No. 04-1329

IN THE

Supreme Court of the United States

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

Petitioners,

v.

INDEPENDENT INK, INC.,

Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE BRIEF OF THE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY

The American Intellectual Property Law Association ("AIPLA") respectfully submits this brief as *amicus curiae* in support of neither party to *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005), to urge the Court to eliminate the presumption of market power in patent antitrust tying cases applied in that decision.

STATEMENT OF INTEREST[1]

AIPLA has no interest in any party to this litigation or stake in the outcome of this case, other than its interest in seeking a correct and consistent interpretation of the law affecting intellectual property.

AIPLA is a voluntary bar association of nearly 16,000 members who daily work with patents, trademarks, copyrights, and trade secrets, and with the legal issues that the intellectual property presents. AIPLA's members include attorneys in private and corporate practice and in government service who secure, license, enforce, and defend against enforcement of intellectual property rights. They regularly counsel and advise their clients regarding, *inter alia*, the requirements of the antitrust laws for patent

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[1] In accordance with Supreme Court Rule 37.6, AIPLA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than AIPLA or its counsel.

licensing arrangements. The arrangements include those that may be argued to tie the sale of patented and unpatented products. The Federal Circuit panel's decision below materially impacts those licensing arrangements.

Through its diverse representation of the intellectual property bar, AIPLA brings a broad perspective and extensive experience to the important issues raised by the decision below. AIPLA offers the Court a unique and balanced perspective, because AIPLA's members represent parties on both sides: (1) patent owners who license or enforce their intellectual property rights and, as a result, may find themselves accused of violating the antitrust laws; and (2) licensees or accused infringers who may respond to infringement threats or suits with claims that the patent owner's licensing arrangements violate the antitrust laws.

Through their work, AIPLA's members have practical experience with the factual predicate underlying the legal question that the Petition presents: whether the presumption of market power in a relevant market for the patented product—based solely on the existence of a patent—has a basis in fact.

AIPLA sought consent to file this *amicus curiae* brief from the counsel of record for all parties, pursuant to Supreme Court Rule 37.3(a). Counsel for all parties consented. Copies of the letters of consent are being filed with the Clerk.

SUMMARY OF ARGUMENT

In *Independent Ink*, a three-judge panel of the Federal Circuit applied a presumption of market power in a relevant market. The panel applied the presumption in the context of an alleged Sherman Act § 1 antitrust violation based on tying of a patented product to an unpatented product. Specifically, the panel held that the mere existence of a patent on a product creates a rebuttable presumption that the patent owner has market power in the relevant market for the patented product itself. In so holding, the panel concluded that prior decisions of this Court require that presumption.

In reality, however, the mere issuance of a patent neither defines a relevant product market nor conveys market power in a relevant market, except in very rare cases. Consequently, the presumption that patents nearly always define a market unto themselves and provide sufficient power to raise prices or restrict output is not based on actual experience. Because the presumption does not reflect market realities, the Court should reject it.

Moreover, the presumption will encourage routine filing of tying antitrust claims, because the accusers would not need to confront market realities. Those filings may arise not only in cases of express ties, but also where a license arrangement may be argued to have a tying effect. The increased risk of treble-damage antitrust liability may discourage patent owners from enforcing their patent rights, and thus may lessen the value of those rights and the incentive to make and disclose innovations to the public.

The detrimental effect of the panel's decision extends to all antitrust tying allegations in the normal context in which patent claims are raised, *i.e.*, where the complaint raises claims of patent infringement, validity, or enforceability. Because the Federal Circuit has exclusive appellate jurisdiction in those cases, its presumption rule will apply.

The decision below addresses an issue of exceptional importance with widespread impact. It concerns not only the administration of the antitrust laws but also the potential for overly aggressive private treble-damage antitrust enforcement that could lessen the incentives for innovation.

AIPLA takes no position on the merits of this case or who should prevail on the present facts in the absence of a presumption of market power. Instead, AIPLA urges the Court to vacate the judgment below, hold that the mere existence of a patent should not create any presumption of a relevant market or of market power in a relevant market for tying arrangements involving patent and other intellectual property rights assessed under the Rule of Reason, and remand the case to the Federal Circuit for further proceedings without that presumption.

ARGUMENT

I. The Federal Circuit Panel's Decision Contravenes Economic Experience

Applying the presumption in the context of an alleged tying violation of Sherman Act § 1, the Federal Circuit panel held that:

> [A] patent presumptively defines the relevant market as the nationwide market for the patented product itself and creates a presumption of power within this market. Once the plaintiff establishes a patent tying agreement, it is the defendant's burden to rebut the presumption of market power and consequent illegality that arises from patent tying.

Independent Ink, 396 F.3d at 1352. In applying this presumption, the panel relied upon and concluded that it was constrained by this Court's decisions in *International Salt Co. v. United States,* 332 U.S. 392, 395-96 (1947), and *United States v. Loew's Inc.,* 371 U.S. 38, 45-46 (1962). *See Independent Ink,* 396 F.3d at 1346-52.

The Federal Circuit panel's decision actually applies two related presumptions: (1) that a patent defines a relevant market for the patented product[2] itself in the United States; and (2) that the patent provides market power in that relevant market. *See i.d.* at 1352. The first presumption typically will control, because if the patent were to define a relevant product market, the patent likely would provide substantial economic power in that market by virtue of the right to exclude.

This Court has instructed that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 466-67 (1992). In AIPLA's practical experience, neither presumption rests on actual market realities.

In AIPLA's experience, virtually all patents cover improvements to existing products that represent modest, incremental advances. Rarely do they claim pioneering inventions that open entirely new economic markets. Thus, the issuance of a patent, standing alone, only rarely affords its owner or licensor any appreciable market power in a relevant product market in the antitrust sense, *i.e.,* the power to raise prices or restrict output in that market. *See Kodak,*

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[2] Patents provide protection for both products and processes. For simplicity, this brief refers only to products.

504 U.S. at 464 (explaining that market power "has been defined as 'the ability of a single seller to raise price and restrict output.'" (quoted source omitted)).

In AIPLA's experience, patented improvements typically compete with and provide alternatives to existing products that are already established in, or that may even dominate, the marketplace. Because they routinely are interchangeable with existing products, patented improvements seldom constitute a relevant product market unto themselves. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Thus, the presumption that a patented product defines a relevant market for antitrust purposes has no basis in fact.

Routine interchangeability also precludes any factual basis for the presumption of market power in a relevant product market. In competing as an alternative to established, existing products, a patented product seldom dominates the marketplace.

As a result, contrary to the presumption, a patent rarely defines a relevant product market or creates market power in any relevant market, in AIPLA's practical experience.

Other Federal Circuit panels have recognized this economic reality in the contexts of other antitrust laws and patent misuse. *See, e.g., C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1368 (Fed. Cir. 1998) (Sherman Act § 2; "It is not presumed that the patent-based right to exclude necessarily establishes market power in antitrust terms. The virtually unlimited variety and scope of patented inventions and market situations militate against *per se* rules in these complex areas."); *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997) (not applying presumption in patent misuse context; "[I]n the absence of market power, even a tying arrangement does not constitute patent misuse."); *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991) (Sherman Act § 2; "A patent does not of itself establish a presumption of market power in the antitrust sense. The commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist."); *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 875 n.9 (Fed. Cir. 1985) (Sherman Act § 2; "[N]ot every patent confers market power." (quoted source omitted)); *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1367 (Fed. Cir. 1984) (Sherman Act § 2; "[P]atent rights are not legal monopolies in the antitrust sense of that word.").

Both the legislative and executive branches have indicated that the presumption is not factually supportable. In enacting 35 U.S.C. § 271(d)(5) (2000), Congress specifically required proof of market power in a relevant market to establish patent misuse or an illegal extension of the patent right. Similarly, the Federal Trade Commission and the Department of Justice have concluded that market power cannot and should not be presumed: "Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power." United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.2 (Apr. 6, 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm (last visited July 20, 2005).

Thus, the essential factual premise of the Federal Circuit panel's decision, and of prior decisions by this Court in *International Salt*, 332 U.S. at 395-96, and *Loew's*, 371 U.S. at 45-46, has no factual basis, in AIPLA's practical experience. Because the presumption does not rest on "actual market realities," the Court should reject it. *See Kodak*, 504 U.S. at 466-67.

II. The Market Power Presumption Eliminates a Critical Limitation on Application of the *Per Se* Rule, which Should Not Be Compromised

The market power presumption can result in *per se* antitrust illegality if the patent owner does not rebut the presumption. This is because, once the plaintiff meets the market power element, remaining key elements of a tying offense may be undisputed or easily proved: two separate products that are tied together in an arrangement that affects a "not insubstantial" amount of commerce in the market for the tied product. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (concluding that tying arrangements are "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."); *see Kodak*, 504 U.S. at 461-62. Thus, the presumption may shift certain cases from the Rule of Reason to *per se* standards for determining illegality of patent tying arrangements under Sherman Act § 1.

Such a result would run counter to the trend of this Court's antitrust decisions. Over the past thirty years, the

Rule of Reason has developed into the preferred method for analyzing the potential for competitive harm in antitrust cases. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997). It affords substantial flexibility to prohibit practices that harm competition, while permitting practices that do not harm competition or that affirmatively enhance competition.

This Court has departed from the Rule of Reason and applied a *per se* rule to tying only in the narrow situation in which the seller is found to have market power in the relevant market for the tying product. *See, e.g., Kodak,* 504 U.S. at 464-78. In such cases, the antitrust plaintiff must (1) define the relevant market and (2) establish that the antitrust defendant has appreciable market power in the relevant market. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 18 (1984); *Kodak*, 504 U.S. at 462 (explaining that "'appreciable economic power' in the tying product market" must be shown for a violation of Sherman Act § 1). This Court has recognized that tying is not necessarily *per se* unlawful. *See, e.g., Times Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949); *Jefferson Parish,* 466 U.S. at 16-18. An accurate analysis of market power in a relevant market thus is critical to the proper application of the Rule of Reason.

The market power requirement guards against a rigid application of *per se* analysis in tying cases. Like any other limitation on the *per se* rule, it should be compromised only in rare instances, specifically where the challenged practice has been shown—through experience—to virtually always harm competition. *See Continental T.V.*, 433 U.S. at 58-59 (explaining that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing"); *N. Pac.*, 356 U.S. at 5 (explaining that *per se* analysis is appropriate only for practices that have a "pernicious effect on competition and lack of redeeming virtue"). The market power presumption applied by the Federal Circuit panel below, however, has not been validated by experience, as decisions of this Court require. *See, e.g., Kodak,* 504 U.S. at 466-67.

There is no reason why the Court's approach to tying should be different where patent licensing is involved. The patent licensing context presents the same seller-buyer relationships as exist in typical tying cases under both the Rule of Reason and *per se* analyses: the patent owner sells licenses to its patents and the licensee buys those licenses. When the seller does not have market power in the tying product, the Rule of Reason is the proper mode of analysis even in tying cases. *See Jefferson Parish*, 466 U.S. at 29 (explaining that an antitrust plaintiff must prove a Rule-of-Reason violation in the absence of *per se* liability).

Moreover, positive benefits may flow from a variety of patent tying arrangements, such as efficiencies in ease of calculating license fees or in distribution. *See, e.g., Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950) (holding non-mandatory package licensing of patents was not patent misuse), *overruled in part on other grounds by Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 555-58 (E.D. Pa. 1960) (holding tying was not antitrust violation for entrant into new industry), *aff'd per curiam*, 365 U.S. 567 (1961).

III. By Effectively Shifting the Burden to the Patent Owner, the Presumption Encourages Accused Infringers Routinely To Allege Tying Antitrust Counterclaims

Accused infringers routinely used to plead antitrust counterclaims. Those counterclaims have significantly diminished in frequency, however, as the Federal Circuit and this Court have narrowed the areas in which an antitrust violation can be pleaded and proved without spending the very substantial resources needed to analyze and prove market realities.

Patent litigation already entails serious risk for the patent owner. According to a recent study, at the district court level, patent owners win only about fifty-eight percent of all patent suits, only about two-thirds of patents are held valid and about the same portion are held infringed, and the patent owners' win rate varies significantly depending on the jurisdiction in which the suit is brought. *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 915-17 (2001).

High costs to litigate infringement cases already prevail. AIPLA conducts an annual economic survey of its members, which litigating parties regularly use as a basis for budgeting infringement litigation, as well as in determining the reasonableness of attorney's fees and costs. *See, e.g., View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 987-88 (Fed. Cir. 2000) (citing survey for attorney's fees); *Yurman Designs, Inc. v. PAJ, Inc.*, 125 F. Supp. 2d 54, 56 (S.D.N.Y. 2000) (same). The 2003 survey, the most recent year for which results are available, shows the median costs for an infringement suit are approximately $4,000,000 and the top twenty-five percent of the suits cost about $6,000,000. *See* Appendix attached hereto at A2, American Intellectual Property Law Assn., *2003 Report of the Economic Survey* 94 tbl. 22 (2003).

In AIPLA's experience, antitrust litigation costs add substantially to the total. Discovery alone in a typical antitrust case often involves hundreds of thousands of documents.[3] The magnitude of these costs represents a substantial burden on any company, regardless of size. They may be crippling to a mid-sized company, and prohibitive to small businesses, start-up companies, and individual inventors.

A tying antitrust claim without the presumption necessarily requires both sides to explore market issues and

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[3] *See BE & K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 528-29 (2002) (recognizing that privately initiated antitrust claims "may impose high discovery costs"); *Conrac Corp. v. AT&T Co.*, 546 F. Supp. 429, 432 (S.D.N.Y. 1982) (noting that "the costs of defending even the most unmeritorious antitrust claims are often high"); William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1889 (2003) ("Given the sweeping language of the Sherman and Clayton Acts and the necessarily vague rulings pronounced by courts interpreting the statutes, a clever customer or competitor of a larger firm may be able to manipulate the history of the firm's behavior in the market to construct a facially plausible theory of wrongdoing—whether or not the firm's business practices are, in fact, anticompetitive. Once a claim has survived a motion to dismiss, a plaintiff often can credibly threaten to impose significant costs on the defendant through wide-reaching discovery." (footnotes omitted)); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12-13 (1984) ("Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.").

entails substantial costs to both sides. But the presumption shifts the bulk of the costs of the antitrust litigation to the patent owner. The presumption thus unfairly handicaps the patent owner by easing the burden for the antitrust plaintiff, thereby increasing the risk to the patent owner.

The presumption imposes a substantial evidentiary burden for the patent owner, because the Federal Circuit panel's decision limits the proof that can be offered. Specifically, the panel held that, to rebut the presumption, it is not enough to show the availability of alternatives to the tying arrangement. Rather, the patent owner must establish the price elasticity of the relevant products, which typically is expensive and time consuming. "The presumption can only be rebutted by expert testimony or other credible economic evidence of the cross-elasticity of demand, the area of effective competition, or other evidence of lack of market power." *Independent Ink*, 396 F.3d at 1352.

Thus, although the market power presumption may simplify that issue for the antitrust plaintiff, it forces the patent owner to introduce substantial, complex, and costly proof just to survive summary judgment. Yet, that shifting of cost and risk is not justified by practical experience.

Moreover, the presumption may provide an incentive to attempt to evade the limitations of a misuse defense by repackaging it as an antitrust claim. Under 35 U.S.C. § 271(d)(5) (2000), to establish misuse, the accused infringer must establish market power and would not receive the significant benefit of the presumption. *See Independent Ink*, 396 F.3d at 1349 n.7.

The Federal Circuit panel's decision has practical effects that may further increase the risk to the patent owner.

It can create confusion in the trial of patent and antitrust issues. For example, where an accused infringer also asserts a Sherman Act § 2 attempted monopolization claim, the jury will be asked to apply the presumption to the Sherman Act § 1 tying claim, but not to the Sherman Act § 2 attempted monopolization claim. *See Independent Ink*, 396 F.3d at 1353. The same can occur where an accused infringer asserts a misuse claim. *See Virginia Panel*, 133 F.3d at 869.

The combined effect of these factors skews the balance of power between the patent owner and the antitrust plaintiff substantially in favor of the antitrust plaintiff. This can have widespread implications for patent owners, since many arrangements involving patents can be characterized as ties. Licensing of numerous patents for a royalty based on total sales, for example, is a common practice that courts have subjected to an antitrust tying analysis. *See, e.g., Automatic Radio*, 339 U.S. at 834; *Zenith*, 395 U.S. at 137-39.

The increased cost and risk flowing from the presumption can coerce patent owners into compromising valid infringement claims and settling cases for less than they otherwise would. According to a recent study, about 95 percent of patent cases settle before the end of trial. *See* Jean O. Lanjouw & Mark Schankerman, *Protecting Intellectual Property Rights: Are Small Firms Handicapped?*, 47 J.L. & Econ. 45, 56 (Apr. 2004). Worse yet, in view of the enhanced risk of treble damage liability, the presumption may compel some patent owners not to enforce their rights at all. That would diminish the value of the exclusive rights afforded by a patent, which in turn may impair the willingness of inventors to innovate and disclose their inventions to the public through the patent system. The effect is not limited merely to cases of express ties, but includes licenses in which the practical effect of a restriction may arguably create a tie.

In addition, shifting the burdens of proof may create an anomaly that it would be more difficult to establish the equitable defense of patent misuse than an affirmative antitrust violation. Yet, misuse proscribes conduct broader than an antitrust violation. "[A]s the Supreme Court has said, the patentee's act may constitute patent misuse without rising to the level of an antitrust violation." *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 668 (Fed. Cir. 1986), citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140 (1969). Moreover, misuse cannot exist where the effect of the licensing does not improperly restrain competition. "'To sustain a misuse defense involving a licensing arrangement not held to have been *per se* anticompetitive by the Supreme Court, a factual determination must reveal that the overall effect of the license tends to restrain competition unlawfully in an appropriately defined relevant market.'" *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 706 (Fed. Cir. 1992), quoting *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001-02 (Fed. Cir. 1986).

These harmful effects are especially detrimental because of the Federal Circuit's central role in adjudicating patent disputes. The Federal Circuit is uniquely positioned among the circuit courts of appeals to handle patent-antitrust cases. Vested by Congress with sole nationwide jurisdiction over patent appeals in cases initiated with patent claims—which are the vast majority of cases involving patents—the Federal Circuit receives appeals that would otherwise have been decided by regional circuit courts of appeals. *See* 28 U.S.C. § 1295(a)(1) (2000). All appealed cases that raise a patent claim in the complaint will flow to the Federal Circuit.

See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 829 (2002).

Accordingly, it is especially important that the Court reverse this presumption by the Federal Circuit panel.

CONCLUSION

For the foregoing reasons, AIPLA respectfully requests that the Court vacate the judgment below, hold that tying arrangements involving patent and other intellectual property rights are assessed under the Rule of Reason without any presumption of market power in a relevant market arising merely from the issuance of a patent, and remand the case to the Federal Circuit for further proceedings without that presumption.

Respectfully submitted,

Dated: August 4, 2005

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APPENDIX

[EXCERPT]

AIPLA

Report of the Economic Survey 2003

PREPARED UNDER DIRECTION OF
LAW PRACTICE MANAGEMENT COMMITTEE

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	Total Survey	Boston Area	NYC Area	Philadelphia-Wilmington	Washington DC Area	Other East	Metro Southeast	Other Southeast	Chicago Area	Minneapolis-St. Paul	Other Central	Texas	California	Other West
		LOCATION OF RESPONDENT'S PRIMARY PLACE OF WORK												
ESTIMATE OF TOTAL COST, THROUGH END OF DISCOVERY AND INCLUSIVE, IN A PATENT INFRINGEMENT SUIT														
More than $25 million at risk														
End of discovery														
Number Reporting	253	10	17	14	33	16	9	7	23	9	34	19	42	19
% of total		*4%*	*7%*	*6%*	*13%*	*6%*	*4%*	*3%*	*9%*	*4%*	*13%*	*8%*	*17%*	*8%*
75th percentile ($000's)	$4,000	$3,000	$3,000	$4,000	$5,000	$3,000	$3,000	$2,000	$3,500	$2,000	$3,000	$6,000	$4,000	$2,000
Median ($000's)	$2,500	$2,500	$2,000	$4,000	$3,000	$1,000	$2,000	$1,000	$2,500	$1,500	$1,350	$4,000	$3,000	$1,500
25th percentile ($000's)	$1,000	$1,500	$1,000	$2,500	$2,000	$500	$1,000	$500	$1,500	$1,000	$750	$2,000	$2,000	$1,000
Inclusive, all costs														
Number Reporting	258	11	17	15	34	17	9	7	23	9	33	21	42	19
% of total		*4%*	*7%*	*6%*	*13%*	*7%*	*3%*	*3%*	*9%*	*3%*	*13%*	*8%*	*16%*	*7%*
75th percentile ($000's)	$5,996	$5,494	$5,009	$5,007	$7,990	$4,010	$5,006	$7,994	$5,494	$3,506	$6,506	$7,997	$6,006	$3,508
Median ($000's)	$3,995	$4,500	$3,750	$4,995	$5,000	$3,000	$3,500	$1,300	$3,506	$2,500	$2,250	$5,009	$4,997	$3,010
25th percentile ($000's)	$2,306	$2,506	$2,244	$2,506	$3,010	$1,991	$2,494	$806	$2,306	$1,994	$1,495	$4,003	$3,508	$2,206
ESTIMATE OF TOTAL COST, THROUGH END OF DISCOVERY AND INCLUSIVE, IN A TRADEMARK INFRINGEMENT SUIT														
Less than $1 million at risk														
End of discovery														
Number Reporting	170	5	10	3	17	13	3	8	19	5	35	15	16	20
% of total		*3%*	*6%*	*2%*	*10%*	*8%*	*2%*	*5%*	*11%*	*3%*	*21%*	*9%*	*9%*	*12%*
75th percentile ($000's)	$248	$251	$251		$301	$201		$138	$250	$251	$151	$251	$375	$175
Median ($000's)	$150	$200	$200	$250	$152	$101	$120	$88	$199	$201	$100	$200	$200	$149
25th percentile ($000's)	$98	$99	$90		$148	$49		$51	$102	$198	$59	$149	$100	$99
Inclusive, all costs														
Number Reporting	166	5	9	3	18	13	3	8	17	5	35	15	14	20
% of total		*3%*	*5%*	*2%*	*11%*	*8%*	*2%*	*5%*	*10%*	*3%*	*21%*	*9%*	*8%*	*12%*
75th percentile ($000's)	$401	$801	$451		$500	$302		$205	$451	$451	$274	$401	$751	$349
Median ($000's)	$298	$400	$350	$750	$401	$298	$200	$138	$302	$350	$225	$302	$450	$251
25th percentile ($000's)	$198	$159	$174		$226	$119		$78	$269	$299	$102	$298	$300	$201