63. The author volunteered as an intake worker for the Consumer Fraud on the Elderly Project from January through August 2004. LAFC lawyers generally advocated giving this advice to consumers facing collection actions who also received government benefits as a source of income.

64. Stephen R. Ripps, "Ohio Civil Rule 11: Time for Change," 20 U. Dayton L. Rev. 133 (1994).

65. Georgene M. Vairo and Ellen P. Quackenbos, "Rule 11: Practice and Problems," ALI-ABA Conference on Trial Evidence, Civil Practice, and Effective Litigation Techniques in Federal and State Courts 139, 180 (July 24, 1991).

66. *Todd I*, 348 F. Supp. at 915.

Dicta Rising to Doctrine: *Independent Ink* resolving the presumption of market power from patents used in antitrust tie-ins

On March 1, 2006 the Supreme Court in *Illinois Tool Works Inc. v. Independent Ink Inc.*, ___ US ___, 126 S Ct 1281 , 74 USLW 4154 , 77 USPQ 2d 1801, 2006 US LEXIS 2024 (2006) reversed a line of cases that held that in an antitrust tie-in, where the tying product is patented or copyrighted, market power could be presumed. The Federal Circuit held "that a rebuttable presumption of market power arises from the possession of a patent over a tying product." *Independent Ink Inc. v. Illinois Tool Works Inc.*, 396 F3d 1342, 73 USPQ2d 1705 (CA FC 2005) The current rule—reversing the presumption—makes economic sense. Analyzing the origins shows that the "patent-antitrust" principle neither arose in an antitrust case, nor evolved through patent cases.

Where a patent owner sells a product covered by a patent on the condition that the purchaser also buys a separate, unpatented product, an antitrust tie-in like situation is presented. The fact of patent coverage no longer permits a presumption of market power. Evidence of market power is required, as are all other elements of the tie-in. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 US 2, 104 S Ct 1551, 80 L Ed 2d 2, 1984-1 Trade Cas ¶ 65,908 (1984).

The market power requirement looks to whether the tying product gives the seller the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*, 466 U.S., at 14. This power has been defined simply as "the ability of a single seller to raise price and restrict output." *Eastman Kodak Co. v. Image Tech. Serv. Inc.*, 504 US 451, 464, 112 S Ct 2072, 119 L Ed 2d 265, 1992-1 Trade Cas ¶ 69,839 (1992).

Illinois Tool Works Inc., v. Independent Ink Inc. dealt with printing devices to print bar codes, typically used by manufacturers to print the codes on boxes for shipping their products. There are unique needs involving rapidly printing the bar codes with ink flowing out under pressure, but avoiding sucking the ink back when the label is finished pressure stops. The Niedermeyer 5,343,226 patent of ITW's licensor Trident taught such an ink jet ink supply apparatus. Supplying the consumable ink is a source of revenue. By coincidence, a Supreme Court patent tie-in case nearly a century earlier involved tying ink sales to a patented apparatus. *Henry v. A. B. Dick Co.*, 224 US 1, 32 S Ct 364, 56 L Ed 645 (1912).

Independent Ink brought an antitrust suit against Trident and its licensee ITW alleging the terms of the Trident - ITW ink device license were a tie-in. As described by the Federal Circuit:

"Trident's standard form licensing agreement allowing the OEMs to use its patented product requires "OEMs to purchase their ink for Trident-based systems exclusively from Trident." (Br. of Appellees at 8.) Specifically, the licensing agreement grants the right to "manufacture, use and sell ink jet printing devices supplied by Trident" only "when used in combination with ink and ink supply systems supplied by Trident." (J.A. at 275.) There is now no claim that the ink is protected by any of Trident's patents. We thus have an explicit tying agreement conditioning the sale of a patented product (the printhead covered by the '226 patent (and possibly other patents as well)) on the sale of an unpatented one (the ink)."

There was no evidence of economic power in the printer -- Independent Ink presented its case relying on the presumption. The issue was framed solely as a tie in of the ink (the "tied" product) by the patent (the "tying" products). The District Court held that market power was not presumed. In the absence of evidence of that power, summary judgment for defendants ITW/Trident was granted. The Federal Circuit reversed, finding there was a presumption of market power flowing from a patent. In reaching that conclusion the Federal Circuit relied the statement in *United States v. Loew's, Inc.* 371 US 38, 83 S Ct 97, 9 L Ed 2d 11, 135 USPQ 201 (1962): "[t]he requisite economic power is presumed when the tying product is patented or copyrighted."

Market Power

Market power is essential in for a finding of an antitrust tie-in because without the power in the "tying" product, no economic injury could flow from forcing a buyer to purchase the unwanted, or "tied" product. Attempts to coerce buyers could not have any force without power. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 US 2, 104 S Ct 1551, 80 L Ed 2d 2, 1984-1 Trade Cas ¶ 65,908 (1984); *Eastman Kodak Co. v. Image Tech.*

Serv. Inc., 504 US 451, 112 S Ct 2072, 119 L Ed 2d 265, 1992-1 Trade Cas ¶ 69,839 (1992) The power must usually be proven by the plaintiff. Independent Ink decided that, despite statements in earlier decisions, market power may not be presumed.

Early Permissive Tying

A trio of early cases permitted licenses tying the use of a patented product to the purchase of an unpatented one as ancillary to the patent grant. *Heaton-Peninsular Button-Fastening Co. v. Eureka Specialty Co.*, 77 F. 288 (6th Cir 1896), *Bement v. Nat'l Harrow Co.*, 186 US 70, 90, 22 S Ct 747, 46 L Ed 1058 (1902), *Henry v. A. B. Dick Co.*, 224 US 1, (1912). This permissive approach was overruled by the Clayton Act. 15 USC § 13a, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 US 502, 37 S Ct 416, 61 L Ed 871, (1917). Thus, the Clayton Act was held to overrule the Court-made rule that tie-ins were permitted.

The issue was somewhat dormant in the antitrust context, as antitrust jurisprudence learned about distribution, *United Shoe Machinery Corp. v. United States*, 258 US 451, 42 S Ct 363, 66 L Ed 708 (1922), *United States v. General Electric Co.*, 272 US 476, 47 S Ct 192, 71 L Ed 362 (1926) and patentees tried variations to control products outside the patent's claims. *Carbice Corp. of America v. American Patents Development Corp.*, 283 US 27, 51 S Ct 334, 75 L Ed 819, 8 USPQ 211 (1931).

The subsequent path for the presumption was logically flawed. The line of cases cited are disconnected in their legal bases, dicta having taken an equitable patent infringement defense through antitrust cases having nothing to do with patents, and concluded there is a market power presumption doctrine. Independent Ink resolved this issue.

Patent Tie-Ins

The line of cases giving rise to the market power presumption finds roots in another patent misuse defense case. *Morton Salt Co. v. G. S. Suppiger Co.* 314 US 488, 492, 62 S Ct 402, 86 L Ed 363, 52 USPQ 30, 1942 Trade Cas ¶ 56 (1942). The issue arose in an affirmative defense to patent infringement defenses, and applied an unclean hands rationale. Suppiger's Patent No. 2,060,645 covered salt dispensing machinery. A Suppiger subsidiary sold salt tablets to the canning trade. The patented machine was used for depositing salt tablets. However, the machines were not sold, they were leased. The lease arrangement included licenses to 200 canners which permitted use of the machines only on the condition that the tablets used were bought from the subsidiary. All profits were derived from the sale of the salt tablets. The tablets themselves were not patented. Summary judgment was granted in favor of accused infringer Morton, finding the Suppiger was not entitled to injunctive relief because it was engaged in a restraint of trade. The Seventh Circuit reversed because all elements of a Clayton (antitrust) Act offense were not met. This, then, was reversed by the Supreme Court.

Thus, in a case where the trial court found an infringement action unsupportable because of the patentee's restraint of trade, the court of appeals elevated the defense to an antitrust case in chief. The Supreme Court grounded the patent misuse defense in unclean hands. The direction of analysis is defined by the statement of the issue: "whether a court of equity will lend its aid to protect the patent monopoly when respondent is using it as the effective means of restraining competition with its sale of an unpatented article." *Morton* is an application of "beyond the scope" patent misuse which follows logically from the fundamental principle of modern patents that they only grant the exclusive right to that which is included in the claims. Use of a patent to restrain sale or use of a product on which the claims do not "read" goes beyond the scope of the claims and was found to be exceed the patent grant.

The next logical issue in *Morton* was to determine the consequences resulting from such a "use" of a patent - does it give rise to a traditional "unclean hands" defense? Morton decided:

> Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article, and is thus a contributing factor in thwarting the public policy underlying the grant of the patent. Maintenance and enlargement of the attempted monopoly of the unpatented article are dependent to some extent upon persuading the public of the validity of the patent, which the infringement suit is intended to establish. Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated.

On the specific issue of whether all elements of an antitrust "tie-in" must be established in order for there to be an inequitable conduct defense the *Morton* court concluded:

> It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity.

Morton was decided based on an equitable defense of unclean hands and expressly avoided application of the antitrust tie-in doctrine.

International Salt Co., Inc. v. United States 332 US 392; 92 L Ed 20; 68 S Ct 12; 75 USPQ 184 (1947) involved machine leasing practices similar to *Morton* and the same unpatented salt: "The principal distribution of each of these machines is under leases which, among other things, require the lessees to purchase from appellant all unpatented salt and salt tablets consumed in the leased machines." Unlike *Morton*, this was an antitrust case. This case's conclusory statement does not provide a detailed analysis, but implies "beyond the scope" misuse:

> The appellant's patents confer a limited monopoly of the invention they reward. From them appellant derives a right to restrain others from making, vending or using the patented machines. But the patents confer

> no right to restrain use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 US 488; *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 US 661; *Mercoid Corp. v. Minneapolis Honeywell Regulator Co.*, 320 US 680, 64 S Ct 278, 88 L Ed 396.

Citing a group boycott case, the *International Salt* court set the stage for a later recognized per se rule:

> it is unreasonable, per se, to foreclose competitors from any substantial market. *Fashion Originators Guild v. Federal Trade Commission*, 114 F2d 80, affirmed, 312 US 457.

The decision did not expressly say that market power could be presumed from a patent.

International Salt attempted to save one of its leases by permitting purchase of competitive salt under the circumstances "that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price." The court found that this was, nevertheless a restraint because it gave International Salt control over price.

Notably, International Salt relied on *Morton* and *Mercoid*, (*Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 US 661, 64 S Ct 268, 88 L Ed 376, 60 USPQ 21 (1944)). *Mercoid* effectively ruled that the doctrine of contributory infringement was patent misuse. Contributory infringement occurs when the accused sells only a component, although the component is used in a later infringement. *Mercoid* decided the doctrine permitted patentees to control something—the component—the sale of which was not itself within the scope of the claims. *Mercoid* was later legislatively overruled in the enactment of 35 USC § 271 (c):

> (c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

International Salt treated the salt-to-machine patent tie-in as a per se violation because it was market foreclosure like Fashion Originators. Tie-ins were not separately considered as a species of per se antitrust violation, although they were the subject of the specific provisions of Section 3 of the Clayton Act. Later, tie-ins were recognized as per se Sherman Act violations in *Northern Pacific Railway Co. v. United States*, 356 US 1, 78 S Ct 514, 2 L Ed 2d 545 (1958). *Independent Ink* casts doubt that per se treatment survived *Jefferson Parish*, although phrasing the rule as per se treatment plus proof of market power may be a distinction without a difference.

Block Booking in *Paramount* & *Loew's*

Statements indicating the existence of a presumption of market power next appeared in two antitrust cases involving the film industry, where copyright was the intellectual property involved. *United States v. Paramount Pictures, Inc*. 334 US 131, 68 S Ct 915, 92 L Ed 1260, 77 USPQ 243 (1948) involved comprehensive control of all aspects of film production and distribution which had evolved over decades, curiously, since the patent misuse case of *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 US 502, 510 (1917). While the first issue, "Price Fixing" is easily understood, most of the practices were industry specific and dealt with a full range of horizontal and vertical control, restraining a variety of product and geographical markets: Clearances and Runs; Pooling Agreements; Formula Deals, Master Agreements, and Franchises; Block-Booking and Discrimination. Of these, "Block-booking" is the tie-in practice. The practice was to require a purchaser to "book" an entire "block" of films—if one popular film was desired, a whole block of less popular films had to be taken as well.

Paramount rephrased the "beyond the scope" rationale of *Morton* and *International Salt* to apply to copyright:

> Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. See *Ethyl Gasoline Corp. v. United States*, 309 US 436, 459, *Morton Salt Co. v. G. S. Suppiger Co.*, 314 US 488, 491; *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 US 661, 665. The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.
>
> We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.

Market power was not an issue in *Paramount*. The entire industry was controlled by the defendants. There was certainly no analysis of the power in a particular film.

Ethyl, cited in *Paramount*, involved patents on gasoline additives and a comprehensive resale price maintenance program with 11,000 of the 12,000 total gasoline jobbers doing business in the United States. Market power was present under the *Ethyl* facts and did not need to be presumed.

Application of *Morton* to antitrust violations based on copyright is of dubious logic because (1) *Morton* was not an antitrust case, it involved an equitable defense only, and (2) there are no claims, the scope of which could be exceeded, in Copyright. Differences in patent and copyright infringement are notable. A patent can literally be a monopoly in that it gives a right to exclude others from practicing the claimed subject matter, even if independently created. Copyright is much more like a traditional intentional tort in that only a "copyist" can be liable—independent creation is a defense. There may be public policy reasons for presuming market power, but the analogy between patent and copyright is not accurate.

The presumption of market power in an antitrust tie-in was recognized expressly in *US v. Loew's, Inc.* 371 US 38, 83 S Ct 97, 9 L Ed 2d 11, 135 USPQ 201 (1962) where "block booking" was the only issue. In *Loew's*, a television station that wanted to broadcast movies was required to buy packages delineated by general categories. In order to obtain desirable, Oscar-winning drama, the licensee was required to also license "bombs" that no one wanted to view. In finding this "block booking" a per se antitrust violation, the first mention of a presumption of market power in an antitrust case occurred in *Loew's*: "The requisite economic power is presumed when the tying product is patented or copyrighted." Authority for this statement was *International Salt* and *Paramount*. The Court explained the connection to patent misuse:

> This principle grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 US 502; *Carbice Corp. v. American Patents Dev. Corp.*, 283 US 27; *Leitch Mfg. Co. v. Barber Co.*, 302 US 458; *Ethyl Corp. v US*, 309 US 436; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 US 488; *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 US 661. These cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products. The patentee is protected as to his invention, but may not use his patent rights to exact tribute for other articles.

Reinforcement in Dicta

More recently, *Jefferson Parish Hospital District No. 2 v. Hyde* 466 US 2, 16, 104 S Ct 1551, 80 L Ed 2d 2, 1984-1 Trade Cas ¶ 65,908 (1984) had nothing to do with patents, at all. *Jefferson Parish*, however, framed the issues because the majority opinion stated that tie-ins are per se antitrust violations:

> "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se." The rule was first enunciated in *International Salt v. United States*, 332 US 392, 396 (1947), and has been endorsed by this Court many times since.

A landmark "post-Chicago" [school of economics] decision gives a good definition of a tie-in, points out the potential economic problems, but does not presume market power because the issue was the opposite. The lower court held economic injury was impossible, and the Court reversed, permitting evidence of unreasonableness. A tie-in "was defined as "an agreement by a party to sell one product . . . on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that [tied] product from any other supplier." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S Ct 2072, 2079 (1992).

Independent Ink Negates the Presumption of Market Power

The above described path from dicta to doctrine results in application of the "rule" by stare decisis. But in the real world, it makes no sense to presume that economic power flows from the mere existence of a patent. Many patents teach inventions that never see the light of day. Many patents teach inventions that are one solution for a product, but there are alternatives.

The Path from Patent Defense through Copyright Misuse to Market Power Presumption

As the above discussion makes apparent, the first express statement that market power may be presumed in tie-in cases involving patent and copyright was not a patent case at all. The best that can be said is that it announced the rule in a Copyright case, *Loew's*. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 US 1, 99 S Ct 1551, 60 L Ed 2d 1, 201 USPQ 497, 1978-1 Copy. L. Rep. 25,064, 1979-1 Trade Cas ¶ 62,558 (1979) brings even this into doubt.

Loew's express presumption relied on *International Salt*, an antitrust case involving a patent license, which did not say market power is presumed, and *Paramount Pictures*, an antitrust case involving industry wide dominance that did not say market power is presumed. Ethyl was an antitrust case having market power under the facts, therefore a presumption was not needed. The other cited cases did not decide antitrust issues, although the subsequently legislatively overruled *Mercoid* remanded on the antitrust issue. *Motion Picture Patent* and *Carbice* found label licenses unable to render sale of a staple item a contributory infringement. *Leitch Mfg. Co. v. Barber Co.*, 302 US 458, 58 S Ct 288, 82 L Ed 371, 36 USPQ 35 (1938) found a process patent could not be enforced under a contributory infringement theory to halt sale of a staple product.

Eliminating the Presumption -- Per Se Rules Are Being Overruled

The use of per se rules began with *United States v. Socony-Vacuum Oil Co., Inc.*, 310 US 150, 60 S Ct 811, 84 L Ed 1129 (1940) which ruled that any agreement to raise, depress, fix, peg or stabilize price was illegal per se. Per se treatment expanded in the mid-20th Century, *Albrecht v. Herald Co.* 390 US 145, 88 S Ct 869, 19 L Ed 2d 998 (1968), *United States v. Arnold, Schwinn & Co.*, 388 US 365, 87 S Ct 1856, 18 L Ed 2d 1249 (1969), *Zenith Radio Corp. v. Hazeltine Research Inc*. 395 US 100, 89 S Ct 1562, 23 L Ed 2d 129 161 USPQ 577, 1969 Trade Cas ¶ 72,800 (1969), *United States v. Topco Associates, Inc.* 405 US 596, 92 S Ct 1126, 31 L Ed 2d 515, 173 USPQ 193, 1972 Trade Cas ¶ 73,904 (1972).

Not soon after, the doctrine began contracting. *Continental T.V., Inc. v. GTE Sylvania, Inc*. 433 US 36, 97 S Ct 2549, 53 L Ed 2d 568, 1977-1 Trade Cas ¶ 61,488 (1977), *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 US 574, 106 S Ct 1348, 1986-1 Trade Cases ¶ 67,004(1986), *State Oil Company v. Khan*, 522 US 3, 118 S Ct 275, 139 L Ed 2d 199, 1997-2 Trade Cas ¶ 71,961 (1997). *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 US 1, 99 S Ct 1551, 60 L Ed 2d 1 (1979) described the policy to invoke per se rules only after considerable experience with a restraint. The Court there upheld a blanket license for music copyright because cooperative pricing was necessary for the creation of a new product—finding blanket license to be other than a per se tie-in.

The Court Does Make Presumptions Regarding Intellectual Property

The court is not beyond announcing presumptions dealing with intellectual property. Presumptions of validity are statutory. In interpreting intellectual property rights the Court makes presumptions with some frequency. The Court presumes that suits are non-frivolous. *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.* 508 US 49, 113 S Ct 1920, 123 L Ed 2d 611, 26 USPQ 2d 1641, 1993-1 Trade Cas ¶ 70,207 (1993) Amendments made in patent prosecution are presumed to have been made to avoid prior art. *Festo Corp. v. Shokestu Kinsoku Kogyo Kabushiki Co.*, 535 US 722, 122 S Ct 1831, 152 L Ed 2d 944, 62 USPQ 2d 1705 (2002) In the case of trade dress, the Court presumes that the subject of a utility patent is functional. *TrafFix Devices Inc. v. Marketing Displays Inc.*, 532 U.S. 23, 121 S Ct 1255, 149 L Ed 2d 164, 58 USPQ 2d 1001 (2001). In terms of "beyond the scope" of the grant, the Court will at least presume that a license cannot endure longer than the patent(s) licensed. *Brulotte v. Thys Co.* 379 US 29, 85 S Ct 176, 13 L Ed 2d 99, 143 USPQ 264, 1964 Trade Cas ¶ 71,287, (1964)

The *Brulotte* rule exists despite the economic rationale (the basis for the dissent) that extending payments over time has a rational basis and may have no materially different economic effect than collecting payments over the (then) 17-year term of the patent. It was a policy choice for the Court to prohibit a license running longer than the expiration of the patent. It is not an economically valid point. In *Independent Ink* the court chose to not have a policy looking to the scope of the patent claims and by differentiating the claimed subject—the tying product—and the unclaimed subject—the tied product, and presuming market power in the former.

Patent Misuse as a Defense

Independent Ink resolves a logical inconsistency. The patent statute has a related provision. 35 USC 271 (d) expressly requires proof of market power to prove a defense of misuse based on tie-in facts:

> (d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following:
>
> * * *
>
> (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

In *US Philips Corp. v. Int'l Trade Comm.*, ___ F3d ___, 2005 US App. LEXIS 20202, 76 USPQ2d 1545 (Fed. Cir 2005) the Federal Circuit followed 35 USC 271 (d) (5) recognizing that its own *Independent Ink* decision presumed market power for antitrust purposes, but that for a defense, it must be proven.

The anomaly of *Philips*, and *Independent Ink* effectively making it "easier" to prove an antitrust violation than an affirmative defense in an infringement case has been put to rest.

Conclusion

The presumption of market power issue has been logically decided. It makes no sense to presume economic power from the mere existence of a patent. A careful analysis of the evolution of dicta to doctrine could have avoided years worth of incorrect application of an apparent rule. The tie-in species of patent misuse may have been derived from inequitable conduct and an analysis based on exceeding the scope of the patent grant, but now both the shield and sword require proof of market power.

TABLE OF AUTHORITIES: FEDERAL CASES

Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)

Bement v. National Harrow Co., 186 U.S. 70, 22 S. Ct. 747, 46 L. Ed. 1058 (1902)

Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99, 143 U.S.P.Q. 264, 1964 Trade Cas. ¶ 71,287 (1964)

Carbice Corp. of America v. American Patents Development Corp., 283 U.S. 27, 51 S. Ct. 334, 75 L. Ed. 819, 8 U.S.P.Q. 211 (1931)

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568, 1977-1 Trade Cas. ¶ 61,488 (1977)

Eastman Kodak Co. v. Image Tech. Serv. Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265, 1992-1 Trade Cas. ¶ 69,839 (1992)

Festo Corp. v. Shokestu Kinsoku Kogyo Kabushiki Co., 535 U.S. 722, 122 S. Ct. 1831, 152 L. Ed. 2d 944, 62 U.S.P.Q. 2d 1705 (2002)

Heaton-Peninsular Button-Fastening Co. v. Eureka Specialty Co., 77 F. 288 (6th Cir 1896)

Henry v. A. B. Dick Co., 224 U.S. 1, 32 S. Ct. 364, 56 L. Ed. 645 (1912)

Illinois Tool Works Inc. v. Independent Ink Inc., ___ U.S. ___, 126 S. Ct. 1281 74 U.S.L.W. 4154 77 U.S.P.Q. 2d 1801, 2006 U.S. LEXIS 2024 (2006) reversed

Independent Ink Inc. v. Illinois Tool Works Inc., 396 F.3d 1342, 73 U.S.P.Q. 2d 1705 (CA FC 2005)

International Salt Co., Inc. v. United States, 332 U.S. 392

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2, 1984-1 Trade Cas. ¶ 65,908 (1984)

Leitch Manufacturing Co. v. Barber Co., 302 U.S. 458, 58 S. Ct. 288, 82 L. Ed. 371, 36 U.S.P.Q. 35 (1938

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1, 201 U.S.P.Q. 497, 1978-1 Copy. L. Rep. 25,064, 1979-1 Trade Cas. ¶ 62,558 (1979)

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1986-1 Trade Cases ¶ 67,004 (1986)

Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376, 60 U.S.P.Q. 21 (1944)).

Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363, 52 U.S.P.Q. 30, 1942 Trade Cas. ¶ 56 (1942)

Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502, 37 S. Ct. 416, 61 L. Ed. 871 (1917)
Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502 (1917)
Northern Pacific Railway Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)
Philips Corp. v. ITC, 2005 U.S. App. LEXIS 20202
Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 26 U.S.P.Q. 2d 1641, 1993-1 Trade Cas. ¶ 70,207 (1993)
State Oil Company v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199, 1997-2 Trade Cas. ¶ 71,961 (1997)
TrafFix Devices Inc. v. Marketing Displays Inc., 532 U.S. 23, 121 S. Ct. 1255, 149 L. Ed. 2d 164, 58 U.S.P.Q. 2d 1001 (2001)
United Shoe Machinery Corp. v. United States, 258 U.S. 451, 42 S. Ct. 363, 66 L. Ed. 708 (1922)
United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1969)
United States v. General Electric Co., 272 U.S. 476, 47 S. Ct. 192, 71 L. Ed. 362 (1926)
United States v. Loew's, Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11, 135 U.S.P.Q. 201 (1962)
United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260, 77 U.S.P.Q. 243 (1948)
United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)
United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515, 173 U.S.P.Q. 193, 1972 Trade Cas. ¶ 73,904 (1972)
Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 161 U.S.P.Q. 577, 1969 Trade Cas. ¶ 72,800 (1969)

FEDERAL STATUTES
15 U.S.C. § 13a
35 U.S.C. § 271 (c)
35 U.S.C. 271 (d)
35 U.S.C. 271 (d) (5)