Spilled ink or economic progress? The Supreme Court's decision in Illinois Tool Works v. Independent Ink

BY BRUCE H. KOBAYASHI*

I. INTRODUCTION

The U.S. Supreme Court's decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*[1] falls squarely within the Court's recent holdings that limit the application of the antitrust laws.[2] In a unanimous decision, the Court rejected the presumption of antitrust market power in patent tying cases. In addition, the Court also rejected a narrower version of

* Professor of Law, George Mason University Law School, Arlington, VA.

AUTHOR'S NOTE: *I would like to thank Josh Wright and Christine Durrance for comments on an earlier draft.*

[1] 547 U.S. 28 (2006).

[2] This case was one of three antitrust cases decided in the 2005–2006 Term. In the other two cases, the Court limited the applicability of the Robinson-Patman Act (Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006)), and held that is was not per se illegal for a lawful, economically integrated joint venture to set prices of products it sells (Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006)). This trend has continued in the 2006–2007 Term, with the Court overruling its longstanding per se treatment of minimum resale price maintenance (Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007)), holding that plaintiffs' pleadings in section 1 cases must contain more than the bare assertion of conspiracy (Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007)),

the presumption of market power that would have applied a rebuttable presumption of market power in cases involving "requirements ties." As a result, any special presumptions in cases involving patent tying claims were eliminated, and plaintiffs pursuing such claims must now prove that the defendant had market power in the tying product.

The Court's recognition that patents do not necessarily confer antitrust market power is consistent with the broad consensus that has developed that views patents and intellectual property rights as distinct from monopolies. Moreover, the Court's decision recognized that a presumption of market power and the per se condemnation of patent tying arrangements would be inconsistent with the broad consensus that such tying arrangements can be procompetitive generally and are presumptively procompetitive in the absence of market power. The Court's holding has been described as "clearly correct"[3] by the Antitrust Modernization Commission and is likely to be widely viewed as a positive marginal development in evolution of U.S. antitrust law.[4]

On the other hand, the Court's holding in *Illinois Tool Works* will ultimately be a modest improvement in an area where antitrust law has far to go.[5] While the Court can be excused for failing to address

---

extending the *Brooke Group* rule to allegations of predatory buying (Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007)), and holding that federal securities laws preempted state and federal antitrust laws in suits based on conduct regulated by the federal securities laws (Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007)). *See generally* Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 COMPETITION POL'Y INT'L 3 (2007) (discussing trend and underlying reasons).

[3] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 105 (Apr. 2007), *available at* http://www.amc.gov/report_recommendation/toc.htm.

[4] *See, e.g.*, Joshua D. Wright, *Missed Opportunities in* Independent Ink, 5 CATO SUP. CT. REV. 333 (2006); Richard G. Taranto, Illinois Tool Works v. Independent Ink: *A Lawyer's Take on Ending Special Suspicion of Patent Tying*, 2 COMPETITION POL'Y INT'L 169 (2006); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 156 (2007 Supp.).

[5] *See, e.g.*, David S. Evans, *Tying: The Poster Child for Antitrust Modernization, in* ANTITRUST POLICY AND VERTICAL RESTRAINTS (R. W. Hahn ed., 2006); AREEDA & HOVENKAMP, *supra* note 4, at 163.

issues not before it, such as reforming the law of tying, the Court's analysis was unnecessarily narrow in several key areas. Perhaps the most serious omission was the Court's failure to clarify what proof of market power means in such cases. Specifically, the Court's analysis implicitly recognizes a distinction between proof of antitrust market power and the extent to which a firm faces a downward sloping demand curve. However, this point is never explicitly stated. While this result is not surprising given the near complete absence of economic analysis in the Court's opinion, it is a serious omission given the Court's most recent holding in this area, *Eastman Kodak Co. v. Image Technical Services, Inc.*,[6] and the general need for guidance in this area.

The remainder of the article is organized as follows. Section II discusses the litigation in the lower courts. Section III analyzes the Supreme Court's opinion in *Illinois Tool Works*. Section IV discusses how the Court's decision in *Illinois Tool Works* impacts tying law generally. Specifically, this section discusses the status of the per se rule as applied to tying generally and the relationship between the Court's holding in *Illinois Tool Works*, the Court's prior holding in *Kodak*, and the economics of metering and price discrimination. Section V concludes, and discusses how the Court's decision in *Illinois Tool Works* relates to its decisions in other recent antitrust cases.

II. BACKGROUND AND LITIGATION IN THE LOWER COURTS

The conduct at issue in the case involves the defendant/petitioner's use of a metering tie that conditions the sale or licensing of a patented item to the purchase of unpatented ink exclusively from the patentee. The petitioner Illinois Tool Works (ITW), through its subsidiary Trident,[7] produced and sold printhead systems for inkjet printers used for printing barcodes on cartons and other materials made of corrugated materials and kraft paper. The printhead systems sold by Trident/ITW included a patented printhead and ink container that was capable of delivering large quantities of ink from a

[6] 504 U.S. 451 (1992).

[7] ITW purchased Trident after the initial complaints had been filed.

remote source. Trident/ITW also sold unpatented ink for use with its printhead system. In addition, their licensing agreements required printer manufacturers to purchase ink from Trident, and required that the manufacturers and their end-use customers agree not refill the ink containers at all.

Respondent Independent Ink sold ink that was chemically identical to the ink sold by Trident/ITW. Independent Ink sued Trident,[8] alleging that Trident's license restrictions on the use of aftermarket ink and the refilling of ink containers was an illegal tie in violation of section 1 of the Sherman Act,[9] and also constituted illegal monopolization and attempted monopolization under section 2 of the Sherman Act.[10] The defendant moved for summary judgment on the section 1 and section 2 claims, and the plaintiff moved for summary judgment on the section 1 claim. The district court denied the plaintiff's motion for summary judgment on the section 1 claim, and granted the defendant's motions for summary judgment on both the section 1 and section 2 claims.[11]

In evaluating the plaintiff's motion for summary judgment on the section 1 claim, the court noted that "the issue before this court concerning Plaintiff's claim under section 1 of the Sherman Act is narrowly focused upon whether a patent confers market power in the market for the tying product as a matter of law."[12] The district court held that the fact that the tying product was covered by a patent did not, without more, establish that the defendant possessed market power in the market for the tying product. The district court argued that the prior prece-

---

[8] This action began when Independent Ink sought a declaratory judgment that it did not infringe on two of Trident's patents. The antitrust claims were amended claims. The patent litigation was decided prior to the district court's decision on the antitrust claims, with Trident's infringement claims being dismissed with prejudice.

[9] 15 U.S.C. §1.

[10] 15 U.S.C. §2.

[11] Indep. Ink, Inc. v. Trident, Inc., 210 F. Supp. 2d 1155 (C.D. Cal. 2002), *aff'd in part and rev'd in part*, 396 F.3d 1342 (Fed. Cir. 2005), *rev'd sub nom.* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

[12] *Id.* at 1160.

dents relied upon by the plaintiff that contained language concerning presumptions of market power based upon patents, including *International Salt*[13] and *Loew's*,[14] arose at a time when genuine proof of power in the market for the tying product was not required generally.[15]

Because the plaintiff relied on the existence of a presumption of market power, it did not present evidence on that issue. The district court held that this omission was fatal to the plaintiff's claim that the defendant's tying arrangement was a per se violation of the Sherman Act.[16] The plaintiff did not argue that the tying arrangement violates section 1 of the Sherman Act pursuant to the rule of reason.

In evaluating the defendant's motion for summary judgment on the section 1 and section 2 claims, the district court held that defendant could not be held liable for monopolization or attempted monopolization because the plaintiff offered no evidence defining the relevant product or geographic markets and thus failed to prove the defendant possessed the requisite market power.[17]

On appeal, the Federal Circuit upheld the district court's grant of summary judgment for Trident on the section 2 claims, but reversed the lower court's grant of summary judgment for the defendant on the section 1 claim.[18] The court rejected the district court's dismissal of several Supreme Court precedents as "vintage," holding that the Court's cases in this area "squarely establish that patent and copy-

---

[13] Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

[14] United States v. Loew's, Inc., 371 U.S. 38 (1962). For a discussion of the plausibility of market power in the tying market in this case, see Bruce H. Kobayashi, *Two Tales of Bundling: Implications for the Application of Antitrust Law to Bundled Discounts*, *in* ANTITRUST POLICY AND VERTICAL RESTRAINTS, *supra* note 5, at 14–17; Roy Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J. LEGAL STUD. 497 (1983).

[15] *Indep. Ink v. Trident*, 210 F. Supp. 2d at 1165.

[16] *Id.* at 1168.

[17] *Id.* at 1167–73 (defendant's motion for summary judgment on section 1 claims), 1173–77 (defendant's motion for summary judgment on section 2 claims).

[18] Indep. Ink, Inc. v. Ill. Tool Works, Inc., 396 F.3d 1342, 1348–49 (Fed. Cir. 2005).

right tying, unlike other tying cases, do not require an affirmative demonstration of market power. Rather *International Salt* and *Loew's* make clear that the necessary market power to establish a section 1 violation is presumed."[19] Later Supreme Court cases, including *Kodak* and *Jefferson Parish* required a showing of antitrust market power because patents or other intellectual property rights were not being asserted.[20] Concluding that the Supreme Court has held that there is a presumption of market power in patent tying cases, the court was obliged to follow this precedent. Moreover, if the precedent was in fact misguided and outdated, it was "up to the Congress or the Supreme Court to make that judgment."[21]

The Federal Circuit then addressed whether the presumption of market power articulated in its earlier cases results in a per se rule against patent tying. Noting that no Supreme Court case directly addressed this issue, the court attempted to ascertain the rule from dictum, and concluded that a patent presumptively defines the relevant market as the nationwide market for the patented product itself, and that the presumption of antitrust market power within this market can be rebutted. Moreover, it rejected the district court's finding that any presumption of market power was rebutted in this case because of the existence of competitive products. According to the Federal Circuit, the mere presence of competing substitutes for the patent was insufficient to overcome the presumption. Rather, the presumption can only be rebutted "by expert testimony or other credible economic evidence of the cross-elasticity of demand, the area of effective competition, or other evidence of lack of market power."[22]

---

[19] *Id.* at 1349–50.

[20] As the Areeda & Hovenkamp treatise notes, there were many patented parts involved in the *Kodak* case. However, the existence of these patents was not asserted by either party in the litigation prior to the Supreme Court case. *See* AREEDA & HOVENKAMP, *supra* note 4, at 146.

[21] *Indep. Ink v. Ill. Tool Works*, 396 F.3d at 1351.

[22] *Id.* at 1352.

III. THE SUPREME COURT'S DECISION

The Supreme Court granted certiorari to "undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements."[23] In a unanimous 8–0 decision by Justice Stevens, the Court reversed the Federal Circuit.[24] The Court's decision addressed the question of whether "the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law."[25] The Court concluded that the "mere fact that a tying product is patented" does not support a presumption of market power and held that in all cases involving a tying arrangement the plaintiff must prove that the defendant has market power in the tying product.[26]

The Court's analysis begins with a description of its past tying decisions. The Court notes that its strong disapproval of tying arrangements, present in earlier cases, had substantially diminished over the years.[27] In its more recent opinions, the Court has required a showing of market power in the tying market.[28] However, the Court notes that these recent cases involved tying products that were unpatented.[29] The Court also traces the origins of the assumption that

---

[23] Ill.Tool Works, Inc. v. Indep. Ink, Inc., 545 U.S. 1127 (2005).

[24] Ill.Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006). Justice Alito took no part in the consideration of the decision in this case.

[25] *Id.* at 31.

[26] *Id.* at 46.

[27] *Id.* at 35. The Court notes that its early opinions constantly assumed that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," citing Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305–06 (1949), United States v. Loew's, 371 U.S. 38, 47–48 (1962), and Fortner Enters., Inc., v. U.S. Steel Corp., 394 U.S. 495, 498–99 (1969).

[28] U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 622 (1977) (rejecting the assumption that tying arrangements serve hardly any purpose beyond the suppression of competition); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (rejecting the application of the per se rule that all tying arrangements constitute antitrust violations).

[29] *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 36.

a patent confers market power to the patent misuse doctrine[30] and its migration to antitrust law in *International Salt*.[31] The Court's opinion clearly sides with the Federal Circuit here, noting that "[o]ur opinion in *International Salt* clearly shows that we accepted the Government's invitation to import the presumption of market power in a patented product into our antitrust jurisprudence."[32]

Indeed, the Court's opinion finds that the existing rule applicable to patent ties was stronger than found by the Federal Circuit. The Court, in discussing its prior opinion in *Jefferson Parish*, notes that

> [n]othing in our opinion suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good. Instead, it described the rule that a contract to sell a patented product on condition that the purchaser buy unpatented goods exclusively from the patentee is a *per se* violation of §1 of the Sherman Act.[33]

The Court's opinion then turns to a "reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product."[34] As others have noted, the Court's language seems

---

[30] *Id.* at 38 (citing Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490 (1942); Carbice Corp. of Am. v. Am. Patents Dev. Corp., 283 U.S. 27, 31 (1931)).

[31] *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 38–39.

[32] *Id.* at 39. This is in direct contrast to the position taken by the district court below. *See* Indep. Ink, Inc. v. Trident, Inc., 210 F. Supp. 2d 1155, 1165 (C.D. Cal. 2002). It also contradicts the position taken by the United States in their amicus brief. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, at 18–25, *Ill. Tool Works v. Indep. Ink*, 547 U.S. 28 (No. 04-1329). Given the Court's holding, this issue is largely an academic one. *See* Wright, *supra* note 4, at 333. The one exception may be its effect on the parties. The Court, in remanding the case, noted that the respondent "reasonably relied on our prior opinions in moving for summary judgment without offering evidence defining the relevant market or proving that petitioners possess power within it." 547 U.S. at 46. Thus, the Court concluded that "the respondent should therefore be given a fair opportunity to develop and introduce evidence on that issue as well as any other issues that are relevant to its remaining §1 claims." *Id.* Indeed, the plaintiff has chosen to continue the litigation on remand, and the market power issue is currently being litigated in the district court.

[33] 547 U.S. at 38 (citations omitted).

[34] *Id.* at 40.

to turn the analysis from a reexamination of the presumption of market power to a reexamination of the presumption that patent ties were per se illegal.[35] Here, and in several other places,[36] the Court's analysis conflates the issue of a presumption of market power, a necessary condition for use of the modified per se test used to evaluate ties not involving intellectual property, and a special per se rule of liability where the existence of a patent tie is a sufficient condition for liability.[37]

The impact of the Court's lack of clarity is greatly diminished by the fact that the Court clearly holds that neither the presumption of market power, nor a special rule in which patent ties are illegal per se survives this decision.[38] The Court's analysis turns to the underlying foundation of the per se rule against patent tying, the patent misuse doctrine. The Court notes that Congress, in both the 1952 Patent Act, and in the 1988 amendments to that Act, enacted legislation that was at odds with the presumption underlying the Court's per se rule.[39]

---

[35] *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 4, at 162.

[36] For example, the Court, in discussing the 1988 amendment to 35 U.S.C. §271(d) of the Patent Act, states that this amendment "certainly invites a reappraisal of the per se rule announced in *International Salt*." *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 42.

[37] Here the Court does not address its holding in N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1957), in which the Court, in holding that the per se rule in *International Salt* applies to nonpatent ties, explicitly rejected any distinction between patent ties and nonpatent ties. *See* AREEDA & HOVENKAMP, *supra* note 4, at 163, noting that the Court, if anything, held the challenged tying arrangements unlawful despite the fact that the tying item was patented, not because of it.

[38] *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 42–43.

[39] While the Court eliminated what it saw as a glaring inconsistency between the law of patent misuse and antitrust law, it did not address the remaining inconsistencies between these laws generally or as applied to tying conduct. The Court's reliance on the law of patent misuse to modernize antitrust law may be a bit of an anomaly. In many other areas, the relationship between patent misuse and antitrust is the opposite, with the misuse doctrine lagging behind antitrust law and economics. *See, e.g.*, Jeffery B. Fromm & Robert A. Skitol, *Harmonization of the IP Misuse Doctrine and Antitrust Law: A Call for Help from the Agencies and Congress*, ANTITRUST SOURCE, Jan. 2003, at 1, http://www.abanet.org/antitrust/at-source/03/01/frommskitol.pdf; (2003); Mark A. Lemley, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CAL. L. REV. 1599 (1990).

Interpreting sections 271(c) and (d) of that act, the Supreme Court held that tying of a nonstaple product, a product that has no use except as part of the patented process or product, was not misuse.[40] Moreover, the 1988 amendment to this section explicitly eliminated the presumption of market power in the patent misuse context, which provided the historical foundation of the Court's per se rule against patent tying.[41] Moreover, the Court notes that "it would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute 'misuse.'"[42]

Thus, "after considering the congressional judgment reflected in the 1988 amendment,"[43] the Court concludes that tying arrangements involving patented products should be evaluated under the standards applied to nonpatent tying cases, "rather than under the *per se* rule applied in *Morton Salt* and *Loew's*. While some arrangements are still unlawful, such as those that are the product of a true monopoly or a market wide conspiracy, that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof."[44]

Finally, the Court's opinion addresses the respondent's argument that the Court should replace the rule of per se illegality with a more narrowly tailored presumption of market power. The primary argument, set forth in the amicus brief of Professors Nalebuff, Ayres, and

---

[40] *Dawson Chem. v. Rohm & Haas*, 448 U.S. 176 (1980), interpreting 35 U.S.C. §271(c) & (d).

[41] In 1988, Congress added the following provision to 35 U.S.C. §271(d): "No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license of sale in conditioned."

[42] *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 42.

[43] *Id.*

[44] *Id.* at 42–43 (citation omitted).

Sullivan (Nalebuff et al. Brief) acknowledges that many patents do not confer market power.[45] However, under their analysis, the presumption should still apply to those that do. The Court addressed and rejected two proposed alternatives to sort out patents with and without market power. The first is a rebuttable presumption that the patentee possesses market power when the tie conditions the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee. The second is a narrower presumption of market power when the tying arrangement involves a metering tie—the purchase of an unpatented good over a period of time. According to the argument, the presumption should apply because such metering ties are used to implement second-degree price discrimination, which requires that the seller possesses market power.

Addressing the respondent's economic arguments would seem to require that the Court analyze the economics of metering ties and the critical economic assumptions made in the Nalebuff et al. Brief.[46] As analyzed in detail below, these include the assumption that a seller who faces a downward sloping demand curve, and thus has power over his own price, necessarily has market power that is relevant to an antitrust inquiry. It also includes the assumption that the use of metering to achieve price discrimination should be condemned because it has a pernicious effect on competition and lacks any redeeming value.

However, rather than address the economic issues directly, the Court's primary reason for rejecting the two proposed alternatives is doctrinal. Specifically, the Court reasoned that the opinion in *International Salt,* which "imported the 'patent equals market power' presumption into our antitrust jurisprudence, . . . provides no support for the respondent's proposed alternative" because it did not rely on the existence of a requirements tie to presume market power and

---

[45] *See* Brief of Professors Barry Nalebuff, Ian Ayres, and Lawrence Sullivan as Amici Curiae in Support of Respondent, *Ill. Tool Works v. Indep. Ink,* 547 U.S. 28 (No. 04-1329) [hereinafter *Nalebuff et al. Brief*]. *See also* Barry Nalebuff, *Unfit to be Tied: An Analysis of* Trident v. Independent Ink, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY, (J. Kwoka & L. White eds., 5th ed. forthcoming 2008).

[46] *Nalebuff et al. Brief, supra* note 45.

because the requirements tie in that case did not involve volume-based price discrimination.[47]

In addition to its doctrinal response, the Court does recognize that the inference of market power from the existence of price discrimination is unwarranted. It notes that "while price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package, it is generally recognized that it also occurs in fully competitive markets."[48] Thus, the Court concludes that neither the existence of a patent nor price discrimination alone should give rise to a presumption of market power. Given this, the Court was not persuaded that the combination of these two factors "should give rise to a presumption of market power when neither is sufficient to do so standing alone. Rather, the lesson to be learned from *International Salt* and the academic community is the same: Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market. For this reason, we reject both respondent's proposed rebuttable presumption and their narrower alternative."[49]

The Court notes the "virtual consensus among economists that has persuaded the enforcement agencies to reject the position of the Government when it supported the *per se* rule that the Court adopted in the 1940's,"[50] and that "[w]hile such a change is not binding on the Court, it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases

---

[47] *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 44. The Court noted that in *International Salt*, it was "the existence of the patent on the tying product, rather than the use of a requirements tie, that led the Court to presume market power. . . . Moreover, the requirements contract tie in that case did not involve any price discrimination between large volume and small volume purchasers or evidence of noncompetitive pricing. Instead the leases at issue provided that if any competitor offered salt, the tied product, at a lower price, 'the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price.'"

[48] *Id.* at 45 (citations omitted).

[49] *Id.*

[50] *Id.*

with a rule of severity for a special category of cases."[51] The Court concludes that

> Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.[52]

IV. TYING, ECONOMICS, AND MARKET POWER WITHOUT A PRESUMPTION

The Court's holding clearly eliminates application of a special presumption of market power or a special per se rule of illegality in patent tying cases. In doing so, the Court usefully attempts to align the law applicable to patent tying cases with the parallel doctrine in both nonpatent tying and patent misuse. This doctrine has evolved to reflect the virtual consensus among economists, enforcement agencies, and Congress that market power cannot be presumed from the existence of a patent or the observation that the seller is engaging in price discrimination, either alone or in combination. Moreover, the Court repeats its rejection of the assumption that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition,"[53] and explicitly recognizes that tying arrangements, including those involving requirements ties, "are fully consistent with a free, competitive market."[54]

In this section, I examine the relationship between the Court's holding in *Illinois Tool Works* and related issues in the law of tying that were not addressed by the Court. Specifically, the Court rejected, but did not explicitly address, the economic arguments made by the petitioner. Nor did it address how cases should proceed in the absence of

---

[51] *Id.* The Court's suggestion that it apply a "rule of lenity" and its reference to the criminal punishment provisions of the Sherman Act seem odd in a civil case under a statute where criminal prosecution for anything other than naked horizontal price fixing is unheard of. *See* Taranto, *supra* note 4, at 178.

[52] *Ill. Tool Works v. Indep. Ink*, 547 U.S. at 46.

[53] *Id.* at 36.

[54] *Id.* at 45.

a presumption or market power. Moreover, although the Court overruled what they saw as the existing per se rule for patent ties, it did not address the continued validity of the Court's modified per se rule for tying arrangements generally or discuss how one would proceed in the presence of market power. Many of these issues were not in the certiorari question presented to the Court. Nonetheless, the fact that these questions and other regarding the law of tying remain unresolved may limit the impact of the Court's useful but narrow holding in *Illinois Tool Works.*

A. The Court's opinion and minimizing economics

The Court's opinion placed economic reasoning in the background, invoking it only by reference when it addressed the respondent's economic argument for a presumption of market power in the presence of price discrimination. In this section, the assumptions underlying the respondent's argument for a rebuttable presumption of market power in the presence of a metering tie are set out and explicitly addressed. While the Court implicitly rejected these assumptions through its economic citations and through its rejection of the respondent's argument, this section addresses them directly.

The case for a rebuttable presumption in the presence of a metering tie is set out in the Nalebuff et al. Brief for the respondent.[55] In the brief, they discuss generally the pro- and anticompetitive explanations for tying and note that the most plausible explanation for the tie in *Illinois Tool Works* was as a metering device to facilitate price discrimination. By restricting the use of aftermarket ink and prohibiting the refilling of the ink containers, ITW was able to monitor the intensity of customer use and charge large volume purchasers more. Thus, the purpose of the metering device was to increase profits via second-degree price discrimination, a form of imperfect price discrimination.[56]

---

[55] *Nalebuff et al. Brief, supra* note 45.

[56] *See* A.C. PIGOU, THE ECONOMICS OF WELFARE (1920) (classifying price discrimination by "degrees"). Perfect discrimination, where each user is charged a price that extracts all of the consumer surplus, is called "first-degree" price discrimination. As noted in the *Nalebuff et al. Brief,* this type of price discrimination achieves static efficiency and is rare. Third-degree and

The brief then argues that a firm's use of metering is "strongly indicative" that the seller has significant market power, thus justifying a presumption, while rebuttable, that favors the challenger of the tie. The brief asserts that that metering is an exercise of a firm's market power and is direct evidence of market power. Moreover, it argues that metering is ambiguous with respect to welfare and is not presumptively procompetitive. Finally, the brief argues that banning metering ties would not generate any type I error costs (the costs of wrongly condemning procompetitive behavior) because firms could legally price discriminate by directly metering through the use of transparent per unit pricing policies.

The primary argument contained in the Nalebuff et al. Brief is that price discrimination is direct evidence of "significant market" power, and that "this justifies a rule specifying that requirements tying arrangements result in a rebuttable presumption of market power. . . . In a perfectly competitive market, such results are not possible."[57] Thus, the brief's argument that price discrimination equals significant (antitrust) market power begins with the observation that price discrimination would not be observed in perfectly competitive markets. Thus, the discriminating firm must face a downward sloping demand curve. Moreover, the brief asserts that the respondent's demonstrated ability to significantly raise ink prices above marginal cost shows that the firm possesses significant market power, noting that "the amount of price discrimination a firm can impose is related to its market power."[58] Specifically, because Trident charged 2.5 to 4 times the price offered by Independent Ink, this price

---

second-degree price discrimination are more commonly observed. Under third-degree price discrimination, consumers are grouped according to their elasticities of demand, and each group is charged a unique profit maximizing price. Metering is an example of second-degree price discrimination, where consumers are offered a single profit maximizing unit price, but pay different prices based on their intensity of use. The welfare consequences of second- and third-degree price discrimination are ambiguous. *See generally,* Michael J. Meurer, *Price Discrimination, Person Use and Piracy: Copyright Protection of Digital Works,* 45 BUFF. L. REV. 845 (1997).

[57] *Nalebuff et al. Brief, supra* note 45, at 22.

[58] *Id.* at 24.

differential indicates "a substantial degree of price discrimination and hence market power."[59]

However, the inference of antitrust market power based on the observation that a market deviates from the perfectly competitive ideal is not warranted. Nor is the inference that the degree of market power possessed by the discriminating firm is related to the amount of price discrimination. As others have pointed out, comparisons to perfectly competitive idealized markets generally are not useful in evaluating real world firms and markets.[60] If deviations from idealized markets were indicators of significant market power, then the infrequent observation of such idealized markets would imply that the exercise of significant market power is ubiquitous. Of course, deviations from perfect competition, including the observation of metering ties, are not indications of significant market power. Firms do not require significant market power to engage in second-degree price discrimination. Rather, all that is required is that the firm sell differentiated products that are not perfect substitutes for their rivals' products. And such product differentiation is ubiquitous in real world markets. Firms in competitive industries frequently engage in price discrimination, including many forms of second-degree price discrimination, and frequently price above marginal cost.[61]

The Nalebuff et al. Brief also conflates the concept of a downward sloping demand curve with the concept of market power. A firm's power over its own price, even a "significant" ability to raise price over marginal costs, is not an indicator of significant market power for antitrust purposes.[62] The former requires only that the firm's own

---

[59] *Id.*

[60] *See* Benjamin Klein, *Market Power in Aftermarkets*, 17 MANAGERIAL & DECISION ECON. 143 (1996).

[61] *See* Wright, *supra* note 4.

[62] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984) ("market power exists whenever prices can be raised above levels that would be charged in a competitive market"). Antitrust market power would coincide with a firm's power over its own price only if competitive markets were equated with "perfectly competitive" markets, where prices equal marginal cost. *See* Wright, *supra* note 4, at 341–42.

price elasticity is not infinite, while the latter requires that the firm have power over the market price. Indeed, the Court cites three academic sources for the proposition that it is "generally recognized" that price discrimination occurs in fully competitive markets.[63] All three of these sources explicitly recognize the difference between a firm facing a less than perfectly elastic supply curve and the concept of market power relevant for antitrust. The Court, however, does not explicitly make this distinction in the opinion.

The brief then turns to the evaluating whether firms should be allowed to engage in price discrimination under the antitrust laws. It correctly notes that the relationship between price discrimination and welfare is ambiguous.[64] The brief notes the standard result regarding the ambiguity of welfare and price in a static model, and also makes the additional point that it is also ambiguous in a dynamic setting.[65] In addition, while the brief did not stress this point, one could also add that the welfare consequences of price discrimination are made even more complex by the fact that intellectual property is involved.[66]

Given the ambiguous nature of the relationship between price discrimination and welfare, the brief argues that this shows that there is

---

[63] William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 ANTITRUST L. J. 661, 666 (2003) (accepting that price discrimination requires that a firm face a less than perfectly elastic demand curve, but arguing that price discrimination is not a reliable indicator of market or monopoly power in any sense relevant to antitrust policy); William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 374–75 (2003) (noting the demand elasticity point and criticizing the use of such demand elasticity as a measure of market power relevant to antitrust); IX PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 101 (2d. ed. 2004) (noting that "price discrimination is not a warrant for condemning a tie that is not objectionable on other grounds").

[64] *Nalebuff et al. Brief*, *supra* note 45, at 20.

[65] *Id.* at 21.

[66] *See, e.g.*, Harold Demsetz, *The Private Production of Public Goods*, 13 J. L. & ECON. 293 (1970); Meurer, *supra* note 56; Jerry A. Hausman & Jeffrey K. MacKie-Mason, *Price Discrimination and Patent Policy*, 19 RAND J. ECON. 253 (1984).

"no presumption that metering is an efficient practice," and that there is no reason to believe that price discrimination is efficient.[67] However, this observation does not support the brief's conclusions. Indeed, the fact that the effects of a certain practice or restraint are ambiguous is usually a factor that mitigates against use of a per se rule. Thus, ambiguous welfare effects do not support the use of a presumption of market power or the imposition of a rule making metering ties per se illegal. Indeed the Court's invocation of a "rule of lenity" is consistent with this view.

The brief provides support for its proposed presumption by asserting that "there is no risk of the *per se* rule leading to false positives."[68] This is because "[e]ven if price discrimination via metering is efficient, firms may continue to seek those efficiencies through direct metering."[69] In addition, such direct metering would have the added benefit of forcing the firm to use transparent pricing and allow potential consumers to avoid being inadvertently "locked in" to supracompetitive tied good prices. Thus, firms "that had been able to price discriminate only because customers were fooled by shrouded prices would no longer be able to artificially enhance their market power at the expense of consumers. . . . There is no reason for the court to facilitate price discrimination."[70]

This part of the brief thus would apply a per se rule in part because the costs of false positives associated with such a rule are asserted to be zero. The brief asserts that there are prefect substitutes for metering, including metering by technology, or through direct metering and transparent pricing. But it is far from clear that this is the case. Take, for example the brief's suggested substitute for ITW's metering tie: that the printer manufacturer place a page counter on the printer and that ITW use that counter to monitor use rates of ink by customers. The brief suggests that monitoring the counter seems no more difficult, and perhaps easier, than monitoring whether the cus-

---

[67] *Nalebuff et al. Brief, supra* note 45, at 3.

[68] *Id.* at 25.

[69] *Id.*

[70] *Id.* at 25–26.

tomer is using the required toner or ink. But this analysis misses the point regarding transaction costs. The use of metering ties works best when there is little or no direct monitoring of the customers. The metering through ink sales takes place without direct monitoring of customers. Moreover, contract remedies, not direct monitoring, serve to enforce behavior by both the printer manufacturer and by end users under the licensing agreement. Thus, the simple transaction costs savings, an efficiency explanation rejected by the Nalebuff et al. Brief as an explanation for metering ties, can explain their use. Only if transaction costs are selectively ignored is the assumption of zero type I error costs associated with a ban on the use of metering ties true.

Indeed, this point is clearly illustrated by *Dawson Chemical Co. v. Rohm & Haas Co.*,[71] a Supreme Court opinion interpreting 35 U.S.C. §271(d), the section of the Patent Act that provided the primary basis for the Court's reexamination of its per se rule against patent ties. In that case, Rohm & Haas owned a patent on a method to spray an unpatented chemical, propanil, to selectively kill weeds in rice crops. Use of the patented method allowed farmers to use propanil to kill weeds without also killing the beneficial crop (rice). Rohm & Haas sold propanil to farmers, giving them an implied license to use the patented process. Dawson Chemical also produced propanil and sold it directly to farmers. Rohm & Haas sued Dawson for contributory infringement. Dawson claimed that Rohm & Haas's refusal to grant licenses other than the implied licenses granted to farmers who purchased propanil from Rohm & Haas constituted patent misuse and was an illegal tying arrangement. The district court agreed and found that Rohm & Haas's refusals to grant direct licenses constituted patent misuse because it was an illegal tying arrangement.[72] The Fifth Circuit reversed.[73] Because propanil was a "nonstaple" article, i.e., one that has no use other than in the Rohm & Haas's patented process, the court held that Rohm & Haas's actions were within the scope of activ-

---

[71] 448 U.S. 176 (1980).

[72] Rohm & Haas Co. v. Dawson Chem. Co., 191 U.S.P.Q. 691 (S.D. Tx. 1979), *rev'd*, 599 F.2d 685 (5th Cir. 1979), *aff'd*, 448 U.S. 176 (1980).

[73] Rohm & Haas Co. v. Dawson Chem. Co., 599 F.2d 685 (5th Cir. 1979).

ities Congress chose to protect when it enacted section 271 of the Patent Act, noting that "Congress did clearly provide for a patentee's right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention."[74] The Supreme Court affirmed the Fifth Circuit's decision.

As is the case with the licensing restrictions in *Illinois Tool Works*, the most plausible explanation for Rohm & Haas's actions is as an attempt to implement a metering tie. One can imagine substitutes for the metering via exclusive sales of propanil, e.g., direct licensing of the process to individual rice farmers, including licenses based upon the number of acres farmed or tons of rice harvested. But the point here is that these methods would likely have entailed much higher transactions costs and monitoring costs, such as negotiating individual licenses, monitoring nonlicensed use, and suing farmers engaged in direct infringement. The Court's choice of allowing patentees to refuse to license the patented process to competing producers of propanil and enabling them to enjoin the sale of nonstaple unpatented goods by competitors reflects a conscious choice to allow the patentee to use the lower transaction cost method metering use—a process that included the use of a metering tie.[75]

Finally, the brief argues that there will be an additional gain from the use of direct monitoring—the use of transparent pricing and the avoidance of unanticipated consumer lock-in.[76] Because increased prices to locked-in consumers do not demonstrate an ability to affect the market price, it is not clear that such ex post opportunism is a useful indicator of antitrust market power. The theory of ex post market power as a result of consumer lock-in was the central issue in the Court's most recent decision that evaluated metering ties, *Eastman Kodak Co. v. Image Technical Services, Inc.*[77] However, as is discussed in detail immediately below, the Court did not explicitly

---

[74] *Id.* at 704.

[75] The Court did not address the antitrust claims. Of course, under the Court's interpretation of the history of patent ties in *Illinois Tool Works*, a rule of per se illegality should have applied to Rohm & Haas's patent ties.

[76] *Nalebuff et al. Brief, supra* note 45, at 24–27.

[77] 504 U.S. 451 (1992).

address this issue either and, indeed, did not even cite its prior holding in *Kodak*.

B. Kodak *and market power without a presumption*

One noticeable omission from the Court's opinion is any explicit discussion of the issue of proof of market power in the absence of a presumption. Indeed, the Court fails to *cite* its last evaluation of a metering tie, its opinion in *Kodak*. In that case, Image Technical Services (ITS) sued Kodak, claiming it unlawfully tied the sale of service for Kodak machines with the sale of parts in violation of section 1 of the Sherman Act and monopolized and attempted to monopolize the sale of service for Kodak machines in violation of section 2 of the Sherman Act.[78] In that case, the Court upheld the Ninth Circuit's reversal of summary judgment in favor of the defendant/petitioner Kodak, holding that Kodak's lack of market power in the photocopier market did not preclude, as a matter of law, the possibility of market power in the derivative aftermarkets for parts and service over "locked-in" consumers.[79] Thus, under the Court's holding in *Kodak*, a single brand could constitute a separate antitrust market for parts.[80]

The Court's failure to address *Kodak* in *Illinois Tool Works* is unfortunate in several respects. First, it was cited in both the district court's[81] and Federal Circuit's decisions[82] in *Illinois Tool Works* for support of the proposition that the Court, in recent cases, has required the plaintiff to prove market power in the tying product, at least in nonpatent cases. Since the Court granted certiorari to undertake a fresh

---

[78] The tying claims were generated by Kodak's refusal to sell parts to independent service organizations (ISOs).

[79] Kodak had a 23% market share in the high-volume copier market and a smaller share of a micrographic equipment market. The plaintiffs conceded that Kodak did not have market power in either of these markets.

[80] Herbert Hovenkamp, *Market Power in Aftermarkets: Antitrust Policy and the* Kodak *Case*, 40 UCLA L. REV. 1447, 1451–52 (1993).

[81] Indep. Ink v. Trident, Inc., 210 F. Supp. 2d 1155, 1162–63 (C. D. Cal. 2002).

[82] Indep. Ink, Inc. v. Ill. Tool Works, Inc., 396 F.3d 1342, 1347 (Fed. Cir. 2005).

examination of the history of both the judicial and legislative appraisals of tying arrangements, the Supreme Court's failure to mention the case, given its otherwise comprehensive treatment of the history of tying jurisprudence, seems odd.[83] At minimum, the Court certainly could have cited the case as further evidence of the Court's evolution of the requirement of market power in tying cases.[84]

More substantively, the Court's opinion in *Kodak* has been widely criticized for confusing the issue of a single firm's power over its own price and the proper concept of antitrust market power, which requires the firm to have the power to control market prices.[85] As has been noted above, the former concept can exist in competitive markets where sellers sell differentiated products but individually have no power over the market price. Thus, it is not appropriate to equate power over one's own product's price, which occurs frequently within competitive industries with differentiated products, with the ability to affect the market price, which is the proper concern for antitrust policy.[86]

---

[83] *See* Taranto, *supra* note 4, at 175 n.26.

[84] Kodak copiers contained 65 patented parts covered by 220 patents. However, the issue of patents was not raised at the time of the Supreme Court case. Indeed, Kodak did not raise the issue of its patented parts and copyrighted works until its Ninth Circuit appeal. By then, the plaintiffs had withdrawn their section 1 tying claims. Other similar cases have centered on the ability of companies to withhold their patented parts. *See In re* Indep. Serv. Org. Antitrust Litig., 203 F.3d 1322 (Fed. Cir. 2000) (holding that refusal to deal patented parts and copyrighted manuals did not violate the antitrust laws). *See* Michelle M. Burtis & Bruce H. Kobayashi, *Why an Original can be Better than a Copy: Intellectual Property, the Antitrust Refusal to Deal, and ISO Antitrust Litigation*, 9 SUP. CT. ECON. REV. 143 (2001).

[85] *See* Wright, *supra* note 4; Hovenkamp, *supra* note 80; Benjamin Klein & John Shepard Wiley, *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L. J. 599 (2003); Klein, *supra* note 60; Benjamin Klein, *Market Power in Antitrust: Economic Analysis after* Kodak, 3 SUP. CT. ECON. REV. 43 (1993); Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak, 63 ANTITRUST L.J. 483 (1995).

[86] Many courts have rejected the theory that contractual lock-in creates antitrust market power. *See* David A. J. Goldfine & Kenneth M. Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts,*

This omission is even more glaring given that the Nalebuff et al. Brief argues that a benefit of preventing firms from using metering ties would be that pricing would be more transparent; thus, such a ban would serve to prevent consumer lock-in, the source of market power under the Court's theory in *Kodak*, from occurring in the first place.[87] In addition, the omission is also significant because the economic basis for rejecting the Nalebuff et al. Brief's proposal for a narrowly tailored presumption is the recognition of the difference between a firm facing a downward sloping demand curve and antitrust market power.[88] As noted above, the respondent's proposal necessarily equates the observation of price discrimination and the discriminating firm's less-than-infinite own price elasticity of demand with antitrust market power. Thus, the Court's rejection of the respondent's proposal also implies that the Court recognizes and accepts the distinction between an individual firm's power over its own price and antitrust market power. Despite this implied recognition, the Court fails to clearly adopt this position in the opinion and thus does not address its prior failure to make the same distinction in *Kodak*. As noted above, the Court cites to the economic literature that makes this point, but fails to explicitly endorse a "robust standard" for antitrust market power that distinguishes between downward sloping demand curves and market power relevant for antitrust purposes. This lack of clarity, along with the Court's silence on *Kodak* and its primary use of a doctrinal rather than economic rationale for rejecting the respondent's proposal, represents an important missed opportunity to clarify this important difference.[89]

---

72 ANTITRUST L.J. 209 (2004). *See also* AREEDA & HOVENKAMP, *supra* note 4, at 165 (citing Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1219 (11th Cir. 2002) ("the mere existence of and exercise of contract power does not show that a defendant had market power")); Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3rd Cir. 1997).

[87] *Nalebuff et al. Brief, supra* note 45, at 24–27.

[88] Taranto, *supra* note 4, at 175–77 (discussing the cited articles and concluding that the Supreme Court, "in citing the discussion, implicitly is adopting a robust legal standard for market power").

[89] *See* Wright, *supra* note 4, at 355; Taranto, *supra* note 4, at 177 (noting that the Court "relies overwhelmingly, though not quite exclusively, on an essentially non-economic analysis").

C. *The status of the modified per se rule*

The Court's opinion does not address or discuss the question of whether tying arrangements should be regarded as per se illegal when the seller does have market power.[90] While this broader issue was not one of the certiorari questions presented to the Court, the continued operation of the modified per se rule will limit the beneficial impact of the Court's holding in *Illinois Tool Works*. The primary reason is that the Court's abandonment of a special per se rule for patent ties will result in application of the oft-criticized modified per se rule currently applied to nonpatent ties. While the patent tying claims of some plaintiffs unable to prove market power will now be deterred or dismissed, those that survive will be judged under this flawed rule. Moreover, given the Court's failure to clarify the market power issue discussed above, many plaintiffs may choose to litigate under the modified per se rule. Indeed, Independent Ink is currently litigating the market power issue on remand.

Generally, use of rules of per se illegality is reserved for conduct that has a "pernicious effect on competition and lacks any redeeming value."[91] In such cases, condemning such practices without a more detailed case by case inquiry generally allows condemnation of anticompetitive behavior without erroneously condemning procompetitive behavior. In addition, such a rule is administratively efficient, as it does not require a case by case inquiry into the operation of such restraints. Thus, under these circumstances, such a rule would minimize the sum of direct costs and error costs.[92]

Indeed, the Court's clear rejection of its earlier position that "[t]ying arrangements serve hardly any purpose beyond the suppres-

---

[90] *But see* Puneet V. Kakkar, *Still Tied Up:* Illinois Tool Works v. Independent Ink, 22 BERKELEY TECH. L.J. 47 (2007) (arguing that "a reasonable interpretation of *Illinois Tool* is that the *per se* analysis is no longer applicable" and citing Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312, 317 (7th Cir. 2006) (applying rule of reason analysis in per se tying claims)).

[91] AREEDA & HOVENKAMP, *supra* note 63, at 352.

[92] *See* David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2002).

sion of competition"[93] suggests that the error cost and administrative cost rationales do not support applying a rule of per se illegality to tying. Thus, the Court's recognition that tying is a ubiquitous practice and used in competitive industries has led it to relax its application of the per se rule to tying in the absence of market power.[94] Moreover, the widespread observation of such presumptively procompetitive ties suggests that their procompetitive purpose would also apply when used by a monopolist. As Posner notes, "[i]f the practice is one employed widely in industries that resemble the monopolist's but are competitive, there should be a presumption that the monopolist is entitled to use it as well. For its widespread use implies that it has significant economizing properties, which implies in turn that to forbid the monopolist to use it will drive up his costs and so his optimum monopoly price."[95] Thus, "as a matter of appropriate competition policy,"[96] it is far from clear that the per se rule should apply to tying in the presence of market power.

Indeed, the Court's modified per se rule for tying cases does recognize that use of tying arrangements in the absence of market power is presumptively procompetitive. Plaintiffs proceeding under the modified per se test must now prove that a not insubstantial amount of interstate commerce is affected, in addition to proving the existence of a tie (separate products) and market power in the tying market.[97] However, even setting aside the fact that tying does not substantively merit per se treatment under the antitrust laws, the modified per se rule fails to achieve the benefits of a per se rule. That is, it neither provides a clear rule nor minimizes litigation costs. Indeed, a single standard for tying under a rule of reason would likely bring both greater clarity and lower litigation costs and would serve to lower error costs by requiring plaintiffs to prove the existence of anticompetitive effects.[98]

---

[93] Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 36 (2006).

[94] *Id.* at 36–37.

[95] RICHARD A. POSNER, ANTITRUST LAW 253 (2d ed. 2001).

[96] AREEDA & HOVENKAMP, *supra* note 4, at 163.

[97] AREEDA & HOVENKAMP, *supra* note 63, at 219–20.

[98] *Id.* at 351.

These considerations have led many to call for the end of the per se rule. These include many economists[99] and the authors of the leading antitrust treatise.[100] Indeed, the Court came close in *Jefferson Parish*, as four Justices voted to do so, with Justice O'Connor writing that "[t]he time has therefore come to abandon the *'per se'* label and refocus the inquiry on the adverse economic effects, and potential economic benefits, that the tie may have."[101] However, the majority in *Jefferson Parish* cited respect for precedent in refusing to do so, holding that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition, and therefore are unreasonable 'per se.'"[102] Clearly, the Court's historical review of tying in *Illinois Tool Works* is inconsistent with such a proposition. Moreover, given the Court's recent demonstrated willingness to eliminate longstanding per se antitrust rules,[103] and given that the Court chose to eliminate a special per se rule applicable to patent ties in this case, the Court's failure to eliminate the outdated and unsupported per se categorization of tying also represents a missed opportunity.

V. CONCLUSION

The Court's decision in *Illinois Tool Works v. Independent Ink* represents a positive step in recognizing that neither the existence of patents nor the observation of price discrimination is a reliable indicator of market power. Moreover, the Court reiterates its rejection of the proposition that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition."[104] As a result, the Court sensibly rejects the existence of a presumption of market power in patent ties, the imposition of a rebuttable presumption of market power

---

[99] *See, e.g.*, Evans, *supra* note 5.

[100] AREEDA & HOVENKAMP, *supra* note 4, at 163.

[101] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring).

[102] *Id.* at 9 (majority opinion).

[103] *See* text accompanying note 105 *infra*.

[104] *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 36 (2006).

when price discrimination is observed, and a special per se rule of illegality for patent ties or requirements ties. In doing so, the Court modernizes antitrust to reflect the widespread consensus of economists, courts, and Congress regarding these issues.

On the other hand, the Court leaves in place an inefficient and outdated modified per se rule as a replacement. Given the Court's recent decisions to overrule longstanding per se bans on both minimum and maximum resale price maintenance in *State Oil* and *Leegin*, respectively,[105] and the recognition that treating patent ties under a special per se rule is inappropriate, the time has come to move tying into modern antitrust by having a unitary standard for evaluating ties under the rule of reason. The Supreme Court's failure to revisit the modified per se rule may be a missed opportunity.

Finally, the Court's decision in *Illinois Tool Works* is consistent with the Court's current trend toward recent "prodefendant" antitrust decisions.[106] These include *Leegin* and *State Oil* mentioned above. They also include the two other cases from the 2005–2006 Term, *Texaco Inc. v. Dagher*[107] (holding that it is not per se illegal for a joint venture to jointly price its products) and *Volvo Trucks*[108] (holding that the Robinson-Patman Act did not apply to defendant's conduct), and the three other cases from the 2006–2007 Term, *Bell Atlantic v. Twombly*[109] (holding that plaintiffs must satisfy heightened pleading standards), *Weyerhaeuser* (applying the "hard to satisfy" *Brooke Group*[110] predatory pricing standard to predatory buying), and *Credit Suisse*[111] (preempting federal and state antitrust laws when conduct is regulated under

---

[105] State Oil v. Khan, 522 U.S. 3 (1997); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[106] *See* Brannon & Ginsburg, *supra* note 2.

[107] Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006).

[108] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).

[109] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

[110] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[111] Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

the federal securities laws). This is in addition to the Court's 2004 decision in *Verizon v. Trinko*.[112] Put together, these cases represent quite a prodefendant run.

The outcomes are, however, consistent with a more fundamental principle. Another explanation for the Court's recent decisions is that their decisions represent a view that incorporates the limits of antitrust law and its institutions.[113] As Justice (then Judge) Breyer stated:

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[114]

Considerations of administrability and the avoidance of the error costs of false positives (the costs of condemning procompetitive behavior) were certainly central to the Court's recent decisions *Trinko* and in *Weyerhaeuser*. As in the Court's *Brooke Group* decision, the Court in these cases treats the limited ability of the legal institutions responsible for administering the antitrust laws as a primary issue.[115] Indeed, many aspects of the Court's holding in *ITW* are consistent with this. These include the Court's discussion of the rule of lenity and the requirement that the plaintiff prove rather than presume market power. Moreover, Taranto suggests that the Court's decision to

---

[112] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[113] Taranto, *supra* note 4, at 179. *See also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

[114] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

[115] Taranto, *supra* note 4, at 179. *See also* Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 25 (2007); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?* 3 COMPETITION POL'Y INT'L 59 (2007).

give so little emphasis to the substantive economic debate to guide its decision is also consistent with such an approach.[116] While some economists may lament this last development, it may be the Court's most telling sign that it understands very well at least one aspect of the economics of antitrust law.

[116] Taranto, *supra* note 4, at 179–80.