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interest and the hardships to both parties require such a remedy.⁴¹ Such an ad hoc result may actually harm consumers more than help them. Without clearly defined remedies, infringing companies may balk at initial settlement demands from NPEs, believing that the court will not enter a permanent injunction. At the same time, NPEs may believe that a permanent injunction is a realistic possibility, and price their settlement offer accordingly. This could result in more lengthy litigation, the costs of which will undoubtedly be passed onto consumers. Furthermore, if more cases reach the trial phase where permanent injunctions are ordered, the result may be that consumers experience more disruptions to products and services they use. Moreover, if MercExchange is right and a patent regime that is less stringent in its enforcement of patent rights actually decreases innovation, consumers can expect fewer new products to go along with their increased costs.

Supreme Court Unknots Tying Presumptions

The Supreme Court of the United States recently released its opinion in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,⁴² which reversed over forty years of precedent. The Court held that the mere fact that a “tying” product is patented does not create a presumption of market power in that product.⁴³ The decision was lauded by businessmen and academics, while some consumer groups lamented that the decision may usher in a new era of consumer exploitation.

Tying refers to a process through which a company uses a patented product to increase sales of a non-patented product.⁴⁴ The company does this by conditioning the sale of a patented product on the purchase of other non-patented products made by the company at the same time or in the future.⁴⁵ A basic example of tying is that of a

⁴¹ See Waldmeir, *supra* note 10.

⁴² *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006).

⁴³ *Id.* at 1293.

⁴⁴ James P. Miller, *Lawsuits Over “Tying” Are Knottier After New Ruling*, CHI. TRIB., Mar. 2, 2006, available at 2006 WLNR 3563242.

⁴⁵ Craig McLaughlin, *Monopoly Power of Patents and Antitrust Law Collide In Patent Tying: A Presumption of Market Power Should Arise From Forcing Consumers To Purchase An Unpatented Good As A Condition of Using The Product*, ORANGE COUNTY LAWYER, Mar. 2006, at 38.

gumball manufacturer who sells a patented gumball dispenser on the condition that the purchaser also agrees to buy five years worth of non-patented – and otherwise generic – gumballs from the seller.⁴⁶

A plaintiff may bring suit against a business engaged in tying under Section 1 of the Sherman Act, which made illegal “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . .”⁴⁷

To bring an action based on a violation of the Sherman Act, a Plaintiff must establish that two different products existed, that a sale or agreement to sell the tying product was conditioned on the purchase of the tied product, market power for the tying product, and that the tied product involved a “not-insubstantial” amount of interstate commerce.⁴⁸ However, where the tying product is patented or copyrighted, market power is presumed.⁴⁹ In other words, the court presumes that the patent grants such economic power to the patent holder that the holder could then “extend its economic control to unpatented products.”⁵⁰ Under this presumption, patent holders have shouldered the burden of proving that their specific patent does not create such market power.⁵¹

The Court has long viewed such tying arrangements between patented and unpatented products with suspicion, noting that “[t]ying arrangements serve hardly any purpose beyond the suppression of competition”⁵² and that “[t]he antitrust laws do not permit a compounding of the statutorily conferred monopoly.”⁵³ Indeed, from the outset, the Court adopted a *per se* rule, holding that any tying that conditioned the purchase of a patented product on the purchase of an unpatented product was a *per se* violation of the Sherman Act.⁵⁴ The Court noted that such tying arrangements must be declared invalid

⁴⁶ Miller, *supra* note 44.

⁴⁷ 15 U.S.C. §1 (2006).

⁴⁸ *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984).

⁴⁹ *Id.* at 16.

⁵⁰ *United States v. Loew's, Inc.*, 371 U.S. 38, 45-46 (1962).

⁵¹ Miller, *supra* note 44.

⁵² *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-06 (1949).

⁵³ *Loew's, Inc.*, 371 U.S. at 52.

⁵⁴ *See United States v. Columbia Steel Co.*, 334 U.S. 495, 522-23 (1948).

because of “the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”⁵⁵

The product in dispute in the *Illinois Tool Works* case was a barcode printing system manufactured by Trident, Inc., a subsidiary of Illinois Tool Works, Inc. (ITW).⁵⁶ The system consisted of a patented ink jet printhead, a patented ink container, and unpatented ink.⁵⁷ Trident sells its systems to original equipment manufacturers (OEMs) who incorporate the printheads and containers into their own printers.⁵⁸ Their printers are then sold to other companies, who then use the items to print barcodes on cartons and packing materials.⁵⁹ Under this arrangement, the OEMs and their customers must agree to buy their ink for the printers exclusively from Trident if they want to use Trident’s printheads and containers.⁶⁰ Soon after, Independent Ink began supplying ink that was chemically identical to Trident at a cheaper price, but claimed to have been shut out of the market by Trident’s tying arrangements.⁶¹

Initially, Trident brought suit against Independent Ink for patent infringement, but that suit was dismissed for a lack of personal jurisdiction.⁶² Then Independent Ink sued Trident, and alleged in an amended complaint that Trident engaged in illegal tying and monopolization in violation of the Sherman Act.⁶³ The District Court entered summary judgment for Trident after finding that the mere existence of a patent did not establish the market power element necessary for a claim brought under Section 1 of the Sherman Act.⁶⁴ On appeal, the Federal Circuit reversed, noting that “the Supreme Court has held that there is a presumption of market power in patent

⁵⁵ *Jefferson Parish*, 466 U.S. at 12.

⁵⁶ *Illinois Tool Works*, 126 S.Ct. at 1284.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1284-85.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1285.

⁶¹ McLaughlin, *supra* note 45.

⁶² *Illinois Tool Works*, 126 S.Ct. at 1285.

⁶³ *Id.* The Sherman Act, 15 U.S.C. § 1, *et seq.* (2006).

⁶⁴ *Independent Ink, Inc. v. Trident, Inc.*, 210 F.Supp.2d 1155, 1177 (C.D. Cal. 2002).

tying cases” and that it was “obliged to follow the Supreme Court’s direction in this respect.”⁶⁵

But in March, 2006, a unanimous Supreme Court changed direction. The Supreme Court reversed the Appellate Court and held that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”⁶⁶ The Court said it was influenced by the large amount of academic literature referencing empirical evidence that a patent does not necessarily create market power.⁶⁷ Similarly, Justice Stevens cited the 1995 antitrust guidelines issued by the Department of Justice and Federal Trade Commission, which state that the agencies “will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.”⁶⁸ Moreover, the Court noted that Congress amended the Patent Code in 1988 to eliminate the presumption of market power in the patent misuse context.⁶⁹ The Court held that Congress clearly did not intend to for the mere existence of a patent to create the necessary market power.⁷⁰

The immediate result of the Court’s ruling is that plaintiffs bringing a tying claim will shoulder a much heavier burden. Some analysts lauded the Court’s ruling, noting that tying actions involving patents will now be subject to the same standards as any other tying action.⁷¹ Additionally, it is believed that the decision was necessary and good for consumers, as the market power presumption had become “an anachronistic tool that encouraged meritless litigation and diminished the incentive to innovate.”⁷² This presumption provided a significant amount of leverage to the plaintiff,⁷³ while it

⁶⁵ *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342, 1351 (Fed. Cir. 2005).

⁶⁶ *Illinois Tool Works*, 126 S.Ct. at 1293.

⁶⁷ *Id.* at 1292.

⁶⁸ *Id.* quoting U.S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property §2.2 (Apr. 6, 1995) available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> (last visited Apr. 10, 2006).

⁶⁹ *Illinois Tool Works*, 126. S.Ct. at 1290.

⁷⁰ *Id.* citing 35 U.S.C. § 271(d)(5) (2006).

⁷¹ Steve Seidenberg, *Ties That Bind: High Court Drops Antitrust Rule*, ABA J. EREPORT, Vol. 5, Issue 9, Mar. 3, 2003, available at <http://www.abanet.org/journal/ereport/m3trust.html> (last visited Apr. 12, 2006).

⁷² *Id.*

⁷³ Miller, *supra* note 44.

hung like the “sword of Damocles” over the patent-holders’ heads.⁷⁴ Others noted that the Court recognized the reality of modern technology that incorporates multiple patents into a single product, which can sometimes be interpreted as “tying.”⁷⁵ Moreover, as stated by Justice Stevens, some tying arrangements remain illegal, but “that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.”⁷⁶

The ruling was not without its critics. They point out that many economists believe that market power should be presumed in tying arrangements involving patented products.⁷⁷ They expressed fears that the Court may have gone too far in eliminating the presumption altogether.⁷⁸ Instead, they think that a rebuttable presumption of market power would have been a more appropriate conclusion – one that would have preserved competitive markets.⁷⁹ The detractors note that at least thirteen states’ attorney generals asked the Court to retain a rebuttable presumption.⁸⁰ Without any presumption, some observers fear that the door will be opened to abusive behavior by patent holders, harming both consumers and small producers.⁸¹

The decision in *Illinois Tool Works* will undoubtedly have a profound effect on how patent-tying disputes are litigated. No longer will plaintiffs be able to point to a patent as proof of market power. Yet, the Court was careful to preserve protections for consumers. The ruling merely alters which party bears the burden of proof of market power. If a patent does confer upon a holder the requisite market power, the consumer will continue to be protected from tying abuses. At the same time, the new rules should help protect patent-holders from frivolous and expensive litigation, the cost of which is typically passed onto consumers.

⁷⁴ Steve Lash, *Patent Owner Sheds Burden In Antitrust Case*, CHI. DAILY L. BULL., Vol. 152, Issue 41, Mar. 1, 2006, at 1.

⁷⁵ Seidenberg, *supra* note 71.

⁷⁶ *Illinois Tool Works*, 126 S.Ct. at 1291.

⁷⁷ McLaughlin, *supra* note 45, at 46-47.

⁷⁸ Seidenberg, *supra* note 71.

⁷⁹ McLaughlin, *supra* note 45, at 47.

⁸⁰ *Id.* at 48.

⁸¹ Brian Deagon, *Techs, Hollywood Ratchet Up Support For Illinois Tool Works*, INVESTOR’S BUS. DAILY, Mar. 1, 2006, at A05.