**Intellectual Property Rights, And Competition Law**

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**Lecture - 19**
**Unilateral Refusal to License or Deal**

Dear students, in this class we will discuss the unilateral refusal to license or deal. Whether as a producer I have the right to unilaterally refuse to license or deal with anybody. In contract law, you are free to contract with anybody. You can very well refuse to deal with somebody, but the question is in the case of intellectual property rights, whether you have that right?

You have a bundle of rights given through the intellectual property. Where the state given particular right is an absolute right. In the previous classes, we said that intellectual property rights are not absolute rights. They are subject to restrictions, they are for the betterment of the society. When it comes to intellectual property versus competition law, these intellectual property should be used only for the purpose of the benefit of the market, benefit of the society at large.

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So, in this class we will see the monopolization of service market. How some of the companies are monopolising service market and how the competition law is taking care of this. Then the tying of service with product which is also one of the problems. And we will see how the competition law is taking care of the monopoly or a monopolist, where the monopolist is dominating the market with his technologies. Then the new doctrine, which is essential facilities doctrine. If I refuse to license on reasonable terms, then what is it that the authorities can do under the essential facilities doctrine. We will see these.

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So, unilateral refusal, refusing to license maybe due to business reasons, maybe due to market reasons, maybe due to other reasons. Here market power is the most important thing. Market power is control over the market absolutely where you can dominate the market and also increase the profitability of the company and control the output as well as control the competitors in the market for a significant period of time.

So, here you can say how these patents, copyright or trade secrets necessarily confer market power upon its owners. Unfortunately, intellectual property law never confers market power, but because of these intellectual properties, some of the big companies and mostly the knowledge driven companies dominate the market. In that particular case how the competition law is going to deal with these kind of situation?

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As I told you the concept of antitrust itself is to open up the market, and the market should be benefitted and the market consumers should be benefitted, out of the technological revolutions and innovations even though the technology is illegally acquired or maintained. If it is legally acquired or maintained then always there is an eye of competition law on that particular technology.

The question is whether the intellectual property owner, who acquired the intellectual property legally, have the right to harm the competition in the market. That means any unreasonable interference, any unreasonable condition is going to affect the market whether I have that particular right.

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But in a number of cases, the court said that the owners of the intellectual property do not have any right to exploit the intellectual property in such a way to affect the market. The famous case of 1994 *Data General Corporation versus Grumman System Support*. Here two companies, the software companies in the 80s fought each other for the market because the softwares and the technologies were developing at that particular point of time.

In this particular case Grumman uses a complex computer program which is known as the ADEX. A computer program is developed by the Data General Corp to diagnose the problems of computers, the problems in DGS, the data general MV computers. That means one company produces computers and the other one is the service provider, which is using a software to identify the problems in computers. Here, Data General claimed that Grumman infringed DGS, the copyrights and misappropriated the trade secrets embodied in ADEX. And if you look into this particular case, the facts of this case are very clear that the Grumman Systems and their operators and their service personnel widely used this particular software which is owned and whose copyright is with the Data General. So, here you can see that an intellectual property acquired through copyright owned by Data general

has absolutely violated by Grumman System's IP when they were servicing the computers. The district court awarded damages but what did the upper court say?

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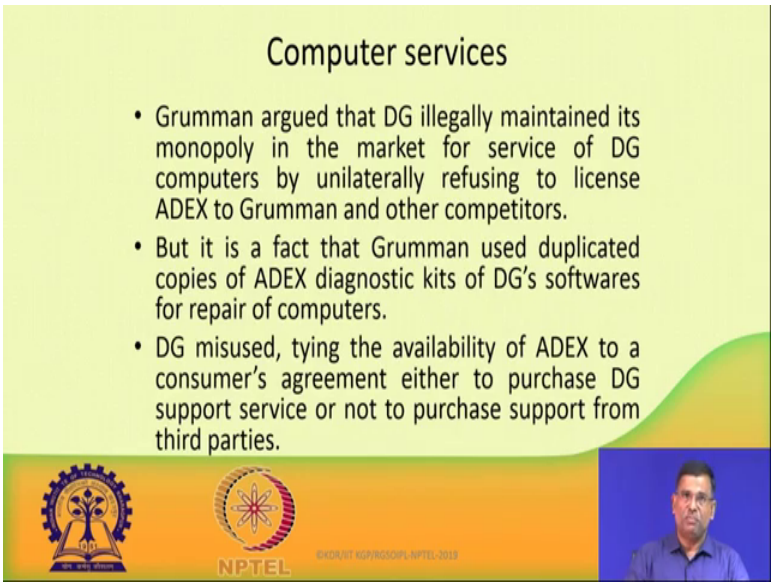


Grumman argued that DG is illegally maintaining its monopoly power in the market for servicing of the DG computers. Not only they but I also must get a piece of the pie of that particular service. So, DG unilaterally refusing to license this ADEX i.e. the particular software used to identify the problems in this particular computer. Grumman alleged that DG is refusing to license this particular software to not only Grumman but other competitors as well. So, it is a violation of competition law.

But DG's argument is that I am the copyright owner of a particular software which I developed for a computer and these are protected by intellectual property and whether to license or not to license is with me. So, the question is if you have complete rights can you refuse to license to anybody. The software was very necessary for repair of the computers. It was alleged that the DG misused and tied this particular software with their computer services.

They also said that consumer's agreed in the agreement either to purchase DG support services or not to purchase support from third parties. Whenever they sold their machines they said to take the service from them, support services from them and also not to take any third party services. So, in this case you monopolize the product, you monopolize the services and you do not allow anybody else to do the services as well. So, other business people will be completely out of the purview.

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So here the court very clearly said that it is an absolute refusal to license which is a violation of the Sherman act and this particular company is a monopolist, it is completely exploiting, constituting and exclusionary conduct of everybody else. So the question is whether the exclusionary conduct is affecting the market.

The single company is a monopolist, who is controlling the absolute market as well as the services. So, all other people will be out of business. So, it means that once monopolist starts harming the competitive process in the market, then it is a violation of competition law. For example, the earlier decision in *Aspen Skiing Company.* If you do not have a valid business justification for tying two things, then it's going to be a violation of the competition provisions.

So, legitimate competitive reason for refusal must be given by the companies and in this particular case the court held that these companies are monopolist and its a violation of the competition provisions.

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What do you mean by business justification? Business justification is a valid justification, it must relate directly or indirectly to the enhancement of consumer welfare or competitive process in the market. It is a defence of the competition provisions. So, it means that if a particular process is for the pursuit of efficiency and quality control it might be legitimate competitive reason and it is not going to attract the competition provisions.

Otherwise, the competition provisions are going to be attracted. Also, the court in this particular case held that this exclusionary conduct of all others and a monopolist's unilateral refusal to license the copyright and then again, author's desire to exclude others from use of his copyrighted work is a presumptively valid business justification for any immediate harm to consumers.

So, there is no harm, if I am keeping the particular product as well as the copyrighted product, the software, if the market is not going to affect. But if the market is going to be

affected and the competitive process in the market is going to be affected maybe from higher price then the provisions of the competition provision are going to visit those particular actions. Here, you can see that effective competition co-operation is indispensable to effective competition in the market.

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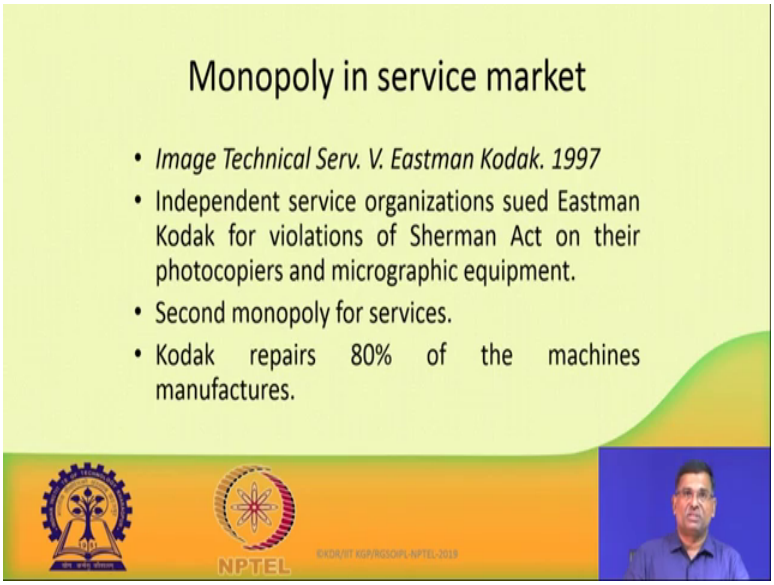


So, you have to co-operate even with your rivalries. If you look into the service market Eastman Kodak case comes. In, *Image technical services versus Eastman Kodak,* 1997 case an independent service organisation sued the Eastman Kodak for violation of the provisions of Sherman Act. This was with regard to their photocopy machines and micrographic equipments.

So, here also the machine was tied. The allegation was that the machine, the photocopy machine is tied with the post sale services of photocopy machines. Here, you can see that at that particular point of time, the Kodak repairs 80 percent of the machines manufactured by them so; that means, 80 percent of the service market is controlled by the Kodak here.

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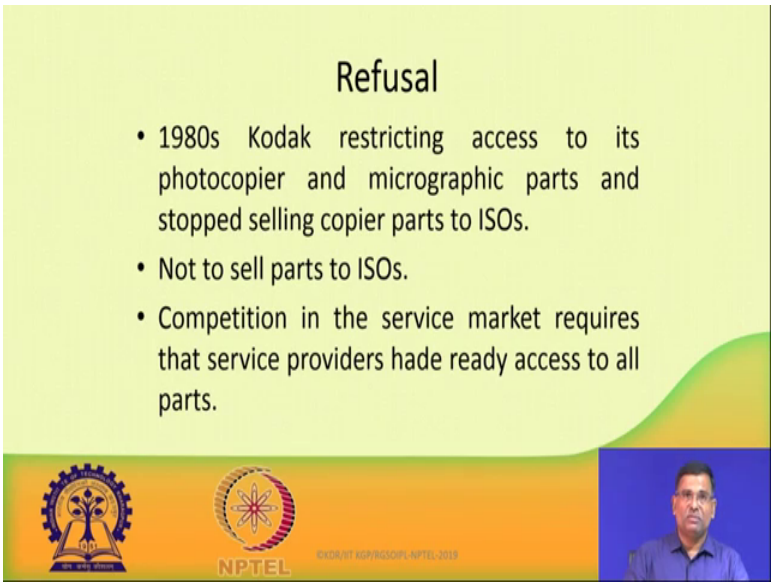


In the 1980s, Kodak restricted access to its photocopying and micrographic parts. They simply said that we are not going to sell the parts to independent service organisations. So, what is going to happen? If you do not have spare parts, you are going to be out of the business. Eastman Kodak took the decision not to sell spare parts to the independent service organisations.

It means they are going to kill the competition in the market and take over all the services of these photocopy machines themselves. These service providers do not have access to parts. Once they do not have access to the parts or there is a deficiency in the parts these independent service organisations will be out of business and so they alleged that there is a violation of section 1 of the Sherman act.

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We can see that this is an attempt by the Eastman Kodak to monopolise, attempted monopolization of sale and services of Kodak machines. This is also a violation of the Sherman and Clayton Act. The district court gave the judgment in favour of Kodak because they have the copyright, so the court thought that the machine as well as the service is protected by intellectual property law. So, there won't be any violation at all.

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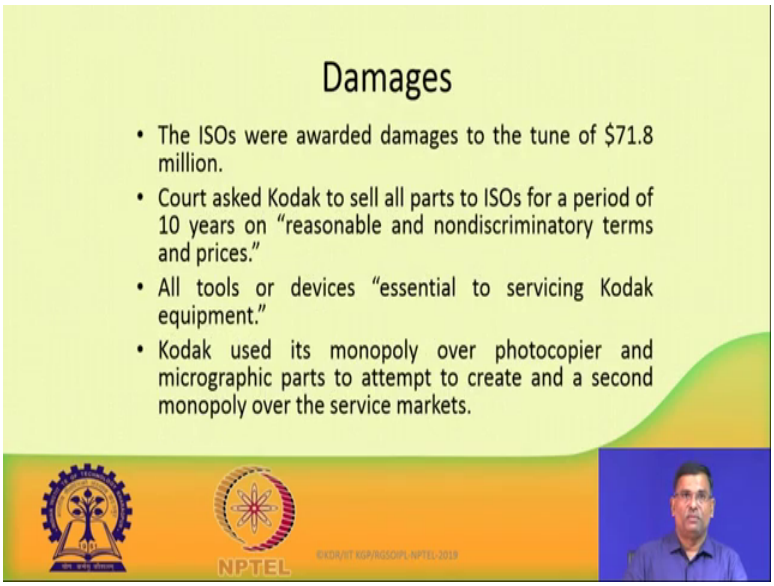


But here the independent service organisations were awarded damages, because you are tying the product with the services and absolute monopoly is formed by it. You can increase the prices to whatever you want in a particular situation. The higher courts awarded the damages to the tune of 71 million US dollars. It was very clearly said by the court that, Kodak's objective is to monopolize the market, not only the product market as well as the service market. And the court ordered Kodak to supply the parts for next 10 years; independent supply to independent service organisations for a period of 10 years on reasonable and non-discriminatory terms and prices.

This is very important, because even though I am a monopolist I am not permitted to sell any products on discriminatory terms and prices. And here specifically court said that all tools and devices essential to servicing Kodak equipment must be sold, must be made available to the independent service organisations for the next 10 years. As I told you Kodak was actually trying to create a monopoly market; not only in the product market but the service market as well, which the court ruled against. It was going to affect the competitive process in the market as well as the competition provisions of the Sherman Act.

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Then we come to the essential facilities doctrine. This is very recent in origin. The technologies, newer technologies are coming into play. For example, mobile phones. A mobile phone is, I would say that it is a bundle of patents. Thousands of patents are in a mobile phone which are owned by different companies. So, if a company for example, Ericsson refuses to a license this particular new technology to Indian company or Chinese company or any other developing country companies, what would the developing countries do for manufacturing a lower priced hand set, mobile hand set.

Remember, all these technologies are protected by the intellectual property rights; so, what are you going to do in this situation? In this particular situation the court considered the case of *Intergraph corporation versus intel corporation*.

So, here you can see that Intergraph is an original equipment manufacturers(OEM) with Intel microprocessors. Everybody knows that Intel's microprocessors are used in each and every equipment. Intergraph used a particular technology in computer workstations during 1987 to 1993.

In 1993, Intergraph discontinued this clipper technology and switched to Intel microprocessors. There was a very warm relationship between Intel and Intergraph and they co-operated with each other and certain concession were given to Intergraph corporation from 1993 onwards. In 1996 Intergraph charged several intel original equipment manufacturers and customers with infringement of clipper based technology on intel microprocessor.

So for three years from 1993 to 1996 the relation was good until 1996 when the terms changed between these two companies and they started suing the original equipment manufacturers. In 1999 Intergraph sued Intel for infringement of the clipper patent, the clipper technology which was earlier used.

You know the two companies, their relationship can be good and after sometime the relation can be bad, but intellectual property violations are always intellectual property violations.

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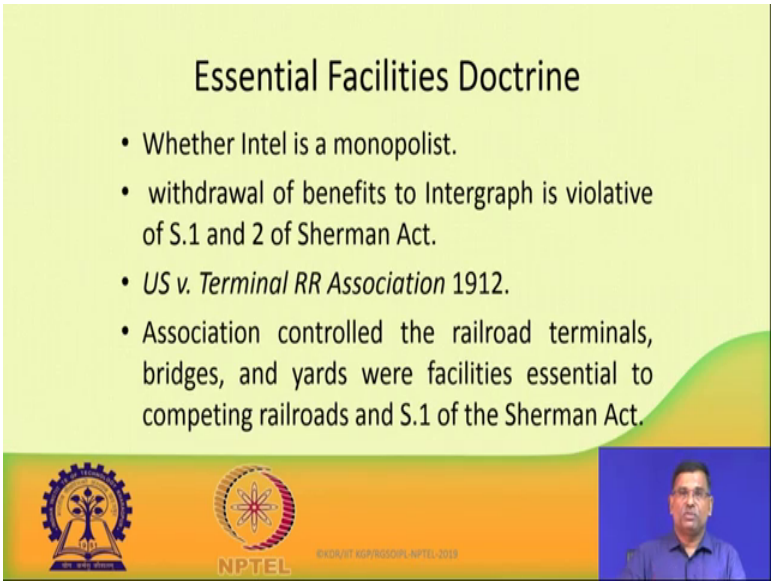

Here the question was whether Intel is a monopolist. Certain benefits were given to Intergraph which were withdrawn by Intel, because intel said that Intergraph is filing suits against me, why should I give any kind of benefits.

Intergraph said these withdrawal of benefits are violation of section 1 and 2 of the Sherman Act and they sited another very old case of 1912 *US versus the Terminal Rail Association*. The association was controlling all railroads, terminals, bridges, yards and all the facilities of competing railroads that there was no competition at all for others at that point of time.

In this particular case, it was said that the railroad association was controlling the entire business. So, it is a violation of the Sherman Act. So, they cited this particular case.

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Here comes the essential facilities. So, if you think that this particular technology is essential for manufacturing, it is essential for manufacture of a particular product and the owner of the intellectual property refuses to license, then what you will do? As I told you it is necessary to compete in the market here.

So, it is very clear that in order to apply the essential facilities doctrine the facility must be controlled by one firm and there is an obligation to make facility available at non-

discriminatory terms to everybody. So, the essential facilities doctrine facilitates the licensing of the technologies, the facility even to the competitors so that there is a fair competition in the market of newer technologies otherwise the new technologies will be only given to certain people, those who can pay more and the developing countries will be out of technologies.

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But certain conditions are to be fulfilled for applying this essential facilities doctrine. First of all the control of the essential facility must be with the monopolist and second, the competitors inability, practically or reasonably to duplicate the essential facility and third, the denial of use of the facility to the competitor and fourth, the feasibility of providing the facility and fifth is if you are using particular technology for eliminating the competition in the downstream market. Then the essential facilities doctrine will be applicable to your technology and it will be given to others on reasonable and non-discriminatory terms.

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So, essential facilities doctrine clearly facilitates others to get a license of an intellectual property on a technology. So, this may deal, may arise in antitrust concerns. Refusal to deal may always raise antitrust concerns. Also when the refusal is directed against the competition and the purpose is to create, maintain, enlarge and to create a monopoly or a monopolist then definitely the provisions of the Sherman Act are going to be attracted. Intel, a big company with microprocessors, has engaged its coercive measures to compel to agree to the terms and conditions because the Intel microprocessors are used in every technology.

So, coercive reciprocity is when if you do it, then only I am going to give you my technology. This is a pernicious effect on the market, on economic similarity. This is nothing, but illegal tying. Definitely, it is going to affect the market. The court said that it is a violation of section 1 and 2 of the Sherman Act. This kind of coercion, coercive reciprocity by using intellectual property is a restraint of trade and ultimately violates the antitrust law.

So, no company can use coercive reciprocity as the owner of a higher technology. I cannot refuse it, because the essential facilities doctrine will be used and it will be made available

to others. So, the newer technologies are available to all and the all players in the market should be made available the newer technologies. If you are refused to deal with these new technologies, then the essential facilities doctrine is going to be applicable in such cases and these technologies will be made available to such kind of people on reasonable terms, on fair terms and non-discriminatory terms.

So, even if I have a higher technology protected by intellectual property, it is not my sweet will to give or not to give. So, I cannot refuse a particular technology to my competitors, because this is very essential to keep the competitive process in the market as well as competition in the market and for the survival of the competitors by this.

We will see in the next classes, the continuation of this class, how the intellectual property interacts with competition law through a number of cases decided by US courts.

Thank you.