Intellectual Property Rights, And Competition Law
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Lecture – 35
IP Licensing and Indian Competition Law

Hello all. Let us start our discussion regarding the IP Licensing Agreements and the Indian Competition Law. In this module, we will look into how the various IP licensing agreements are dealt by the Indian competition commission with illustrations of case laws and case analysis.

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In this module, we will deal with the nature of IP agreements, various jurisdictional issues to understand how the IP agreements are coming under the purview of competition law. We will look into different cases to understand how the jurisdictional issues and licensing issues were resolved by the competition commission of India.

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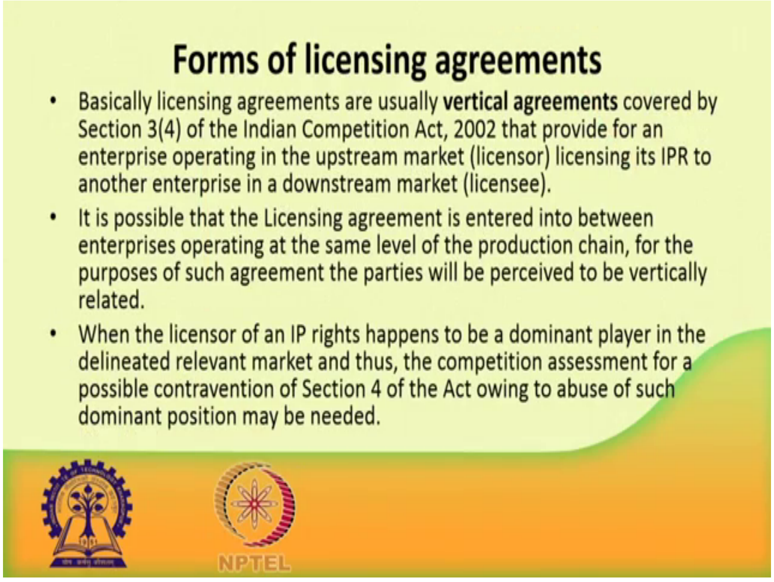

By our discussion on various provisions of the Indian Competition Act, 2002; we know that various agreements maybe horizontal or vertical agreements. If they are having certain appreciable adverse effect on the competition in India, then they may be considered as anti-competitive agreements.

The licensing agreement can be a vertical agreement which is covered under the sub-section (4) of Section 3, and it provides that the enterprise operating in the upstream market i.e. the licensor licenses the intellectual property rights to another enterprise operating in the downstream market i.e. the licensee. So these two are at two different levels of the supply chain. This is a vertical agreement. It is one kind of licensing agreement which is possible. There is another kind of licensing agreement between the enterprises which are operating at the same level which are known as horizontal agreements. For the consideration of IP licensing, such agreements will be perceived to be vertical.

Suppose, there is a company A having certain procedure for packaging certain material and another company B is having an advanced method for the packaging of material. Since both of them are related to the packaging of material, they are at the same level, since a licensing agreement is in existence related to an intellectual property right; for the purpose of the competition law it will be perceived as a vertical agreement.

And, when the licensor is having a dominant power or is a dominant player by virtue of the market share or technology which it possesses in that relevant market then the competition assessment will be regarding its abuse of the dominant position. Section 4 of the Competition Act deals with the abuse of dominant position. We have already seen and learnt all these.

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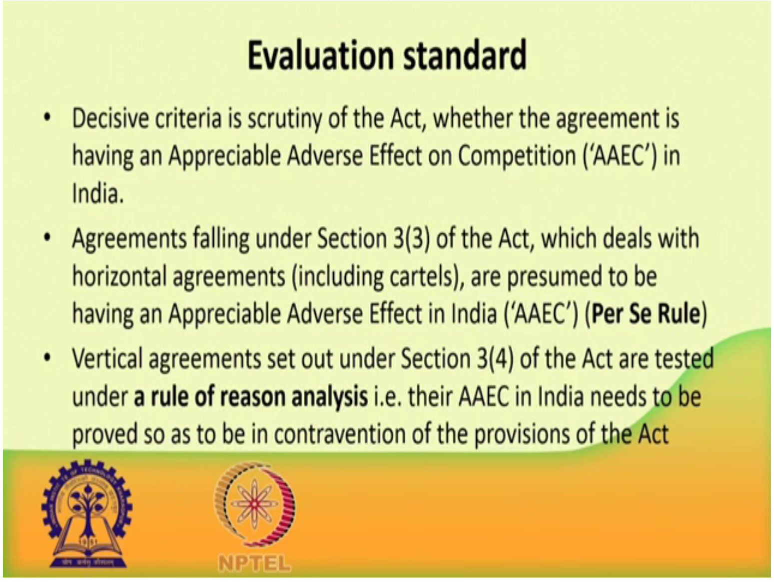

Now, we will look into how the provisions of the Indian Competition Act are laid down and how the competition commission of India deals with such issues. Not all agreements are anti-competitive. An agreement will be considered as an anti-competitive agreement when it has an appreciable adverse effect on the competition in India.

The agreements falling under sub-section (3) of Section 3 of the Act deals with the horizontal agreements including cartels and such agreements are presumed to have an Appreciable Adverse Effect on Competition i.e. they are presumed to be per se anti-competitive. The per se rule is applicable here i.e. any horizontal agreement per se would be considered as anti-competitive.

The vertical agreements which falls under sub-section (4) of Section 3 of the Indian Competition Act are dealt on a rule of reason basis i.e. the details of deeds or the nature of the arguments are looked into to understand whether they are causing or may cause an appreciable adverse effect in the competition in India or not. A rule of reasoning approach or the ***ROR analysis*** is done to understand whether the vertical agreements are anti-competitive or not.

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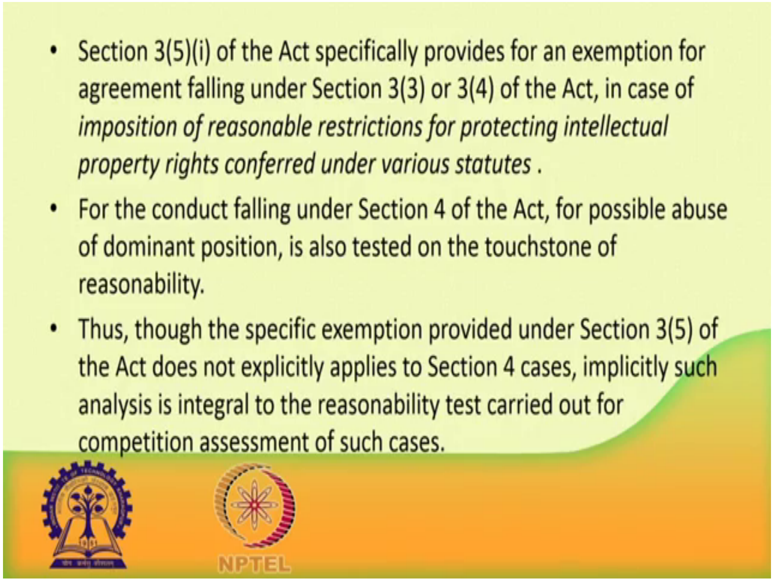

We have seen that the sub-section (5) of Section 3 has laid down various acts related to intellectual property rights which may be considered to be immune from the provisions of Section 3. Sub-section (i) of 3(5) of the act specifically provides for an exemption for the agreements falling under the sub-section (3) and sub-section (4) of Section 3 of the Act.

In those cases, imposition of reasonable restriction for the protection of intellectual property rights conferred under various statutes such as the Patent Act, Copyright Act, Trademark Act, Semiconductor and Integrated Circuit Chip Protection Act, Geographical Indication and Protection Act, will not come under the purview of the competition law.

But the conduct falling under the purview of Section 4 for possible abuse of dominant position, are tested on the basis of the rule of reason approach. They are not considered to be per se anti-competitive. The rule of reason analysis is followed in order to understand the anti-competitiveness of the agreement. So, even though there are exemptions provided under sub-section (5) of Section 3 of the Act, it does not directly relate to Section 4, i.e., if there is a dominant player having certain intellectual property rights and abusing its power dominance with respect to those intellectual property rights; section 3 sub-section (5) will not come into the picture and those cases will be dealt only on the basis of the rule of reason approach.

In many of these cases, the IP holders consider that since these reasonable restriction can be placed as per Section 3 sub-section (5), they are immune from the competition law, but it is not the case i.e. reasonable restriction are only to protect the rights conferred by various IP laws in order to prevent infringement of the right, but that does not mean that IP holders can place any restriction to enjoy their rights.

IPR is a monopoly right, so you as an IP holder are free from any obligation or one can enjoy the right the way he wants, but that does not mean one can place any kind of restriction, which may even lessen the competition or raise the price of the product or may give any anti-competitive feature in their agreements.

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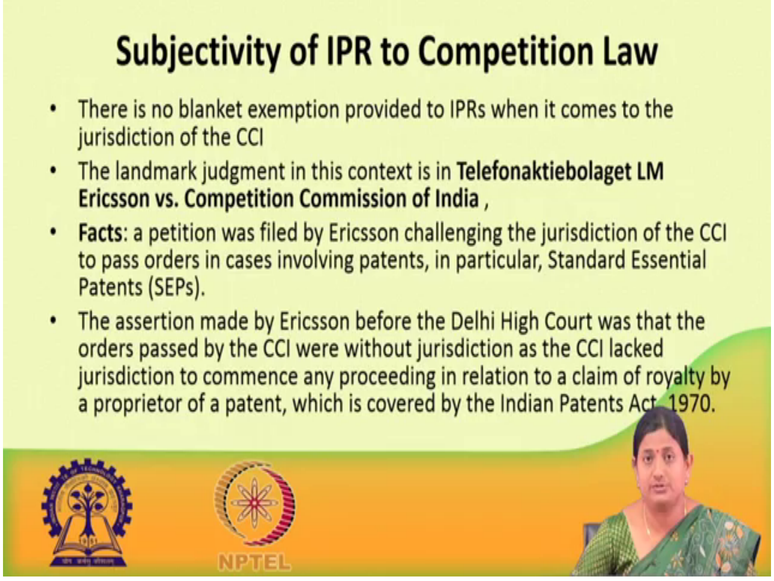

Before understanding how the IP cases are dealt under the competition law, we have to understand whether IPR is coming under the purview of the competition law. I am asking this question because many of the cases land in the courts like the Supreme court and the High court, just to find out whether competition commission of India has the jurisdiction to analyse those cases or not. As I mentioned earlier, IP holders think that they have a blanket exemption because they are having an IPR, a blanket exemption from the competition law, but this is not true.

There is no blanket exemption provided to IPRs when it comes under the purview of the competition commission of India. A landmark decision in this regard was the case between Ericsson and the competition commission of India. In this case, a petition was filed by Ericsson challenging the jurisdiction of the competition commission of India with respect to certain cases related with patent.

It was a case related to standard essential patents. We will deal with the details relating to standard essential patents and technology. The petition was regarding whether CCI has jurisdiction to determine the cases involving patent rights or standard essential patents, whether IP is under the purview of CCI or not.

The assertion made by Ericsson before the Delhi High Court was that, the orders passed by the CCI were without jurisdiction as CCI lacked jurisdiction to commence any proceeding in relation to the claims or royalty by a proprietor of a patent, covered by the Patent Act of 1970. As per Ericsson, all the matters related to patents are covered by Patent Act 1970.

The amount of royalty, how the royalty will be shared, what will be the conditions, all these matters should come under the purview of the Patent Act only. So, the competition commission of India does not have any jurisdiction for deciding or for passing any order related to patent negotiations.

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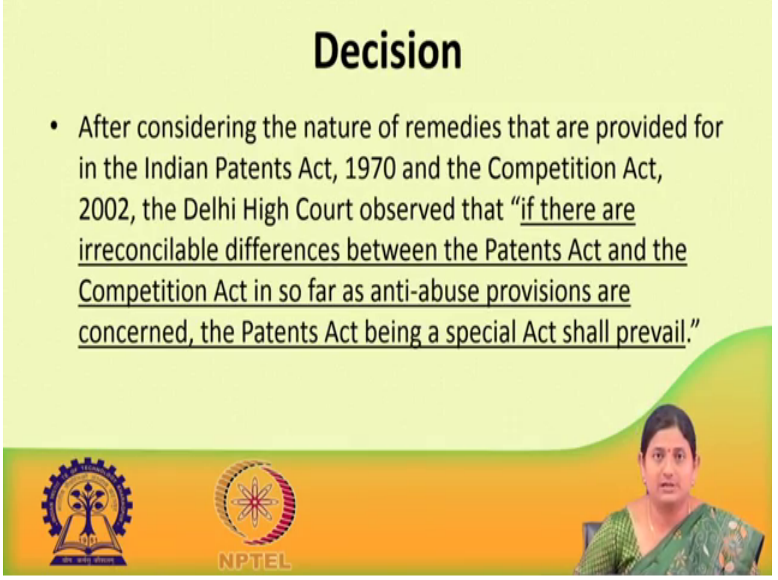

After considering all the facts, evidences and the nature of remedies provided under both Competition Act and the intellectual property statutes like Patent Act, 1970, the Delhi High Court observed that, if there are irreconcilable differences between the Patent Act and the Competition Act, in so far as anti-abuse provisions are concerned Patent Act being a special legislation shall prevail. This means that, if there are differences between the remedies provided by the Patent Act and the Competition Act, the Patent Act shall prevail.

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They found that there are no irreconcilable differences between the two statutes but the remedies provided by the Competition Act of 2002 for abuse of dominant position were substantially different from the Patent Act of 1970 where there is no remedy for the abuse of dominant position.

But these are not mutually exclusive, i.e., the grant of one remedy is not exclusive of the other, i.e. if you sought for one remedy, it is not that you cannot seek for another remedy under the Patent Act. These two remedies from two different acts are very different, but are not mutually exclusive. The Delhi High Court said that these decisions are non-overlapping decisions.

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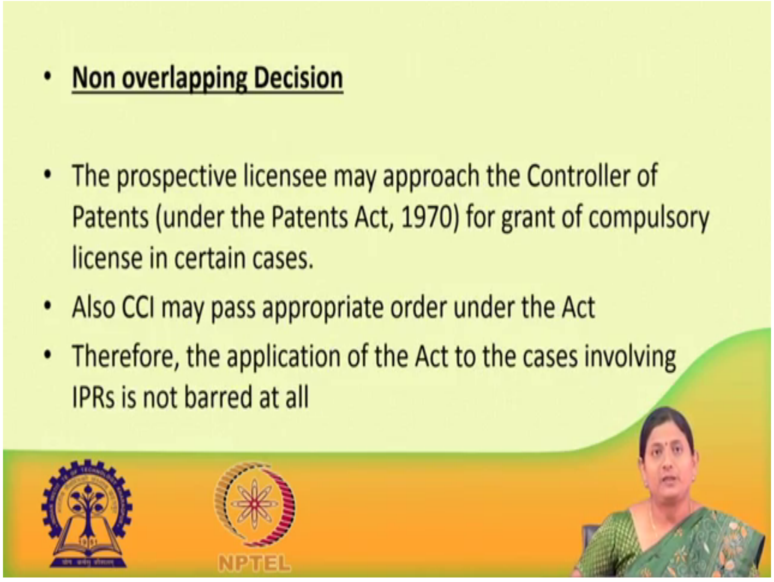

The prospective licensee may approach the Controller of Patents under the Patent Act, 1970 for the grant of compulsory license in certain cases. If a licensing negotiation fails then we have the provision of compulsory licensing under the Patents Act.

The prospective licensee may also approach the Competition Commission of India to get an appropriate order. Therefore, the application of the act to these cases involving IPR, is not barred at all i.e. competition commission of India has the jurisdiction to solve or to issue orders related to cases where intellectual property is involved.

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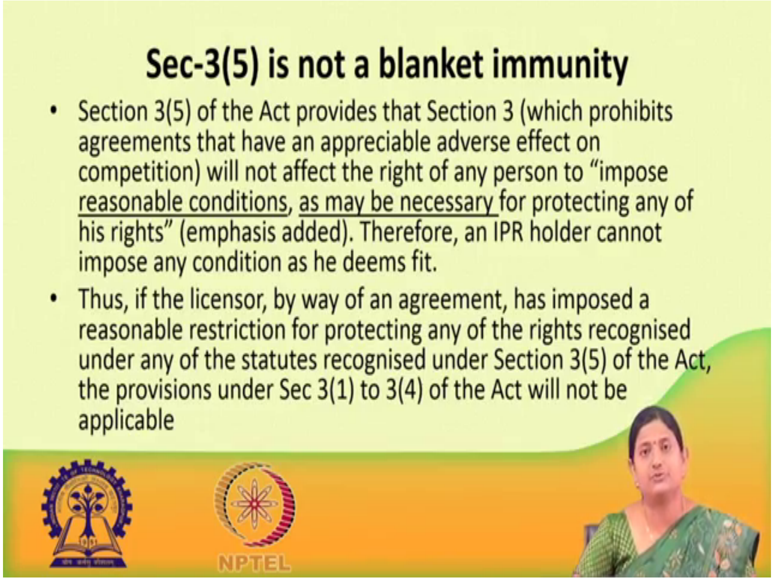

With this case, it was established that sub-section (5) of Section 3 is not a blanket immunity. Sub-section (5) of Section 3 of the act provides that the Section 3 which prohibits agreement having an appreciable adverse effect on Indian competition, Indian market will not affect the right of any person to impose reasonable restrictions, reasonable conditions as may be necessary for protecting any of his rights.

Reasonable restrictions, reasonable conditions for protecting rights; means protecting rights from infringement. IPR holder cannot impose any restriction that he wants to put. These restrictions should be reasonable, to enjoy rights or to prevent them from infringement. The licensor, by the way of an agreement, can impose reasonable restrictions for protecting any of his rights, recognised by any of the statutes mentioned in the section.

Other provisions under Section 3 i.e. sub-section (1) and sub-section (4) of the section 3 are not applicable i.e. for those reasonable restrictions, the anti-competitive law provisions will not be applicable. But when it is abuse of dominant position then the court will look into the rule of reasoning approach and how it has caused appreciable adverse effect in the competition market will be analysed.

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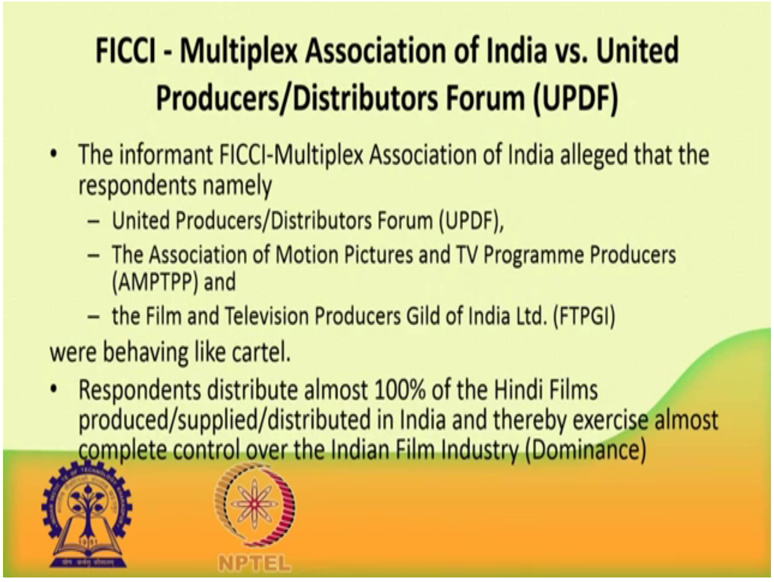

This misconception about blanket immunity related to IP was also dealt in another case ***FICCI Multiplex Association of India vs. United Producer and Distributors Forum (UPDF)***. It was alleged that United Producers and Distributor Forum, the association of motion pictures & TV program producers and film & television producers Gild of India, all these three were behaving like a cartel.

As we have seen, it is very difficult to get a proof regarding cartel and their functioning underneath. In their complaints, they stated that all the respondents produce, supply and distribute the films in India thereby exercising complete control over Indian film industry i.e. these parties are in a dominant position and they are behaving like a cartel. This complaint went to competition commission of India.

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FICCI alleged that the respondent UPDF the producer and distributor's forum, had issued a notice instructing all his members not to release any films to the member of FICCI. Producer's association sent notice to all multiplex theatres.

After a negotiation failure, UPDF asked all the multiplex theatres not to showcase any movie to FICCI. A notice was also sent to the members by UPDF because the basic conflict was between FICCI association of the Multiplex Association of the India and UPDF on the point of royalty sharing or revenue sharing ratio.

In 2009, it was alleged that the producer and distributors started demanding unreasonable amount of royalty sharing. Earlier the revenue sharing was around 40 to 44 percent of the revenue for the first week, then with the subsequent weeks the revenue sharing used to decrease to 30 to 35 percent. It depended on the nature of the movie. But in 2009, they demanded 50 percent of revenue sharing for all weeks. Because of this demand, there was a conflict between the association of multiplexes and the producers gild. This is where the problem started.

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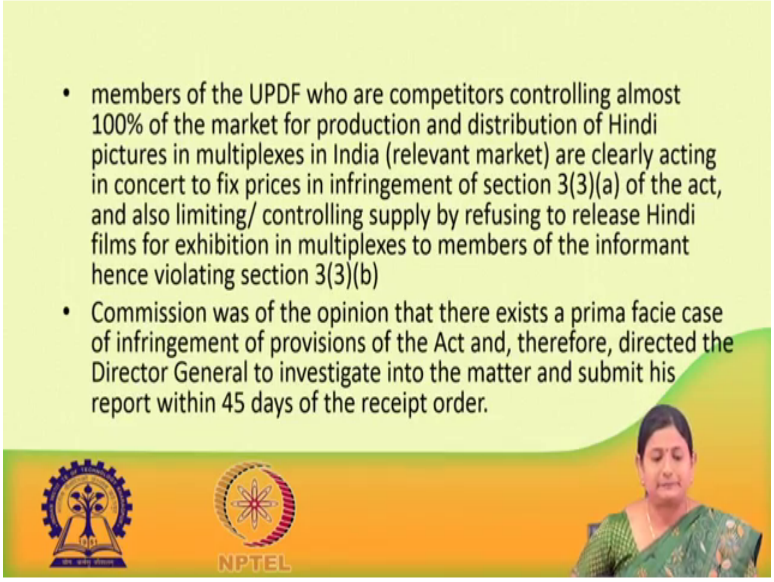

FICCI alleged that, the members of UPDF, who are the competitors controlled 100 percent of the market for the production and distribution of Hindi films in the multiplexes. So, Multiplexes are the relevant market in this case.

Now all the parties, i.e. all the respondents have come together to fix the prices for the revenue sharing and this is why they are behaving like a cartel and violating subsection (3)(b) of Section 3 of the Indian Competition Act. The competition commission was of the opinion that there exists a prima facie case of infringement of the provisions of the Act and therefore it directed the Director General to investigate into the matter and bring a report within 45 days.

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DG investigated into the case and found that, there is a cartel like conduct among the respondents and there have been instances of anti-competitive conducts because, the letters issued by the association AMPTPP as well as the producer's gild to the members 'with an appeal to not to release the films in the multiplexes' was real.

The respondents conducted several meetings and sent letters to multiplexes to not to release movies, and have threatened them of suspension or boycott if they release any of these movies without their permission. DG, finally found that these behaviours are in contradiction to sub-section (3) of the Competition Act, 2002.

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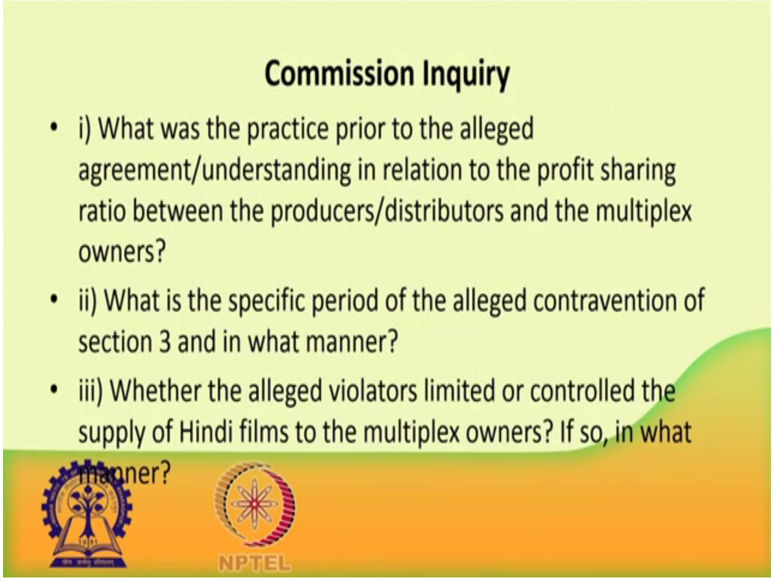

That's where the commission's enquiry started. The commission raised seven questions, which it should enquire. First, what was the practice prior to the alleged agreement or understanding in relation to profit sharing ratio between the producers, distributors and the multiplex owners? What was the situation earlier?

As I mentioned, now they were demanding 50 percent of the revenue sharing. Earlier it was nearly 35 to 45 percent, depending on different kind of movie. But now their demand changed to 50 percent for all the movies, for all the weeks. The distribution pattern was quite different during the enquiry.

Second question, what is the specific period of the alleged contravention of Section 3 and in what manner? From what time the alleged contravention has been continuing. This complaint was made around March 2009, and it continued approximately till June. So, it was for around a year. As you know, the movie business is a huge business, even loss of one week is a substantial loss. So, that time period should also be taken into account during the investigation.

The third questions, whether the alleged violator limited or controlled the supply of Hindi films to multiplex owners? If so, in what manner? Are the respondents the only party who are supplying movies to multiplex theatres? Whether the respondents are in a dominant position or not? Producer's gild and AMPTPP is having all the main producers. In the report of the commission, which is available on the competition commission of India website, one may find all the relevant report regarding this case.

I will share the link in the reference section, where you can see that they have named all starting from Amir Khan, Siddharth Roy Kapoor, Mahesh Bhatt, all the producers like Karan Johar, Shahrukh Khan, Red Chilli Entertainment, Amir Khan Production allegedly involved in this association. In the investigation, it was established that, yes, they were the main supplier of Hindi films to the multiplex owners. And during this period only one movie was released, which was a low budget movie that did not do well in the market.

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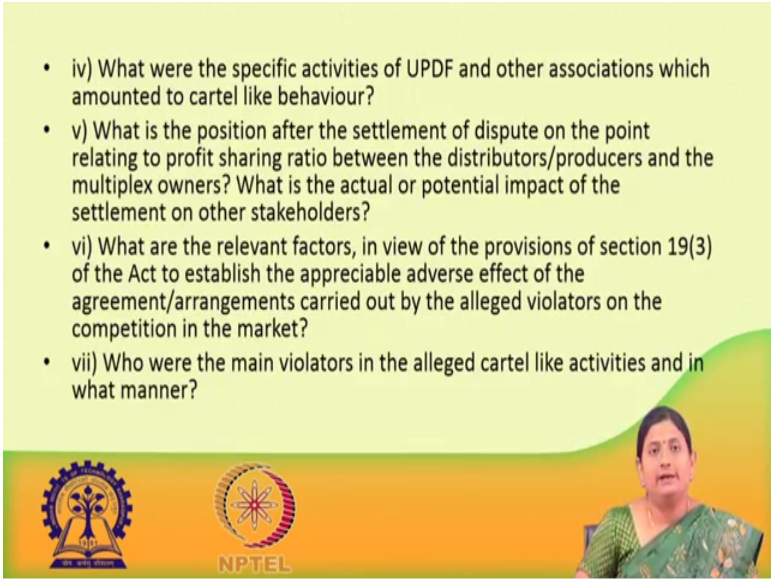

The fourth question, what were the specific activities of UPDF and other associations that amounted to cartel like behaviour? The commission found that various meetings were conducted and simultaneous boycott of multiplex theatre, for not supplying movie or issuing letter, fixing the price, etcetera were to be regarded as cartel like behaviour.

The fifth question, what is the position after the settlement of the dispute on the point relating to profit sharing ratio between distributor, producers and multiplex owners? What is the actual or potential impact on the stakeholders due to the settlement? What will happen if the price is fixed? What will be the potential impact on the consumers or stakeholders?

The sixth question, what are the relevant factors in view of section 19 of the Act to establish appreciable adverse effect on the agreement or the arrangements carried out by the alleged violators? And who were the main violators in the alleged cartel like activity and in what manner? All these questions were raised and the above mentioned points were investigated during this case.

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After complete enquiry, the competition commission found out that, the behaviour created entry barriers in the market for multiplexes which is indisputably a violation. Because of the price fixing, there is not going to be any benefit to the consumers, nor would there be any improvement in the distribution of the film or the promotion of the scientific, technical or economic development in the industry.

This was a matter between the producers and the multiplex owners. It was not going to enhance the user's experience or technical experience or the economic development in the industry, the profit will only go to the producer. The multiplex may not charge higher and hence, there would be loss to the multiplex owners and the profit would be for the producers or the movie suppliers.

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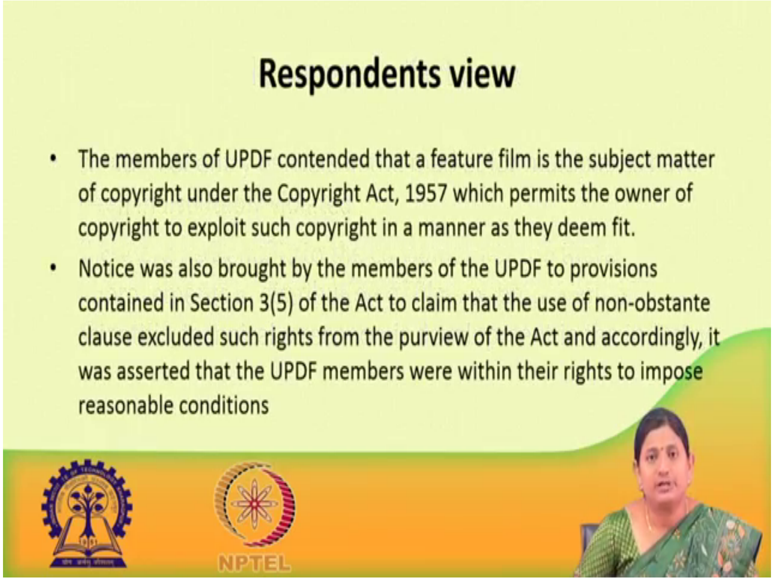

Responding to these, the respondents said that feature film is a subject matter of the Copyright Act, 1957, which permits the owner of the copyright to exploit copyright in any manner as they deem fit. So, it should come under the purview of copyright act, 1957 and not the competition commission of India.

UPDF brought sub-section (5) of Section 3 and claimed that the non-obstante clause excluded such rights from the purview of the Act and accordingly it was asserted that the UPDF members were within their rights to impose reasonable conditions, because the films are under the purview of Copyright Act. The UPDF are free to impose any reasonable restriction to enjoy their rights. This was the contention from the respondent's side.

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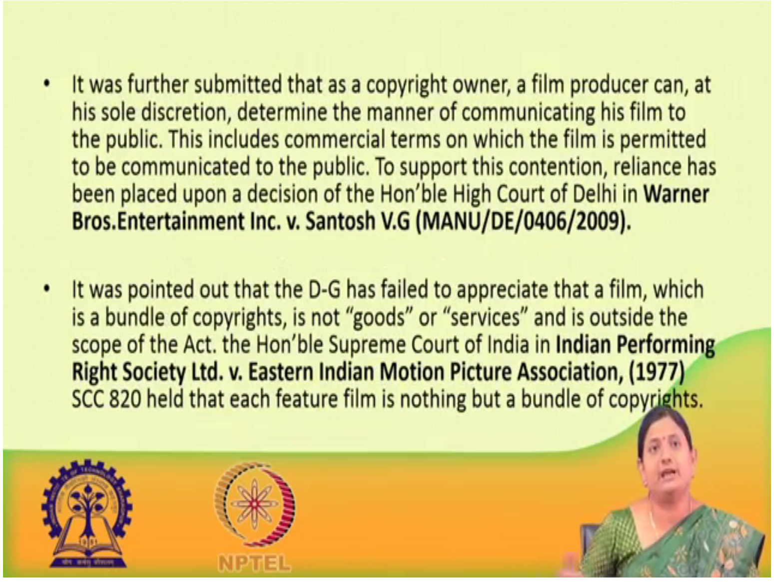

With this contention, they sited many cases such as *Warner Brothers versus Santosh V. G*. They said that a copyright owner or a film producer can, at his sole discretion determine the manner to communicate his films to the public. This includes, the commercial terms on which the film is permitted to be communicated to the public. And so, producer is free to communicate how much money he wants to release the movie. Since the producers gild and UPDF are also copyright holder, they are free to negotiate the licensing amount or whatever they deem fit for the deal.

They accused DG of failing to appreciate that a film, which is a bundle of copyright, is per se not a good or a service. It is outside the scope of the act. They said, a movie cannot be considered as a good or a service. It is a bundle of copyright. And hence the DG erred in his decision.

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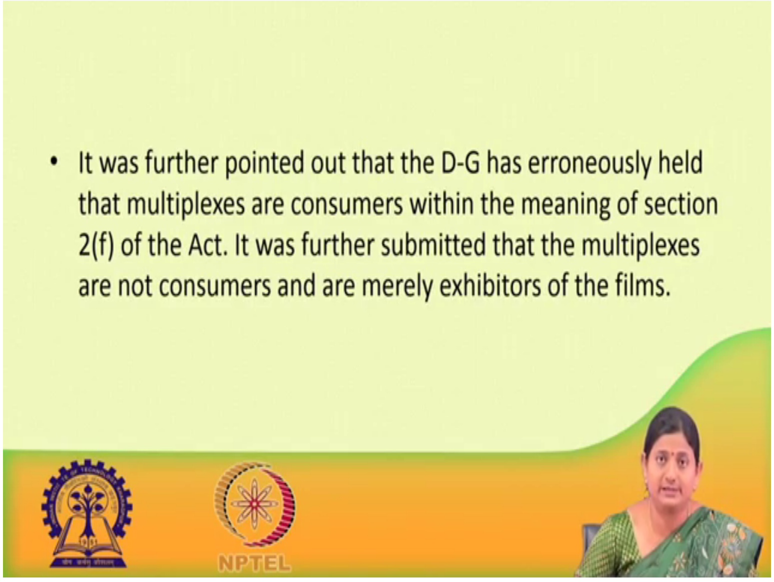

It was further pointed that, the DG has erroneously held that multiplexes are consumers as they are taking the material from UPDF and utilising those as a consumer. But the respondents submitted that multiplexes are not consumers and are merely exhibitors for the film.

Films are copyright, they are not goods or services, the multiplex theatre, multiplex owners are not consumers, under sub-section (5) of Section 3 a blanket immunity has been provided to the producers association to use their copyright: These were the contentions from the respondent's side.

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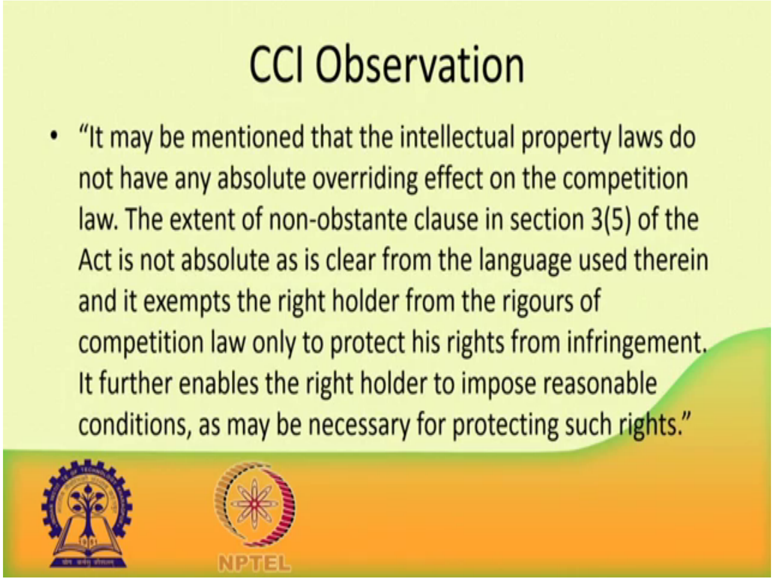

However, the CCI in its final submission observed that "it may be mentioned that the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of *non-obstante* clause in the sub-section (5) of section 3 of the act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions as may be necessary for protecting such rights."

The right holders can place any reasonable restriction to enjoy the monopoly which they get from intellectual property right statutes. The CCI gave its observation on sub-section (5) of Section 3, regarding various intellectual property laws.

This is one of the case where the competition commission of India emphasised that IP can come under the purview of competition commission of India and Section 3 sub-section (5) does not provide a blanket immunity from other sections when it comes to IP related agreements. With this decision, the jurisdiction established for the competition commission of India to deal with cases involving IP licensing negotiation.

We will discuss more cases on IP licensing. Stay tuned. Thank you.