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 THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The American Bar Association ("ABA"), with over 405,000 members, is the leading national membership organization of the legal profession. Its members come from each of the fifty states, the District of Columbia, and the U.S. territories. Membership is voluntary and includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields. ABA members represent the full spectrum of public and private litigants, including plaintiffs and defendants. Among the ABA entities are the Section of Antitrust Law, with over 9,000 members, and the Section of Intellectual Property Law, with over 19,000 members.

This case squarely presents the question whether a court must presume that a patent confers market power for purposes of a tying claim under Section 1 of the Sherman Act. In 1990, the House of Delegates of the ABA adopted a resolution providing that intellectual property rights shall not be presumed to define a market or to establish market power in actions under the antitrust laws.[2] Because the ABA

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

Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] Specifically, the ABA House of Delegates adopted a policy position that favored "in principle legislation such as H.R. 469, 101st Cong., 1st Sess. (1989) (Fish) and S. 270, 101st Cong., 2d Sess. (1989) (Leahy) which provide[d] that intellectual property rights should not be presumed to define a market or to establish market power in actions under the antitrust laws." ABA Section of Patent, Trademark & Copyright Law, *Report and Recommendation to the House of Delegates*, Report No.

represents a uniquely broad spectrum of the American legal community, its perspective on the central issue in this case should be helpful to this Court.[3]

SUMMARY OF THE ARGUMENT

The question presented in this case is narrow and focused. The Court granted certiorari to determine whether, in a claim for unlawful tying under Section 1 of the Sherman Act, "market power in the relevant market for the tying product . . . is presumed based solely on the existence of [a] patent on the tying product." Petition at I. The American Bar Association urges the Court to hold that the answer is no. Contrary to the view of the court below, the ABA believes that this answer is consistent with the Court's prior decisions and the meaning of Section 1. Therefore, the decision of the Court of Appeals for the Federal Circuit should be reversed.

The Federal Circuit held that a presumption of market power must apply where the tying product is patented not because such a presumption is factually supportable, nor because it serves any overriding legal policy. Rather, the Federal Circuit held that the market power presumption was mandated by this Court's prior decisions, especially *United States v. Loew's Inc.*, 371 U.S. 38 (1962).

But the Court of Appeals, like some others, has misread *Loew's*. The "presumption" applied in *Loew's* was not a presumption of actual market power, as the Court's tying

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122C (Feb. 1990). The action of the House of Delegates adopting the report is at 115 ABA Reports 42 (1990). The Section report itself is at 115 ABA Reports 1365-70 (1990). In 2001, the ABA reiterated its support for bills that would prevent any presumption of market power in intellectual property cases. *See Market Power and Intellectual Property Litigation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 11 (2001) (statement of Charles P. Baker, Chair, ABA Section of Intellectual Property Law).

[3] Both parties have consented to the filing of this brief. The letters of consent are on file with the Clerk of the Court.

jurisprudence now requires. It was, to use the *Loew's* Court's own words, a "presumption of *uniqueness* resulting from the existence of the [intellectual property] itself." 371 U.S. at 48 (emphasis added). Indeed, the *Loew's* Court expressly stated that its references to the "requisite economic power" over the tying product should *not* be confused with actual market power:

> [T]he requisite economic power may be found on the basis of either uniqueness or consumer appeal, . . . [because] market dominance in the present context does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act . . . .

Id. at 45 n.4. The "presumption of uniqueness" in *Loew's*, moreover, was obviated by this Court's later decisions in which the requirement of "power" in the tying product market was expressly defined to mean actual market power in the sense of power over price.

Neither *Loew's* nor any other decision of this Court has ever applied a presumption of actual market power to decide a case in which the tying product was protected by a patent or copyright. Thus, the ABA does not believe that *Loew's* must be overruled. We emphasize, however, that the question presented is not whether any decisions of this Court must be overturned, or how many, but whether a presumption of market power based on intellectual property alone should be rejected. While the necessity of overruling *Loew's* may be debatable, the American Bar Association respectfully submits that the question presented by the Petition is not.

A. The Presumption Is Baseless And Unworkable.

The ABA adopted its 1990 policy because the market power presumption has no basis in economic reality and therefore unjustifiably reduces incentives to innovate. We are aware of no evidence that the fact of a patent, copyright, or other intellectual property confers market power in all or even a significant majority of cases. The judicial and academic consensus that any such presumption is unwise, moreover, is overwhelming. As a result, neither the court below nor the Respondent here has cited any economic or legal commentator who currently defends the presumption.

Members of the executive and legislative branches agree that the presumption should be rejected. Both antitrust enforcement agencies have eschewed it in their intellectual property enforcement guidelines, and Congress specifically amended the patent laws to ensure that any claim of "misuse" based on tying would require proof of market power. 35 U.S.C. § 271(d).[4] Even those few courts that have regarded the presumption as mandated by *Loew's*, have made no attempt to defend it.

The presumption is also unworkable, as the anomalies that arise from the Federal Circuit's attempt to apply it in this case demonstrate. To reach the result below, the Federal Circuit concluded that:

(1) a presumption that a patent creates market power in fact is warranted under Section 1 of the Sherman Act, but plays no role whatsoever under Section 2,

(2) the market power presumption must be deemed rebuttable (a conclusion based on "clearly articulated Supreme Court dicta," Pet. App. 15a (the Federal Circuit's opinion reported at 396 F.3d 1342), but it may not be rebutted by evidence going to the heart of any finding of actual market power, that is, the "presence of competing substitutes for the tying product," Pet. App. 16a (internal quotation marks omitted), and

(3) the presumption carries with it a presumed *geographic* market, in which (contrary to existing law and

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[4] *See* H. Hovenkamp, M. Janis & M. Lemley, *IP and Antitrust* § 4.2e6, at 4-36 (Supp. 2005) (hereinafter "HJL Treatise") ("It would also be irrational for Congress to immunize patent ties from Patent Act liability only to have them condemned under the Sherman or Clayton Act . . . .").

common sense) every product with a United States patent competes in a market defined as the United States.

These propositions have no basis in the decisions of this Court or the economics of tying arrangements. Rather, they demonstrate the difficulty of applying a presumption with no basis in fact to actual cases. If the Federal Circuit's presumption is not rejected, that difficulty will be visited on every member of the bench and bar struggling with the application of antitrust law to intellectual property.

B. This Court's Decisions Do Not Support The Market Power Presumption.

The lower court's conclusion that it was bound to apply the market power presumption to a patented tying product reflects a fundamental misunderstanding of *Loew's* and this Court's tying jurisprudence.

Many of the Court's early tying decisions condemned tying arrangements included in intellectual property licenses as inherently anticompetitive. A principal rationale employed by the Court during that period was the so-called "leveraging fallacy"—that the patentee was using one monopoly (on the invention) to gain a second monopoly (on the tied product).[5] Although that rationale has not survived the Court's later decisions, it was the primary basis for the findings of *per se* illegality in decisions such as *International Salt Co. v. United States*, 332 U.S. 392 (1947), and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

In the 1950s, the Court decided a tying case for the first time by focusing on the degree of the seller's power in the market for the tying product.[6] In a series of subsequent cases that included *Loew's*, however, the Court emphasized that the requisite "power" was not actual market power, but

[5] *See, e.g.*, W. S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957).

[6] *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953).

merely a showing of distinctiveness or uniqueness. This showing was easily met in a patent case, "[s]ince one of the objectives of the patent laws is to reward uniqueness . . . ." *Loew's*, 371 U.S. at 46. But, even as these cases found that patents could justify a "presumption of uniqueness" by definition, *id.* at 48, the Court acknowledged that a presumption of actual market power could not be justified, because it was "common knowledge" that patents do not necessarily confer market power. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 10 n.8 (1958).

Loew's was the first and last case in which this Court applied a presumption of any kind to a tying product protected by intellectual property rights. But *Loew's* specifically denied that its "presumption" was the same as the presumption applied by the Federal Circuit below—that a patented tying product may be presumed to confer actual market power. Thus, *Loew's* simply did not ask or answer the question presented here.

The Court's subsequent cases have taken a different approach to the question of "power" in tying cases and have thus undermined the rationale for the *Loew's* "presumption of uniqueness." Beginning with *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) ("*Fortner II*"), the Court has held repeatedly that a tying claim cannot survive unless a plaintiff first pleads and proves that the seller has genuine market power in the tying product. *Fortner II* reversed a judgment of illegal tying based upon jury findings of uniqueness because those findings did not establish actual market power. In 1984, *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) ("*Hyde*"), confirmed the rule by rejecting a tying claim in which the seller had only 30 percent of the tying market. Based on these decisions, scholars have concluded that this Court's current requirement of market power in the tying product "would refuse to find sufficient power in *International Salt*, . . . or in decisions such as *Paramount* or *Loew's* . . . ." HJL Treatise, *supra* note 4, § 4.2e4(A), at 4-31.

In its opinion below, the Federal Circuit acknowledged this change in the law of tying, but argued that it occurred only for unpatented products, not patented ones. Pet. App. 6a. The Federal Circuit based this conclusion principally on "dicta" from *Hyde* suggesting that the Court's current market power requirement could be satisfied by the existence of a patent. Pet. App. 9a, 14a-15a. That suggestion, which was immediately challenged by the four concurring Justices, and later questioned by other members of the majority, cannot change the holding of *Loew's*. And that holding did not apply a presumption of *market* power to intellectual property.

C. *Stare Decisis* Does Not Justify Adherence To The Presumption Of Market Power.

In the view of the ABA, the principles of *stare decisis* do not present an obstacle to the Court's rejection of the presumption of market power.

First, this Court overrules only cases in which the principle at issue was necessary to the result. The *Loew's* Court relied on additional evidence of arguable market power that provides alternative grounds for the holding.

Second, if the Court concludes that it must overrule *Loew's* to reverse the judgment below, there are powerful reasons to do so. As improved analysis of economic practices and priorities has evolved, this Court has overruled several prior holdings in the antitrust area, especially in cases challenging assumptions underlying *per se* rules of liability. *See, e.g., State Oil v. Khan*, 522 U.S. 3, 20 (1997) ("*Khan*"). Here, both the overwhelming opposition to the presumption and the continued debate over the meaning of *Loew's* make this an even more compelling case for overcoming *stare decisis*.

Third, *Loew's* has caused uncertainty, not reliance. Accordingly, the ABA does not believe that members of the legal and business community have relied to their detriment on the interpretation of *Loew's* that the Federal Circuit found controlling here. Rather, the ABA believes that the majority view for the past twenty years that patents do not justify a presumption of market power has been undermined and unsettled by the decisions, including the opinion below, redefining the *Loew's* presumption to mean market power. Any disapproval of *Loew's* that accompanies rejection of the market power presumption would result in clarity and common sense, not disappointed expectations.

ARGUMENT

I. A Presumption That The Existence Of Intellectual Property Rights Implies Market Power Is Unfounded And Unwise.

The presumption of market power applied by the Court of Appeals below has no basis in economic reality or legal policy. In the 1980s, it became clear that, despite this Court's decisions in *Fortner II* and *Hyde,* some lower courts would presume market power from the existence of a patent or copyright,[7] while others would not.[8] The ABA adopted its first resolution opposing the presumption in 1990, and has maintained that position for the reasons summarized by the Chair of the ABA Section of Intellectual Property Law when testifying before Congress in 2001:

> Because such presumptions are arbitrary, ignoring real world facts, they have no proper basis from the point of view of either intellectual property or antitrust law, and they lower incentives created by intellectual property law to invest in new jobs and new industrial facilities based on technical advances.[9]

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[7] *Digidyne Corp. v. Data Gen. Corp*., 734 F.2d 1336 (9th Cir. 1984).

[8] *Will v. Comprehensive Accounting Corp*., 776 F.2d 665 (7th Cir. 1985); *A.I. Root Co. v. Computer/Dynamics, Inc*., 806 F.2d 673 (6th Cir. 1986).

[9] *See Market Power and Intellectual Property Litigation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 11 & nn.1 & 2 (2001) (Statement of Charles P. Baker, Chair, Section of Intellectual Property Law, on

We ask the Court to reject the presumption for two principal reasons:

A. The Presumption Is False.

First and foremost, "whether a patent confers market power is a question of fact, not policy."[10] As the Petition in this case amply demonstrates (Pet. 19-20), there is no empirical evidence that patents confer market power in every case (as the presumption holds), or even in any significant number of cases. In fact, the evidence available indicates that the vast majority of patents confer neither market power nor monetary profit to the patentee.[11] Thus, there is nothing to contradict the answer to the question from Professor Areeda: "Patents, copyrights, trademarks, and other forms of intellectual property do not themselves confer *any* market power."[12]

Nor is the factual case for the presumption improved, as the Respondent argues, by narrowing the field of "presumptive" patents to those that are employed in tying arrangements. This Court has repeatedly recognized the benefits of and reasons for tying arrangements that apply

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behalf of the American Bar Association citing prior testimony by the ABA on this issue) (Mr. Baker's statement is also available at http://www.abanet.org/ intelprop/ marketpower.pdf).

[10] P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 518, at 194 (Supp. 2005).

[11] *See, e.g.*, Comments of F. M. Scherer, Panel Discussion, *The Value of Patents and Other Legally Protected Commercial Rights*, 53 Antitrust L.J. 535, 547 (1985) ("[s]tatistical studies suggest that the vast majority of all patents confer very little monopoly power—at least, they are not very profitable"); R. Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 Hastings L.J. 399, 437 (2003) ("eighty percent to ninety percent of patents never create any monetary return on the patent holder" (footnote omitted)).

[12] IIA P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law* ¶ 523, at 130 (1st ed. 1995) (original emphasis).

with or without market power.[13] Among those benefits are quality assurance and customer preference.[14] Of particular note here, tying can be used as a means of "metering" the use of the invention itself, allowing the patentee to charge more to those who use the invention more intensively (that is, those who buy more ink), and less to those who do not. Such metering is "nearly always procompetitive."[15] In such a case, the patentee who imposes the tie "would be precisely equivalent to the lessor of an automobile who charges by the mile that the lessee drives."[16] Thus, the mere use of a tie, successful or not, cannot transform Illinois Tool, or a rental car company, into a monopolist.

In addition to its theoretical flaws and lack of empirical evidence, the argument that a patentee who insists on a tying arrangement "must" have market power is belied by the history of tying cases brought before this Court. In each of the Court's antitrust cases discussed below involving a tying product subject to intellectual property rights, there was clear evidence that the defendant did not have market power in the tying product. In *International Salt*, "there were several firms selling roughly equivalent lixator machines,"[17] and in *Paramount* and *Loew's* "not only the defendants but presumably numerous rivals offered copyrighted motion pictures of equivalent quality and desireability."[18] Indeed, the record in this case—which reflects substantial other sellers of substitutes for the tying product, and was fatal to

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[13] *See, e.g.*, *Will*, 776 F.2d at 673 ("The Supreme Court emphasized in *Hyde* and again in *National Collegiate Athletic Association* that tying may have competitive benefits.") (citations omitted).

[14] HJL Treatise, *supra* note 4, § 21.2, at 21-8.

[15] *Id*. at 21-12.

[16] *Id.* at 21-13.

[17] *Id*. § 4.2e4, at 4-31.

[18] *Id.* Those rivals would include the four co-defendants in *Paramount Pictures*, Columbia Pictures, Universal, United Artists, and Loew's itself.

the Section 2 claim below—belies any claim that the presumption is ordinarily true.

Because the presumption is groundless, it places a burden on intellectual property rights that is unjustified. Thus, there is striking unanimity among both economic and legal commentators that the presumption is harmful to consumers and should be abandoned. *See* Pet. 19. The federal enforcement agencies have expressly eschewed the presumption in their enforcement guidelines. Pet. 17-18. And Congress has expressly amended the Patent Act to provide that any claim of "misuse" by tying must prove market power, "thereby abolishing any presumption that a patent itself defines a market or implies market power."[19] For these reasons, most courts have also rejected the presumption (Pet. 9) and others that have applied it have done so solely in deference to this Court.

B. The Presumption Is Unworkable.

In its attempt to apply the presumption of market power to the case before it, the opinion below highlights certain anomalies of the presumption, and actually creates new ones.

First, the court had to acknowledge that the presumption it found warranted in a Section 1 tying case had no application whatsoever in a Section 2 claim. Pet. App. 17a. The conclusion that Section 2 requires market power was mandated by this Court's decisions in *Walker Process* and *Spectrum Sports*.[20] The Court of Appeals offered no

[19] X P. Areeda, E. Elhauge & H. Hovenkamp, *Antitrust Law* § 1737c, at 83 (2d ed. 2004), citing 35 U.S.C. § 271(d), and noting: "While the Act does not define proof of illegal tying under the antitrust laws, it would be anomalous to equate patents with power for antitrust purposes but not for misuse purposes, for the patent misuse defense is either equivalent to the antitrust offense or more hostile to the tying defendant."

[20] *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965) ("Without a definition of that market there is no way to measure [the patentee's] ability to lessen or destroy competition. . . . There may be effective substitutes for the device which do not infringe the patent."); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

rationale for the distinction, and none is apparent. If the presumption were grounded in fact, it would have at least some relevance to any antitrust analysis of market power. Instead, the anomalous result was accepted below for a single reason: "Neither *International Salt* nor *Loew's* dealt with section 2 of the Sherman Act." Pet. App. 17a.

Of greater practical consequence, however, the Court of Appeals next considered what would happen *after* the presumption was applied. For, unlike this Court's decision in *Loew's*, the Federal Circuit's decision here did not end the case in the plaintiff's favor. Acknowledging that this Court had never decided the issue, the Court of Appeals concluded that the presumption must be rebuttable, based on "clearly articulated Supreme Court dicta." Pet. App. 15a. That dicta came from the Court's 1984 *Hyde* decision, in which the majority observed that it was "fair to presume" that a patent "gives the seller market power." *Id.* (quoting *Hyde*, 466 U.S. at 16). The Federal Circuit thus remanded the case to give the defendant an opportunity to rebut the presumption of market power.

In doing so, however, the court further observed that "[t]he mere presence of competing substitutes for the tying product . . . is insufficient to" rebut the presumption. Pet. App. 16a. This language came from the decision in *Loew's*, in which (as noted) the presumption applied was expressly *not* a presumption of market power, but a presumption of "uniqueness." The *Loew's* Court was simply stating that the presence of competing substitutes was insufficient to overcome the presumption because, even though directly relevant to the question of market power, market power was not the test: "Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power." *Loew's*, 371 U.S. at 45.

Because it applied the *Loew's* language about "competing substitutes" to a test that *does* require market power under this Court's current law, the Federal Circuit's rule is quite extraordinary. There is no more direct evidence that a party lacks market power than the presence of other significant competitors already in the market.[21] Such competitors, by definition, are supplying options to consumers, have overcome any barriers to entry, and may have the current capacity to expand output and defeat any attempt by the alleged monopolist to curtail output.[22] After excluding this compelling evidence from consideration, the Federal Circuit stated that

> [t]he 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.

Pet. App. 16a. But what "expert testimony" on the subject of actual market power would ignore the presence of direct competitors? What cross-elasticities will be more relevant than those of the "competing substitutes"? And what "other evidence of lack of market power" will suffice? In antitrust terms, it is as if the Federal Circuit has told the patent holder that you may rebut a presumption that it is raining, perhaps by expert analysis of barometric pressure, or by measuring reservoir levels, but not by going outside and taking your hat off.

There is practical difficulty in the Federal Circuit's selection of a "rebuttable" geographic market as well. Although *Loew's* made no reference to geographic markets either, the Federal Circuit supplied one itself: "Thus, a patent presumptively defines the relevant market as the

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[21] *E.g.*, L.A. Sullivan, *Handbook of the Law of Antitrust* § 8, at 30-31 (West 1977) ("[M]arket power is the power of a firm to affect the price which will prevail on the market in which the firm trades. Whether a seller possesses such power depends upon the . . . availability of substitutes for the seller's product.").

[22] *See, e.g., Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414-15 (7th Cir. 1989).

nationwide market for the patented product itself . . . . " Pet. App. 15a (emphasis added). But there is no reason to believe that all products with U.S. patents compete in the same "nationwide" geographic market. It is widely recognized that geographic markets for patented products may have only a local reach, or may go well beyond domestic borders.[23] Here, the Federal Circuit's presumption of a "nationwide" market does not even comport with the market definition of this very plaintiff, who argued in the District Court that "the geographic market for the tying product is the United States and Canada." Pet. App. 45a.

We emphasize these practical problems because the consequences of these rules will be visited on those individuals and businesses attempting to negotiate, execute, and enforce intellectual property agreements—as well as the 28,000 members of the ABA's Sections of Intellectual Property Law and Antitrust Law attempting to advise clients and try cases.

II. The Market Power Presumption Finds No Support In The Prior Holdings Of This Court.

As noted, we do not believe the market power presumption can be supported as a matter of economic policy. A closer question is whether the Court's precedent has previously applied such a presumption. The Court of Appeals construed *Loew's* to hold "that, where the tying product is patented or copyrighted, market power may be presumed rather than proven." Pet. App. 8a. To square that holding with the Court's later decisions requiring genuine market power to support a claim of tying, the Court of Appeals also construed *Loew's* as "confirm[ing] that patent tying is a distinct doctrine" from tying involving nonpatented

[23] *See*, *e.g.*, HJL Treatise, *supra* note 4, § 4.3b, at 4-45 (giving examples of different markets and concluding that "the characteristics of the [patented] good itself determines the size of the market and the range of competitive choices").

products. Pet. App. 9a. As indicated, we do not believe that *Loew's* can support either proposition.

The flaw in the Circuit Court's reading lies in its failure to recognize the role in this Court's decisions of "economic power" in the tying product, and how the definition of that power has changed over time. The Court's decisions can be divided into three parts: (1) the period of "hostility"—before power in the tying product was even considered, (2) the period of "uniqueness"—when "power" was defined to mean a sense of distinctiveness so easy to satisfy that it could be inferred from the existence of the tie itself, and (3) the current period of actual market power—in which power is defined as market power in the modern sense of power over price.

A. The Period Of "Hostility."

Nearly one hundred years ago, this Court rejected an attack on a tying arrangement strikingly similar to this one—in which a patented mimeograph machine was licensed on the condition that the licensee purchase the ink from the patent holder. *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912). The patentee had argued, even then, that the tying arrangement was a form of metering, by which the licensor "is merely insuring to himself a royalty based upon the output of the machine." *Id.* at 65. In upholding the tie as consistent with the use of the patent right, the majority rejected the argument of Chief Justice White in dissent that the use of a tie allowed the patent holder "to bring within the claims of his patent things which are not embraced therein, thus . . . to multiply monopolies at the will of an interested party." *Id.* at 53. This was an early and forceful articulation of what many have called the "patent leveraging fallacy."[24]

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[24] W.S. Bowman, Jr., *Patent and Antitrust Law* 154 (U. Chi. Press 1973). Whether the leveraging theory was properly applied in the Court's early cases is not within the scope of the question presented here. We note only that the theory has been abandoned in the Court's modern decisions,

Five years later, in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917), the views of Chief Justice White prevailed, and *Henry v. A.B. Dick* was overruled. This time, Justice Holmes dissented:

> The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which of course it is not, and more accurately as a possible domination to be established by such means. *But the domination is one only to the extent of the desire for the* [patented] *tea pot or film feeder*, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I cannot see in allowing him the right to do so anything more than an ordinary incidence of ownership . . . .

243 U.S. at 520 (emphasis added). The Court then embarked on a period of self-described "hostility" to tying arrangements. *See Loew's*, 371 U.S. at 46. That period culminated in the Court's 1947 decision in *International Salt Co. v. United States*, 332 U.S. 392 (1947), where the tying product was patented, and its 1948 decision in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), where the tying product was copyrighted.

International Salt and *Paramount Pictures* are significant here because the Federal Circuit has suggested that they must be "overrul[ed]" to reject the presumption of market power. Pet. App. 14a. But that is difficult to justify when neither

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see, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring) ("The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the tying product.") (emphasis omitted), and is routinely rejected by the commentators: "Tying cannot enable a patentee to attain a double monopoly profit by tying unpatented goods." HJL Treatise, *supra* note 4, § 21.3b, at 21-20. *See also Hyde*, 466 U.S. at 36 (concurrence describing this view as "easily demonstrated and widely accepted"). Whatever the historical merit of the leveraging theory, it helps to explain why the Court's early decisions did not address the issue of power in the tying product market.

case addressed, or even discussed, any requirement of power in the tying product. Instead, the cases relied expressly on the leveraging theory as their rationale.[25] The *International Salt* opinion condemned the tie as long as the "volume of business" affected in the tied product not be "insignificant or insubstantial." 332 U.S. at 396. The principal competitive evil identified was the tendency of the tie "to foreclose competitors from" access to sales of the tied product. *Id.* If these cases no longer comport with this Court's tying jurisprudence, they were disapproved long ago. It is not necessary to overrule them for providing the "wrong" answer to a question that was never asked.

B. The Period Of "Uniqueness."

The first case to consider any concept of power in the tying market came five years later in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). There the Court refused to condemn as an illegal tie a newspaper's requirement that ads be run in both its morning and afternoon papers. The Court's opinion described the Sherman Act's prohibition on tying as confined to cases where "the seller enjoys a monopolistic position in the market for the 'tying' product." 345 U.S. at 608. Because the defendant had no power in the relevant market for advertising, the tying claim was rejected.

In a series of subsequent decisions, however, the Court made clear that the definition of the "power" sufficient to satisfy this test was not actual market power in the modern sense of power over price, but something far broader. The first was *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), in which the tying product was the

[25] *Int'l Salt*, 332 U.S. at 395-96 ("But the patents confer no right to restrain use of, or trade in, unpatented salt."); *Paramount Pictures*, 334 U.S. at 158 ("Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other.").

"exclusive" landholdings of certain railroads along the right-of-way. Justice Black made clear that the suggestion in *Times-Picayune* that the defendant have a "monopolistic position" would not be taken literally:

> While there is some language in the *Times-Picayune* opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product . . . .

356 U.S. at 11. That power could be found in a tying case "regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not." *Id.* Indeed, that definition of power was so broad that it could be inferred from the very fact of the tying arrangement itself: "The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power . . . . " *Id.* at 7-8.

As the defendants in *Northern Pacific* argued unsuccessfully that market power was now the test, they tried to distinguish *International Salt*, which had not required proof of power, by asserting that the existence of the patent made the difference. Justice Black disagreed:

> In arriving at its decision in *International Salt* the Court 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.

Id. at 9 (original emphasis). For the Court in *Northern Pacific*, the result in *International Salt* was compelling evidence that the requisite power was *not* true market power—if that were the test, a patent alone clearly would not meet it:

> Of course 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 privileges is slight.

Id. at 10 n.8.

Four years later, this Court's decision in *Loew's* continued the process of defining down the concept of "power" in the tying market. The Court's oft-repeated statement that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted" was immediately preceded by this passage:

> Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

371 U.S. at 45 (footnote omitted). The *Loew's* Court thus could not have been clearer that its definition of the "requisite economic power" was *not* "some power to control price," and thus not actual market power in its modern sense. The *Loew's* Court continued in a footnote that a finding of "economic power . . . on the basis of either uniqueness or consumer appeal . . . does not necessitate a demonstration of market power." 371 U.S. at 45 n.4. And the Court specifically noted that "it should seldom be necessary in a tie-in sale case to embark on a full-scale factual inquiry into the scope of the relevant market . . . [or compute] the seller's percentage share in that market." *Id.*

Once the requisite power was defined as "uniqueness," moreover, a presumption of such power based on the existence of intellectual property followed by definition, because "one of the objectives of the patent laws is to reward uniqueness." *Id.* at 46. This is understandable. A patent is awarded only to inventions that are both novel and not obvious,[26] and thus distinctive by their very nature. A copyrighted work, moreover, is literally unique, as the law protects only the original item itself.[27] Thus, it was not difficult for the *Loew's* Court to find that the holding of *Paramount Pictures*, notwithstanding its failure to address the issue of power, fit comfortably into the "presumption of uniqueness," for "[a] copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen." 371 U.S. at 48.

In sum, and contrary to the opinion below, *Loew's* did not "ma[k]e clear that, where the tying product is patented or copyrighted, *market power* may be presumed rather than proven." Pet. App. 8a (emphasis added). Rather, it held only that *uniqueness* may be (and arguably must be) presumed from a copyright or patent. And that, as this Court has repeatedly stressed, is a very different inquiry.[28]

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[26] *E.g.*, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co*., 535 U.S. 722, 736 (2002) (citing 35 U.S.C. §§ 101-103 (1994 ed. and Supp. V)).

[27] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (Holmes, J.) ("Personality always contains something unique. . . . [Even] a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright . . . .").

[28] Nor did *Loew's* "confir[m] that patent tying is a distinct doctrine" from the law governing non-patented products. Pet. App. 8a. The Court of Appeals based that conclusion solely on a reference in *Loew's* to the defendants' argument "that their behavior is not to be judged by the principle of the patent cases . . . , but by the general principles which govern . . . nonpatented products." *Id*. But the *Loew's* Court, like Justice Black in *Northern Pacific*, *rejected* the defendants' argument that the doctrines were separate, noting that "[a]pplicability of *Paramount Pictures* brings with it a meeting of the test of *Northern Pacific* [for unprotected products], since *Paramount Pictures* is but a particularized application of the general doctrine as reaffirmed in *Northern Pacific*." *Loew's*, 371 U.S. at 50.

C. The Period Of Market Power.

The Court's subsequent decisions in *Fortner II* and *Hyde* fundamentally altered the law of tying. In *Fortner II*, the Court reversed a finding of requisite power in the tying product market that was based on a finding of uniqueness. That finding, in turn, was based on several indicia of uniqueness suggested by Justice Black in his prior opinion for the Court in *Fortner I*.[29] *See Fortner II*, 429 U.S. at 614-16. Among the findings of uniqueness considered in *Fortner II* was the same one that Justice Black had stressed in his *Northern Pacific* opinion: that "petitioners entered into tying arrangements with a significant number of customers in addition to Fortner." *Id.* at 614. This time, however, the Court rejected these findings as insufficient to establish the power requirement for tying. *Id.* at 618.

The *Fortner II* Court explained that "uniqueness" was relevant to the question of tying product power only to the extent that it reflected "whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Id*. at 620 (footnote omitted). The Court acknowledged that a commentator on *Fortner I* had "correctly analyzed the burden of proof" when he stated that "[it is] clear that market power in the sense of power over price must still exist." *Id*. at 620 n.13.

In this way, the definition of power for purposes of the "forcing" requirement in tying was changed fundamentally from the approach of *Northern Pacific* and *Loew's*. Whereas in *Loew's* true market power was simply one means of showing the requisite "uniqueness," now "uniqueness" was relevant only as a means of showing real power over price. Because what the plaintiff in *Fortner II* labeled "uniqueness"

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[29] *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

did not relate to actual market power, moreover, the plaintiff lost. *Id*. at 621-22. The doctrine was cemented by the decision in *Hyde*, where the Court rejected a tying claim because a 30-percent market share was too small to show market power, despite evidence that the surgical services involved were "unique" in other senses. *Hyde*, 466 U.S. at 27 ("While these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." (footnote omitted)). *Hyde* thus turned on precisely the kind of "factual inquiry into the . . . seller's percentage share" of the market that the *Loew's* opinion said was unnecessary "in a tie-in sale case." *Loew's*, 371 U.S. at 45 n.4. Those holdings cannot be squared with the statement in *Loew's* that "the mere presence of competing substitutes for the tying product" is insufficient to defeat a tying claim. *Loew's*, 371 U.S. at 49.

The Federal Circuit's conclusion that the requirement of tying product power was fundamentally altered by these decisions with respect to most products, but was left undisturbed when the tying product was patented or copyrighted, does not follow. The principal ground for the Federal Circuit's conclusion was a statement in *Hyde*—which the Federal Circuit described as "clearly articulated Supreme Court dicta" (Pet. App. 15a)—that it is "fair to presume" that a patent "gives the seller market power." *Id*. at 9a (quoting *Hyde*, 466 U.S. at 16). But that statement is insufficient to resolve the question presented here for numerous reasons.

Because *Hyde* did not involve intellectual property, the statement about patents in the majority opinion was not necessary to the Court's holding. Thus, that remark should be read with caution, especially when the *only* authority cited was *Loew's* itself, *see Hyde*, 466 U.S. at 16, citing 371 U.S. at 45-47, including the very page stating that a tying claim "does not necessitate a demonstration of market power . . . ." *Loew's*, 371 U.S. at 45 n.4.

The Court's assertion, moreover, if construed to presume actual market power, had already been questioned by other "clearly articulated Supreme Court dicta." Pet. App. 15a. Indeed, the falsity of that proposition was described as "common knowledge" by the Court twenty-five years earlier in *Northern Pacific*, 356 U.S. at 10 n.8.

The *Hyde* majority's remark about patents was further questioned by the four concurring members of the Court. Indeed, Justice O'Connor's *Hyde* concurrence described the presumption of market power in patent cases as a "common misconception." 466 U.S. at 37 n.7 (O'Connor, J., concurring). And when, only two months later, the Ninth Circuit relied on *Loew's* to apply a presumption of market power to intellectual property Justices White and Blackmun, both members of the *Hyde* majority, dissented from the Court's refusal to grant certiorari, describing the Ninth Circuit decision as "suspect on several grounds." *Data Gen. Corp. v. Digidyne Corp.*, 473 U.S. 908, 909 (1985) (White, J., dissenting from denial of cert.) (urging review to determine "what effect should be given to the existence of a copyright . . . in determining market power").

We do not suggest that "nose-counting," as the Federal Circuit characterized it, Pet. App. 12a, can be used to declare a change in this Court's law. The question here is whether the language in *Hyde*—relied upon, and characterized as dicta, by the Federal Circuit—should suffice to carve a patent exception to the new requirement of market power in tying cases.

The answer is that dicta should not decide cases. One of the many ironies of the cases following *Hyde* is that this Court's effort to expand the range of legality under the antitrust laws for beneficial ties in all areas (by redefining the required "power" as market power) has inadvertently narrowed the scope of legality for ties involving intellectual property. By also redefining the *Loew's* "presumption" to be one of market power, courts like the Federal Circuit have taken what was designed to be an additional burden for the claimant (who must prove real market power) and turned it into a burden for the intellectual property defendant (for whom real market power is presumed). Only by relying on the "dicta" in *Hyde* could the Federal Circuit reach such a strange result under this Court's decisions.

In sum, a review of this Court's tying jurisprudence does not support the holding of the Federal Circuit below. Rather, the conclusion of Justice O'Connor in the concurring opinion in *Hyde* still holds: "Nor does any presumption of market power find support in our prior cases."[30]

III. The Doctrine of *Stare Decisis* Cannot Justify The Presumption of Market Power.

A. The Presumption of Market Power Was Not Necessary to The Result in *Loew's.*

We have shown that there is no need to overrule *Loew's* because its holding did not depend on the question presented here. While it may be true that many of the presumptions, rationales, and acknowledged "hostilities" underlying *Loew's* have been undermined by the Court's tying jurisprudence, that happened long ago. As this Court observed in reconsidering another antitrust precedent, "[w]ith the views underlying [*Loew's*] eroded by this Court's precedent, there is not much of that decision to salvage." *State Oil v. Khan*, 522 U.S. at 21.

This Court has made it clear that the doctrine of *stare decisis* is reserved for holdings. Thus, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760 (1984), the Court pointed out that, while many of its prior decisions had expressed approval of the intra-enterprise conspiracy doctrine, "in all but perhaps one instance" that doctrine was unnecessary to the result. The Court did not, for example, overrule its decision in *United States v. Yellow Cab Co.*, 332

[30] *Hyde*, 466 U.S. at 38 n.7.

U.S. 218 (1947), on which many had relied in applying the intra-enterprise conspiracy doctrine. That was because *Yellow Cab* had been misinterpreted as applying the doctrine, when in fact it did not. *See Copperweld*, 467 U.S. at 762 (finding "little support for the broad doctrine *Yellow Cab* has been thought to announce").

The Court may deal with *Loew's* in the same way, because the holding in *Loew's* may be supported on alternative grounds, independent from the presumption of uniqueness. In *Loew's*, the lower court had found that each film "was in itself a unique product." The court had relied on evidence of the characteristics of each copyrighted film, which "varied in theme, in artistic performance, in stars, in audience appeal, etc.," for its conclusion that each defendant had market dominance over each film. *Loew's*, 371 U.S. at 48 (quoting 189 F. Supp. at 381). Based on this evidence, this Court concluded that each defendant "had a 'monopolistic' position as to each tying product," resulting in "sufficient economic power" to "confirm the presumption" and condemn the tie. *Id.* at 48.[31] Under this view, each individual film was a market unto itself in which the defendants held complete power over price and output. Because such a market definition is theoretically possible,[32] it is not clear that the holding in *Loew's* was necessarily dependent on any presumption. Indeed, several courts have distinguished *Loew's* on these grounds.[33]

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[31] Professor Pearson, in contemporaneous commentary, agreed with this approach, stating that "unless the Court is to play the part of the critic in each block-booking case to come before it, it would have to take the position either that each film is a separate product or that films are fungible. I think it was well warranted in taking the former approach." R. N. Pearson, *Tying Arrangements and Antitrust Policy*, 60 Nw. U. L. Rev. 626, 651 n.88 (1965).

[32] *See Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 482 (1992).

[33] *See, e.g.*, *Capital Temps., Inc. v. Olsten Corp.*, 506 F.2d 658, 663 (2d Cir. 1974) ("The appellant misreads *Loew's* if he concludes that the mere

B. *Loew's* Meets The Court's Criteria For Rejection Under *Stare Decisis*.

If, notwithstanding the above analysis, *Loew's* is read as supporting a presumption of market power, it appropriately may be overruled in keeping with the Court's past application of *stare decisis*. This Court has pointed out that "[i]n 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." *Khan*, 522 U.S. at 20. Rejecting the putative market power presumption of *Loew's* thus fits comfortably within the Court's "common-law tradition" of developing antitrust doctrine. *Id.* at 20-21. Here, as in *Copperweld*, this Court "has never explored or analyzed in detail the justifications for such a rule." 467 U.S. at 766. Here, as in *Khan*, "the analytical underpinnings of [*Loew's*] were substantially weakened by" later decisions. 522 U.S. at 14.

Indeed, this is a stronger case for reversal in at least two ways. First, the extent of opposition to the presumption is unprecedented. For this Court to uphold an antitrust rule deemed unambiguously harmful to consumers solely on the basis of *stare decisis* would transform the doctrine into an "inexorable [and irrational] command." *Khan*, 522 U.S. at 20. Second, unlike the rules rejected in *Copperweld* and *Khan*, there is substantial disagreement as to what this Court's "prior" rule has been. As we explain below, there is ample dissent among the courts as to what *Loew's* requires. That was not the case in *Copperweld*, where Justice Stevens pointed out that "it had been the universal conclusion of both the lower courts and the commentators that this Court's cases establish" the intra-enterprise conspiracy doctrine. 467 U.S.

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existence of the copyrighted tying motion pictures was enough to create the tying."); *3 P.M., Inc. v. Basic Four Corp.*, 591 F. Supp. 1350, 1359 n.11 (E.D. Mich. 1984). *See also* HJL Treatise, *supra* note 4, at 4-37 n.114.

at 783-84 (Stevens, J., dissenting). In *Khan*, moreover, there was no dispute that the Court's decisions had declared maximum vertical price-fixing unlawful *per se*. 522 U.S. at 7. The case for *stare decisis* is undermined where, as here, there is sharp disagreement as to whether the "established" rule is, in fact, established.

C. There is No "Reliance" Interest That Supports the Application of *Stare Decisis* Here.

Respondent has argued that the doctrine of *stare decisis* prohibits the Court from overruling *Loew's* because members of the legal and business communities have for several decades relied on *Loew's* and ordered their affairs accordingly. Resp. Br. in Opp. to Cert. at 5. If the Court determines that it must overrule *Loew's*, the ABA believes that it offers a valuable perspective on the extent to which this legal doctrine has ordered legal affairs. In our view, Respondent has it backwards.

For nearly 30 years, it has been clear to bench and bar that the *per se* rule against tying was not a *per se* rule in the same sense as others, that is, one in which no inquiry into actual market structure is made. Rather, the Court held in *Fortner II* and emphatically reaffirmed in *Hyde* that a tying arrangement cannot harm competition without a showing of actual market power in the tying product. This requirement, as the Federal Circuit acknowledged below, Pet. App. 6a-7a, marked a fundamental change from this Court's prior precedents.

These decisions eroded the basis for assuming that the Court would continue to apply *any* presumption to intellectual property—much less a new presumption of genuine market power. This view was confirmed shortly after the 1984 decision in *Hyde*, when the Ninth Circuit construed *Loew's* to require a presumption of market power and two Justices of the *Hyde* majority promptly labelled the decision "suspect."[34] By 1986, both the Sixth and Seventh Circuits had rejected that reading of *Loew's*,[35] and the majority of courts thereafter concurred. Pet. 23 n.8.

In fact, the criticism of the Ninth Circuit's *Digidyne* decision for over twenty years makes the point that there has been no "reliance" by the legal and business community on the presumption of *Loew's*. Far from being accepted as an inevitable application of *Loew's*, *Digidyne* has been assailed by commentators, rejected by other Circuits, and ignored by numerous District Courts.[36] Thus, the suggestion of the Federal Circuit below that the presumption of market power in patent cases is a settled doctrine only questioned by the Sixth Circuit in *A.I. Root* and by two others "in dictum," Pet. App. 13a, is unfounded. On the contrary, Judge Easterbrook's description fifteen years ago is closer to the mark:

> The tying doctrine was linked to market power in *Hyde*, and although some lower courts missed the message and continued to hold that copyrights and patents are monopolies, most got on board.[37]

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[34] *Data Gen. Corp. v. Digidyne Corp.*, 473 U.S. 908, 908 (1985) (White, J., dissenting from denial of cert.).

[35] *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985).

[36] *See* X Areeda & Hovenkamp, ¶ 1737d, at 83-85 (discussing *Digidyne* and observing that "[t]he basis for inferring power from a copyright or trademark is even weaker than it is for patents"); *Will*, 776 F.2d at 673 n.4 (rejecting *Digidyne*); *Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 236 (S.D.N.Y. 1988) (same); X Areeda & Hovenkamp, ¶ 1737d, at 85 n.37 (collecting cases).

[37] Hon. F.H. Easterbrook, *Intellectual Property is Still Property*, 13 Harv. J.L. & Pub. Pol'y 108, 113 (1990). The principal case that "missed the message" at that time was *Digidyne*:

> The Ninth circuit held in *Digidine Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), that the software of a computer

Current commentators agree that "[e]ven in antitrust cases, the presumption of market power for patents has largely disappeared since 1988."[38] In commenting on the Federal Circuit's decision in this case, moreover, Professor Hovenkamp concluded as follows:

> Heretofore the presumption of market power for patented or copyrighted products had languished to the point that antitrust plaintiffs chose not to rely on it. With the Federal Circuit's new imprimatur, however, one can expect that plaintiffs will rely on the presumption in a much wider variety of situations, and in most of these it will be unwarranted.[39]

Whichever way the Court decides to resolve the issue now, the state of the law we have set forth does not describe orderly adherence to an established precedent reflected by the holding of cases such as *Digidyne*. It describes, rather, a state of uncertainty. And that uncertainty has been heightened dramatically by this decision of the Federal Circuit, a court which has stated that "the antitrust consequences of patent tying . . . is a question governed by our law." Pet. App. 4a-5a (footnote omitted).

From the perspective of the ABA, therefore, there has not been "reliance" by the legal or commercial community on the presumption in *Loew's* in any sense important to *stare decisis*. Rather, there has been a consensus that a presumption of market power is unwarranted as a matter of

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> representing less than one percent of any market represented economic power sufficient to bar a tie-in between hardware and software. Almost everyone else, including the Seventh Circuit, in *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985), rejected that view and held that intellectual property is now just like other property.

Id. at 113 n.18.

[38] HJL Treatise, *supra* note 4, at 4-36.

[39] Areeda & Hovenkamp, *supra* note 10, ¶ 518, at 197-98 (Supp. 2005) (footnote omitted).

economics and legal policy. At the same time, the ABA has recognized that, while most courts have rejected the presumption of market power, others have felt constrained to apply it. The Court's effort to provide clarity and guidance in this area of the law will be frustrated as long as there are those who believe that the presumption of market power in patent cases is "still" the law.

CONCLUSION

For the reasons stated, the ABA respectfully requests that this Court reverse the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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