

INTELLECTUAL PROPERTY AND EC  
ANTITRUST: UNILATERAL  
REFUSALS TO LICENSE  
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# Volvo v Veng, The ECJ 1988 (continued)

- However, the ECJ held that a refusal to license *might be abusive* if combined with other conduct, provided such conduct is liable to affect trade between Member States. As examples of such conduct it listed:
  - The arbitrary refusal to supply spare parts to independent repairers;
  - The fixing of prices for spare parts at an unfair level; or
  - A decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation.

# Magill, The ECJ, 1995 (Continued)

- the broadcasting companies were the only sources of the basic information needed for the weekly TV guide;
- the refusal to supply this information prevented the appearance of a new product which the broadcasting companies did not offer and for which there was demand;
- there was no justification for the refusal;
- the broadcasting companies reserved to themselves the secondary market of weekly TV guides by excluding all competition on the market.

# Summary

- The existence of an intellectual property right is *not sufficient* to establish the existence of a dominant position.
- The duty to supply that applies to dominant companies *cannot* be extended automatically to the duty to license IPRs.
- The reasoning in *Volvo v. Veng* with regard to unfair pricing and refusal to supply independent third parties is arguably *inconsistent* with the legal monopoly conferred by an IPR.
- Whilst there has not yet been an application of *Volvo v. Veng* insofar as excessive pricing is concerned, in *Magill* the CFI did specifically liken *Magill* to the (i) arbitrary refusal to supply independent traders; and (ii) the decision to stop producing a product for which there was still demand.

# Summary

- In the wake of *Magill*, it would appear that the duty to license applies **only** in situations where the refusal would prevent the emergence of a new product, which would typically appear in a two market scenario.
- In *Ladbroke*, the Court confused matters by suggesting that (i) there may be a duty to license **either** where access is essential **or** where the introduction of a new product may be prevented; and (ii) a dominant firm must license **everybody** once it has licensed **somebody**.

# Summary

- The Commission's treatment of an IPR as an essential facility in *IMS* may be objected to on the ground that such an approach would vitiate IPSs in any case where the IPR had a blocking effect. The order of the President of the Court in *IMS* casts doubt on such an application of the essential facilities doctrine.
- The EU cases appear to reflect some underlying concern with a legislative issue -- the legitimacy of granting certain forms of IPR protection.