No. 04-1329

In the Supreme Court of the United States

ILLINOIS TOOL WORKS INC., ET AL., PETITIONERS

v.

INDEPENDENT INK, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

To establish that a tying arrangement constitutes a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, an antitrust plaintiff must prove that the defendant has "appreciable economic power" in the tying product market. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992). The question presented in this case is whether the courts should recognize a special exception for patented products, in the form of a rebuttable presumption of market power.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and accordingly have a strong interest in the correct application of those laws. They have issued guidelines specifically addressing the question presented in this case and rejecting as a matter of antitrust enforcement policy the presumption that patents confer market power. See *Antitrust Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132 (1995).

STATEMENT

1. Petitioner Illinois Tool Works (ITW), through its Trident division, manufactures a patented piezoelectric ink jet printhead, a patented ink container, and non-patented ink specially formulated for use in Trident's printhead system.

Pet. App. 20a. Printing equipment manufacturers (the original equipment manufacturers or OEMs) incorporate Trident's system into printers that are used to print bar codes on product cartons. *Ibid.* OEMs are also able to obtain comparable technology from other sources. At least two other companies have developed printheads capable of printing bar codes on cartons. *Id.* at 22a. Product manufacturers also use labeling systems to print bar-coded labels that can be affixed to cartons. *Ibid.* Those other companies and systems compete with Trident's printhead system. *Ibid.*

Trident licenses its patented products to OEMs as a package. Pet. App. 21a. Petitioners do not dispute that Trident's licenses require OEMs to use only ink supplied by Trident in single-use containers or that those licenses also prohibit both OEMs and end users from re-filling Trident ink containers. See *ibid.* Petitioners assert, however, that the OEM licenses do not prevent end users from using ink containers and ink from third-party manufacturers. *Ibid.*

2. Respondent Independent Ink, Inc. (Independent) is a distributor and supplier of printer ink and ink products. Pet. App. 20a. Independent brought this action to obtain a declaratory judgment of non-infringement and invalidity with respect to two of Trident's patents. *Id.* at 22a. Independent later amended its complaint to allege, among other things, that petitioners engaged in unlawful tying in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 22a-23a. Independent also alleged that petitioners monopolized, attempted to monopolize, and conspired to monopolize the market for ink used in Trident's printhead system, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Pet. App. 23a.

Petitioners and Independent filed cross-motions for summary judgment on Independent's Section 1 tying claim, and petitioners also moved for summary judgment on Independent's Section 2 monopolization claim. In asserting its Section

1 claim, Independent relied solely on a per se, rather than a "rule of reason," theory of liability. See Pet. App. 23a-24a ("Plaintiff does not argue that Defendants' tying arrangements violate the Sherman Act pursuant to the Rule of Reason."). The district court denied Independent's motion for summary judgment and, instead, granted summary judgment for petitioners on both claims. *Id.* at 38a, 49a, 56a.

The district court observed that Independent's Section 1 per se tying claim required proof of four elements, including market power in the relevant market for the tying product. Pet. App. 28a. See *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 12-18 (1984). The court rejected Independent's contention that a patent on the tying product, standing alone and as a matter of law, establishes the requisite coercive economic power in the market for the tying product, finding that "[t]he weight of authority is to the contrary." Pet. App. 30a. The district court was not persuaded otherwise by Independent's recitation of "several vintage Supreme Court cases," including *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), and *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). Pet. App. 34a n.10.

The district court determined that those decisions were not controlling because "[t]he Court's language concerning presumptions of market power based upon patents arose at a time when genuine proof of power in the market for the tying product was not required." Pet. App. 34a n.10 (citing 10 Phillip E. Areeda et al., *Antitrust Law* ¶ 1737a (1996)). The court noted that, in this case, Independent produced "no evidence from which a reasonable trier of fact could define the relevant product and geographic markets" and failed to "proffer any evidence that Defendants possess market power by virtue of their market share or that the market for the tying product contains barriers to entry." *Id.* at 49a. The court accordingly granted summary judgment against Independent on its Section 1 theory. *Ibid.*[1]

3. The court of appeals reversed the district court's grant of summary judgment on the Section 1 claim. Pet. App. 5a-17a. The court stated that "the Supreme Court's cases in this area squarely establish that patent and copyright tying, unlike other tying cases, do not require an affirmative demonstration of market power." Pet. App. 9a. "Rather, *International Salt* and *Loew's* make clear that the necessary market power to establish a section 1 violation is presumed." *Ibid.* The court of appeals acknowledged that "the Supreme Court precedent in this area has been subject to heavy criticism" and that other courts of appeals have reached a different result, *id.* at 12a-13a, but it concluded that it was bound by *International Salt* and *Loew's* to recognize that "there is a presumption of market power in patent tying cases," *id.* at 14a. The court observed that "[t]he time may have come to abandon the doctrine, but it is up to the Congress or the Supreme Court to make this judgment." *Ibid.*

The court of appeals determined that Trident's patents established only a rebuttable presumption of market power, Pet. App. 14a-15a, but the court concluded that petitioners' evidence of competition from two rival printhead systems and from bar code labeling systems was insufficient as a matter of law to overcome that presumption, *id.* at 16a-17a. The court of appeals therefore reversed the district court's grant of summary judgment on the Section 1 claim, but it remanded the case "to permit [petitioners] an opportunity to supplement

[1] The district court also concluded that petitioners were entitled to summary judgment on the Section 2 claim because Independent proffered no evidence concerning the relevant product or geographic markets and no relevant evidence of Trident's alleged monopoly power. Pet. App. 54a-56a. The Section 2 claim is not before this Court.

the summary judgment record with evidence that may rebut the presumption." *Id.* at 17a.[2]

SUMMARY OF ARGUMENT

A. This Court's decisions under Section 1 of the Sherman Act restrict per se condemnation of tying arrangements to those situations in which the defendant has coercive economic power in the tying product market that it uses to impair competition in the tied product market. See, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992); *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 12-18 (1984). The court of appeals' application of a presumption that patents confer market power is inconsistent with the rationale of those decisions, and it conflicts with the Court's teaching that per se rules are properly applied only to conduct that is almost always anticompetitive.

B. There is no economic basis for inferring market power from the mere fact that the defendant holds a patent. That view is shared by diverse members of the antitrust community—including scholars, enforcement agencies, and Congress. Such an inference would confound two quite distinct concepts: the legal right under intellectual property law to exclude a copyist's infringing products and the economic concept of market power. While a patent can provide significant protection from competition, only a small percentage of patents actually confer significant market power. Those relatively rare instances cannot support a sweeping presumption

[2] The court of appeals affirmed the district court's grant of summary judgment for petitioners on the Section 2 claim. It observed that "[t]he presumption of illegality in patent tying arises in section 1 cases" and that "[n]either *International Salt* nor *Loew's* dealt with section 2." Pet. App. 17a. The court concluded that the normal burdens of proof therefore apply, that "the plaintiff bears the burden of defining the market and proving defendant's power in that market," and that Independent failed to carry its burden in this case. *Id.* at 18a.

of market power whenever the tying product is patented. Instead, before invoking a rule of per se illegality, courts should always make a careful inquiry into the realities of the relevant market, whether or not the tying product is patented. The existence of a patent is relevant to the question of market power, and patentees may indeed possess such power in particular cases, but a court should consider evidence specific to the market at issue.

C. The court of appeals was mistaken in concluding that this Court's decisions require courts to apply a presumption that patents confer market power. The Court's decisions in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962), and *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), rest on a congressionally repudiated view of the scope of patent rights, and they predate the Court's articulation of the market power requirement and accordingly reflect the now-outdated assumption that proof of significant market power is unnecessary to support a per se tying violation. See 10 Phillip E. Areeda et al., *Antitrust Law* ¶ 1737a-1737c, at 80-83 (2d ed. 2004) (*Antitrust Law*). If, contrary to the government's view, that assumption has somehow survived this Court's decisions in *Eastman Kodak*, *Jefferson Parish*, and other similar cases, the Court should now expressly reject it as inconsistent with mature principles of antitrust law. See, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 21 (1997).

D. Because the court of appeals misread this Court's decisions to require the presumption that patents confer market power, it noted but gave no weight to the mismatch between the presumption and the procompetitive policies of antitrust law. The presumption is an anomalous legal shortcut, encouraging meritless antitrust claims while discouraging innovation and efficiency-enhancing business practices. Those considerations confirm that the presumption should be rejected.

ARGUMENT

COURTS SHOULD NOT PRESUME THAT A PATENT CONFERS THE MARKET POWER NECESSARY TO ESTABLISH THAT TYING IS UNLAWFUL PER SE

This Court has recognized and reaffirmed that Section 1 of the Sherman Act authorizes per se condemnation of a tying arrangement only if the plaintiff proves that the defendant has market power in the tying product market. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992); *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 12-18 (1984). That principle should apply without regard to whether the defendant holds a patent for the tying product. There is neither a theoretical nor an empirical basis for presuming that sellers of patented products have market power within the meaning of the Sherman Act. The presumption is inconsistent with this Court's decisions and would undermine the procompetitive policies of the antitrust laws.[3]

[3] This case concerns only a patented product. But there is also no basis for the court of appeals' suggestion (Pet. App. 9a) that the presumption applies when the defendant holds a copyright in the tying product. There is even less reason to extend the presumption to copyrighted products because the protection afforded by a copyright (which extends only to the individual expression of an idea and not to the idea itself) is more circumscribed and because very few copyrighted works, as a theoretical or practical matter, could conceivably possess market power. See William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 296 (2003); 1 Herbert Hovenkamp et al., *IP and Antitrust* § 4.2, at 4-9 (2002). At the same time, the absurdity of inferring market power from the intellectual property right to prevent copying in the copyright context only underscores that those are two distinct concepts that should not be confounded in the patent context.

A. Section 1 Does Not Impose A Per Se Prohibition On Tying Arrangements In The Absence Of Market Power In The Tying Product Market

"Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). Nevertheless, some types of restraints have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit," *ibid.*, that they are deemed unreasonable as a matter of law and "therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

Per se rules are "appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). Some agreements, such as horizontal price-fixing, bid-rigging, and market allocation, are always per se unlawful. *E.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 & n.21 (1984); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899). But, as the Court emphasized in *Jefferson Parish*, "not every refusal to sell two products separately can be said to restrain competition." 466 U.S. at 11. To the contrary, "[b]uyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act." *Id.* at 12.

Accordingly, this Court's decisions restrict per se condemnation of tying arrangements to those restraints that have a "substantial potential for impact on competition" in an economically relevant market for the tied product, *Jefferson Parish*, 466 U.S. at 16. Arrangements that merely impose assertedly unwelcome terms on purchasers of the tying product are not per se illegal. The seller must have "the degree or the kind of market power" that enables him to deny purchasers of the tying product the ability to choose freely among suppliers of the tied product, *id.* at 17-18, and thereby "impair competition on the merits" in the market for the tied product and harm consumer welfare. *Id.* at 14. This "per se rule against tying" has been recognized by courts and scholars as distinct from the per se rule applied to naked horizontal restraints. See 9 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1730, at 351 (2d ed. 2004) ("The per se rule against tying is a peculiar one that differs dramatically from the usual per se rule against, for example, horizontal price fixing."); *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n.26.[4]

B. Possession Of A Patent On The Tying Product Does Not Establish Market Power

1. The Court's decision in *Jefferson Parish* indicates that the market power necessary to support a per se tying claim exists when "prices can be raised above the levels that would be charged in a competitive market." 466 U.S. at 27 n.46. It is certainly possible that a patent holder could possess market power sufficient to support a per se tying claim, and antitrust liability may be appropriate if a plaintiff provides evidence sufficient to support such a conclusion and to establish the other elements of the claim. It is scarcely "predictable" (*State Oil Co.*, 522 U.S. at 10) or "manifest[]" (*Continental T.V., Inc.*,

[4] Market power is a necessary, but not a sufficient condition for per se condemnation. See *Eastman Kodak*, 504 U.S. at 464. The tying arrangement also must involve economically distinct products. See *Jefferson Parish*, 466 U.S. at 21-22. And the arrangement must foreclose "a substantial volume of commerce" to rival suppliers of the tied product, because otherwise "the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." *Id.* at 16.

433 U.S. at 49-50), however, that patentees necessarily possess market power. To the contrary, there is a broad consensus in the antitrust community that "there is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent, copyright, trademark, or other intellectual property right." 10 *Antitrust Law* ¶ 1737a, at 79. As Professors Hovenkamp, Janis, and Lemley explain, a "patent grant creates an antitrust 'monopoly' only if it succeeds in giving * * * the exclusive right to make something for which there are not adequate market alternatives, and for which consumers would be willing to pay a monopoly price." 1 Herbert Hovenkamp et al., *IP and Antitrust* § 4.2, at 4-9 (2002).[5]

A presumption that a patent holder possesses market power sufficient to impair competition in the tied product market is unsound because it blurs the distinction between the legal right, based in intellectual property law, to exclude a copyist's infringing product and the economic concept of market power. "Neither ownership of [a] property right nor the power to exclude conveys monopoly power unless the property right in question dominates a properly defined relevant market. The great majority of patents do not." 3 *Antitrust Law* ¶ 704a, at 159 (2d ed. 2002). See also 10 *Antitrust Law* ¶ 1733b, at 15 (to "equat[e] the statutory 'patent monopoly' with substantial market power" is "careless[]"); Edmund

[5] Accord J. Dianne Brinson, *Proof of Economic Power in a Sherman Act Tying Arrangement Case: Should Economic Power Be Presumed When the Tying Product Is Patented or Copyrighted?*, 48 La. L. Rev. 29 (1987); Russell Lombardy, *The Myth of Market Power: Why Market Power Should Not Be Presumed When Applying Antitrust Principles to the Analysis of Tying Arrangements Involving Intellectual Property*, 8 St. Thomas L. Rev. 449 (1996); William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 Colum. L. Rev. 1140 (1985).

W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 Vand. L. Rev. 1727, 1729-1731 (2000) (presumption that intellectual property rights are always associated with market power is an "elementary" error).

A market participant's possession of a patent right, and the consequent statutory right to exclude infringing products from the marketplace, cannot give the participant market power if—as is usually the case—there are noninfringing alternatives to the patented product that qualify, in the economic sense, as good substitutes. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962) (boundaries of product market determined by "interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); *NCAA*, 468 U.S. at 111 ("The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games.").[6]

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[6] There is no merit to the suggestion (Br. in Opp. 11) that, because "a patent prevents a competitor from either making an identical patented product, or from making an equivalent product * * *, a patent, in and of itself, provides the power to preclude direct head to head competition in the patented product, or its equivalents." The patent law's doctrine of equivalents has no bearing on the economic concept of substitutability because it only "allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes." *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 733 (2002). A product need not be substantially identical, as the doctrine of equivalents requires, to function as an economic substitute for a patented product and be part of the same market for antitrust purposes. *United States* v. *Continental Can Co.*, 378 U.S. 441, 449-450 (1964). For example, a traditional wooden pencil would not infringe a patent claiming a mechanical pencil, but both could be included in a "pencil" or "manual writing instrument" market.

A patented product, no matter how novel, unique, or distinct for purposes of patent law, may well face competition from other products that consumers would substitute for the patented invention. Indeed, many patented articles are not commercially viable at all "because the product has little use or because the patentee's product differs too little from [more preferred] rival versions." 10 *Antitrust Law* ¶ 1733b, at 14.[7] To illustrate, the Patent and Trademark Office has issued scores of patents for items such as bottle openers, toothbrushes, and paper clips. See United States Patent and Trademark Office Home Page (visited Aug. 2, 2005) <http://www.uspto. gov/patft/ index.html> (searchable Patent Data Base). It would be implausible to presume that the owner of such a patent possesses market power merely by virtue of the patent.[8]

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[7] See generally F.M. Scherer, *The Innovation Lottery*, in *Expanding the Boundaries of Intellectual Property* 15 (Rochelle Dreyfuss et al. eds., 2001) (data on the size of rewards shows that "the big prizes from innovation are thrown to a small minority of winners, while the majority of innovative efforts confer only modest rewards"); John R. Allison et al., *Valuable Patents*, 92 Geo. L.J. 435, 437 (2004) ("Many patents are not worth enforcing—either because the inventions they cover turn out to be worthless, or because even if the invention has economic value the patent does not.") (footnotes omitted); Mark Schankerman, *How Valuable Is Patent Protection? Estimates by Technology Field*, 29 RAND J. Econ. 77, 79, 93 (1998) (finding distribution of patent value is skewed and "[m]ost patents have very little private value").

[8] See Herbert Hovenkamp, *Federal Antitrust Policy* 406 (3d ed. 2005) ("The economic case for 'presuming' sufficient market power to coerce consumer acceptance of an unwanted tied product simply because the tying product is patented, copyrighted, or trademarked is very weak."); Richard A. Posner, *Antitrust Law* 197 (2d ed. 2001) ("a patent is a poor proxy for monopoly power"); Richard C. Levin et al., *Appropriating the Returns from Industrial Research and Development*, 1987 Brookings Papers on Econ. Activity: Microeconomics 783, 817 (instead of presuming the existence of market power in a patent, "court[s] should inquire into the actual competitive significance of intellectual property protection in the particular market").

2. As a matter of longstanding antitrust policy, both the Department of Justice and the Federal Trade Commission have rejected the presumption that patents confer market power for the simple reason that the presumption is so demonstrably unsound. Over a decade ago, for example, the Department and the Commission jointly issued explicit guidance explaining that they do "not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner" because, "[a]lthough [a patent] 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." *Antitrust Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132, § 2.2 (1995) (*1995 Antitrust-IP Licensing Guidelines*). The government has consistently adhered to that enforcement position for more than twenty years.[9] Instead of presuming market power, the antitrust agencies de-

[9] See, *e.g.*, J. Paul McGrath, Assistant Attorney Gen., Antitrust Div., DOJ, *Patent Licensing: A Fresh Look at Antitrust Principles in a Changing Economic Environment* 12 (Apr. 5, 1984) ("[The market power] presumption reflects the traditional, though ill-conceived, notion that the patent laws create 'monopolies' that are inherently in conflict with the competition policy underlying the antitrust laws. The truth is, however, that the exclusive rights to patents rarely give their owners anything approaching a monopoly."); *Antitrust Enforcement Guidelines for International Operations—1988,* 4 Trade Reg. Rep. (CCH) ¶ 13,109, § 3.6 (1995) ("[I]ntellectual property—even a patent—does not necessarily confer a monopoly or market power in any relevant market"); *Intellectual Property Antitrust Protection Act of 1995: Hearing on H.R. 2674 Before the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 11 (1996) (testimony of Deputy Assistant Attorney General Joel Klein); Mary L. Azcuenaga, Commissioner, FTC, *The Intersection of Antitrust and Intellectual Property: Adaptations, Aphorisms and Advancing the Debate* (Jan. 25, 1996) <http://www.ftc.gov/speeches/azcuenaga/alis.htm>; Thomas B. Leary, Commissioner, FTC, *The Patent-Antitrust Interface* (May 3, 2001) <http://www. ftc.gov/speeches/leary/ ipspeech.htm>.

termine whether a patent owner possesses market power by applying the same analysis that they apply to any other valuable asset, which requires the consideration of possible substitutes that might allow consumers to turn to other suppliers of a similar product or process. See *id.* § 2.1.[10]

Congress also has rejected, in the context of patent misuse, a presumption that a patent confers market power. As the district court explained:

> Four years after the Supreme Court decided *Jefferson Parish*, Congress passed the Patent Misuse Reform Act of 1988, which provides that a tying arrangement does not constitute patent misuse in the absence of market power. 35 U.S.C. § 271(d)(5). If, as is clear, a patent is insufficient to establish market power in tying cases when con-

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[10] A number of foreign antitrust agencies have reached the same conclusion. See Commonwealth of Australia, *Application of Trade Practices Act to Intellectual Property, Background Paper* § 4.6 (1991) <http://www.accc.gov.au/content/index.phtml/itemId/325546> ("[T]o determine the degree of power a corporation has in a market, one must first define the relevant market. * * * The existence of intellectual property rights enjoyed by a corporation is irrelevant to this market definition. The market is defined by the area of close competition between different sources of particular products and their substitutes."); Competition Bureau, Government of Canada, *Intellectual Property Enforcement Guidelines* § 4.1 (2000) <http: //www.strategis. ic.gc.ca/pics/ct/ipege.pdf> ("[T]he right to exclude others from using the product or process does not necessarily grant the owner market power."); European Comm'n Notice, *Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements*, 2004 O.J. (C 101/2) ¶ 9 <http://www.europa.eu.int/eur-lex/pri/en/oj/ dat/2004/c_101/ c_10120040427en00020042.pdf> ("There is no presumption that intellectual property rights and license agreements as such give rise to competition concerns."); Taiwan Fair Trade Comm'n, *Rules for Review of Technology Licensing Arrangement Cases*, Rule 3 <http: //www.ftc.gov.tw/indexEnglish.html> ("[T]he Commission does not presume that a licensor, as a result of owning a patent or know-how, has market power within a relevant market.").

> sidering the "patent misuse defense," it would be anomalous for the same patent to be sufficient to establish market power in the same case for purposes of a counterclaim under the Sherman Act.

Pet. App. 36a n.11. See 10 *Antitrust Law* ¶ 1737c, at 82-83; see also *Schlafly* v. *Caro-Kann Corp.*, 1998-1 Trade Cas. (CCH) ¶ 72,138 (Fed. Cir. 1998) (applying 35 U.S.C. 271(d)(5) to hold that, because patentee was not shown to have market power within a relevant market, licensing restrictions did not violate Section 1 of the Sherman Act).[11]

There is no merit to respondent's suggestion (Br. in Opp. 8) that a presumption of market power should operate, not in the "the entire world of patents," but rather when a patent is actually licensed and involved in tying. That argument overlooks the undeniable reality that, even when a patented product is commercially viable, it is still often subject to competition from non-infringing substitutes.[12] The fact that courts do

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[11] The court of appeals noted Congress's enactment of the Patent Misuse Reform Act, Pet. App. 10a n.7, but it suggested that an inference could be drawn from Congress's failure to adopt proposed statutory language for "affirmative patent tying claims" that Congress expected courts to apply a presumption in those cases. That inference is unsound. See *State Oil Co.*, 522 U.S. at 19 ("[i]n the context of this case, we infer little meaning from the fact that Congress has not reacted legislatively to [a precedent that the Court is reconsidering]"); *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) ("[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation") (citations and internal quotation marks omitted).

[12] Judicial decisions in the patent arena have recognized the importance of non-infringing substitutes. For example, if a patent holder brings a successful infringement action against a competing product, a factor in assessing damages is the extent to which the infringer's sales were drawn from non-infringing substitutes rather than the patented product. See *State Indus., Inc.* v. *Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1577-1578 (Fed. Cir. 1989), cert. denied, 493 U.S. 1022 (1990); *BIC Leisure Prods., Inc.* v. *Windsurfing Int'l, Inc.*, 1 F.3d 1214,

not subject all tying arrangements to a per se rule underscores that tying arrangements are often consistent with robust competition. Even when the patented product is part of a tying arrangement, therefore, there is no basis for presuming market power. The courts do not presume market power from the mere existence of a tie, and the fact that the tying product is patented should not alter that conclusion. A court thus cannot avoid the necessity of making the same market inquiry that it would make in the case of a non-patented product.

There is also no merit to the contention that courts should presume that patents confer market power because economically rational companies would not invest in research and development or in obtaining patents unless the result would be significant economic power in the marketplace. See Br. in Opp. 7-8. That argument falsely equates the *possibility* of obtaining market share and perhaps even market power, which provides an incentive to innovate, with actual *success* in acquiring market power. See *IP and Antitrust* § 4.2, at 4-9 ("in assessing whether a granted intellectual property right creates power, we distinguish expectations from the situation that exists after the right has been conferred"). The potential for profit spurs innovation and investment, notwithstanding that many innovators and investors do not ultimately achieve the profits they seek, let alone market power.[13]

1218-1219 (Fed. Cir. 1993); *Panduit Corp.* v. *Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978).

[13] The presumption of market power is particularly inappropriate because it would effectively expand the scope of the per se rule respecting tying arrangements when many authorities have urged the curtailment of that rule. In *Jefferson Parish*, four Justices would have eliminated the per se rule in all tying cases in favor of the rule of reason. 466 U.S. at 33-35 (O'Connor, J., concurring). See 9 *Antitrust Law* ¶ 1730b, at 356 ("We therefore agree with the concurring Justices in *Jefferson Parish* that the special per se rule em-

3. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. * * * In determining the existence of market power * * * this Court has examined closely the economic reality of the market at issue." *Eastman Kodak*, 504 U.S. at 466-467. The issue of market power should not be determined by the formalism of whether the tying product is patented, but by the market reality of whether the tying product has generated demand that cannot be satisfied through substitution of rival products. See *United States Steel Corp.* v. *Fortner Enters.*, 429 U.S. 610, 619 (1977) (*Fortner II*). A patented product may possess uniqueness, and that uniqueness may contribute to establishing market power, but in many cases it will not, and a general legal presumption that patented products confer market power is therefore not justified.

The better approach is illustrated by a line of antitrust tying cases in which the tying product is land. Each parcel of land has a unique location, but "uniqueness of location is not in itself adequate to establish market power[;] * * * there must be other evidence showing that the location lends the defendant a competitive advantage others cannot meet." *Baxley-DeLamar Monuments, Inc.* v. *American Cemetery Ass'n*, 938 F.2d 846, 852 (8th Cir. 1991). There is no presumption that, because the tying product is land and "all land is unique," the defendant must therefore have market power. *Id.* at 851; see *Northern Pac. Ry.*, 356 U.S. at 7 (market power shown by massive land holdings "strategically located in

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ployed in tying has most of the disadvantages of the standard rule of reason without the advantages."). Since *Jefferson Parish*, the D.C. Circuit has declined to apply the per se rule to tying claims in software markets because of the "undue risks of error and of deterring welfare enhancing innovation." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 89-90 (D.C. Cir.) (en banc), cert. denied, 534 U.S. 952 (2001).

checkerboard fashion amid private holdings and within economic distance of transportation facilities").[14]

C. This Court's Decisions Do Not Require The Creation Or Preservation Of A Presumption That Patents Confer Market Power

This Court's tying jurisprudence has evolved substantially over the years as the Court has brought increasingly rigorous economic analysis to bear on the antitrust implications of tying arrangements. The Court's earliest decisions "were extremely hostile to [tying arrangements], whether the case involved intellectual property or other tying products." Pet. App. 5a. The Court analyzed the legality of such arrangements without inquiry into whether the defendant used the tie to exploit any market power that it may have had in the market for the tying product. See *id.* at 5a-6a. But particularly since its decision in *Fortner II*, the Court has emphasized the need to inquire into the defendant's "'market power' in the market for the tying product." Pet. App. 6a. See, *e.g.*, *Eastman Kodak*, 504 U.S. at 462 (tying "violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market"); see also 10 *Antitrust Law* ¶ 1733a, at 13 (The requirement of market power "was not taken seriously until the late 1970's. Beginning with *Fortner II* and continuing in *Jefferson Parish* and *Kodak*, the Supreme Court has insisted that the plaintiff prove such power." (footnotes omitted)).

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[14] See *Breaux Bros. Farms, Inc.* v. *Teche Sugar Co.*, 21 F.3d 83, 86-87 (5th Cir.) (control of 17.5% of sugar cane land in relevant market is insufficient to show market power), cert. denied, 513 U.S. 963 (1994); *Baxley-DeLamar Monuments*, 938 F.2d at 851 ("the mere fact that the tying product is real estate does not convey market power"); *Monument Builders of Greater Kan. City, Inc.* v. *American Cemetery Ass'n*, 891 F.2d 1473, 1482-1483 (10th Cir. 1989) (finding allegations of high market share and uniqueness of cemetery plots sufficient to state a tying claim).

Despite the evolution in the Court's tying jurisprudence, the court of appeals looked back to the Court's 1947 decision in *International Salt* and its 1962 decision in *Loew's* for guidance in analyzing tying arrangements involving a patented tying product. The court of appeals understood those cases to create a presumption that patents confer market power. See Pet. App. 8a-10a. The court's understanding is highly questionable, because it is far from clear that those cases support "any presumption of market power." *Jefferson Parish*, 466 U.S. at 37 n.7 (O'Connor, J., concurring). An examination of those cases and their underpinnings reveals that they do not establish a controlling rule that patents confer market power, and they accordingly do not have "direct application" to the precise issue presented here. Pet. App. 14a (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).[15]

The Court's decision in *International Salt* addressed whether the defendant had violated Section 1 by requiring lessees of its patented salt machines to use its salt. See 332 U.S. at 393. The opinion for the Court does not state that patents are presumed to confer market power, and indeed it contains no discussion whatsoever regarding the defendant's

[15] Indeed, the court of appeals' conclusion in this case is difficult to square with its own past decisions. Panels of the Federal Circuit, including the panel in this case, have concluded, in the context of addressing claims under Section 2 of the Sherman Act, that a patent does not confer market power for purposes of the antitrust laws. See Pet. App. 17a-18a; *Abbott Labs.* v. *Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991) ("A patent does not of itself establish a presumption of market power in the antitrust sense."), cert. denied, 505 U.S. 1205 (1992); *C.R. Bard, Inc.* v. *M3 Sys., Inc.*, 157 F.3d 1340, 1368 (Fed. Cir. 1998) ("It is not presumed that the patent-based right to exclude necessarily establishes market power in antitrust terms."), cert. denied, 526 U.S. 1130 (1999); *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F.2d 1350, 1367 (Fed. Cir.) ("patent rights are not *legal monopolies* in the antitrust sense of that word"), cert. denied, 469 U.S. 821 (1984).

market power (or lack thereof) in the salt machine market. See *id*. at 394-398. The Court's failure to discuss that factor suggests that the Court, at that time, considered the inquiry unnecessary to establish a Section 1 violation; it certainly does not suggest that the Court adopted *sub silentio* a rule that market power must generally be shown but is to be presumed from the existence of a patent. See 10 *Antitrust Law* ¶ 1733d, at 18-19.

The Court later confirmed in *Northern Pacific*, *supra*, that its decision in *International Salt* did not depend on whether the defendant had patented its machines. *Northern Pacific* involved a Section 1 challenge to a railroad's tying agreements in which it sold or leased land on condition that the recipients agree to use only the railroad's shipping facilities. See 356 U.S. at 7. The Court cited *International Salt* in invalidating the tying arrangements and rejected the railroad's argument that the latter decision was distinguishable because it involved a patented product. Stating that "we do not believe this distinction has, or should have, any significance," *id*. at 9, the Court explained that *International Salt* "placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not because of it." *Ibid*. *Northern Pacific* thus refutes the court of appeals' view that *International Salt* adopted a presumption that patents confer market power.

The Court's decision in *Northern Pacific* also explained cogently why the existence of a patent does not suffice to establish market power. The Court reasoned that

> it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the

> product and the economic power resulting from the patent privilege is slight. As a matter of fact the defendant in *International Salt* offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant.

356 U.S. at 10 n.8.

To be sure, the Court's subsequent decision in *Loew's*, which involved the block-booking of copyrighted films, does state that there is a presumption of market power for patented or copyrighted tying products. 371 U.S. at 45. But the decision does not convincingly explain the economic rationale for that observation (which was, in any event, dictum, at least as applied to patents). The Court cited *International Salt*, but it did not identify anything in that decision that called for recognition of such a presumption, nor did it attempt to reconcile its analysis with the passage from *Northern Pacific*, set out above, which expressed the understanding that a patent typically is *not* associated with market power. See *id.* at 45-46.[16]

The *Loew's* Court instead stated that the presumption it had identified "grew out of a long line of patent cases" applying the theory of patent misuse to bar patentees who employed tying arrangements from enforcing their patents. 371 U.S. at 46 (citing, *inter alia*, *Mercoid Corp.* v. *Mid-Continent*

[16] *Loew's* also cited *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), which also involved the block-booking of copyrighted films. See 371 U.S. at 45-46. Like *International Salt*, however, *Paramount* did not announce or apply a legal presumption respecting market power and did not even discuss whether the defendant had market power in the market for the tying product. See 334 U.S. at 156-159. Instead, *Paramount*, like *Loew's*, appeared to rely on principles drawn from the patent misuse doctrine. See *id.* at 157-158. See also pp. 21-22, *infra*.

Inv. Co., 320 U.S. 661 (1944)). The Court explained that those "cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." *Ibid.*; see generally *id.* at 46-48. Thus, the *Loew's* Court's reference to a presumption of market power was a reflection of the then-existing view that a patent grant was generally inconsistent with all forms of tying arrangements, regardless of whether the patent actually conferred market power. See *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 157-158 (1948).

That limited view of the rights conferred by a patent is anachronistic under current law. As discussed above, Congress has legislatively broadened the scope of those rights by making clear that tying arrangements involving patented products do not constitute patent misuse—and thus do not prevent enforcement of the patent—in the absence of market power. 35 U.S.C. 271(d)(5). Whatever the merit of the *Loew's* analysis under prior law, therefore, that analysis leads to a different result under modern patent law, because the patent-misuse rationale can no longer justify any failure to require actual proof of market power.

The Court's more recent tying decisions in *Eastman Kodak*, *Jefferson Parish*, and *Fortner II*, which emphasize the crucial need to consider market power when analyzing tying arrangements, have further eclipsed the Court's earlier decisions in *Loew's* and *International Salt*, which predate the application of a more rigorous economic inquiry into antitrust issues. The Court's recent decisions expressly require that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold." *Jefferson Parish*, 466 U.S. at 18. Thus, the existence of market power, "defined as 'the ability of a single seller to raise price and restrict output,'" is now a "necessary feature of an illegal tying arrangement." *Eastman Kodak*, 504 U.S.

at 464 (quoting *Fortner Enters.* v. *United States Steel Corp.* 394 U.S. 495 (1969)). That instruction leaves no room "to infer power from a patent on the tying product," 10 *Antitrust Law* ¶ 1737a, at 82, and strongly suggests "that the power needed to trigger per se illegality cannot be inferred from a patent alone." *Id.* ¶ 1737a, at 80; see *id.* ¶ 1737c, at 82 ("[I]f *Salt* was essentially indifferent to power over the tying product, it has been overruled by the legal rule adopted in *Fortner II* and *Jefferson Parish*.").

The court of appeals observed (Pet. App. 9a) that *Jefferson Parish* and *Fortner II* contain dicta arguably supporting a market-power presumption for patented or copyrighted products. But such *dicta* plainly have no controlling force in this Court because neither case involved a patented or copyrighted tying product and "repeating dicta does not infuse it with life." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 300 (1995). See *Lingle* v. *Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005). Indeed, the Court's dictum in *Jefferson Parish* prompted immediate criticism from four Members of the Court. The majority observed that, "if 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." 466 U.S. at 16. But Justice O'Connor, joined by three other concurring Justices, focused on the precise question in more detail:

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any

> relevant sense if there are close substitutes for the patented product.

Id. at 37 n.7. The Court's *Jefferson Parish* dictum is most reasonably understood as "merely describing pre-*Fortner II* cases without reexamining them." 10 *Antitrust Law* ¶ 1733e2, at 27. It recognizes that patent rights are relevant in assessing market power, but it provides no basis for an exception to the Court's express direction that courts focus their inquiry into the validity of a tying arrangement "on the market or markets in which the two products are sold." *Jefferson Parish*, 466 U.S. at 18.[17]

Ultimately, if the Court concludes that its decisions in *Eastman Kodak*, *Jefferson Parish*, and *Fortner II*, together with Congress's requirement that market power be proved in order to establish patent misuse by tying, have merely undermined, but not eradicated, the notion that the mere existence of a patent presumptively establishes market power, then the Court should take appropriate action to finish the process. While this Court approaches reconsideration of its decisions "with the utmost caution," *State Oil Co.*, 522 U.S. at 20, "[i]n

[17] The Court's dictum in *Fortner II* is even less consequential. That Court noted that "the statutory grant of a patent monopoly in *International Salt* * * * represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power," 429 U.S. at 619. But that language does not suggest that *International Salt* treated the products as sufficiently unique to give rise to market power *because* they were patented or that all patented products would be sufficiently unique. *Fortner II* also emphasized, repeatedly, that the presence of a patent or copyright may sometimes explain why a product qualifies as unique and that, to show market power, the product must be sufficiently unique to "significantly differentiate[]" it from competitors' products. *Id.* at 620-622. Because *Fortner II* emphasized the need to show power "to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market," *id.* at 620, that decision more generally supports the requirement of a case-specific analysis of actual market power.

the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. * * * Accordingly, th[e] Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question." *Id.* at 20-21 (overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)). See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (overruling *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra* (overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). Accordingly, the Court should squarely reject the presumption that patents confer market power, overruling, to the extent necessary, any contrary suggestion in *International Salt* and *Loew's*.

D. A Presumption That Patents Confer Market Power Would Conflict With The Procompetitive Policies Of The Antitrust Laws

The court of appeals' decision sets out an obviously anomalous rule. It directs district courts to assess market power in Section 1 patent tying cases under an artificial presumption inapplicable to tying claims involving non-patented products or to other types of antitrust claims involving patented products. Because that presumption lacks a sound foundation in fundamental principles of antitrust law and policy, it should be discarded.

1. Market power need not be proved to establish some per se violations of the antitrust laws, such as horizontal price fixing, where the conduct at issue is deemed unreasonable as a matter of law without regard to the market power of the participants. See *Northern Pac. Ry.*, 356 U.S. at 5. If practices have no countervailing benefits and are unlikely to suc-

ceed or even be attempted in the absence of market power, such a rule makes sense. But most antitrust claims, including allegations of unlawful tying arrangements, involve practices that may be attempted and make economic sense in the absence of market power and thus depend critically on an assessment of market power. In those areas of antitrust law where market power matters, the Court has created no legal shortcut, comparable to the presumption in this case, for showing that the defendant has sufficient market power to satisfy the required element of the antitrust violation.[18]

The Court has recognized that there are different ways of proving market power. A court may consider direct evidence of a defendant's ability to raise prices to determine whether the defendant has the requisite economic power. See *Eastman Kodak*, 504 U.S. at 477. Or a court might look to evidence of market share in properly defined markets, taking into account evidence of barriers to market entry and other factors. See, *e.g.*, *United States* v. *Microsoft Corp.*, 253 F.3d 34, 54-56 (D.C. Cir.) (en banc), cert. denied, 534 U.S. 952 (2001). Patents (and other intellectual property rights) sometimes are important, and they may be relevant in determining whether entry would be unlikely to prevent a significant exercise of market power. See *Fortner Enters.* v. *United States Steel Corp.*, 394 U.S. 495, 505 n.2 (1969) (*Fortner I*). But it is also commonly the case that, notwithstanding the existence of intellectual property rights, the evidence establishes that

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[18] As the court of appeals acknowledged, the market power presumption would be inapplicable to cases involving patented products brought under Section 2 of the Sherman Act. Pet. App. 17a; *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (requiring independent proof of market power despite existence of a patent). Thus, the creation or retention of the presumption could place courts in the position, as in this case, of reaching inconsistent conclusions in the same case respecting a seller's market power in a single market.

existing and potential competition is ample to prevent a defendant from exercising significant market power. Accordingly, in every case in which a showing of market power is required, its existence must be considered in light of evidence relating to the particular markets at issue. The district court concluded that Independent failed to make an adequate showing of market power in this case. Pet. App. 49a.

2. Sound antitrust enforcement, public or private, does not benefit from reliance on a presumption of market power that lacks any foundation in economic reality. There is no reason to excuse plaintiffs who challenge tying arrangements involving patented articles from making the same showing of market power required of plaintiffs who challenge other tying arrangements or who raise other antitrust claims involving patented products. Indeed, because plaintiffs often join multiple antitrust claims involving issues of market power in one civil action, a court frequently must consider evidence of market power to resolve the case, irrespective of any special presumption applicable only to Section 1 tying claims. See Pet. 54a-56a.

Recognition of the presumption, however, might well encourage meritless claims and enable plaintiffs to reach the jury and prevail at trial without having to show anything more (with respect to market power) than a patent on the tying product. First, by shifting to defendants the burden of disproving market power, the presumption increases the cost of defending against meritless suits and may, therefore, lead defendants to settle such suits. Second, even if the defendant offers evidence of its lack of market power, the presumption may enable plaintiffs to survive summary judgment and precipitate the need for a jury trial. In this case, the court of appeals did not precisely explain what procedural consequences would follow from a defendant's submission of evidence sufficient to rebut the presumption. In holding that petitioners had not "create[d] a genuine issue of material fact on the issue" of market power, however, the court seemed to imply that rebuttal evidence on remand would send the issue to the jury. See Pet. App. 17a.[19]

3. A presumption of market power that lacks any basis in economic reality may have a negative effect on efficiency and innovation incentives. Perceived rewards from the efficient exploitation of intellectual property can induce intellectual property owners to invest in research and development, bringing new products to consumers.[20] But conversely, a market power presumption that undermines perceived rewards may constitute a drag on innovation or, at a minimum, cause firms with patents to forgo potentially efficient tying arrangements.[21]

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[19] The courts have not uniformly decided whether a defendant who rebuts an evidentiary presumption becomes entitled to a trial or to entry of judgment as a matter of law. See 2 John W. Strong, *McCormick on Evidence* § 344, at 461 (4th ed. 1992) ("The problem of the effect of a presumption when met by proof rebutting the presumed fact has literally plagued the courts and legal scholars."). "[D]ifferent presumptions will continue to be viewed as having different procedural effects." *Id.* at 476.

[20] See, *e.g.*, *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 480 (1974) ("The patent laws * * * offe[r] a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy."). See also, *e.g.*, *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 73-74 (1942) ("[s]pectacular prizes * * * are thrown to a small minority of winners," encouraging individuals to "do their utmost" to win "the big prizes before their eyes").

[21] See Scherer, *The Innovation Lottery* 20 ("To the extent that investments in technological and artistic creation are motivated by the longshot hope of a

As this Court has long understood, the use of legal presumptions, as well as other procedures to facilitate litigation, can have real-world effects on firm behavior and innovation.[22] The proposed market power presumption would predictably cause some intellectual property owners that do not possess market power to avoid tying, even in cases where the practice may be efficient. Reducing the patentee's options for efficient exploitation of its patent rights may, in turn, adversely impact the incentives to innovate. Moreover, it may deprive consumers of the benefits of efficiency-enhancing practices. See *1995 Antitrust-IP Licensing Guidelines* § 5.3 ("Although tying arrangements may result in anticompetitive effects, such arrangements can also result in significant efficiencies and procompetitive benefits.").[23]

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very large reward, intellectual property policies should sustain and reinforce that incentive system, not undermine it.").

[22] See, *e.g.*, *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 439-441 (1984) (barring secondary liability based on a presumed intent to cause copyright infringement, noting the potential effect of that presumption on product innovation); *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996) (concluding that construction of patents by judges, rather than juries, promotes "the importance of uniformity in the treatment of a given patent" and, in turn, innovation); *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) (noting that "[f]undamental alterations in [the patent doctrine of equivalents and the rule of prosecution history estoppel] risk destroying the legitimate expectations of inventors in their property"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 593 (1986) (noting that the effect of allowing implausible inferences to survive summary judgment and require a jury trial "is often to deter procompetitive conduct").

[23] Package licenses and tie-ins can enhance consumer welfare in a variety of ways through, for example, economies of joint sales, quality assurance, protection of goodwill, and cheating on a cartel price. See Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 319-322 (4th ed. 2005). See also Marius Schwartz & Gregory J. Werden, *A Quality-Signaling Rationale for Aftermarket Tying*, 64 Antitrust L.J. 387 (1996); William F.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Baxter & Daniel P. Kessler, *The Law and Economics of Tying Arrangements: Lessons for the Competition Policy Treatment of Intellectual Property*, in *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* 137, 142-143 (Robert D. Anderson & Nancy T. Gallini eds., 1998) (beneficial effect of tying as a "metering" device).