Intellectual Property Rights, And Competition Law
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Lecture – 27
IP Based Conduct Under Article 102

Hello. Let us start the next module. In this module, we are going to discuss about the Intellectual property based conduct under Article 102.

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In this module, we will be discussing the principle for assessment under Article 102 of the treaty of functioning of European Union and in particular we will look into how the intellectual property related licensing or agreements are evaluated under Article 102.

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As we discussed in the earlier classes, the Article 102 of the treaty of functioning of European Union prohibits abuse of dominant position. In particular, the Article states that "any abuse by one or more undertaking of a dominant position within the internal market or in a substantial part of this market shall be prohibited", if it affects the trade between the Member State.

These kind of abuses may be created in four particular ways; first: if the agreement or the contract directly or indirectly imposes unfair purchase or selling prices and imposes unfair trading conditions on the third parties or the parties involved in the agreement. Second: if it limits the production market or technical development, which are prejudicial to the consumers.

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Third: if it applies dissimilar conditions, to equivalent transactions, on other trading parties, which may place them in a competitive disadvantageous position. And, fourth: if the contract has certain supplementary obligation which are not directly related to the subject of such contracts and are required to be accepted by other third parties. All these may be an abuse of dominant position.

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If we look critically into Article 102, there are two critical things; first: it does not talk about the abuse of dominant position by a single undertaking, one or more undertaking may come together and may have dominant position in the market. And, so, it is not only applicable to one undertaking but two or more undertaking can also be liable for the abuse of dominant position as well.

And second, the dominant position per se is not prohibited under Article 102. It is the abuse of dominant position which is and the European commission judges the abuse of dominant position based on its evaluation of *appreciable adverse effect on the competition* in the market i.e., they look into for fair and healthy competition, which is the objective of European competition policy. They look into, whether the practices are creating a divide between the internal market or whether the practices are having certain adverse effect on the total competition in the market such as in terms of product generation, product supply or related things.

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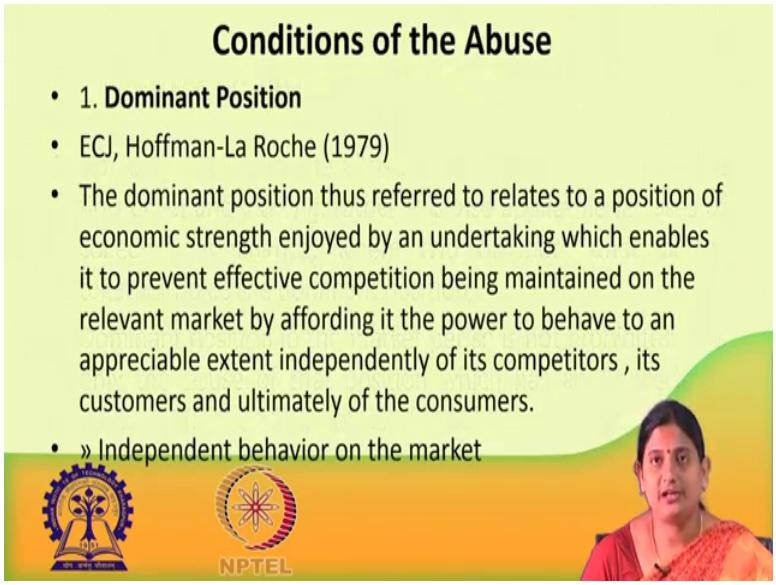

If we critically look into the statements or the regulations of Article 102, there are two things; first: a dominant position and second is the abuse of dominant position. In order to decide any case related to abuse of dominant position, the commission has to establish first that the entity or the undertaking is having a dominant position in the European market or in the member state.

Through case laws there are conditions laid down which the undertaking must satisfy to be regarded as a dominant undertaking. There are also certain guidelines which have been developed in due course, which states how a company or a firm or an undertaking can be considered as a dominant undertaking. One of the earlier and critical case law is *Hoffman-La Roche decision* of European court of justice.

The court held that, the dominant position referred relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in the relevant market by affording the power to behave in an independent manner from its competitors, i.e. if an undertaking is having a strong position in the economic market and if it can behave independently of its competitors, if it can define or can dictate how the company or the market should behave, then it may be regarded as a dominant position. So, the independent behaviour of a firm or an undertaking in the market is very critical for determining, whether a company is holding a dominant position or not.

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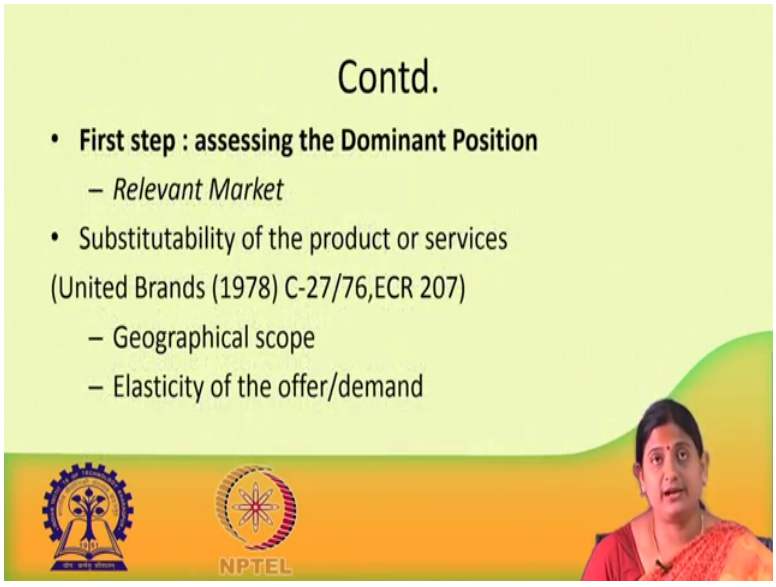

In assessing the dominant position, there are two or three more criteria which may be looked into. First: the dominant position is always looked into a relevant market. So, if we are talking about the total European internal market then the relevant market comprises of maybe a market in a member state, or wherever the products are being sold

or manufactured. And, the elasticity of the offer or the demand, the substitutability aspect, are also looked into which we will discuss in the later section.

The geographical scope i.e. the geographical boundary as well as the product nature and quality and the substitutability of the product are very important in deciding the relevant market. One of the first landmark case, a critical case, which decided the relevant market is *United Brands Case* given in 1978. It gave a clear idea about what can be considered as a relevant market. We will discuss this case after some time.

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Apart from this case law, in 1997 the commission gave a notice regarding "market" definition, where the commission emphasised on the *demand side substitutability*. The commission said that for the purpose of the market definition demand substitutability is of a great significance than the supply side substitutability and the potential competition. There are two parts; a demand and a supply, the manufacturers are on the supply side, and the consumer is at the receiving end of the demand.

The consumer's decision or the consumer's viewpoint, has to be taken into account while deciding whether the product can be substituted or not. In particular, in the paragraph 14 of this notice, the demand substitutability is measured by the range of products which can be taken as an option, or to substitute other products, by the consumers i.e. they have

clearly specified that the consumer's opinion regarding the substitution of a product is very critical while deciding the market.

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In this regard, the European commission has adopted a test, which is known as *SSNIP*, that stands for *small, but significant non transitory increase in price test*. This is an American test, and has been imported from United States. It is a hypothetical monopolist test which ascertains that, the level of demand and demand substitution are the instances when a consumer will shift their allegiance to another product as a result of price increase.

SSNIP is designed to analyse, whether the increase in price would be profitable or would lead to customer preferring substitute product rather than buying the first product. For example, if there is a product which is available at 50 rupees per unit, and there are two related and similar products which are available for 30 or 20 rupees respectively. If the price of first product is increased by(Say) 5 or 10 percent, then whether consumer will prefer to buy the first product or consumer will shift their allegiance to the product "b" or "c". The SSNIP test determines whether the consistency of the product sales in the market after price increase can be retained or not. It is very essential, in determining the relevant market, while deciding abuse of dominance cases.

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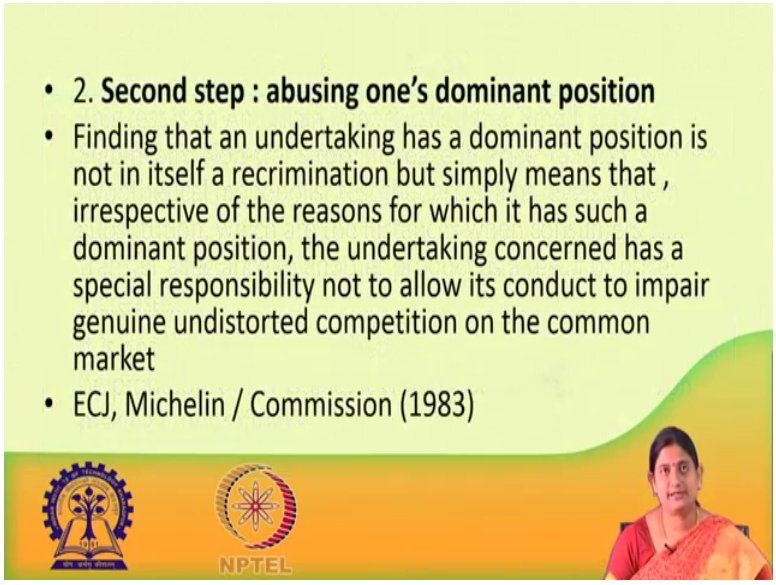

So, we talked about, firstly to decide about the dominant position and the scope of relevant market as well as geographical market. One of the critical thing is, the share of market held by the company. The European commission has developed certain guidelines, which say that, if an undertaking is holding a share of 40 percent or less, it does not come under the purview of Article 102. The second aspect of Article 102, which is the most critical aspect, is the abuse of dominant position.

Dominant position per se is not prohibited, it is the abuse of dominant position which is. The finding that an undertaking has a dominant position itself is not a recrimination but simply means that irrespective of the reasons because of which it has such a dominant position, the undertaking has a special responsibility not to allow any conduct that impairs or distorts genuine competition i.e. if a company or an undertaking is having a dominant position it has certain duties. So, they should not hamper the healthy competition in the common market in the European Union. It has been laid in Michelin case in 1983. This is one of the landmark decisions, which gave an idea regarding abuse of the dominant position.

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United Brands versus Commission is another landmark decision, which gave a definition regarding "relevant market" as well as laid down the test for dominance. United Brands Company was the main supplier of bananas in the European Union.

The commission found that United Brands Company(UBC) is holding a dominant position in the market and it has abused its position, because UBC prohibited the distributors from reselling bananas, which were still green. It also prohibited and it did not give a license to another distributor named *Olesen*, because Olesen at certain point of time advertised for a competitor company for the reason of which UBC did not give license to Olesen. Olesen filed a complaint against UBC in the European Commission. The Commission's view was that UBC holds a dominant position and it violated and abused its position.

Aggrieved by this decision UBC appealed to the Court of Justice. UBC said that, the European commission has erred while considering the relevant market, because UBC is only supplying the bananas in the European market. From the point of view of UBC, solely bananas should not be taken as the relevant market. The whole fresh fruit market should be taken into consideration for deciding whether UBC is holding a dominant position or not.

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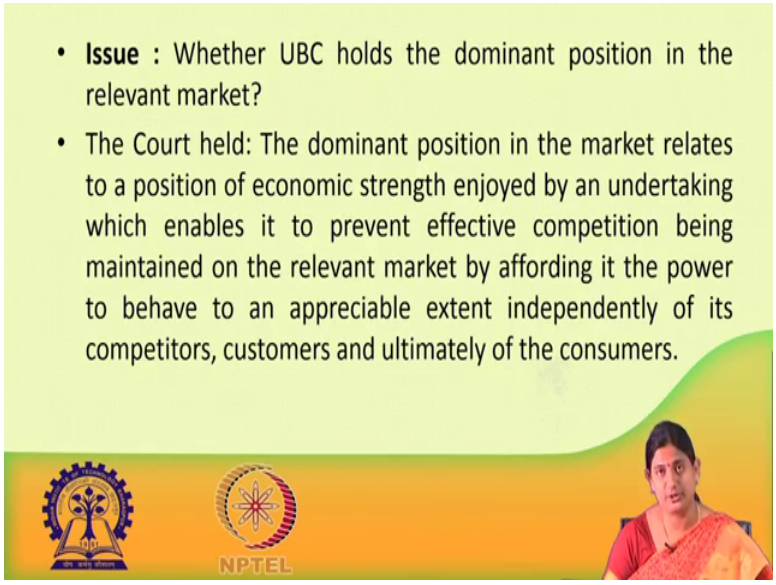

The issue was whether UBC holds a dominant position in the relevant market or not. The court held that the dominant position in the market relates to the position of economic strength. Here it was regarding "banana". The court looked into the aspect of substitutability of the product. The court looked into whether the interchangeability parameter has been met or not.

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In this case, the court held that, whether banana could be singled out by such special features that distinguishes it from other fruits or not, will be judged from the consumer point of view. Suppose there are no raw fresh banana in the market. Will the consumer who has a preference for raw banana buy any other type of fresh fruit to mitigate their demand or they will only rely on the fresh banana?

With this question, they found that the consumers will only rely on raw banana. Hence, only banana market is the relevant market itself and not the whole fresh fruit market. The European Court of Justice also held that UBC held a dominant position and it had abused the dominant position by not giving the license to its competitor or other distributor.

This is one of the landmark cases, where the definition of the relevant market has been judged by interchangeability parameter. On the geographical extent, the market is spreading. Another important factor is for how long the company has been operating in the market. Time also plays a critical role in deciding these matters.

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The court considered many factors including the seasonal substitutability in general between banana and other seasonal fruits. And, it concluded that a very large number of consumers having a constant need for bananas are not noticeably, even appreciatively enticed away from the consumption of the product by the arrival of the other fresh fruit.

Banana market is a market which is sufficiently distinct from other fresh fruit market. Hence, the relevant market is not only restricted to banana but includes other fresh fruits also.

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But, it is not always the case that the European court of justice agrees with the decision given by the commission. In *Continental Can Case* the court disagreed with the opinion of the commission on relevant product market. The case was about light metal can which is used for packaging of fish and meat.

The court held that, in order to be regarded as constituting a distinct market, the products in question must be individualised, not only by the mere fact that they are used for packaging of certain product, but by particular characteristics of the production, which makes them specifically suitable for this purpose.

The court held that a dominant position on the market for light metal containers for meat and fish cannot be decisive as long as it has not been proved that the competitors from other sector of the market cannot enter the market by simple adaptation.

So, the different case histories show that it depends upon the nature of the very product. In the earlier case it was regarding raw banana, it is simply a kind of fruit, but here it is

about a produced item in which a particular metal has been taken into consideration to create a container.

It not only depends upon the nature of the product but at the process of the product as well, in terms of how it is affecting the market, whether it can be adapted by other person or not all these are critical in deciding a relevant market.

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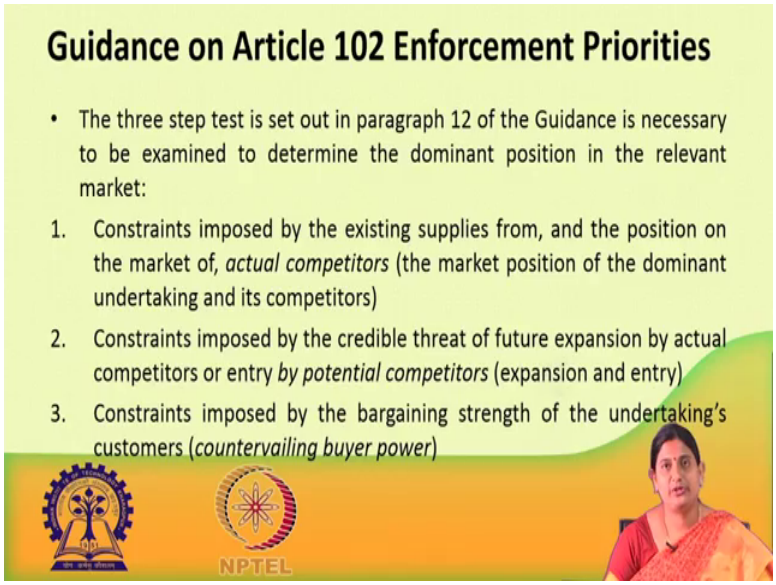

We discussed about two parameters, first is the relevant market, second is the dominant position. There are also specific guidances given on Article 102 regarding enforcement, specifically in para 2 of the guideline on the assessment of Article 102 three step test has been laid out.

To determine the dominant position in the relevant market, three test or three parameters must be examined, first: constraint imposed by the existing suppliers and position of the actual competitor on the market i.e., the market position of the dominant player and its competitor.

Second: constraint imposed by the credible threat of future expansion by actual competitor or by entry of the potential competitors i.e., whether it is hampering the competition or promoting the competition.

Third: constraint imposed by the bargaining strength of the undertaking's customer i.e., how it is affecting the purchasing power of the buyer's. These three parameters must be taken into consideration before enforcing Article 102 in the case of any of these conducts.

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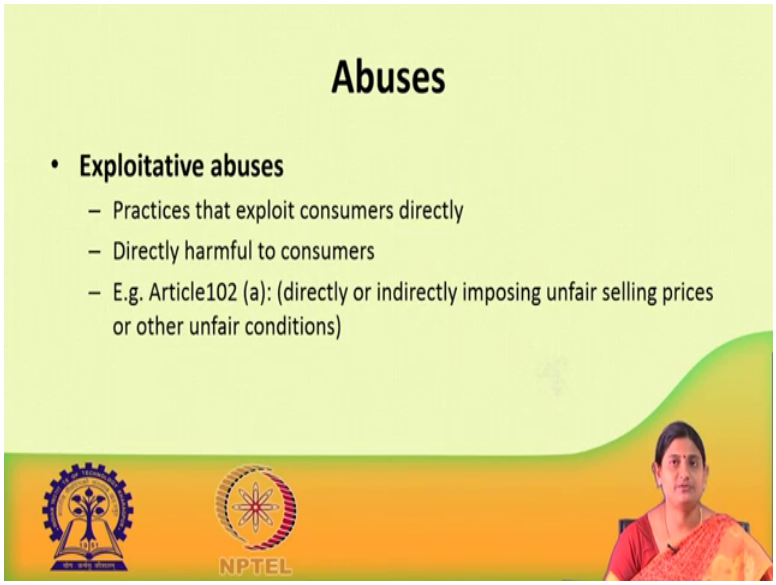

All these case laws, all these directives and guidelines can be summed up in that there are three kinds of abuse, first is exploitative abuse, second is exclusionary abuse and third is the discriminatory abuse. The exploitative abuses are practices which exploits customers directly and is directly harmful to the consumers. For example, sub-section (a) of Article 102 which prohibits directly or indirectly imposing unfair selling prices or unfair condition i.e., if there is only one manufacturer for per product and if he is not sharing his technology or intellectual property and selling the product at a higher price, if it is directly affecting the consumer then it would be a kind of exploitative abuse.

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Second is the exclusionary or anti-competitive abuse. This includes all those practices that excludes the competitors from the relevant market and restricts the competition. It may be beneficial for the consumer in the short run, but it may have long detrimental effects due to the reduced competition. For example, tying, refusal to supply, exclusive dealing agreements, predatory pricing, price discrimination, all these are the forms of exclusionary or anti-competitive abuses.

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Third is the discriminatory abuse which are the practices that discriminate between various customers. As per the Article 102 sub-section (c) applying dissimilar conditions to equivalent transactions with other trading parties and placing them in a competitive disadvantageous mode is prohibited.

This maybe in different geographical locations, selling of a product at different prices and critically binding third parties or other contracting parties in undue agreements, which are not directly related to the object of the agreement. These kind of things will be termed as discriminatory abuse.

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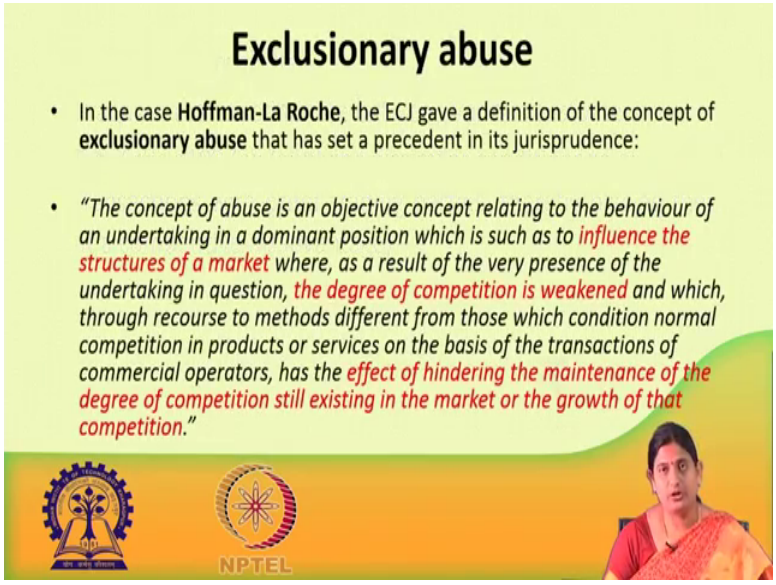

We will look one by one at all these kinds of abusive practices. In *Hoffmann-La-Roche case,* a broad definition regarding exclusionary abuse was given which states that the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is to influence the structure of the market. As a result of the very presence of the undertaking in question, the degree of competition is weakened. And, the recourse to methods, different from those with the condition of normal competition or competition in the product or the services on the basis of the transaction of the commercial operators, has the effect of hindering the maintenance of the degree of competition.

There are three things, influencing the structure of the market, the degree of competition is weakened and it hindering the maintenance of the degree of competition and it hampers the growth of the market with these practices.

In *Hoffman-La Roche case*, Hoffman-La Roche was one of the leading vitamin manufacturers. It manufactured nearly 90 percent of the total vitamin segment and it was one of the major distributor for one of the vitamin, which is used for industrial medicinal purposes.

And, since it was the major manufacturer, it gave discounts and lucrative offers to other distributors to buy vitamins from them. In the European internal market, it tried to have a dominant position and by virtue of these action, it was said that Hoffman-La Roche abused the dominant position for nearly 4 years for which the European commission fined them heavily, around 1 million dollars as fine was imposed. For the first time, the definition or the concept of exclusionary abuse was introduced here.

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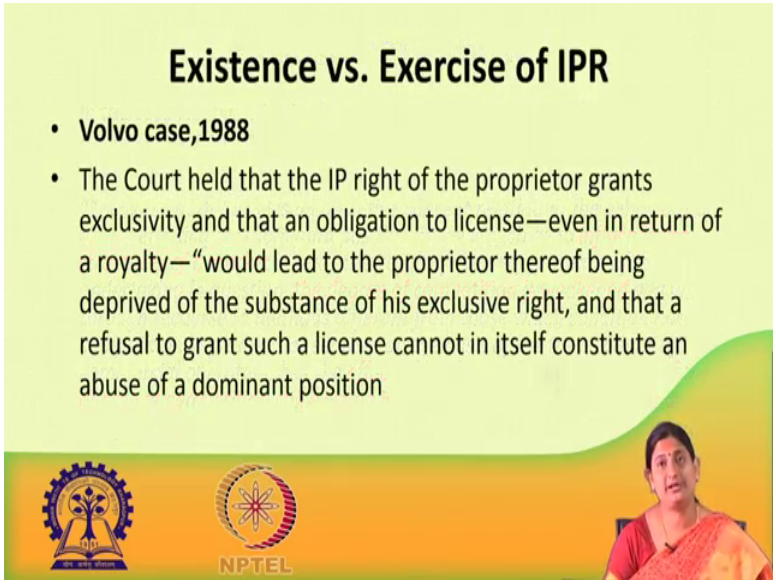

Let us discuss the intellectual property rights in the agreements. As you know, intellectual property rights are monopolistic rights. These rights give the privilege to the inventor or the proprietor to use his right for himself. By virtue of the existence of the right, it is said that it can exclude other competitors from using that right which means it

is hindering competition at the first place, but it is necessary to exercise the IPR rights by the company that has developed a new technology and is giving a product of better quality or maybe at lower prices. The company must get some benefit from their technology. It is not per se hindering other competitors to further innovate or to come up with other technologies, that may be better, that may be in an advantageous position or a better position than the earlier inventor.

In this regard IPR, per se, does not give any company any right to be a dominant company, because per se IPR is not restricting competition. Existence of an IPR and exercise of the IPR are two different things. Existence of an IPR is when (say) one company is having certain intellectual property rights, in the form of patents or any other form, they may use it for their own purposes, but it should not hamper the competition in the market.

One of the decision regarding the existence and the exercise of IPR was the *Volvo versus Wang* case in 1988. It was about a protected design right. The Volvo, manufacturer of Volvo cars; had certain design registered for the front hood of their car, which is very specific to the car segment. Wang, another manufacturer of replacement part, infringed their designs right without taking license. They started selling the front hood to damage the consumer base. Volvo initially filed a case of infringement alleging that this is the violation of their intellectual property rights. Wang said Volvo refused to give them license and Volvo is abusing its dominant position.

The court held that the IP right grants proprietor exclusivity and there is an obligation to license. If, in return of the royalty, it would lead to the proprietor being deprived of the substance of his exclusive right i.e., whether to license or not to license solely depends on the proprietor himself, the proprietor does not necessarily have to give the license to any third party.

A refusal to grant such license in itself cannot constitute an abuse of the dominant position. This is one of the critical case since it was related to car segment. In the car segment there are two things; one is the manufacture of the car and other is the

manufacturer of replacement part. When a consumer buys a car, they look into where can they get the services if the car is damaged.

In this case, the relevant market has two segments, one is the total car segment and the other one is the replacement part segment, both having some inter-linkage. In this case, the court decided that Volvo has the right not to give the license to Wang, because consumers are well aware that they are purchasing a car from a particular manufacturer. If anything happens to the car, they may get the replacement from the manufacturer itself. They do not necessarily have to depend on third party. In this case, the existence versus the exercise of intellectual property right was dealt very beautifully, but some critically argue that it was a narrow decision; however, this is one of the landmark cases which laid down the concept of existence and exercise of IPR.

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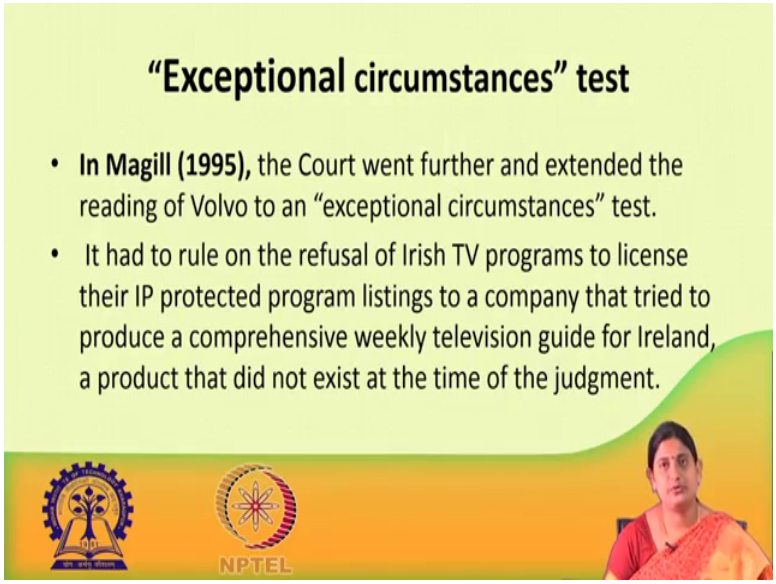

There are few critical things associated with the abuse of dominant position i.e. per se IPR is not hampering the competition, but under certain exceptional circumstances, the holder of intellectual property right, may be considered as abusing the dominant position. This is known as the *exceptional circumstances test*. In the next series, we will discuss a few more cases and continue with that.