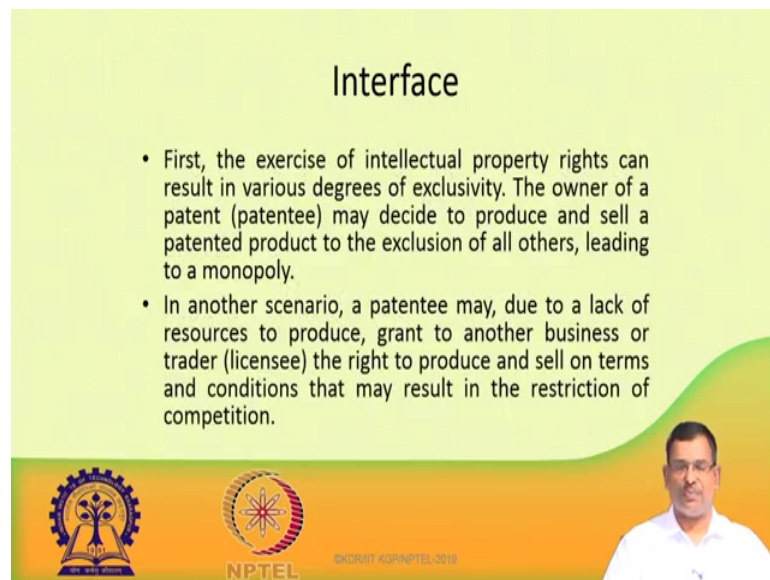
So, we can see that the interface sometimes leads to two distinct results. The competition authorities should always look into these two branches and the intellectual property. Every country under the WTO agreement (164 countries) has to protect intellectual property under the *TRIPS* agreement.

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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The slide is titled "Interface" and contains two bullet points. The first bullet point states: "First, the exercise of intellectual property rights can result in various degrees of exclusivity. The owner of a patent (patentee) may decide to produce and sell a patented product to the exclusion of all others, leading to a monopoly." The second bullet point states: "In another scenario, a patentee may, due to a lack of resources to produce, grant to another business or trader (licensee) the right to produce and sell on terms and conditions that may result in the restriction of competition." The slide features a green and yellow background with a wavy line separating the text from the footer. The footer includes the logos of IIT Bombay and NPTEL, along with the text "©KORBIT KOPNPTEL, 2018" and a small portrait of a man in a white shirt.

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 Sherman 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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Link

- There is a close link between patent rights and competition, which, in simple terms, can be characterized by two factors:
- on the one hand, patent laws aim to prevent the copying or imitation of patented goods and thus complement competition policies in that they contribute to a fair market behaviour.
- On the other hand, competition laws may limit patent rights in that patent holders may be barred from abusing their rights.
- In sum, experience shows that too high or too low protection of both patents and competition may lead to trade distortions. (WIPO-1996)

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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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Interface


- Harming consumers by chilling innovation and discouraging competition is against consumer policies.
- Concerns about anti-competitive intellectual property rights, blocking patents and patent ambush cases, standardization process.
- Is really intellectual property protection reduces competition.
- Licensing
- Effective competition leads to effective market performance.

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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Objective

- It is in the interest of society and market that competition prevails.
- Competition put pressures on suppliers forcing them to share the surplus resulting from efficient performance with consumers in the form of lower prices.
- Efficient allocation of resources can increase economic welfare up.
- It is possible to better off without anyone making worse off.

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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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Objective

- Competition policy and competition laws have the primary aim to protect competition to secure the efficient functioning of the market mechanism.
- Price system or price mechanism
- Innovation or dynamic efficiency
- Competition as the driving force of efficiency.
- Market structure
- IPR protects free riding in the market

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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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Balance

- Right balance between static and dynamic efficiency.
- IPR allows reaping benefits for a period of time.
- Leads to greater innovated product in the market and consumer welfare.
- Theory of complementarity.
- Private property right owner v. consumer welfare.
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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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Competition law

Adam Smith summed it all up in *An Inquiry into the Nature and Causes of the Wealth of Nations*:

"People of the same trade seldom meet, even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."

The idea was that –greater the output of a firm better be able to take advantage to added productivity from specialized labor.

But presently, a firm increases the market allocation by monopolization, and there is necessity to curb such misuse for the welfare of consumers.

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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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History

- Canada first country to adopt the law in 1889
- US was the second country to adopt the law in 1890
- Finland's court judgment in 1837 on forest producers
- In France, the initial foundations of a competition law were laid in the Chapelier Law of 1791
- Japan – prohibition of Private Monopoly and Maintenance of Fair Trade of 1947.
- In 1995, only about 35 countries with a competition law, today the number is nearly 120 countries and counting....

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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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Objectives of competition law

- Protects the competitive process
- Economic efficiency
- Prevents the harmful effects of monopoly
- Secures consumer benefits such as lower prices, wider choice and more innovation

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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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Application of Competition Law to Intellectual Property Rights

- 1 Market power derived from Intellectual Property Rights (IPR)
- 2 Abuse of such power
- 3 Licensing of patents, copyrights and trademarks

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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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Clash between Competition and Intellectual property Convergences:

- Both IP and competition is a tool to promote competition in the market and against monopolies.
- The overlap is due to the separate system of rules applied to the market based on their own logics.
- Competition and intellectual property law perceived as two branches of law which works hand in hand to discipline the market with the same objective of consumer welfare.(No clash?)

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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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Clash between Competition and Intellectual property

Convergences:

- When the competition rules apply to the exercise of IPRs, they apply a s a separate system according to their own logic.
- They treat the exercise of an IPR, once granted, as any other private tangible right, subject to the public law limits on market behavior created by the competition rules.
- On the closer inspection, the logic of competition law reveals a predisposition to accommodations to the exercise of IPRs.
- We can find there is a natural overlap in the aims of the two fields of law.
- The exclusive rights created by IP laws provide an incentive to inventors to create substitute products within markets and new products which establish new markets.

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

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Clash between Competition and Intellectual property
Convergences:

- IP licensing is a vehicle to enlarge exploitation of protected technologies which creates wider diffusion of the new technologies.
- IP legislation prevents copying but in fact encourage competition by substitution between follow on innovators and pioneer innovators.
- Experimental use – patents
- Fair use – copyright
- Competition rules cannot be applicable to IPRs.
- But it is applicable when IPRs are used as an instrument of abuse or as a means of restricting competition.



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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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Technology Restrictions

- (a) Requirement to commit to a long-term contract such that alternative arrangements with rival technology licensors would become financially unfeasible;
- (b) Non-compete clause that forbids the licensee to compete or to handle products that compete with that of the patentee;
- (c) Geographic or territorial restriction or ban preventing the licensee from selling in or into the licensed geographic region, area or territory;
- (d) Maximum-quantities clause that limits the quantity to be produced by a licensee to the level of anticipated demand expected in a geographic region, area or territory;
- (e) Requirement to pay royalties before production begins or to extend royalty payments beyond the patent expiration date, or imposition of a demand for non-licence and non-product related royalty payments;



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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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Technology Restrictions

- (f) Limitation-of-use clause, limiting the use of the patent to a certain scientific field, for example, whereby the licensee is allowed to use the patent to develop medicinal or pharmaceutical products or processes but not industrial products or processes;
- (g) Imposition of a minimum retail price, fixing terms and conditions that could directly impact the selling price of the product or service;
- (h) Grant of veto powers over the grant of future licences to the licensee;
- (i) Imposition of penalty clauses, whereby the patentee or licensee has to pay a cost if it does business with another firm;

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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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The slide is titled "Technology Restrictions" and lists three types of restrictive clauses:

- (j) Imposition of grant-back clauses, whereby the licensee is required to give back to the licensor the right to use any patented improvement that the licensee contributes to the original patented invention;
- (k) Exclusive grant-back clauses, which provide the licensor an exclusive right to use or sublicense any patented improvements while the licensee is given a non-exclusive right to use the patented improvements;
- (l) Exclusive tie-in and buying clause whereby the licensee is required to acquire all technology or products solely from the patentee, including unpatented materials as part of a tie-in or other mandatory packaged licensing

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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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Competition and IP

...But a partnership under strain

- Competition law sets increasingly stricter and deeper limits to the exercise of IPR's, in particular by dominant companies
 - Compulsory IP licensing
 - from *Volvo/Veng* (1988) to *Magill* (1991) and *IMS* (2004) to *Microsoft* (2007)
 - Recognition of IPR's
 - from *TTBER* (2004) to *Microsoft* (2008, under appeal)
 - Standardization
 - from *Horizontal Cooperation Guidelines* (2001) to *Rambus* (on-going)




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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e.g., Compulsory IP licensing

Before Microsoft	After Microsoft	Questions ?
Conditions for abuse		
License indispensable to carry on specific business	License necessary to remain viably on the market	From technical indispensability to economic superiority?
Elimination of all competition	Likelihood of elimination of effective competition	From judicial overview to regulatory discretion?
New product for which there is consumer demand	Limitation of technical progress	From successful innovation to product differences?
No objective justification	No objective justification	?
IPR at issue		
Copyright	Patents, copyright and trade secrets	What future for innovation in Europe?



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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Divergence

- In recent times the actual no. of confrontations have been increasing between the owners of IP and competition authorities around the world.
- For Instance in *Microsoft Corporation case(2013)* EU Competition authorities granted US\$731 million for alleged misuse of IPRs; at the same time there was a softer approach taken by US on the same level of charges; similarly the same case was handled in India by the CCI exonerated Microsoft from all charges except abuse of dominant position even in US. India as a developing country wants to Promote innovation in all markets
- Recently, *Micromax* an Indian Company faced Legal action from *Ericsson* on violation of "essential Patents" necessary for the working of the new telecommunication technologies like 3G & 4G Delhi High court was quick in granting an Injunction but *Google Motorola* are not able to get an injunction against *Microsoft* in the US on similar grounds.
- This shows that how ill equipped the CCI and Indian Courts are on these Techno-legal-economic issues having the potential of affecting Indian Innovation and economy.

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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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Common objectives :Different perspectives

- IP and antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.
- From competition point of view IPRs may be viewed as a means to reduce competition. IPR gives right holder exclusive monopoly while hindering others from offering the product in the market, in competition with the right holder.
- IPR may be used as a weapon to restrict competition between licenses given to the product.
- National legislations played a crucial role in protecting the market from anti-competitive practices.
- It can be said that the competition law and IP law share the same economic objectives. If the two laws can be interpreted in the background of a common objective forcible conflicts between these two laws can be avoided.
- They actually complementary both are aimed at encouraging innovation, industry and competition.
- Both disciplines promotes dynamic efficiency: a system of property rights and market rules that create appropriate incentives for invention, innovation innovation and risk in R&D.
- Antitrust recognizes the critical role that IPR Plays in driving innovation and so values these rights.
- It also plays vital role in liberalized economy. Most countries especially newly emerging economies either Amended or Enacted Competition Law in the background of liberalized economy (Including EU, Japan, India)

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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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- Countries should plan their competition law based on their economic policies.
- Driving force of most of the developing economies of the world.
- Efficient market performance is a prerequisite in the interest of consumers and economy in general.

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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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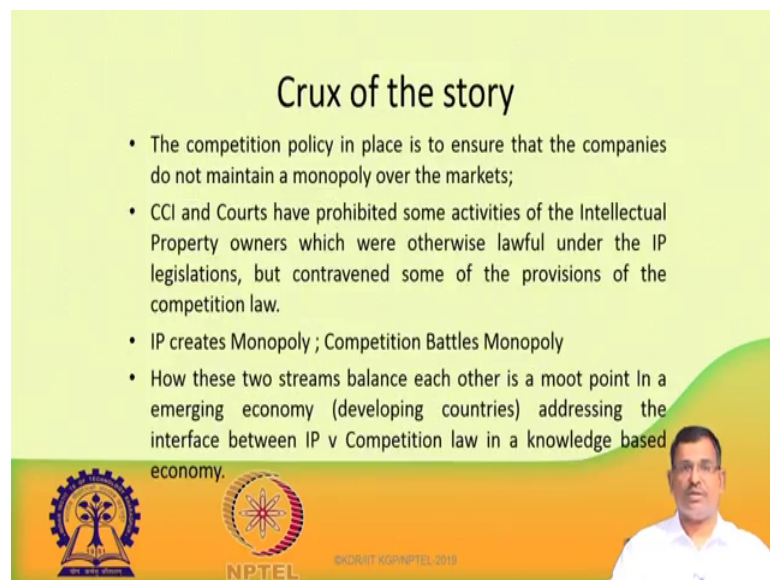
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- Incentivize investment in research and development to promote innovation. Innovation Supply scientific and technical advancement to the market... Ultimately diversity of products bring competition in the market which is impetus to further innovation and diversification in the product category.
- If there is a monopoly there is a less chance of innovation in the product varieties. Hence competition drives more investment in R&D and further innovation in technologies.

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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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Crux of the story

- The competition policy in place is to ensure that the companies do not maintain a monopoly over the markets;
- CCI and Courts have prohibited some activities of the Intellectual Property owners which were otherwise lawful under the IP legislations, but contravened some of the provisions of the competition law.
- IP creates Monopoly ; Competition Battles Monopoly
- How these two streams balance each other is a moot point In a emerging economy (developing countries) addressing the interface between IP v Competition law in a knowledge based economy.

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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.