

# **Patents and Market Power:** The Case of *Independent Ink*



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- There is a necessary tension between economics and the law
  - The tension is not a bad thing!
  - Reconciliation of sound economics with sound legal reasoning is a by-product of that tension
    - For example, non-patent tying arrangements
  - Sometimes there is no reconciliation
    - Patent tie-ins

# Non-Patent Tying Arrangements

- With respect to tying arrangements, it was once *Economics VERSUS the Law*
- No longer!!!
- The law now gets it right...what was once viewed as a *per se* violation of the antitrust laws now requires a careful market analysis and showing of market power in the tying market for there to be liability

**But, for patent tie-ins, this is not the case!!**

- ***International Salt Co. v. United States (1947)***: Did not speak to the general presumption of market power, but endorsed District Court view that the ability of a patent tying arrangement to accomplish a monopoly was obvious.
- ***United States v. Loew's (1962)***: “*Since the requisite economic power may be found on the basis of either uniqueness or customer appeal...it should seldom be necessary in a tie-in sale case to embark on a full-scale factual inquiry into the scope of the relevant market... and...the seller’s percentage share in that market. **This is even more obviously true when the tying product is patented or copyrighted, in which case...sufficiency of economic power is presumed.***” (emphasis added)

- ***U.S. Steel Corp v. Fortner Enterprises, Inc. (Fortner II) [1977]:***  
“...the unique (emphasis added) character of the tying product has provided critical support for the finding of illegality in other cases...the statutory grant of a patent monopoly in International Salt...represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of market power.”
- ***Jefferson Parish Hospital District No. 2 v. Hyde (1984):*** In general, an inquiry into market power in the tying product is required; however, when the tying product is patented “the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful. Other presumptions of illegality can be made when the seller’s share in the market for the tying product is high...or when the seller offers a unique product that competitors are not able to offer.”

**Where are we? The Jefferson Parish court made it clear the presumption of market power extends to patented products.**

# ***Independent Ink v. Illinois Tool Works and Trident***



- June 2002: U.S. District Court, CD of California

**Plaintiff:** Argued “that a patent, standing alone, with no consideration of the products at issue, their substitutes, or a definition of the relevant market, established market power in a tying case as a matter of law.”

**Court:** “As Plaintiff relies on nothing more than Defendant’s patent, it cannot establish that Defendant had market power in the market for the tying product...”

# *Independent Ink v. Illinois Tool Works and Trident*



- January 2005: U.S. Court of Appeals for the Federal Circuit

**Plaintiff:** Argued, again, that the established precedent mandated that there was a presumption of market power attached to a patent.

**Defendant:** Argued “affirmatively that *International Salt* and *Loew’s* are no longer good law.”

**Court:** “...Supreme Court cases...have consistently reaffirmed the holdings of *International Salt* and *Loew’s* that **no proof of market power is necessary in patent or copyright cases**...(i)n sum the Supreme Court cases in this area squarely establish that patent and copyright tying, unlike other tying cases, do **not** require an affirmative demonstration of market power.” (emphasis added)

# ***Independent Ink v. Illinois Tool Works and Trident***



- So, where are we?
  - There is a presumption of market power in the “market” for the tying product when the tying product is patented
  - The presumption is rebuttable
- This decision was based solely on precedent...there was no economic analysis underlying the CAFC decision

# ***Independent Ink v. Illinois Tool Works and Trident***



- District Court vs. CAFC
  - The CAFC decision does not speak to the merits of the underlying scholarship that attacks the presumption of market power. The District Court decision seems to embrace it.

## What do we mean by market power?

- Non-pejorative term, to an economist
- Means that a firm has the ability to affect its sales by changing the price it charges
- For antitrust purposes, saying a firm has market power is meaningless...unless...
- We show that a firm has sufficient market power (monopoly power, perhaps) to sustain non-competitive prices, terms of sale, and output

- A patentee may—or may not—have “market power” in the non-pejorative sense
  - This is not an interesting antitrust conclusion; the real question is whether the patentee has the ability to sustain anticompetitive behavior.
- *THAT* is what the market power presumption is focused on...there is a presumption that a patent, by itself, allows a firm selling a patented product to behave anticompetitively...put differently, to force its customers to buy a product they do not want.

***THAT* is the presumption that is wrong!**

# If the Presumption Is Wrong, How Did We Get Here?



- **General proposition of those favoring the presumption:** the legal monopoly granted by a patent with respect to the patented technology or product confers an *economic* monopoly
- They see a patent as creating something that is *unique* and not replicable in the market place and, so the argument goes, there is *market* power associated with the patent

# Do Patents Define Markets?

- Clearly...no!
- The market power presumption skirts the issue of market definition
- Recall the language from *Independent Ink*:
  - **Plaintiff:** *Argued “that a patent, standing alone, with no consideration of the products at issue, their substitutes, or a definition of the relevant market, established market power in a tying case as a matter of law.”*

# The (Not Very Persuasive) Economics of the Market Power Presumption



- The economic reasoning underlying the presumption of market power: VERY weak
  - Technically unique is not competitively unique
  - Technically unique does not mean valuable or commercially important
  - Technically unique does not imply an absence of alternatives
- The proponents of the presumption would bypass analysis of:
  - Market definition (market power exists, but we don't care about in which market)
  - Structure/conditions of entry/next best alternatives
  - Actual marketplace outcomes
  - Evidence of actual market power and measuring its extent

# Imagine...

- You get to be the Plaintiff in *Independent Ink* and there is no market power presumption
- What would you have to analyze?
  - Relevant market:
    - What are consumer alternatives to the patented ink delivery system sold by Trident?
    - Price sensitivity
    - Functional substitutability
  - Market Structure and Conduct
    - Competitors and shares
    - Entry conditions: ease and fact of entry
    - Vigor of competition (Price and otherwise)
    - Evidence of ability to sustain non-competitive behavior

**In short...it starts to look like a real antitrust case!**

# The Economic Basis for No Presumption



Five premises underlying the “no-presumption” view:

1. There is *no* necessary connection between a patent’s technical uniqueness and monopoly power associated with the patent
2. Patents do not define markets
3. Patented products and technology can and do face constraining competition
4. That competition can—and often does—prevent the patentee from exercising market power, even when the patent defines something truly unique, and
5. Evidence abounds of patented products with no associated market power

# Is this Sound Economics?

- In a word....YES!

**There is no economic basis for a presumption of sufficient market power to raise competitive concerns for a patented product or technology!**

**There is no basis for presuming a patent tie-in harms competition!**

# Does It Really Matter?



- The presumption is rebuttable...in the *Independent Ink* case, Trident has the ability to rebut the presumption of market power attached to its patents by the CAFC.
- If the presumption is rebuttable, does it matter that the presumption exists?
  - The evidence will demonstrate if the presumption is false

# False Positives and False Negatives

- False positives: Concluding a patent confers market power when it does not
- False negatives: Concluding there is no market power associated with a patent when there is

**The presumption creates a risk of false positives; false positives can preclude an otherwise efficient selling or distribution plan from being implemented...the presumption can actually reduce competition**

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