No. 04-1329

In the Supreme Court of the United States

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,
Petitioners,

v.

INDEPENDENT INK, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

From the alarmist tone of the arguments advanced by respondent and its amici, one would think that the question in this case was whether the Court should immunize sellers of patented goods against all tying claims. In fact, the issue here is considerably narrower — whether tying claims involving patented goods should be assessed under the market power standard that applies to every other type of tying claim and that applies in every other category of antitrust claim involving a patented good.

The United States, the American Bar Association, the American Intellectual Property Law Association, and numerous other distinguished amici have concluded that a presumption of market power based solely on the existence of a patent on the tying product makes neither legal nor economic sense. The overwhelming majority of antitrust scholars agree.

Respondent and its amici concede that many patents confer no market power at all (Br. 23) and that the market power requirement plays the crucial role of protecting procompetitive or harmless ties against treble-damages liability (*id.* at 37). They nevertheless claim that market power should be presumed in patent tying cases based on Section 3 of the Clayton Act (15 U.S.C. § 14), *stare decisis*, and their assertions about the market power allegedly conveyed by litigated patents. These arguments are inconsistent with this Court's precedents, economic reality, and common sense. The market power presumption should be eliminated.

A. Section 3 Of The Clayton Act Does Not Limit This Court's Authority To Overturn The Market Power Presumption.

This Court has observed that there is an important interest, "well represented in th[e] Court's [antitrust] decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (citations omitted). Accordingly, in the antitrust context the Court has applied a *stare decisis* standard different from that applicable to precedents construing other statutes, and has several times reconsidered and overruled its decisions interpreting the antitrust laws. See Pet. Br. 14-15; U.S. Br. 18.

Respondent argues against applying that standard here, contending that Section 3 of the Clayton Act limits the Court's authority to overrule its prior decisions regarding the market power presumption. Br. 12-13, 16-19. That assertion is simply wrong.

To begin with, Section 3 does not single out patent-related tying claims for special treatment; it applies the same general standard whether the tying product is patented or not: "It shall be unlawful for any person engaged in commerce * * * to lease or make a sale * * * of goods * * *, whether *patented or unpatented*, * * * on the condition * * * that the lessee or purchaser thereof shall not use or deal in the goods, * * * where the effect of * * * such condition * * * may be to substantially lessen competition * * *" (emphasis added).

Section 3 was enacted to ensure that patented goods were not *exempt* from general antitrust principles as a consequence of *Henry v. A.B. Dick Co.*, 224 U.S. 1

(1912). See *International Bus. Mach. Corp. v. United States*, 298 U.S. 131, 137-38 (1936).[1] There is no basis whatever for respondent's assertion that Section 3 imposes a different, harsher rule for patent tying claims. And the statute certainly did not codify the market power presumption, which was not recognized by this Court until after Section 3's enactment.

If respondent were correct, moreover, the law governing tying and exclusive dealing (which is also covered by Section 3) would be frozen in time as of 1914 and this Court would have no authority to evolve appropriate legal standards as it does with respect to other aspects of antitrust law. While the existence of Section 3 might preclude the Court from eliminating all antitrust liability for tying and exclusive dealing, it surely does not preclude the Court from construing the statutory requirement of "substantially lessen[ing] competition" based on (in *State Oil*'s words) "changed circumstances and the lessons of accumulated experience."[2]

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[1] In *A.B. Dick*, the Court held that the defendant's sales of ink for use with the plaintiff's patented mimeograph machines — notwithstanding the patent license's requirement that licensees use the patent holder's ink — constituted contributory infringement. 224 U.S. at 35. Although no party raised an antitrust issue in the case, the Court's opinion contained language intimating that patent ties might be exempt from antitrust liability. See *id.* ("Congress alone has the power to determine what restraint shall be imposed [on patentees]. As the law now stands it contains none * * *").

[2] Some commentators go further. See, *e.g.*, R. Posner, *Antitrust Law* 207 (2d ed. 2001) (by "requir[ing] proof of anticompetitive effect [to establish a Section 3 violation, Congress] implicitly authorize[s] the courts to alter the scope

Respondent also discusses standards applied by this Court in determining whether to overrule prior decisions interpreting other statutes and the Constitution. Br. 11-12. But none of those decisions is applicable here; this is "an ordinary antitrust case" (Br. 13) governed by the standard set forth in *State Oil*.[3]

B. The Presumption Does Not Rest On A Determination By This Court That Patents Typically Convey The Degree Of Market Power Necessary To Establish An Unlawful Tie.

Although this Court expressly recognized the market power presumption in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the Court did not rely on empirical evidence regarding the market power conveyed by a patent or otherwise determine that a patent conveys the degree of market power required to establish an unlawful tie in other contexts. Pet. Br. 16-20. Respondent's claims that the presumption rests on conventional antitrust analysis cannot be reconciled with this Court's decisions.

Respondent asserts that we seek "to overturn fifty years of settled law" (Br. 13), but it does not dispute the fact that this Court has not applied the presumption in

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of the prohibition in accordance with changing perceptions of the competitive effects of particular practices, even to the point where no practice would fall within it").

[3] Respondent also half-heartedly argues that Congress's failure to overturn the presumption somehow eliminates this Court's authority to do so. Br. 34-35 & 40-41. The Court has declined to rely on congressional inaction as a basis for preserving other antitrust precedents; it should do so here as well. Pet. Br. 39-44; U.S. Br. 15 n.11.

the 42 years since first expressly recognizing it in *Loew's*. See Pet. Br. 16. Although the Court did refer to the presumption during that time, those statements — as the Solicitor General points out — are "most reasonably understood as 'merely describing pre-*Fortner II* cases without examining them.'" U.S. Br. 24 & n.17 (citation omitted). This case thus presents the Court with its first opportunity in 42 years actually to decide whether or not to apply the presumption.

Respondent also argues that the presumption rests on "decades of precise experience" with patent ties. Br. 14. Prior to *International Salt Co. v. United States*, 332 U.S. 392 (1947), the Court did decide a number of cases in which it refused to allow patent holders to maintain infringement claims based on patents that were subject to a tie. See, *e.g.*, *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944), *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942). And — as in *International Salt* — the Court condemned patent ties without requiring a separate showing of market power. See, *e.g.*, *Mercoid*, 320 U.S. at 664-66; *Morton Salt*, 314 U.S. at 491-92. But in none of those cases did the Court suggest that an empirical assessment of the defendant's market power was even a factor in the analysis, let alone that it had reason to presume a specific quantum of market power from a patent. Rather, the perceived attempt to extend the scope of the patent was reason enough to condemn the tie. See, *e.g.*, *Mercoid*, 320 U.S. at 667.

Respondent argues that these decisions actually rest on antitrust policy. Br. 18-19. But this Court in *Loew's* concluded that the market power presumption "grew out of a long line of" patent misuse cases, not antitrust cases. 371 U.S. at 46; see Pet. Br. 16-17. Nothing in respondent's brief provides any basis for disregarding this Court's explanation of its own decision.

Finally, respondent does not take issue with our explanation (Br. 20-22) of the evolution of the market power standard in tying cases brought under the antitrust laws. See also U.S. Br. 18 (the Court's early tying decisions "analyzed the legality of such arrangements without inquiry into whether the defendant used the tie to exploit any market power that it may have had in the market for the tying product" but "particularly since its decision in *Fortner II*, the Court has emphasized the need to inquire into the defendant's market power"). Even if the Court's early decisions regarding patent ties might somehow reflect a determination about a patent's market impact, they provide no support whatever for the conclusion that a patent provides presumptive evidence of the "significant" market power that the Court now requires to establish an illegal tie. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984).

C. The Government's Enforcement Policy And Authoritative Scholarly Commentary Weigh Strongly Against The Presumption.

Respondent dismisses the government's antitrust guidelines and the Solicitor General's position in this case as irrelevant to the issue before the Court. Br. 41. But the Court has expressly relied on the government's enforcement policy in deciding to overrule prior antitrust decisions. See, *e.g.*, *State Oil*, 522 U.S. at 19; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984). The government's position here is therefore highly significant.

Moreover, even if respondent's assertion (Br. 41) that the guidelines "address all antitrust claims dealing with intellectual property" were correct,[4] it would be irrelevant: The guidelines specifically address tying and explicitly reject the market power presumption. Pet. Br. 35; U.S. Br. 13, 14.

The Court also has looked to the "'great weight' of scholarly criticism" in determining whether to overrule an antitrust precedent. *State Oil*, 522 U.S. at 21 (citation omitted). Respondent has identified (Br. 42-43) a few scholars who support some form of presumption. Yet they pale in comparison to the great number that have concluded that the presumption should be abandoned. Pet. Br. 37-39.

D. The Presumption Is Economically Irrational, Unfair, And Inefficient.

Respondent's principal argument is that the market power presumption makes economic sense, is fair to both parties, and promotes efficient administration of the antitrust laws. Br. 20-34. Respondent is wrong on all three counts.

1. The Presumption Does Not Reflect Economic Reality.

a. Respondent acknowledges that "[m]any patents have little or no value" but asserts that the presumption is nonetheless justified because "patents involved in tying litigation are likely to be unusually valuable" and

[4] As their title indicates, the guidelines address only licensing issues, and therefore say nothing about the treatment of intellectual property in areas such as mergers and unilateral conduct.

therefore likely to convey market power. Br. 21. Respondent, however, does not present a single economic study of patents involved in ties or tying litigation or any studies of market power whatsoever. The authorities that respondent does cite do not support its contention.

First, nothing cited by respondent validates its assertion that "valuable" patents necessarily convey market power. A patent, like any property right, may have value yet nevertheless confer little or no market power on its owner because of the existence of patented or nonpatented substitutes. See Pet. Br. 13-14, 26; U.S. Br. 15 ("even when a patented product is commercially viable, it is still often subject to competition from non-infringing substitutes" (footnote omitted)). None of the studies cited by respondent or its supporting amici discuss product substitutes or other attributes of the relevant product market, or otherwise explain why a "valuable" patent likely conveys substantial market power. Indeed, the 30% market share in *Jefferson Parish*, 466 U.S. at 27, was highly valuable, but that market share alone was not enough to establish the existence of significant market power.[5]

[5] For instance, the value estimations in the German studies performed by Professor Scherer were based on responses to "a single substantive *counter-factual* question" posed to patent holders: "If in 1980 you had known how its contribution to the future profitability of your enterprise would unfold, what is the minimum price for which you would have sold the patent, assuming that you had a good-faith offer to purchase?" D. Harhoff, F. Scherer & K. Vopel, *Exploring the Tail of Patented Invention Value Distributions,* in Economics, Law, & Intellectual Property 283-84 (2003) (emphasis added). These responses, divorced from other information

Second, respondent's syllogism rests on the assumption that a tie can succeed in the marketplace only if the seller has market power in the tying product. Thus, respondent contends that "[i]f the patent is not highly valuable, buyers will not feel compelled to accept a condition on the license; instead they will turn elsewhere and buy a substitute for the patented good that is free from any such conditions." Br. 25.

This reasoning completely ignores the fact that ties often succeed because they satisfy customer preferences or are otherwise procompetitive. As this Court has explained, "[b]uyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively — conduct that is entirely consistent with the Sherman Act." *Jefferson Parish*, 466 U.S. at 11-12. Indeed, respondent's contention directly contradicts established wisdom that, "[a]lthough tying can sometimes impair rivalry and thereby gain or reinforce market power, * * * diminished competition is not the object or effect of most litigated tie-ins, especially not of those foreclosing only a small share of a properly defined tied product market." 9 P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 1703a, at 30-31 (2d ed. 2004).

If respondent's position were correct, moreover, it could not logically be limited to patented goods. *Any* successful tie would presumptively demonstrate market

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about the markets in which the patents competed, say nothing about the products with which the patented products compete or whether the estimated values reflected an ability to charge supra-competitive prices as opposed to the value of the patents notwithstanding the existence of a competitive market.

power because — in respondent's view — buyers' acceptance of the tie establishes the absence of reasonable substitutes for the tying product. Respondent's "success equals market power" argument does not depend on the presence of a patent; the market power element could be presumed for every successful tie. The Court should reject respondent's invitation to read the market power requirement out of tying jurisprudence.

Third, respondent's argument evidences considerable naiveté about the litigation process, because it fails to take account of the litigation-stimulating effects of procedural rules. If a plaintiff gained the benefit of a market power presumption whenever some aspect of the tying product is patented, plaintiffs would seek out tying products that meet that easy test. Because a plaintiff need not prove that the existence of the patent is the reason that the tie succeeded, the coincidental presence of a patent — perhaps on an unimportant aspect of the tying product — would be a sufficient reason to file a lawsuit and gain the benefit of the presumption.

Tying claims frequently are filed by competitors, as in this case. The ability to impose the burdens of litigation — including the costs attendant to disproving the existence of market power — will likely provoke a wave of abusive lawsuits based on inconsequential patents on the tying product.

Finally, if patents that give rise to litigation convey market power, there is no reason why that principle should be restricted to tying cases. It also should apply to other patent-related antitrust claims in which proof of market power is required. Yet such a standard would be inconsistent with the courts' repeated conclusion in other contexts that a patent may be evidence of market power but is not sufficient to establish that fact. Pet. Br. 23-24. The only logical course is to harmonize these conflicting standards by abandoning the unjustified presumption in the tying context.

b. Respondent also claims that the presumption is justified because "most patent tying arrangements are in the form of requirement ties," which are "typically used for 'metering,'" — "mak[ing] the price charged vary with usage" — and which "generally cannot be imposed absent market power." Br. 26-27.

Respondent is simply wrong in presuming that the presence of price discrimination, such as supposed metering, is "strong evidence of market power." Br. 27; see also Nalebuff Br. 22-24. Numerous scholars have concluded that price discrimination occurs in many competitive industries. See, *e.g*, W. Baumol & D. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L.J. 661, 666 (2003) ("evidence of [discriminatory pricing] practices by itself is not enough to demonstrate market power, and in some cases may even establish a presumption of its absence"); B. Klein & J. Wiley, *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 Antitrust L.J. 599, 602 (2003) (firms that price discriminate "do not necessarily possess any antitrust market power at all * * *"); T. Muris, *Improving the Economic Foundations of Competition Policy* (January 15, 2003), *available at* http://www.ftc.gov/speeches/muris/improveconfoundatio.htm ("Most real world markets, even those for relatively 'homogeneous' products and a market structure inconsistent with significant market power, exhibit significant price variation. These price differences do not prove that the firms have market power."); E. Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory — And the Implications for Defining Costs and Market Power*, 112 Yale L.J. 681, 733 (2003).[6] This conclusion is particularly true with respect to intellectual property. See, *e.g.*, 2A Areeda & Hovenkamp, *supra*, ¶ 517c2, at 134 (in "intellectual property licensing, * * * price discrimination is ubiquitous and seldom indicates significant market power").

Moreover, requirement ties are not just used to meter; they can serve quality control purposes as well. See, *e.g.*, *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342 (9th Cir.1987) (accepting quality control defense for requirement tie), *cert. denied*, 488 U.S. 870 (1988); B. Klein, *Market Power in Franchise Cases in the Wake of* Kodak*: Applying Post-Contract Hold-Up Analysis To Vertical Relationships*, 67 Antitrust L.J. 283, 305-11 (1999) ("requirements contracts [can be] used to control quality" and may have lower enforcement costs than other methods of protecting product

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[6] The underlying theory has been explained as follows:

> [W]hen courts speak of market power, they typically mean the ability to affect market-wide price, not merely one's own price. * * * Evidence of price discrimination — which shows only that a firm is able to set its own price above marginal costs — cannot demonstrate that a firm has the ability to affect market-wide prices and output.

J. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 Antitrust L.J. 327, 358 (2005).

quality). The evidence in the record supports that justification here.[7]

Finally, "metering" raises serious antitrust concerns only where the defendant has significant market power. See, *e.g.*, 9, 10 Areeda & Hovenkamp, *supra*, ¶¶ 1711b4, 1711c, 1763a.[8] That is a compelling reason to require an *affirmative* showing that the defendant has significant market power in the tying product market before the tie is deemed *per se* illegal.[9]

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[7] Pet. Br. 30 n.8; see also A1291 (notes of respondent's sales person indicating that "[Independent Ink's] ink ran the same length of time [as ink from Marsh (a Trident OEM)] in side by side test, but was not as dark and did not go through the heads as well"). In any event, the market for ink is not limited to Trident and Independent Ink; the need to control quality arises due to inferior attributes in other inks as well.

[8] The prevailing view is that metering is usually procompetitive. See, *e.g.*, *id.*, ¶ 1711a3, at 102 ("[The] 'metering' function of price discrimination is likely to expand production and use of the tying product and thereby to improve resource allocation. This benefit, together with the benefit to the low-price customers, offsets the possible loss of consumer surplus to the high-price customer."); U.S. Br. 30; ABA Br. 10.

[9] Professors Nalebuff, Ayres and Sullivan concede that perfect price discrimination "can expand output and improve efficiency in some cases" but claim that "imperfect price discrimination has not been demonstrated to be efficient in the marketplace." Nalebuff Br. 18-22. But "[e]ven imperfect price discrimination * * * will generally have socially desirable results." J. G. Sidak, *Debunking Predatory Innovation*, 83 Colum. L. Rev. 1121, 1133 (1983). It clearly is not so "'plainly anticompetitive' and very likely without 'redeeming virtue'" as to justify *per se* condemnation. *Broadcast Music*,

2. The Presumption Is Unfair.

Respondent next defends the presumption on the ground that patent tying defendants are better positioned to disprove the existence of market power because they are likely to be wealthier (Br. 30) and can more easily adduce evidence regarding competitors (*id.* at 31).

First, none of the arguments advanced by respondent is unique to patent tying cases. They apply equally to all tying cases; indeed, to most antitrust cases. Yet this Court indicated in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), that "the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved" is "a matter of proof" for claims under Section 2 of the Sherman Act. *Id.* at 177-78; see also *Medimmune, Inc. v. Genentech, Inc.*, 2005 WL 2649293, at *5 (Fed. Cir. Oct. 18, 2005) (no presumption of market power in Section 1 case not involving tying). Respondent never explains why patent-owning tying defendants are likely to have greater relative wealth or knowledge of the relevant product market than patent-owning defendants in

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Inc. v. Columbia Broad., Sys., Inc., 441 U.S. 1, 9 (1979). Yet that would be the practical effect of respondent's approach.

Similarly without merit is their contention (at 24-27) that tying can be prohibited because direct metering is "easier." "In [certain] patent situations, * * * the only practical way to measure the patent's use may be a 'tie' requiring licensees to buy an unpatented product from the patentee (or its designee) or to base royalties on output of an unpatented product." 10 Areeda & Hovenkamp, *supra*, ¶ 1763b, at 393. In other situations, direct metering will be more inefficient than ties. See *id.* ¶ 1763a, at 391; Sidak, *supra*, at 1132.

these other contexts, and there is no basis for believing that such a difference exists.

Second, it is not necessarily true that defendants are any better positioned to adduce evidence of competing substitutes than are plaintiffs. Indeed, the Georgetown study cited by respondent reveals that a vast majority of tying and exclusive dealing claims (which were grouped together) are initiated by competitors or dealers. See S. Salop & L. White, "Private Antitrust Litigation: An Introduction and Framework," *in Private Antitrust Litigation*, at 9 (1988). There is no reason to suspect that these plaintiffs' knowledge of the relevant market or competing products is inferior to the information possessed by tying defendants.

Moreover, respondent's claim that the burden of proving market power is too heavy is undercut considerably by its own assertion that even without a presumption it has carried that burden here. Br. 45-48. Indeed, it is sharply inconsistent with this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), where the plaintiff did not rely on the market power presumption yet still was able to defeat summary judgment.

Third, respondent ignores the fact that victorious plaintiffs often receive attorneys' fees and costs as well as treble damages. See 15 U.S.C. § 15(a). This and other procedural devices such as class actions are the measures Congress provided to encourage antitrust litigation and to cover litigation expenses. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975). Defendants, of course, are not reimbursed, even when they defeat nonmeritorious claims.

Finally, respondent ignores the presumption's unfairness to patent holders. Though respondent recognizes that the market power requirement helps screen out harmless ties (Br. 37), it argues that the cost of false positives will be low because the other prerequisites to the *per se* rule, plus the ability to present efficiencies as an affirmative defense, will adequately compensate for a diluted market power requirement. *Id.* at 36-39.[10] That is wrong.

Proof of market power is essential to demonstrate that a tie will have anticompetitive effects. Pet. Br. 20-22.[11] Neither the other elements of *per se* liability nor the opportunity to present efficiencies as an affirmative defense adequately compensates for the absence of an effective market power screen for two reasons. To begin with, that approach would create a significant risk that the tying defendant will be unable to explain its conduct in a manner persuasive to the jury, and thus the tie will be condemned *per se* despite having no possible adverse effect on competition. See Verizon Br. 12-16; cf. 10 Areeda & Hovenkamp, *supra*, at ¶ 1760e, at 352-56 (discussing problems that arise through forcing a defendant to present justifications as an affirmative defense).

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[10] Respondent (at 30-32) understates the difficulty in rebutting the presumption. See Pet. Br. 32-34.

[11] All the theories cited by respondent (at 43 & n.18) require the presence of market power to produce anticompetitive effects. See, *e.g.*, D. Carlton & M. Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 Rand. J. Econ. 194, 194 (2002); Verizon Br. 18-19.

In addition, the presumption risks prolonging trials even where the efficiency justifications are clear because of the lenient standards of review applied at the dismissal and summary judgment stages. See, *e.g.*, Verizon Br. 25. That, in turn, will increase the risk that meritless lawsuits will be filed in order to extract pretrial settlements, and may deter substantial amounts of procompetitive conduct. Pet. Br. 27-34; U.S. Br. 27-29.

Respondent calls these theories "sheer speculation," claiming that "[i]f the presumption caused all these bad consequences, Trident should easily be able to offer numerous concrete examples from the past fifty years." Br. 36. This facile response overlooks two critical phenomena. First, it disregards the extent to which the presumption has been undermined by the lower courts and the federal enforcement agencies over the years. Pet. Br. 21-24; U.S. Br. 13-14. Reinvigoration of the presumption by this Court would stimulate an avalanche of these claims.

Second, overdeterrence costs typically are not visible: a company's decision not to sell products in a package (and thereby increase consumer choice) is not public and does not create litigation. This lack of visibility of the effects of overdeterrence, however, has not prevented this Court from recognizing the substantiality of this concern in numerous contexts. Pet. Br. 31-32.

3. The Presumption Harms Judicial Efficiency.

Respondent claims that the presumption aids administrative efficiency. Br. 33-34. But, as the Solicitor General points out (U.S. Br. 27), these cases — as here — typically involve multiple antitrust claims, and those other claims will have to be resolved under conventional antitrust principles. In addition, the presumption will encourage the filing of meritless lawsuits by plaintiffs seeking to extort settlements and will unnecessarily prolong cases where the absence of market power is clear. See Pet. Br. 34.

Moreover, respondent ignores the fact that upholding the presumption will spawn years of litigation about the presumption's contours. The briefs in this case illustrate the problem. Respondent first asserted that the presumption was irrebuttable (Br. in Opp. 24 n.7), but now states that it may be rebutted (Br. 32). Other amici acknowledge that "application of the *Loew's* presumption is not appropriate in all patent tying cases," yet nevertheless suggest a "'patent-plus approach'" analogous to a "quick look" standard. District of Columbia Br. 5, 6; see also Scherer Br. 10 (suggesting a "relaxed evidentiary burden" at first); Pet. 24 (discussing lower court decisions). Litigation thus would be avoided if the Court simply were to apply the same market power analysis in patent tying claims that applies to every other antitrust claim in which the issue arises.

E. Respondent Has Not Proven Market Power.

Finally, respondent contends that, even if the presumption is overturned, the judgment below nonetheless should be affirmed because respondent provided direct evidence of market power in the form of higher ink prices, customer survey responses that Trident's policies were "too restrictive," statements by Trident that it "dominates the inkjet printhead market," and evidence indicating that Trident sold between 80 to 100% of the piezoelectric printheads used in printers. Br. 45-48.

These assertions are directly contrary to the district court's findings, affirmed by the Federal Circuit, that respondent's Section 2 claims failed because respondent "proffer[ed] no evidence that would establish Defendants' market power in the as yet undefined market for the tying product" (Pet. App. 18a, 49a). As the court below explained, respondent did not carry its burden of proving the relevant market — making "only the conclusory allegation of a geographic market without supporting economic evidence" — let alone the existence of market power in such a market. Pet. App. 18a.

Moreover, respondent's principal argument — that end-users pay more for Trident ink than Independent Ink ink — ignores the fact that these sales were not covered by the alleged tie*: the licensing agreement challenged by respondent did not bind end-users to purchase Trident ink; it applied only to ink purchases by OEMs*. J.A. 94a-96a. And the price differential cited by respondent results from mark-ups imposed by OEMs and distributors. See J.A. 277a (in 1994, Trident's price to OEMs was $79 to $110 a bottle); J.A. 290a-91a (in 2000, Trident's average price to OEMs was $85).

Furthermore, a customer survey revealing dissatisfaction (J.A. 406a-10a) is not evidence of significant market power. Cf. *Jefferson Parish*, 466 U.S. at 26 (expressed "preference of persons residing in Jefferson Parish to go to * * * the closest hospital [instead of East Jefferson, where they had to go] * * * is not necessarily probative of significant market power").

Nor are statements of market "domina[nce]" of any import to the market power inquiry. Cf. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 668 (7th Cir. 1987) ("employee statements * * * are insufficient to raise a genuine issue of material fact regarding [the defendant's] market power"; "market power * * * and 'its measurement requires sophisticated econometric analysis'") (citation omitted).

Last, the evidence cited by respondent does not indicate that Trident had an 80 to 100 percent market share: Among other deficiencies, this statistic ignores the nascent competition from other piezoelectric printhead manufacturers and competition from pre-printed labels, which, as the district court noted, "may even have advantages over [piezoelectic] printers in terms of quality and reliability." Pet. App. 22a, 36a. In short, judgment is warranted for petitioners, not for respondent.

For the forgoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed, reinstating the district court's grant of summary judgment in favor of petitioners on the Section 1 theory.

Respectfully submitted.

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