PATENT TYING AND ANTITRUST REGULATION—MOVING FORWARD AFTER ILLINOIS TOOL

Monique M. Sadarangani¹

Cite as 13 J. High Tech L. 613

ABSTRACT

Many legal scholars and professionals criticize United States antitrust laws, meant to regulate unfair competition and practices, in the area of patents. Specifically, many argue that antitrust laws take away what the patent is meant to give: a limited monopoly in the patent product market. Furthermore, many of these critics believe a full scale rule of reason analysis should control the area of patent tying law, rather than a form of the traditional per se rule, while others do not believe tying should be regulated at all in this area. Many of these individuals fall in line with the Chicago School of thought prevailing in and throughout antitrust law and regulation.

This piece will look at the history of antitrust law and the development of the per se rule and rule of reason, discussing how the history of patent tying case law in the United States shows a need for per se rules by analyzing key cases that have led to a less strict approach to patent tying analysis. Specifically, the most recent Supreme Court patent tying decision is addressed, detailing the reasoning stated behind the decision, as well as the latent intent of Justice Stevens’ decision. Finally, I will argue that, in the area of patent tying, an accord must be reached between the full fledged market power analysis currently adopted by the court for

¹ Monique M. Sadarangani received her J.D. in May of 2012 from Suffolk University Law School, and was a member of the Journal of High Technology Law.

Copyright © 2013 Journal of High Technology Law and Monique M. Sadarangani. All Rights Reserved. ISSN 1536-7983.
all patent tying cases and a per se rule of illegality regarding patent tying arrangements.

I. INTRODUCTION

Antitrust law seeks to enhance competition through its regulation of the marketplace. Initially, Congress’s primary focus through its legislation was stopping cartel-like behavior and monopolization. Regulation soon progressed to other areas, including territorial divisions, attempts at monopolization, and tying arrangements to name a few. The Supreme Court struggled with its analysis for years before adopting a per se approach to certain types of competition. This easy to apply approach to antitrust law allowed lower courts throughout the United States to effectively and swiftly handle antitrust claims and manage anticompetitive behaviors.

Among the areas where the Court applied a per se approach was patent tying arrangements. In applying a per se approach to patent tying arrangements, the Court presumed power to those in-

2 See FTC, An FTC Guide to the Antitrust Laws, July 8, 2008, archived at www.webcitation.org/63GjEzRcr (declaring that Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").
3 See FTC, FTC Fact Sheet: Antitrust Laws: A Brief History, Feb. 21, 2013, archived at www.webcitation.org/6EbcrYrdJ (stating that when antitrust laws were first enacted in the 1800’s the primary purpose was to deal with trusts).
4 See An FTC Guide to the Antitrust Laws, supra note 2 (giving an explanation of the different antitrust laws and anticompetitive areas each deals with).
5 See United States v. Trenton Potteries Co., 273 U.S. 392, 400-01 (1927) (applying a per se rule to a price fixing arrangement for the first time under antitrust laws).
6 See Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203, 1219-24 (9th Cir. 1982) (applying a per se rule to a tying arrangement regarding sugar beet seed); see also Susser v. Carvel Corp., 332 F.2d 505, 513 (2d Cir. 1964) (applying the Supreme Court’s presumption of market power in patents to trademarks and thus utilizing a per se presumptive approach).
individuals issued a patent. The presumed power in a patent came from the fact that an individual issued a patent obtains a limited monopoly for a period of time in the patented product. For the period of time that the patent is in effect, the patentee is the only one who can produce that particular product. Therefore, if the patentee decides that in order for consumers to purchase their patented product, the consumers must also purchase another unpatented product, this could have detrimental effects on competition. The Supreme Court indicated through its history of decisions related to patent tying relationships that forcing a consumer to purchase an unpatented product in order to get a patented product was unfair competition.

However, along with other areas of antitrust law, beginning in 2006 with the Supreme Court, swift changes began to occur in the way courts decide patent tying cases. This new analysis adopted by the Court leaves an undesirable result to consumers: the party antitrust regulation seeks to protect.

Part II looks at the history of antitrust law, with a focus on the history of tying arrangements and where the Supreme Court left off in its discussion of patent ties. Part II also looks at the overall changes that took place throughout the history of antitrust jurisprudence, moving from per se rules to a rule of reason approach. Part III sets forth the method of analysis currently in use for tying cases generally. Part III gives three fictional tying scenarios with an application of the tying analysis to the three sets of facts in or-

---

8 See Loew's, 371 U.S. at 45 (presuming theater had market power in the film market because of the patent in the feature films).
9 See id. at 46-47 (explaining benefits of copyright and patent monopoly for owners); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 515-16 (1917) (stating a patent grants the patent holder a limited monopoly in the patented product market).
11 See Loew's, 371 U.S. at 44-45 (recognizing tying agreements ability to restrain and inhibit consumer purchasing choices).
12 See, e.g., id. at 45-46 (reviewing history of case law involving patent tying agreements and Court's hostility toward the practice).
order to illustrate that not all tying arrangements have negative consequences on competition and the consumer generally. This section also discusses the difficulty in finding a tying arrangement for antitrust purposes, aside from the market power analysis that concurrently must be accomplished.

Finally, Part IV argues for a change in the current state of antitrust patent tying analysis. Part IV suggests that, especially with new and upcoming technologies, patents are necessary to protect interests in intellectual property. Tying products to these new and up and coming technologies could have more detrimental effects that what courts were previously looking at in their court rooms. In order for the courts to be able to effectively handle these types of cases, a clear and concise method must be adopted in order to counteract the potential for harm to the consumers through unfair anticompetitive practices. Part IV concludes by suggesting a method for dealing with patent tying that falls in between the per se market power presumption and a full-fledged market power analysis.

II. History

Prior to the enactment of antitrust legislation, the United States failed to regulate commercial competition. After the Civil War, expansion into the West, railroads, and increased manufacturing of goods led to unregulated economic growth in the United States. In this period, citizens blamed their discontentment with conditions in factories and other areas of life on monopolies, and the public sought reform for big businesses.

15 See id. (stating that the "explosive economic growth" led to later economic depression and the wealth of only a few).
16 See id. at 41-42 (suggesting that the pressure toward reform came from farmers, immigrants, and Americans suffering at the hands of big businesses that, at that time, exercised self-regulation). The big businesses did many acts that are today illegal under antitrust laws, such as predatory pricing, output control, price fixing, coercive mergers, and other forms of corruption. See id. at 42 (explaining how the rapid economic growth resulted in concentrated wealth among few).
The Sherman Act, therefore, initially began as a means to regulate and control private businesses that restrained competition.\textsuperscript{17} Through the Sherman Act, courts began their interpretation of the legislation, often times with difficulty.\textsuperscript{18} Therefore, the early Supreme Court antitrust cases constantly changed and evolved with varying degrees of interpretation of the Sherman Act.\textsuperscript{19} While the early Supreme Court cases dealt mostly with whether a firm directly or indirectly restrained trade and interfered with interstate commerce, the Supreme Court soon dealt with other issues, one of them being tying arrangements.\textsuperscript{20}

A. Statutory Authority of Antitrust Law and Tying

A common form of tying occurs when a seller conditions the sale of one product (the "tying product") on the purchase of a separate product (the "tied product").\textsuperscript{21} The conditioning of one sale upon the purchase of another "forces" the consumer to purchase an unwanted product.\textsuperscript{22} Courts utilize two Congressional acts to deal with tying: the Sherman Act of 1890\textsuperscript{23} and the Clayton Act

\textsuperscript{17} See id. at 42-43 (asserting Congress created the Sherman Act in 1890 "to condemn trade restraints and monopolies").
\textsuperscript{18} See E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications, 5 (5th ed. 2009) (indicating that Senator Sherman, who sponsored the legislation, stated "[i]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.").
\textsuperscript{19} See id. at 6 (indicating that early cases went from very narrow to very broad interpretation of what it means to restrain competition through interstate commerce).
\textsuperscript{20} See id. at 230-32 (examining the early tying cases before the Supreme Court).
\textsuperscript{22} See Jefferson Parish, 466 U.S. at 12 (indicating that an invalid tying arrangement exploits the consumer, stating ")[T]he essential characteristic of an invalid tying arrangement lies in 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.").
of 1914. The United States antitrust laws and patent laws blend in the area of patent tying arrangements: restrictions within the scope of what a patent grants are permissible acts under the antitrust laws; restrictions beyond a patent’s scope may be subject to antitrust liability. While antitrust laws appear to restrict competition, and patent laws seek to foster competition through “incentives for innovation,” both antitrust and patent laws “ultimately provide[] consumers with better products over time,” thus making patent and antitrust laws complimentary.

The first piece of antitrust legislation, the Sherman Act, consists of two sections that concern tying arrangements. Sherman Act § 1 states that “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.” Sherman Act § 2 deals specifically with monopolization and attempts to monopolize in a given market, making such acts felonies. A plaintiff may bring any type of antitrust claim concerning tying under the Sherman Act, but the Clayton Act deals solely with the tying of goods.

Congress established the Clayton Act as a civil remedy for antitrust violations, empowering private individuals harmed by these violations to sue for damages. The Clayton Act § 3 states that:

25 See ABA SECTION OF ANTITRUST LAW, ANTITRUST COUNTERATTACK IN INTELLECTUAL PROPERTY LITIGATION HANDBOOK, 90 (2010) [hereinafter ABA] (suggesting that antitrust and patent laws complement one another).
26 See id. at 91 (explaining how antitrust laws help to promote competition that can cause further innovation).
27 See 15 U.S.C. §§ 1, 2 (dealing with both horizontal and vertical restraints of trade).
31 See 2 LOUIS ALTMAN & MALCOLM POLLUCK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 10:19 (4th ed. 2003) (indicating the Clayton Act may have been a response to the Court’s validating tying arrangements a year earlier in United States v. Winslow, 227 U.S. 202, 217-18 (1913)).
It shall be unlawful . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Where the Clayton Act directly states a tying arrangement is unlawful in its statutory language, the Sherman Act does not, but regulates tying by analyzing the tie’s effect on competition. Nonetheless, tying analysis is the same under both the Sherman Act and the Clayton Act.

B. The Per Se Versus Rule of Reason Analysis in Antitrust Litigation

The early Supreme Court struggled with its statutory interpretation of the Sherman Act. In Addyston Pipe, the Court affirmed
Judge Taft’s Sixth Circuit decision establishing the ancillary restraint doctrine. Under the ancillary restraint doctrine, a restraint is lawful only when it is reasonable and ancillary to the main purpose of a lawful contract. Though the Court held that the restraint in Addyston Pipe was unreasonable, and therefore unlawful, the ancillary restraint doctrine proved to be an important doctrine in antitrust case history.

1. DEVELOPMENT OF THE RULE OF REASON IN ANTITRUST LAW

The Court first advanced the rule of reason standard in Standard Oil Co. v. United States. The rule of reason allowed courts to evaluate various factors in antitrust litigation, weighing the restraint’s impact on competition with other pro-competitive factors. While giving further breadth to Sherman Act interpretation, the Court in Standard Oil also concluded that certain conduct is inherently anticompetitive, and for these types, a rule of reason analysis is unnecessary.

The Court finally put the rule of reason to work in Chicago Board of Trade, where members of a trade organization entered an agreement that required all its members who purchased grain af-
ter trade closing hours to purchase at the closing price. Though the trade organization essentially fixed the price of grain to be sold, traditionally subjecting them to per se condemnation, the Court applied a rule of reason analysis. Justice Brandeis, writing for the Court, stated the rule of reason test to be “whether the restraint imposed is such as merely regulates[,] and perhaps promotes competition[,] or whether it is such as may suppress or even destroy competition.” Justice Brandeis indicated that a rule of reason analysis allows courts to “consider the facts peculiar to the business . . . ; its conditions before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable.” Chicago Board of Trade, therefore, articulated a rule of reason approach that allowed anything and everything to be considered when determining whether a restraint was unlawful.

2. The Per Se Rule of Illegality

The Court failed to give Standard Oil’s per se rule substance until United States v. Trenton Potteries Co. in 1927. Trenton Potteries involved a combination to fix prices of bathroom pottery equipment. At the trial, the defendants’ argued that the prices fixed were reasonable, did not injure the public, and therefore, did not violate § 1 of the Sherman Act. In rejecting this defense, the Court asserted that regardless of the reasonableness of the prices, “[t]he aim and result of every price-fixing agreement, if effec-

44 See Chicago Bd. of Trade, 246 U.S. at 237 (setting the price of grain for consumers).
45 See id. at 238 (applying pro-competitive factors).
46 Id. (indicating that a restraint that has the effect of promoting competition should be valid).
47 Id. (allowing any fact to come into the analysis).
48 See id. (analyzing market conditions related to grain trade to show the need for the benefit of it).
49 See Trenton Potteries, 273 U.S. at 401 (applying a per se rule to a price fix agreement among 23 corporations for the sale of pottery and rejecting the Chicago Board of Trade factor argument).
50 See id. at 393-94 (accusing 20 individuals and 23 corporations of Sherman Act violations).
51 See id. at 399 (utilizing arguments from Chicago Board of Trade).
tive, is the elimination of one form of competition."\textsuperscript{52} The Court further stated that these types of restraints are unreasonable on their face and do not require "the burden of ascertaining . . . whether it has become unreasonable through the mere variation of economic conditions."\textsuperscript{53} Thirteen years later, in \textit{United States v. Socony-Vacuum Oil Co. (Socony)},\textsuperscript{54} the Court further clarified the per se condemnation of price-fixing agreements by stating that any conduct that affects price should be condemned outright.\textsuperscript{55} Furthermore, \textit{Socony} stated market power was not a condition to finding a price-fixing violation.\textsuperscript{56}

The per se rule in antitrust litigation controlled for many years, condemning outright those agreements or practices whose effect on competition was "pernicious" and "lack[ed] any redeeming virtue."\textsuperscript{57} While the Court fully established the per se rule, in the 1970's the rule of reason began to take control of antitrust litigation.\textsuperscript{58} Throughout the 1970's and 1980's, rule of reason analysis

\textsuperscript{52} See id. at 397 (taking price fixing horizontal agreements out of any rule of reason analysis).
\textsuperscript{53} See id. at 398 (finding some things are inherently dangerous to competition and require a per se approach).
\textsuperscript{54} See 310 U.S. 150, 224 (1940) (condemning price fix in order to stabilize gas prices).
\textsuperscript{55} See id. (stating that an agreement that interferes with ordinary market conditions goes against what the Sherman Act aims to promote).
\textsuperscript{56} See id. at 267 n.59 (stipulating that some things should be condemned outright because of the very nature of agreement).
\textsuperscript{58} See, E.g., NCAA v. Bd. of Regents of Univ. Okla., 468 U.S. 85, 103 (1984) (applying a truncated rule of reason to a horizontal price and output restriction); Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 19-20 (1979) (failing to apply a per se rule to a blanket licensing agreement, conceded to be a price-fix, because of the Court’s lack of experience and uniqueness of the product); Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 689 (1978) (utilizing a rule of reason analysis for a horizontal restraint that prohibited competitive bidding for a professional organization). Quick look analysis takes a case out of per se condemnation, even if there appears to be a naked restraint, when the restraint is “intuitively obvious.” See Cal. Dental Ass’n v. FTC, 526 U.S. 756,
began to play an even more important role in antitrust cases in the Supreme Court, with the thinking of the Chicago School of Law and Economics ideology accelerating during the Reagan Administration. \textsuperscript{59} Today, the majority of antitrust law is evaluated under a rule of reason analysis, rather than per se, with a focus and reliance on an economic approach. \textsuperscript{60}

3. THE JUDICIAL HISTORY OF TYING: PER SE OR RULE OF REASON?

Courts generally view tying arrangements as a negative business tool that deprives consumers from making personal choices over

\textsuperscript{59} See Spencer Weber Waller, \textit{The Chicago School Virus}, 27 (2008), archived at www.webcitation.org/664girJKQ (discussing the Chicago School of Law and Economics ideology as a trend in antitrust cases accelerated during the Reagan Administration which appointed many judges to the federal appellate courts with both "literal and intellectual ties to law and economics, often with explicit Chicago School ties and often with substantial past interest and experience in antitrust"). The Chicago School's basic characteristic "is the belief that free markets and the price mechanism are the most effective and desirable ways for a society to organize production and economic life in general." See id. at 1; see also Sandeep Vaheesan, \textit{Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine}, 2010 \textit{Utah L. Rev.} 911, 914 (2010). (emphasizing the major influences of Chicago School thinkers on the theories of monopoly).

\textsuperscript{60} See, e.g., Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 877, 885 (2007) (applying the rule of reason to minimum resale price maintenance in the vertical restraint context, thus allowing all vertical restraint categories to be analyzed under a rule of reason analysis); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2002) (utilizing a rule of reason for Microsoft's alleged tying of internet explorer to their software); \textit{Cal. Dental Ass'n}, 526 U.S. at 759 (applying the rule of reason for a horizontal restraint). See also Waller, \textit{supra} note 59, at 29 (articulating how antitrust began as a form of federal common law where the courts were responsible for most of the law making but has changed into a reliance on economic analysis because of the shift to the law making power to the federal enforcement agencies). Waller states that "[t]hese changes have been aided by the fact that antitrust has always had strong receptors attracted to economic theory." See Waller, \textit{supra} note 59, at 30.
which products to purchase.\textsuperscript{61} However, not all tying arrangements are antitrust violations, and a tie can have a non-monopolistic and legitimate business purpose.\textsuperscript{62} Therefore, not all tying arrangements are deemed illegal, and the “law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other.”\textsuperscript{63} Regardless of the pros or cons of tying arrangements, when looked at in terms of antitrust litigation, the Court traditionally analyzed tying under the per se rule.\textsuperscript{64} Even so, the per se rule for tying is far different from that in \textit{Socony} or \textit{Trenton Potteries}—the per se rule for tying requires four steps of analysis before the tie is condemned as a violation of antitrust laws.\textsuperscript{65} The four elements required to condemn a tie as per se illegal are that: 1) there must be two separate products; 2) an agreement conditioning the sale of the tying product on the tied product; 3) market power in the tying product; and 4) a non-

\textsuperscript{61} See \textit{Areeda & Kaplow, supra} note 14, at 686. (explaining tying arrangements sometimes constitute monopolization or attempted monopolization and the buyer might feel coerced by the tie). “[T]he essential characteristic of an invalid tying arrangement lies in 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.” \textit{See Jefferson Parish}, 466 U.S. at 12-13 (stating that the seller’s exploitation of its control over a product constitutes an invalid tie).

\textsuperscript{62} See \textit{Areeda & Kaplow, supra} note 14, at 687-92 (indicating a common justification for tying is quality control or improvement). Therefore, in order to ensure that operation of their machine works properly, a manufacturer may wish to tie servicing to the lease of their machines. \textit{See id.} at 691-92. Furthermore, a tie can be voluntary: A buyer can choose to purchase two products at a discounted price; one product at the higher price; and a buyer can be persuaded to purchase two products together without any discount. \textit{See id.} at 705-06. \textit{See also} Fortner Enters., Inc. v. U.S. Steel Corp. (Fortner I), 394 U.S. 495, 517-18 (1969) (White, J., dissenting) (stating that the offering of packages can be a seller’s attempt to compete effectively).

\textsuperscript{63} See \textit{Jefferson Parish}, 466 U.S. at 14 (dealing with tie of anaesthesiological services to surgeries).

\textsuperscript{64} \textit{See Fortner I}, 394 U.S. at 503 (stating that tying arrangements “generally served no legitimate business purpose”).

\textsuperscript{65} \textit{See Jefferson Parish}, 466 U.S. at 25-26 (laying out the four prerequisites for a per se tying violation).
insubstantial effect on interstate commerce.\textsuperscript{66} Therefore, the tying per se analysis looks much more like a quasi rule of reason analysis than the traditional per se rule of illegality, making the plaintiff prove market power in the tying product market before establishing a violation.\textsuperscript{67}

C. IMPORTANT PATENT TYING CASES AND THE PRESUMPTION OF MARKET POWER

For years courts presumed market power in the tying product where the defendant company held a patent in that tying product.\textsuperscript{68} Therefore, unlike regular tying cases, a plaintiff bringing a patent tying claim did not have to prove the defendant's market power in the tying product market.\textsuperscript{69} While controversial,\textsuperscript{70} the presumption of market power in patent tying is justified when viewed from an economic perspective,\textsuperscript{71} and the Supreme Court condoned it from the early 1900's until a recent decision in 2006.\textsuperscript{72}

\textsuperscript{66} See \textit{id.} (extrapolating a four element test from a cloudy precedential foundation).

\textsuperscript{67} Compare \textit{Jefferson Parish}, 466 U.S. at 35 (O'Connor, J., concurring) (utilizing a special form of the per se rule for tying), \textit{with Northern Pacific Railway}, 356 U.S. at 8 (applying a strict form of the per se rule).

\textsuperscript{68} See \textit{Loew's}, 371 U.S. at 44-45 (tying feature films to inferior films); see also \textit{Jefferson Parish}, 466 U.S. at 16 (tying anesthesiological services to surgeries).

\textsuperscript{69} See \textit{Loew's}, 371 U.S. at 45-46 (presuming power because of patent in the feature films).


\textsuperscript{71} See \textit{ALTMAN & POLLACK}, supra note 31 (discussing the negative economic impact tying can have on consumers and the market).

\textsuperscript{72} See \textit{Illinois Tool}, 547 U.S. at 35 (eliminating the presumption of market power in patent tying cases).
One of the earlier patent tying cases began as a patent misuse case. In *Motion Picture Patents*, the patent holder for movie projection equipment attempted to force licensees to use only its company’s film in the equipment. A patent holder brought a patent infringement action against the licensee who failed to comply with the licensing agreement. The Court held that the licensees were not responsible for infringement, stating that previous courts erred in their decisions that allowed patent holders to condition sales or leases on the purchase of non-patented goods. In deciding the case, the Court looked directly at the Patent Act, indicating that the statute does not grant the inventor the ability to restrict use of the patent outside of the scope of the limited patent monopoly granted to him. Prior to this decision, Congress enacted the Clayton Act, including § 3, which made it an antitrust violation to tie non-patented goods to a patented product, and the Court possibly reacted to the recent antitrust legislation.

73 See *Motion Picture Patents*, 243 U.S. at 505 (explaining how it came about in the patent infringement context where the patentee misused his patent license).
74 See id. at 506-07 (tying film, an unpatented good, to a desired patented product).
75 See id. at 505 (attempting to enforce an unlawful tying agreement).
76 See id. at 514-18 (overruling the 1912 case, *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912)). *A.B. Dick Co.* dealt with a patented mimeograph machine licensed with the restriction that it was only to be used in conjunction with the patentee company’s “stencil paper, ink, and other supplies . . . .” See *A.B. Dick Co.*, 224 U.S. at 11 (describing machine’s license restriction).
77 See *Motion Picture Patents*, 243 U.S. at 516 (relating that the purpose of a patent is to allow enjoyment of rights, and success of one’s innovation by giving one a very limited monopoly). In making this determination, the Court relied on their prior decision in *Bauer v. O’Donnell*, that held the right of a patent holder to vend is “exhausted by a single, unconditional sale, . . . thereby carried outside of the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it.” Id. at 516, cited in *Bauer v. O’Donnell*, 229 U.S. 1, 13 (1913).
79 See Reicher, *supra* note 70 at 305 (stating how the Court’s overruling of *A.B. Dick Co.* was an initial step in narrowing patent protection).
In 1936, the Court dealt again with tying in the patent context in *Int’l Bus. Machines Corp. v. United States*. In this case, the Government brought suit against International Business Machines Corp. ("IBM") for violating § 3 of the Clayton Act. The Court dealt with the issue of IBM conditioning the lease of their patented tabulating machine—a machine that was one of only two on the market that performed "certain mechanical tabulations and computations, without any intervening manual operation, by the use in them of cards upon which are recorded data which are the subject of tabulation or computation"—on the restricted use of only IBM’s tabulating cards in their machines. Even though IBM argued that the restriction ensured adequate performance of its patented machines, the Court found IBM in violation of the Clayton Act. *International Business Machines Corp.* specifically dealt with tying arrangements where a company with a patented product coveted by the public seeks to monopolize the market of another non-patented good, thereby using their patented product as leverage. Therefore, the case stands for not allowing patent tying arrangements when the tie tends to eliminate business competition and create a monopoly, “rather than [protect] . . . good will.”

Finally, in 1947, the Court indicated it was “unreasonable, per se, to foreclose competitors from any substantial market” through

---

80 See 298 U.S. 131, 134-35 (1936) (stating the Clayton Act condemns tying arrangements in lease agreements, as well as the sale of products).
81 See id. at 132 (tying punch cards to a patented machine).
82 See id. at 133-34 (restricting the lease of highly needed machinery on the purchase of another IBM product).
83 See id. at 138-39 (finding IBM made inconsistent arguments since it allowed some leasees to use their own cards). The Court specifically rejected IBM’s defense because there was “no contention that others . . . [could] [not] meet [their] requirements,” finding that other companies were perfectly capable of “manufacturing cards suitable for use in [IBM’s] machines . . . .” Id. at 139 (stating that in fact, the Government itself, who had leased IBM’s machines, was allowed by IBM to make large quantities of the cards).
84 See *Int’l Bus. Machines*, 298 U.S. at 139 (presuming that leveraging principals indicate that one product may be used to sell another less desired or undesired product).
85 See id. at 140 (assuming IBM’s tie was an attempt to gain leverage in the punch card market).
the use of a patent in *Int’l Salt Co. v. United States*. In classifying patent tying arrangements as per se illegal, the Court looked at prior horizontal restraint cases where it used per se rules in antitrust litigation. Then, in *United States v. Loews*, though not dealing directly with patent tying, the Court directly stated that when the Government grants a seller a patent, a presumption of market power exists because of the limited monopoly given to the patent holder, and because the buyer cannot obtain the product elsewhere.

The Supreme Court recently took a dramatic step away from patent tying precedent in its most recent patent tying decision. In *Illinois Tool*, eighty-nine years after *Motion Picture Patents* Justice Stevens authored the unanimous Supreme Court decision, concluding "that the mere fact that a tying product is patented does

86 *See* 332 U.S. 392, 396 (1947).
87 *See id.* (looking to Fashion Originators Guild v. Fed. Trade Comm’n (FOGA), 312 U.S. 457 (1941); *Socony*, 310 U.S. at 150; and *Trenton Potteries*, 273 U.S. at 392 for justification for a per se rule). A horizontal restraint is one put into place by competitors, or a group of competitors, and is specifically dealt with through § 1 of the Sherman Act. *See Areeda & Kaplow, supra* note 14, at 165 (introducing the concept of horizontal restraint). Certain types of horizontal restraints continue to be especially pernicious and problematic to competition, and they are thus treated under a per se analysis. *See United States v. Reicher*, 983 F.2d 168, 170-72 (10th Cir. 1992) (discussing bid-rigging); *Palmer*, 498 U.S. at 47 (describing territorial allocation); Superior Court Trial Lawyers Ass’n v. Fed. Trade Comm’n, 493 U.S. 411, 416 (1990) (discussing output restrictions); *Maricopa County Med. Soc’y*, 457 U.S. at 348 (describing price-fixing); *FOGA*, 312 U.S. at 461 (discussing group boycotts).
88 *See* 371 U.S. 40 (dealing with a copyright tying issue).
89 *See id.* at 45-47 (stating general proposition that when a limited monopoly is granted it presumes power in patented product markets). The Court repeated this proposition in *Jefferson Parish*. *See Jefferson Parish*, 466 U.S. at 16 (1984) (stating "[I]f the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power").
90 *See Illinois Tool*, 547 U.S. at 35 (eliminating the presumption of market power for defendants using patents for tying purposes and aligning patent antitrust law with the Chicago School of thought); *see also* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693, 720 (2009) (recognizing Justice Stevens drastic change from *Jefferson Parish* to *Illinois Tool*, and stating that it is difficult to reconcile Justice Stevens’ statements surrounding tying arrangements).
not support . . . a presumption" of market power.\textsuperscript{91} Illinois Tool dealt with the tying of unpatented ink to a patented piezoelectric impulse inkjet printhead and patented ink container.\textsuperscript{92} In ignoring years of tying case precedent, the Court, through Justice Stevens, indicated that its rationale stemmed from the 1988 Congressional amendment to the Patent Act, which eliminated the market power presumption in patent misuse cases.\textsuperscript{93} While Justice Stevens stated that its more recent tying opinions "required a showing of market power in the tying product[,] . . . rather than relying on assumptions," the Court failed to consider the reasons for giving a presumption for patented products in the first place.\textsuperscript{94} The Court further looked at Justice O’Connor’s concurring opinion in Jefferson Parish, which questioned the validity of the presumption of market power for patent holders by stating the presumption comes from the Court’s “patent misuse cases rather than . . . antitrust jurisprudence.”\textsuperscript{95} Jefferson Parish is the same case that Justice Stevens, for the majority, noted that “certain types of contractual arrangements are deemed unreasonable as a matter of law,” and “[i]t is far too late in the history of antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’”\textsuperscript{96}

\section*{II. The Facts of Patent Tying Relationships}

Tying arrangements present specific issues in antitrust regulation because tie-ins present very precise problems in exclusive

\begin{flushleft}
\textsuperscript{91} See Illinois Tool, 547 U.S. at 31 (implying that patents do not confer a limited monopoly).
\textsuperscript{92} See id. at 31-32 (tying a generally available product to a one of a kind product).
\textsuperscript{93} See id. at 31 (relying on patent legislation to render a Supreme Court decision).
\textsuperscript{94} See id. at 35 (relying on cases that do not deal with patented products to justify a market power inquiry over a presumption of market power).
\textsuperscript{95} See id. at 37-38 (failing to consider how patent misuse cases articulate underpinnings of antitrust law).
\textsuperscript{96} See Jefferson Parish, 466 U.S. at 9 (giving the opinion of the Court regarding a tying violation).
\end{flushleft}
As discussed earlier, tying arrangements involving patents can pose more difficult problems when taking into consideration the fact that patents in themselves are meant to give the patent holder a limited monopoly.

A. What is a Tie?

The economics behind a basic tie-in arrangement is simple. A seller who had a “sufficient degree of control over the supply of one article (the ‘tying’ goods) conditions its availability on, or otherwise requires, the purchase or lease from him of a different product, whether or not it is a necessary, auxiliary, or complementary article (the ‘tied’ goods).” This arrangement allows the seller to insulate himself from competition in the tied product which he, at the time of the tie, lacks power or control over. A seller, however, may also be using a tying arrangement to protect the potential buyers of other inferior products on the market. Yet, however selfish the seller’s act may appear in his attempt to protect the buyer from inferior products of a similar kind in the market, this act too is motivated by the seller’s attempt to control the tied product market because the seller’s motivation comes from protecting himself in the tying product market. In order for a tie to exist, there must be two separate products. The two products must be sufficiently distinct, meaning that they

98 See Illinois Tool, 547 U.S. at 33-35 (describing the history of patent, copyright, and trademark tying relationships as having market power as a matter of law due to the intellectual property right issued to them).
99 See 2 ALTMAN & POLLACK, supra note 31, at § 10:18 (simply stating how a tying arrangement works).
100 See id. (discussing how a seller may use a tie to his advantage, including by facilitating the entry of the tied product into the market).
101 See id. (stating that the seller may seemingly be acting out of the buyer’s interests, rather than his own, in forcing a tie upon buyers).
102 See id. (explaining how any tying arrangement is motivated by selfish, exclusive dealing type, acts on the seller's part).
103 See id. (articulating that tying arrangements must consist of at least two separate and distinct products).
do not naturally fit together.\textsuperscript{104} Therefore, items making up a
single product\textsuperscript{105}, “patents related to the same device,” the “sale
and servicing of specialized, complicated equipment,” or trade-
marked items and a franchise for the sale of products in order to
ensure quality control, are all valid and allowable ties.\textsuperscript{106} While
the case of the single product appears to be the most concrete
and easily ascertainable, it has proven to be a complex issue that
is the first line of defense for sellers defending antitrust suits.\textsuperscript{107}
Courts must look at the marketing structure for the products in
order to discern whether the products are truly distinct, or if the
seller is merely marketing two distinct products as one.\textsuperscript{108}

The second element required for a tying relationship to exist is
that the seller is conditioning the purchase of one item, the tying

\textsuperscript{104} See Times-Picayune Publ’g Co. v. United States, 345 U.S. 594, 614 (1953)
(finding that two separate newspapers were not indistinguishable products as
to advertisers because advertisers merely wanted to place their ads to be seen
by the public in either one of the papers). \textit{But see} United States v. American
Can Co., 87 F. Supp. 18, 20-21 (N.D. Cal. 1949) (stating metal and fiber contain-
ers made by a canning machinery company are independent products).

\textsuperscript{105} See N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493, 501 (D.
Del. 1971) (rejecting defendant’s argument that the sale of remote control cable and electric shift engines are a bundling of several parts of one product).
The court concluded that evidence in the business records proved that the two
products were separate because, among other things, the company advertised
the products separately. \textit{See id.} (stating that control cables were marketed
separately as accessories).

\textsuperscript{106} See 2 ALTMAN & POLLACK, supra note 31, at § 10:18 (indicating the allowable
types of tying arrangements).

\textsuperscript{107} See, e.g., Microsoft Corp., 253 F.3d at 85-89 (dealing with the issue of whether
an internet browser and operating system are two products); Hack v. President and Fellows of Yale Coll., 237 F.3d 81, 86-87 (2d Cir. 2000) (looking into
whether a Yale college education was separate and distinct from mandatory
on-campus housing for freshman and sophomore students); PSI Repair Ser-
vices, Inc. v. Honeywell, Inc., 104 F.3d 811, 815-17 (6th Cir. 1997) (determining
whether repair parts for the defendant’s equipment that had always been
sold only in conjunction with the defendant’s own repair services were two
distinct products); Principe v. McDonald’s Corp., 631 F.2d 303, 304 (4th Cir.
1980) (dealing with single franchising package).

\textsuperscript{108} See WILLIAM C. HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK §
2:18 (2012) (stating that courts look into the complex issue of whether two
products exist through a variety of market factors).
product, on the purchase of another item, the tied product.\textsuperscript{109} In most scenarios, the conditioning requirement appears on the face, making it unnecessary to prove the element.\textsuperscript{110} Where it is necessary to prove that the buyer was coerced or forced to buy a tied product because the conditioning is not apparent on its face, courts must see whether the buyer actually desires the tied product on its own, or whether the buyer’s purchase of the tied product is induced by the buyer’s desire for the tying product.\textsuperscript{111}

A third requirement for a tie to exist is market power in the tying product market.\textsuperscript{112} Proving market power in the tying product market may be shown through a variety of things, including: a dominant customer base; a unique product that cannot easily be duplicated; legal barriers; a lack of product substitution; or other things, such as huge buyer acceptance that cannot be explained by anything other than economic leverage.\textsuperscript{113} Courts generally are looking to see whether the seller has an advantage in the tied product market because of their significant existing advantage in

\textsuperscript{109} See Eastman Kodak, 504 U.S. at 461-62 (defining what entails a tying arrangement). “A tying arrangement is ‘an agreement by a party to sell one product but only on the condition that the buyer also purchases a different... product, or at least agrees that he will not purchase that product from any other supplier.” Id. (citation omitted).

\textsuperscript{110} See id. at 462-64 (skipping from whether two products exist over to the issue of market power, where the agreement itself conditioned the sale of one product on the other).

\textsuperscript{111} See Holmes & Mangiaracina, supra note 108, at § 2:18 (stating that the buyer may be ignorant of other possible purchase choices, and therefore, buys the tied product because it is advertised in such a way, or the buyer may be compelled to purchase a product she can do without because of her desire for the tying product). In Jefferson Parish, the Supreme Court indicated that coercive factors were not demonstrated because hospital patients were ignorant to the tying of hospital services and anesthesiological services. See 466 U.S. at 27-28 (reversing the appellate court’s decision).

\textsuperscript{112} See United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II), 429 U.S. 610, 619-20 (1977) (stating sufficient market power in the tying product market is required in order for the seller to require purchasers to accept terms that are not part of a competitive market environment).

\textsuperscript{113} See Holmes & Mangiaracina, supra note 108, at § 2:18 (expressing the various ways courts find market power, including the seller holding a patent, which has recently been expressed as no longer presuming market power in Illinois Tool).
the tying product market. This concept is especially important because, without market power in the tying product, consumers will likely go elsewhere for their buying needs and the tie will ultimately fail.

The fourth requirement for a tie is that a “not insubstantial” amount of commerce in the tied market has been affected by the arrangement. Courts’ requirements for the effect on interstate commerce in the tied product market are few, finding satisfaction in meeting the requirement for tying relationships through small effects on dollar amounts or at least some effect on competitive sales.

The four elements stated above make up the requirements for a “per se” test of a tying violation. Once these four elements are met, the illegality of the tie is presumed. The defendant is then able to defend the tie, stating that though the defendant’s actions

---

114 See Eastman Kodak, 504 U.S. at 464 (determining whether market power exists for a tie); Jefferson Parish, 466 U.S. at 18 (stating that when “the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market”). The inquiry must “focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.” Id.

115 See Jefferson Parish, 466 U.S. at 19-28 (looking at the character of the demand for hospital services and anesthesiological services, and finding that while the anesthesiological services could be provided separately, the hospital lacked market power because seventy percent of the patients residing in the area enter other hospitals).

116 See Loew’s, 371 U.S. at 48-49 (stating that in the case at hand, there is no question that the adverse effects on free competition requirement is met through Loew’s block booking contracts).

117 See, e.g., Blough v. Holland Realty, Inc., 574 F.3d 1084, 1089-90 (9th Cir. 2009) (finding that buyers failed to show that the harm was “not insubstantial” in the tied product market because there was no market for the tied product at all); Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1425-26 (9th Cir. 1995) (holding a not insubstantial amount of commerce was affected to support a tying claim where $100,000 in annual sales to a single computer service customer were affected by a tying claim involving computer software and hardware service support).

118 See Eastman Kodak, 504 U.S. at 461-62 (defining a tying arrangement).

119 See id. (indicating the elements for a tie).
constitute a per se tying violation, it is nonetheless competitively justifiable.\textsuperscript{120} In allowing the defendant to give an affirmative defense for their tying violation, the courts are making it so sellers do not kill their business in attempting to follow antitrust regulations.\textsuperscript{121}

B. \textbf{GOOD TIE OR BAD TIE: FACTUAL ECONOMIC SCENARIOS}

Meeting the four requirements for a tie places a presumption of anticompetitive behavior on the defendant; however, not all ties are bad ties.\textsuperscript{122} The tying arrangements antitrust regulators are concerned about are those that coerce buyers so they are unable to exercise their decision-making capabilities and purchase a superior or cheaper substitute product.\textsuperscript{123} This section gives factual scenarios that show the difference between a good and bad tying arrangement.

1. \textbf{SCENARIO ONE}

A grocery store is having difficulty unloading a new energy drink that it purchased wholesale from the distributor. Since energy drinks were gaining popularity among consumers, the grocery store purchased fifty cases of the drink for their first order, expecting it to sell within two weeks or so. After about two months, the grocery store still had forty cases left in their stock. The energy drink, for whatever reason, was not popular among consumers. The grocery store decided that the energy drink was tak-

\textsuperscript{120} \textit{See} United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556-57 (E.D. Pa. 1960), \textit{aff'd}, 365 U.S. 567 (1961) (giving a business justification for a tie of antenna equipment to service contracts, stating that malfunctioning systems would undermine the company’s goodwill to customers and effect the industry as a whole); \textit{see also} Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 656 (1st Cir. 1961) (finding it reasonable for defendant to insist on specific measurements of storage containers).

\textsuperscript{121} \textit{See} Dehydrating Process Co., 292 F.2d at 656 (stating it is unnecessary to require defendants to cut their own throats in following antitrust regulation).


\textsuperscript{123} \textit{See id.} (discussing problematic and concerning tying arrangements).
The grocery store put up an advertisement in its store stating, “Buy a bag of X Brand chips at full price, get X Brand Energy Drink for FREE!” Consumers who were already going to buy the chips began taking an energy drink with their purchase, allowing the grocery store to unload the energy drinks in a week. The grocery store, though losing money from their initial purchase of the energy drink, was happy to have their storage and shelves free for other items that would sell. Consumers were happy because they felt they were getting something for nothing, even if they would never have purchased the energy drink on its own.

In order to determine whether the scenario above is a good tie or a bad tie, going through the four steps to finding an antitrust tying violation is necessary. First, the chips and the energy drink are obviously two products because they are marketed separately, they are from two distinct companies, and they are not the same product or part of the same product. The first element of an anticompetitive tie is met. Moving on to the second element, whether the seller is conditioning the purchase of the chips on purchasing the energy drink, poses another question: are consumers being forced to purchase the energy drink if they purchase the chips? The answer is no here. The consumer is able to get the energy drink for free upon purchase of the chips, but she can also purchase the chips and leave the energy drink behind. The second element is not met because there is not forcing upon the consumer. Therefore, the tying scenario above is a valid, or good tie.

These types of “good” ties are seen every day. Stores put up advertisements and sales, combining two items, but it is up to the consumer to decide whether they want to take or leave the tied product or service. If the tie is not taken, the consumer does not lose out on anything; the consumer is not forced to pay more to get a product she wants and the consumer is not forced to buy a product or service she does not want.
2. SCENARIO TWO

Company X manufactures high capacity ink-jet printers to large businesses. The businesses, out of convenience, purchased the company’s ink cartridges along with the printers when purchased or rented through the company. After an economic depression hit the country, the businesses made every attempt to save money. A new company that put ink in recycled ink cartridges that were made to fit in almost any ink-jet printer began being utilized by most big businesses because of their low ink cost. Company X began losing a great deal of money on their ink sales because the businesses stopped buying their ink to go into their printers.

In order to curve their losses, Company X decided to send a letter to all the businesses that previously purchased one of their ink-jet printers, indicating that use of any ink used in Company X’s printers that is not manufactured by Company X may cause serious damage to the printer and Company X would not uphold its unlimited warranty servicing provisions unless Company X’s ink is used. Company X also began putting this same language in new ink-jet printer purchase and rental contracts. However, Company X told one of the businesses who the president was close friends with that this was a hoax to make more money, and that business could use any ink they wanted because it would not damage the printers.

Without considering the deceptive practice on the part of Company X, let us consider whether the tying arrangement is anti-competitive. While an ink-jet printer and ink are items that appear to go together, they are two separate products. The ink-jet printer and ink are sold separately, marketed separately, and are generally purchased separately by consumers. Ink is needed for the Company X printers to work, but the ink can also be sold separately for other printers. Therefore, the two items are separately distinct and would not be classified at one item.

Next, we look to conditioning. Is Company X conditioning the sale of their ink-jet printers on the purchase of their ink cartridg-
es? While the company is not conditioning the sale of their printers on the purchase of cartridges, Company X is conditioning the warranty on the sale of their cartridges. The conditioning of their warranty on the sale of their ink cartridges would also be considered to satisfy step two because Company X is taking away something previously available to consumers who do not purchase their ink cartridges.

Step three looks at whether Company X has market power in the tying product market, namely the ink-jet printers. The market power category is a little difficult to ascertain based on these limited facts, but some things can be taken from the scenario. For instance, market power may be found where Company X has the most widely used or accepted ink-jet printer for large business, or possibly the only large-scale ink-jet printer. If there are no adequate substitutes out there for the big businesses, a court would likely find Company X to have market power in the ink-jet printers. Also, it may be too costly for big businesses to switch to other manufacturers for their ink-jet printer needs, making it easier for the businesses to succumb to the pressures of purchasing Company X’s ink cartridges. If the businesses are not leaving Company X for one or more reasons, it is very possible that Company X’s ink-jet printer does not have an adequate substitute available for the businesses, giving Company X market power over the ink-jet printer market.

Finally, does the tying arrangement have a not insubstantial effect on the ink cartridge market? If the big businesses maintained their business with Company X and switch back to purchasing ink cartridges from Company X, the effect on the ink cartridge market will likely be more than insubstantial because this new green company will lose business, as will other companies with cheaper ink products.

Therefore, the four steps to finding an anticompetitive tie are met in this scenario. Company X would need to show some procompetitive justification for tying the two products together. Company X will likely state that their justification is to protect their ink-jet printers from damage from other inferior ink prod-
products. However, if the conversation between Company X and big business president friend of Company X surfaces, this would defeat Company X’s justification.

3. **Scenario Three**

Company Y is a leading developer in cell phone technology. Company Y recently developed a new cell phone that is unlike any other on the market: it can collapse to fit in any size pocket without being noticed; it never needs to be charged; and it has a virtually unlimited memory for storing numbers, pictures, videos, and the like. Company Y knows their phone is going to be so popular that everyone in the world is going to want one. The best part is, Company Y has a patent on the cell phone, making it so no other company can copy its design or technology for three years! Company Y also has a 5X speed network that is a little faster than the other network speeds out there but is more costly. Due to the cost and relatively small benefit from the 5X network, Company Y has been having trouble getting consumers to latch on to the idea of 5X. Company Y decides to tie the purchase of the new cell phone to the 5X network, conditioning the sale of the cell phone to use of the 5X network on the phone. The plan works, and soon Company Y has a waitlist throughout the world for their new cell phone combined with the 5X network.

Company Y’s arrangement deals with two distinct products: the cell phone and network speed. Company Y’s arrangement is also coercive because it is conditioning the sale of the phone, something consumers want, to the 5X network, something consumers can do without. The third question, whether Company Y has market power should be simple here: Company Y has a patent in the cell phone giving Company Y a limited monopoly in this new cell phone technology. This patent means that for three years Company Y is the only company that will be producing a cell phone of this kind. There are no substitutes because of this patent power, so consumers are unable to obtain the cell phone elsewhere. Courts usually look to economic measurables, such as whether adequate substitutes exist in the market to determine whether market power exists. So, why should a patent in a prod-
uct, which gives a company a monopoly in that product for a period of time, not also be an adequate indicator of market power?

Finally, Company Y’s tie would likely have a substantial effect on other networks’ speed sales through other companies. If consumers really want this new phone, and the only speed you can get with the phone is 5X, the other companies with other speeds will generally suffer as a result. Therefore, Company Y’s tie is anticompetitive.

III. Analysis

A. The Court’s Reasoning in Illinois Tool

*Illinois Tool* changed the structure of antitrust patent tying cases by taking away the presumption of market power.\(^{124}\) In *Illinois Tool* Justice Stevens, delivering the opinion of the Court stated that because of the amendment to the Patent Act in 1988 that eliminated the market power presumption for determining patent misuse cases, it made sense that the presumption also be eliminated in patent tying cases involving alleged antitrust patent tying relationships.\(^{125}\) Specifically, Justice Stevens stated that “the vast majority of academic literature” recognizes that a patent does not necessarily confer market power.\(^{126}\) However, the Court cites four authors to verify its statement that the vast majority recognize this concept, all from a Chicago School ideology.\(^{127}\)

Furthermore, the Court relied on a congressional act when the Supreme Court has always made itself out to be the supreme decision makers of the law.\(^{128}\) Justice Stevens further stated “it would be unusual for the judiciary to replace the normal rule of

\(^{124}\) See *Illinois Tool*, 547 U.S. at 31 (stating that a full market power analysis is necessary in determining whether a patent tie exists).

\(^{125}\) See id. at 40-43 (basing their decision primarily on a congressional act rather than years of precedent).

\(^{126}\) See id. at 46 n.4 (citing Areeda, Burchfield, Hovenkamp, and Posner).

\(^{127}\) See id. (naming four authors aligned with the Chicago school of thought).

\(^{128}\) See Marbury v. Madison, 5 U.S. 137, 178 (1803) (stating that the judicial power of the United States extends to “all cases arising under the constitution”).
lenity that is applied to criminal cases with a rule of severity for a special category of antitrust cases."\textsuperscript{129} The Court’s statements fail to support their reasoning when considering the history of patent tying cases.\textsuperscript{130} The overall strictness of \textit{Illinois Tool} in determining tying cases is questionable, beyond the lack of adequate reasoning, when considering that Justice Stevens has been a longstanding proponent for antitrust analysis to take the more flexible role, often providing reason to believe he looks at rule of reason analysis as a continuum.\textsuperscript{131} Justice Stevens, through his opinion in \textit{Jefferson Parish}, for instance, came up with the quasi-per se rule for establishing tying violations that courts utilize today.\textsuperscript{132}

The Court further reasoned in \textit{Illinois Tool} that while “price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package, it is generally recognized that it also occurs in fully competitive markets.”\textsuperscript{133} Is the Court’s statement literally correct? Suppose a patent holder of a new cell

\textsuperscript{129} See \textit{Illinois Tool}, 547 U.S. at 45 (indicating that all types of criminal cases should be judged in the same category).
\textsuperscript{130} See id. at 33-38 (discussing the history of patent tying cases).
\textsuperscript{131} See Waller, supra note 90, at 700-01 (analyzing how Justice Stevens, more than any other justice, has “articulated a comprehensive view of the rule of reason as a rule of interpretation for all of Section 1 of the Sherman Act”). Justice Stevens appears to see rule of reason analysis “as a continuum where some conduct is presumed to unreasonably restrict competition (and is hence unlawful) where no potential justifications are permitted . . . [while] [o]ther conduct is similarly presumed unreasonable only after proof of certain market facts (usually market power) with no potential justifications allowed in this situation either.” \textit{Id.} (noting Justice Stevens’ preference).
\textsuperscript{132} See \textit{Jefferson Parish}, 466 U.S. at 15-16 (stating the modern standard); see also Waller, supra note 90, at 716-717 (stating that while the quasi-per se rule established in the case is still good law and utilized today, the lower courts have “grafted all kinds of exceptions” and some courts have even ignored the rule and applied a full-fledged rule of reason analysis).
phone in the hypo earlier charges $1000.00 more for its cell phone plus the speed than any other cell phone on the market. This price would be considered an “above market price.” The phone, if worth $300.00 plus the speed worth $100.00 for the life of the phone does not come close to the price they are charging. In a truly competitive market consumers will find substitutes with lower costs and choose these phone and plans over the patent holder’s phone. However, what makes the consumer purchase the phone at the high price, along with the tied speed, if the fact that there are no adequate substitutes on the market. With no adequate substitutes and no way for competitors to put substitutes out into the market, the market is not competitive by nature. If consumers either want or need the patented product, they are going to purchase it even at a much higher price, and even if it means purchasing the higher priced speed plan that is tied to it.

B. Effects of Complete Removal of the Market Power Presumption

In taking away the market power presumption without giving a more adequate reasoning for their decision, the Court failed to fully rationalize their decision. Furthermore, why did the Supreme Court find the need to remove a presumption of market power for patent tying cases when patents are meant to give the patentee a monopoly for a period of time in their patented product? In Illinois Tool, ink was the unpatented and readily available product with multiple manufacturers and distributors.


135 See id. at 676 (stating that when looking at whether a patent holder misused his limited monopoly, the “key inquiry . . . is whether the patentee has impermissibly broadened the ‘physical or temporal scope’ of the patent grant with anticompetitive effect”) (citing Windsurfing Int’l, Inc. v. AMF, Inc., 782 F.2d 995, 1001-02 (Fed. Cir. 1986)).

136 See Illinois Tool, 547 U.S. at 32-33 (giving background for antitrust claim).
The piezoelectric inkjet printhead and ink container were the patented and one of a kind products. The real question the court should have asked was whether there was any need to tie the ink to the patented products.

An analysis of the tie easily answers the question. Any ink could have been used in the printhead and container. There were two distinguishable products. There was conditioning occurring through the requiring the purchase of the ink. The next question the one would ask in determining a tie is whether market power exists. However, why would the court need to waste its time with a market power analysis when the holders of the product were already given a monopoly in those products for a period of time? No one else was allowed to make a printhead and ink container similar or even close to the ones produced by the patent holders. Does it really matter if the product(s) are desirable, or does it only matter that those who DO want the product do not have adequate options in that market?

After the Supreme Court’s decision, students and scholars alike took it upon themselves to outwardly state how great the decision was to innovation. Almost all of the scholarly work on the issue of the removal of the market power presumption support the removal that took place in Illinois Tool and state the decision was good for competition. One author cited by the Supreme Court as support for its decision in Illinois Tool, Baumol, discusses the need for rethinking the criteria in place to determine market power or monopoly power because of new economies and the need for innovation.

---

137 See id. (laying out background for case).
138 See, e.g., Hayden, supra note 70, at 95; Reicher, supra note 70, 70 at 297; Walsh III, supra note 70, at 267 (supporting the removal of the market power presumption).
139 See, e.g., Hayden, supra note 70, at 96-97; Reicher, supra note 70, at 297; Walsh III, supra note 70, at 267 (indicating that the removal of the market power presumption should have been removed long ago).
140 See Baumol, supra note 133, at , 661-62 (stating that reliance on evidence of price discrimination often occurs without a defensible economic foundation).
Baumol indicates that a firm with a negative sloping demand curve may not have any market power and frequently will find it impossible to earn any excess over competitive profits.\textsuperscript{141} “A firm that charges the marginal-cost prices that would prevail in the theoretical state of perfect competition will be unable to recover its costs.”\textsuperscript{142} Baumol further states that “[i]f a firm’s customers differ in their demand patterns, that firm may be unable to survive financially unless it adopts discriminatory prices.”\textsuperscript{143}

Baumol believes the market will determine the discriminatory prices in the long run, and this will force the firms to charge different prices.\textsuperscript{144} What Baumol and others with similar thinking fail to recognize is that market power is not based entirely on price discrimination, but other factors.\textsuperscript{145} While Baumol focuses on price discrimination as evidence of market power, he also suggests that with no barriers to entry, other players will enter the market and drive a firm’s prices down.\textsuperscript{146} In a competitive market, prices may be driven down, but those with market power (or patents in a given product market) may have power to drive prices up or down in order to monopolize, tie, or do other non-competitive things.\textsuperscript{147}

\textsuperscript{141} See Baumol, supra note 133, at 665 (stating that these firms “will be unable to earn more than zero economic profits”).
\textsuperscript{142} See Baumol, supra note 133, at 665 (describing marginal-cost disadvantages).
\textsuperscript{143} See Baumol, supra note 133, at 665 (describing a financial need to resort to discriminatory prices).
\textsuperscript{144} See Baumol, supra note 133, at 665 (believing that competitive forces will leave even price-discriminating firms with little choice on its prices).
\textsuperscript{145} See HOLMES & MANGIARACINA, supra note 108 (articulating the many ways market power may be found).
\textsuperscript{146} See Baumol, supra note 133, at 664 (stating that the presence of competition, and not monopoly power, is often the thing responsible for discriminatory prices).
\textsuperscript{147} See Dennis W. Carlton & Michael Waldman, The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, 33 RAND J. ECON. 194, 194–96 (2002) (arguing that in dynamic markets, “tying can be used to transfer monopoly power from the primary market to a newly emerging market” and can preserve a monopoly position).
Contrary to what Baumol states in his article and what others believe, it is actually difficult to find market power for an antitrust violation. This is not because it does not exist, but because each side is able to argue for their own interpretation of market power, thus defining the relevant geographic and product markets to fit their advocating needs. Furthermore, a lack of a market power presumption equals less effective antitrust regulation. Removing the presumption leads more firms to have power to leverage themselves into other markets by tying, not because healthy competition draws them into those markets, but because opportunities exist. This is especially true where the firm holds a patent in a product market.

Leveraging using a patented product can, and likely will, lead to greater customer preference for the unpatented product, and, at

---

148 See Holmes & Mangiaracina, supra note 108 (stating that courts have found market power through a variety of ways, not only through price discrimination). See also Spectrum Sports, 506 U.S. at 458-59 (finding that market power did not exist in an attempt at monopolization case because plaintiff was unable to show relevant product in geographic markets and economic power in that market). The Supreme Court stated that proof of unfair or predatory conduct, alone, is insufficient. See id. at 457.

149 See Spectrum Sports, 506 U.S. at 459 (finding that though defendants exhibited predatory conduct, without plaintiffs being able to demonstrate proof that the conduct was directed or relevant to a specific geographic, plaintiffs could not win on their claim).

150 See supra Section II.A—C (detailing the history of antitrust cases with a market power presumption in place up to the current interpretation).

151 See Christopher R. Leslie, Patent Tying, Price Discrimination, and Innovation, 77 Antitrust L.J. 811, 815-16 (articulating that antitrust’s initial prohibition of tying is based on a leverage theory, first articulated in Justice White’s dissent in Henry v. A.B. Dick, 224 U.S. 1, 56 (1912)). This theory believes that a monopolist will be able to expand its monopoly power into other markets through tying. See id. (describing the Clayton Act).

152 See Leslie, supra note 151, at 823 (indicating that in the case of “metered tying” the theory that patent tying actually facilitates innovation “fails to consider the potential negative effects of patent tying”). Metered tying actually allows patent holders to “obtain supracompetitive profits not just for the patented products themselves but also for complementary products that are outside the scope of the patent.” See Leslie, supra note 151, at 823 (stating that “[i]ncreasing monopoly profits can lead to rent-seeking behavior, such as inefficiently duplicative expenditures in research and development that decrease social welfare”).
the very least, a limited time monopoly in the unpatented product market, gaining popularity, and potentially extorting prices. This is because branding and tipping are very important in market competition. Branding is not gaining a monopoly due to someone’s skill or acumen, but occurs with gaining leverage in your product. Patents are only meant to give a limited monopoly in a particular product for a very limited period of time. Patents, however, were never meant to allow firms to leverage into other product markets in order to build brand recognition, branding, and potential monopolies.

---

153 See Leslie, supra note 151, at 824 (noting that the patent holder is entitled to raise the price of the patented product and preventing rivals from selling an infringing product, but not to extract prices from locked-in sales of other products).
154 See Leslie, supra note 151, at 836 (stating that branding is essentially an effect of having market power). For example, when a firm is able to gain notoriety for its product in the market as being “the product” of that kind, it gains brand recognition. If brand recognition for a particular product occurs, the result could be that this particular product becomes the desirable product, while other similar products are less desirable, or at the very least less unknown. Examples of this phenomenon are people referring to tissues as Kleenex, soft drinks referred to as Coke, and the use of the terms IPOD to refer to the general field of MP3 players. “‘Tipping’ occurs when one platform’s initial advantage is magnified into near-complete dominance of the relevant market.” Vaheesan, supra note 59, at 945 (providing a definition for “tipping”).
155 See United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416, 430 (2d Cir. 1945) (articulating that those firms that win monopolies through their hard work and acumen are not violating antitrust laws). Judge Learned Hand in ALCOA indicates that growth must be something else, and a firm should not be punished if it competes properly and “wins.” See id (distinguishing between legal and illegal monopolies).
156 See Leslie, supra note 151, at 811 (discussing how patent law grants exclusory rights to patent holders, but only to the extent that they are able to prevent competitors from manufacturing and selling infringing products).
157 See Leslie, supra note 151, at 836 (stating that while Chicago School theorists believe leveraging is not possible, “economists have since explained how tie-ins can foreclose enough of the tied product market to deter entry because new competitors may not be able to make enough sales to cover their fixed costs or to achieve the minimum efficient scale to compete profitably”).
C. THE FUTURE OF PATENT TYING

Removal of the presumption in patent tying antitrust cases especially reflects an issue when new technologies are involved. Where a new technological device is the patented product, in today’s constantly advancing society, tying to this patented product poses an increased risk of unfair competition in the marketplace.\(^{158}\) Utilizing this patented product beyond the scope of the patent’s limited monopoly by forcing consumers to purchase another product in order to gain this new technology could prove itself costly to consumers.\(^{159}\)

While the Supreme Court, through Justice Stevens’ opinion in *Illinois Tool*, appears to be on board with a fully fledged market power analysis for every patent tying case that comes through the courtroom, based on Justice Stevens’ continuum approach to antitrust analysis in the past, the opinion he delivered in *Illinois Tool* may possibly reflect a similar approach to patent tying analysis.\(^{160}\) While Justice Stevens stated in *Illinois Tool* that in that particular case the plaintiff lost their motion for summary judgment, he articulated that it was because “respondent reasonably relied on our prior opinions in moving for summary judgment without offering evidence defining the relevant market or proving that petitioners possess power within it.”\(^{161}\) This leaves open the possibility that, Justice Stevens would have presumed market power existed had the plaintiff brought forth some evidence of

\(^{158}\) See Leslie, *supra* note 151 at 815-16 (providing an example of unfair competition involved in patent tying). The increased risk of unfair competition through patent tying of a new technology that the marketplace desires is that market power could be granted to the patent owner readily easily, thus allowing leveraging into the unpatented product market. See Leslie, *supra* note 151 at 815-16 (describing the hazards of patent tying new and desirable technologies).

\(^{159}\) See Leslie, *supra* note 151 at 814 (describing how tying a tying arrangement can result in the consumer paying a higher price for the second product).

\(^{160}\) See *Illinois Tool*, 547 U.S. at 31 (stating a presumption of market power is established in American law but concluded that the mere fact that a tying product is patented does not support such a presumption).

\(^{161}\) *Id.* at 46 (delivering the decision of the Court).
market power, but not necessarily requiring a full-fledged market power analysis.162

For the future of patent tying cases, in understanding that the Court has long ago moved in line with the Chicago School ideology, while a presumption of market power is gone, it should not be lost.163 A test for patent tying case analysis that is more in line with the long history of antitrust tying, patent misuse, and antitrust patent tying cases alike, at the same time accepting the role market power analysis has come to play in the antitrust analysis in more recent years, should be articulated.164 A proposed test is this: a plaintiff seeking application of the presumption of market power to move forward with his or her patent tying case must as a threshold matter, provide some facts beyond that of the patent that suggests the patent holder has anticompetitive effect on the unpatented product market.165 The evidence of some, even a minute showing, that the patent holder has an effect on the unpatented market would then allow the plaintiff the rebuttable presumption of market power.166 Therefore, the presumption of market power would be based on both the fact that the individual holds a patent and that there have been some effects already in the unpatented market.167 The plaintiff would still be required to show the other elements for the court to find a violation of anti-

162 See id. (recommending that when the case returns to district court the party may introduce evidence that a market power exists).
163 See id. (showing that while the presumption of market power is gone, the standard to establish market power is less stringent).
164 See Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing, Co., 472 U.S. 284, 297-98 (1985) (illustrating an example of a possible test that should be articulated).
165 See id. at 298 (applying a similar test in a section 1 group boycott situation).
166 See id. at 296 (stating that "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted").
167 See id. at 296-97 (discussing when a plaintiff challenges expulsion from a market there must be some showing "that the cooperative possesses market power or unique access to a business element necessary for effective competition").
competitive tying, however, without the costly and time consuming market power litigation.\textsuperscript{168}

Justice Stevens’ past decisions and theories related to rule of reason analysis and proving market power supports the theory that \textit{Illinois Tool} was decided on the facts presented to the Court and was by no means meant to convey a rule that required plaintiffs to do a full market power analysis for every patent tying case and, therefore, supports this test.\textsuperscript{169} For instance, Justice Stevens expressly supported a per se rule for patent tying cases in \textit{Jefferson Parish},\textsuperscript{170} and Justice Stevens was the originator of the concept for quick-look analysis in antitrust through the \textit{NCAA} case— a concept that indicates some forms of violations can bypass the need for a full market power analysis if the plaintiff is able to show certain anticompetitive behavior.\textsuperscript{171}

IV. CONCLUSION

The Supreme Court’s decision in \textit{Illinois Tool} marked a drastic change in how courts enforce antitrust patent tying cases in the United States. While many scholars believe this change benefits

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{168} See supra Section III A – B (detailing the requirements for a tie and discussing market power). A full fledged inquiry into market power proves costly and in many cases prevents plaintiffs from continuing with their claims because of the long and drawn out litigation. See supra Section III A – B (discussing the effects costly and prolonged litigation has on plaintiffs).
\item \textsuperscript{169} See Waller, supra note 90, at 710-21 (summarizing Justice Stevens’ advocacy for “quick look” analysis and other presumptions for market power when a minimal showing of market power has been shown).
\item \textsuperscript{170} See Jefferson Parish, 466 U.S. at 15-16 (writing for the majority).
\item \textsuperscript{171} See NCAA, 468 U.S. at 103 (applying a truncated version of rule of reason analysis in a horizontal restraint context). Quick look analysis allows for a truncated rule of reason analysis where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” See Cal. Dental Ass’n, 526 U.S. at 770 (describing the cases which have formed the basis of quick look analysis). While a “quick look” test was first clearly articulated in Cal. Dental Ass’n, the Court specifically looked to Justice Steven’s \textit{NCAA} opinion language to formulate the basis for the test. See Cal Dental Ass’n, 526 U.S. at 769-70 (stating “we held that a ‘naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.’” (citing NCAA, 468 U.S. at 110)).
\end{enumerate}
\end{footnotesize}
society, new economies, and patent holders alike, the removal of the presumption all together leaves another area of antitrust law open to the full fledged market power analysis. Diving into this market power analysis in the courtroom is costly and time consuming, making antitrust litigation side with the party with deeper pockets who is able to stay in the game the longest. In most cases, this is not the individual harmed by the supposed anticompetitive act.

The market power presumption for patent tying cases allowed regulation in an area where, many times, it is all too easy for firms and individuals to take advantage of consumers. This is due to the power already established and given to them, though for a limited period of time, through the patent itself. This power must be recognized as real in order to help antitrust regulation succeed in the future. While Illinois Tool removed the market power presumption for the patent tying case, Justice Stevens’ past opinions show a different side of the Supreme Court judge that hoped to remedy anticompetitive conduct through a responsible and fair means. With this in mind, especially when facing technological advances in products that are highly marketable and desirable, it is wise to take another look at the market power presumption surrounding patent tying antitrust cases. By taking a step back to the presumption, while at the same time allowing the economics the Chicago School ideology so desires, all might just win.