

# The IMS Case: A Comparative Perspective

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# US/EU: Divergence?

## At first glance ...

### ■ EU Approach

- Prior to IMS, “exceptional circumstances” involved elements of either monopoly leveraging (*e.g.* using control over TV listing to stifle competition in comprehensive weekly TV guides; refusing to provide spare parts to independent repairers), or change in course of dealing (decision to no longer produce spare parts for a model still in circulation).

# EU Approach (cont.)

- According to the European Commission's approach in *IMS*, “exceptional circumstances” also include ownership of essential facility.
- Unilateral refusal to license IP right that constitutes an essential facility is, without more, abusive.

# U.S. Approach

- Strict Approach of *Xerox* (Federal Circuit)
  - “In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws.”

# U.S. Approach (cont.)

- The Pretext Exception -- *Kodak* (9<sup>th</sup> Circuit)  
IP owner may refuse to license IP right except where the refusal is a pretext to mask anticompetitive conduct.
- Abuse of Standards Setting Process – *Dell Computer* (FTC)  
Late assertion of IP rights in standards setting process is anticompetitive.

# How Would IMS Come Out in the United States?

- Under *Xerox*, no license.
- Under *Kodak*, possible that court would order license on grounds that IMS's assertion of its IP rights was a mere pretext for excluding NDC from the market.
- Under *Dell*, possible abuse of the standard setting process if facts show that IMS belatedly asserted its rights once a serious competitor appeared.

# Conclusions

- Divergence in theory, but not necessarily results.
- European Commission seems to be trying to shoehorn cases into existing theory -- often a poor fit, leaving impression that its decisions may be motivated by other concerns that are not articulated.