

Moving Forward While Facing Backward: *Illinois Tool* Rejects the Presumption of Market Power in Patent Tying Cases

BY KEVIN D. McDONALD

*"Then I felt like some watcher of the skies
When a new planet swims into his ken;
Or like stout Cortez when with eagle eyes
He star'd at the Pacific—and all his men
Look'd at each other with a wild surmise—
Silent, upon a peak in Darien."*

—JOHN KEATS, ON FIRST LOOKING INTO
CHAPMAN'S HOMER

ON FIRST LOOKING INTO THE Supreme Court's opinion in *Illinois Tool*, which unanimously rejected the presumption that a seller of a patented tying product has market power solely by virtue of the patent, my reaction was one of nostalgia. Some years ago, my firm's managing partner was a man of great dignity and ability, who would send us occasional memoranda discussing firm policy. I soon noticed, however, that a number of these memos began with the words, "As you know." I also soon concluded that, when a memo began with "As you know," the words that followed invariably told me something that I did *not* know—and often something that I was surprised to learn. That feeling returned when I read the first sentence of Justice Stevens's opinion in *Illinois Tool*.

The only background you need before considering that sentence is to know that the case presented a classical and undisputed tying arrangement: A subsidiary of Illinois Tool Works sells a patented printhead that applies barcodes to packages as they move on an assembly line. To license the printhead (the "tying product"), however, one must also agree to buy the ink that it uses (the "tied product") from the

licensor. A rival seller of ink brought a complaint alleging unlawful tying under Section 1 of the Sherman Act and monopolization under Section 2. The district court dismissed all of the antitrust claims for the failure to plead and prove market power. In January 2005, the Federal Circuit affirmed as to the Section 2 claim, but reversed as to tying, reasoning that early Supreme Court decisions mandated a presumption that the existence of a patent on the tying product conferred market power on the seller.¹ The petition for certiorari, supported by a host of amici that included the American Bar Association, was promptly granted, and—to the surprise of virtually no one—the Supreme Court reversed.

Here is the Court's opening sentence, with a small addition I could not resist:

[As you know,] In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), we repeated the well-settled proposition that "if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power."²

Students of rhetoric will note several masterly strokes. This proposition was not simply stated in *Hyde*; it was "repeated." And repetition is what one would expect when a proposition is not simply acknowledged, but already "well-settled." The reader scarcely notices by the end of the quote that the presumption set forth in *Hyde* was that the seller of a patented good has "market power," a crucial conclusion in resolving the question presented in *Illinois Tool*.

As the author of two amicus briefs by the American Bar Association urging reversal, I am gratified that the Court held that "the mere fact that a tying product is patented does not support such a presumption,"³ and thus refused to embrace an anachronistic rule widely derided as economic nonsense and already rejected by most lower courts. To address the larger question of what *Illinois Tool* portends for the future of tying law, however, we must focus on the *way* in which the Court chose to reject the presumption of market power. If, as I shall argue, the Court squandered an opportunity to do more and engaged instead in an effort to rewrite history that is not only unpersuasive on its face, but

Kevin McDonald is a partner in the Washington office of Jones Day. He was the author of two amicus briefs in *Illinois Tool* submitted by the American Bar Association on behalf of the Petitioners.

directly refuted by its own underlying sources, it is essential to understand why the Court felt compelled to do so.

The answer lies in that first sentence, which is wrong in all three of its principal points:

(1) The Supreme Court did previously recognize a “presumption” that applied to patented products in tying cases, but it was never a presumption of actual market power. Indeed, the only Supreme Court case to apply a presumption of any kind to a tying product subject to intellectual property rights—Justice Goldberg’s opinion in *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962)—expressly denied that the presumption was one of market power. *Id.* at 45 n.4. Rather, it was a presumption of “uniqueness” or “distinctiveness” so vague that any tying product could satisfy it. (In *Northern Pacific Railway*, Justice Black would famously infer the requisite “uniqueness” in a non-patent case from the very existence of the tie itself.⁴) Such an elastic concept of uniqueness was plainly satisfied by a patented product, which by definition must be novel and “not obvious,” and hence distinctive to that extent, even when economically worthless.

(2) When *Hyde* was decided in 1984, moreover, it was far from “well-settled” that any presumption of market power existed in Supreme Court case law. On the same day, Justice O’Connor’s concurring opinion mocked the presumption as a “common misconception” and flatly concluded: “Nor does any presumption of market power find support in our prior cases.”⁵ After *Hyde*, moreover, the majority of lower courts, including the Sixth and Seventh Circuits, had rejected a presumption of market power in tying cases involving intellectual property.⁶ And the principal circuit court decision applying the presumption (handed down by the Ninth Circuit only three months after *Hyde*) had been described by former Assistant Attorney Joel Klein in testimony to Congress as a “relic,” unlikely to be repeated.⁷ Indeed, as Professor Hovenkamp has noted, by the time that the Federal Circuit ruled in *Illinois Tool* in January 2005, “the presumption of market power for patented or copyrighted products had languished to the point that antitrust plaintiffs chose not to rely on it.”⁸ That is seldom the fate of a “well-settled proposition” in the Supreme Court.

(3) Finally, not even the claim that this proposition was being “repeated” is true. For I have found no other occasion on which any member of the Supreme Court defined the “presumption” of *Loew’s*, or any other presumption involving intellectual property, to be a presumption of market power. As noted, the Court in *Loew’s* said precisely the opposite. The distinction is crucial, because the Court’s later decisions in *Fortner II* and *Hyde* established that the economic power necessary to establish an illegal tie was genuine market power—what the Court in *Fortner II* described as “market power in the sense of power over price.”⁹ Justice Breyer aptly defined the market power requirement after *Hyde*, while still on the First Circuit: “The majority [in *Hyde*], for example, makes clear that by its requirement of ‘market power’ it means significant market power—more than the mere abil-

ity to raise price only slightly, or only on occasion, or only to a few of a seller’s many customers.”¹⁰

Both Justice Stevens and the Federal Circuit in *Illinois Tool* acknowledged that *Fortner II* and *Hyde* had fundamentally altered the law of tying by requiring a showing of true market power.¹¹ Because *Loew’s* applied a vastly different presumption, and no case has applied any presumption since, Justice O’Connor was correct to say in *Hyde* that a “presumption of market power” finds no “support in our prior cases.”

“That’s one small step for man, one giant leap for mankind.”

—NEIL ARMSTRONG, JULY 20, 1969

I recognize that this critique may strike some as rather academic, if not ungrateful. Why should we care if a unanimous decision reaching the correct result is based on faulty reasoning? What danger is there that a bad history lesson will affect the law of tying going forward? Those are fair questions. For I agree that even a small step in the right direction is always welcome and, like Neil Armstrong’s, may have large repercussions.

Still, I confess to having had higher hopes, and with some cause. First, a full generation has gone by since *Hyde*—a full generation since the Court acknowledged, in Justice Breyer’s words, “that tying’s anticompetitive mechanism is not obvious.”¹² During that time, there has been growing acknowledgment “that most tie-ins benefit competition, even when the defendant has tying product power.”¹³ Yet the per se rule against tying theoretically remains, and thus it remains plausible to state, as one commentator recently did, that our “tying doctrine is widely regarded today as irrational.”¹⁴ The Court’s opportunity to explain the flaws in the presumption in a way that would help lower courts rationalize tying law seemed obvious.

Second, the Justices’ comments at the oral argument showed that they grasped the underlying problem with tying law, and hinted that they might seize the opportunity to fix it. Justice Stevens, who actually cited Judge Bork’s 1978 book, *The Antitrust Paradox*, in his *Volvo* dissent this term,¹⁵ seems also to have discovered the chapter on tying. Thus, he asked counsel for *Illinois Tool* how far his argument against the presumption would take the Court: “I think there’s a good argument that if a patent is really a good patent, it doesn’t really matter [to consumers] whether the patentee charges a very high royalty or . . . gets profits out of the tied . . . product.”¹⁶ Justice Scalia later echoed that, even “assuming that there is market power in the patent—we’re not really sure that you can extend it through tying.”¹⁷ Chief Justice Roberts pointedly asked counsel for the United States whether “[a]ssuming there’s monopoly power in the tying

product, the Government's position is that that still presents an antitrust problem?"¹⁸ (Although noting that "Justice O'Connor made persuasive points in her concurring opinion in [*Hyde*] . . . that the per se rule does not make a whole lot of economic sense,"¹⁹ the Deputy Solicitor General understandably demurred.)

The same issue was raised by Justice Breyer, who noted that "there happens to be instances where tying is justified for procompetitive reasons, [such as] risk-sharing, maintaining product quality, [etc.] . . . And the real problem is that the law doesn't admit a defense."²⁰ He further volunteered that he "would have agreed with the dissent—the concurrence in—in *Jefferson Parish*, but that's not the law. And so now what you're saying is, well, we have to go and really make that the law."²¹

These and other tantalizing comments at the argument held out the possibility of a genuine reassessment. The Court might have concluded that a presumption of market power, while economically unwise, is particularly pernicious because the general per se rule against tying—in which establishing market power may end the case in the plaintiff's favor—makes no sense. Some might consider that jurisprudentially unsound, as venturing beyond the question presented in *Illinois Tool*, but that is not necessarily so. It is not improper to acknowledge, and to fix, a more fundamental problem that has produced or at least exacerbated the problem one initially inspected. In any event, I would rather be having *that* debate than trying to decide whether the pure result in *Illinois Tool* constitutes genuine progress.

"But that's not what's worrying me. It's how to do it. These things must be done de-li-cate-ly."

—THE WICKED WITCH OF THE WEST,
THE WIZARD OF OZ

Because, let's face it, the result was never seriously in doubt. Once someone is forced to argue, as did the plaintiff and the Federal Circuit in *Illinois Tool*, that the presumption was one of actual market power, then the case against the presumption is overwhelming.

To begin with, a presumption that the very existence of a patent confers market power is not true. This is so obvious and so universally accepted that the *Illinois Tool* Petitioners were able to represent (accurately) that they were "not aware of any significant authority on antitrust or intellectual property law who has defended the presumption in the patent and copyright tying cases in the last twenty years."²² In 1988, Congress demonstrated its view of the presumption by amending the patent laws to clarify that a patent "misuse" defense based on tying could not succeed unless the infringer proved that the patentee had actual market power.²³ In the mid-1990s, both federal enforcement agencies eschewed any

presumption of market power based on intellectual property²⁴ because, as the Solicitor General explained in his amicus brief in *Illinois Tool*, "[t]here is neither a theoretical nor an empirical basis for presuming that sellers of patented products have market power within the meaning of the Sherman Act."²⁵

The plaintiff unwittingly underscored the economic weakness of the presumption by arguing at the Supreme Court, for the first time, that there was theoretical support for (1) a rebuttable presumption (2) for a narrow class of "requirements" ties (3) used to meter the licensee's usage (4) in order to achieve price discrimination. I have shown elsewhere that even that argument does not parse.²⁶ But the argument itself caused the new Chief Justice to ask this pithy question: "Are you conceding that the presumption makes no sense outside of the requirements metering context?"²⁷ That question nicely underlined two things: first, the impossibility of defending the *actual* presumption applied by the Federal Circuit, and second, the equal impossibility of relying on any prior case law for the plaintiff's new and arcane presumption. After counsel's answer, which contained neither the word "yes" nor "no," Justice Stevens felt the need to follow up: "I'm kind of curious what your answer is to the Chief Justice's question."²⁸ At which point, the reporter inserted "(Laughter)."²⁹

Even beyond the lack of empirical support, the presumption suffers from other flaws that made the result in *Illinois Tool* predictable. One is that a presumption of true market power in patent tying cases would be weirdly inconsistent with other aspects of antitrust law. There are many other antitrust theories that require proof of market power to one degree or another, including claims under Section 2 for monopolization and non-tying claims under Section 1 measured by the rule of reason. In its 1965 *Walker Process* decision, decided only three years after *Loew's*, the Supreme Court allowed a Section 2 claim for wrongful enforcement of a patent procured by fraud to proceed, but stressed that all elements of the antitrust claim, including market definition and market power, must be proven separately.³⁰ The Court expressly recognized that the patented item alone may not constitute "a relevant market [because] [t]here may be effective substitutes for the device which do not infringe the patent."³¹ That statement is obviously inconsistent with the notion that a patent alone confers market power. Thus, if the presumption were really one of market power, the failure to make use of it in other IP antitrust cases, even as a starting place for the analysis of power, would be indefensible.

This inconsistency is highlighted when one considers the simple-sounding question of whether the presumption should be rebuttable. Of course it should, stated the Federal Circuit below, relying on the same sentence in *Hyde* quoted at the outset of *Illinois Tool*.³² Indeed, both the plaintiffs and their amici in the Supreme Court conceded that the limited form of the presumption they advocated would be rebuttable. Yet that concession raises its own questions, to

wit, (1) why the presumption wasn't rebuttable in *Loew's*; (2) why in this area of antitrust (as opposed to many others where power is at issue) the burden should be shifted to the defendant; and (3) how, in practice, the rebutting is to be done. On this last point, the Federal Circuit remanded the tying claim to the district court but, borrowing another unfortunate line from *Loew's*, warned that "[t]he mere presence of competing substitutes for the tying product . . . is insufficient to" rebut the presumption.³³ The circuit court suggested vaguely that "expert testimony" or evidence of "cross-elasticity" might suffice, but excluded the usual, and obvious, starting point: evidence of other current and substantial sellers in the market. This conclusion caused the ABA to observe in its amicus brief: "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."³⁴ It is perhaps not surprising that a presumption false in fact and anachronistic in law would also prove to be unworkable in practice.

So the question was never really *whether* the Court would reverse the Federal Circuit, but *how*. Given the overwhelming consensus against the presumption, as well as the overpowering array of parties seeking reversal (the brief of the United States was signed by the Solicitor General, the Department of Justice, the Federal Trade Commission, and the Patent and Trademark Office), I had no doubt that the Court would reject the presumption even if that meant overruling prior precedent. In fact, I predicted in *The Antitrust Source* last fall that the only question likely to give the Court pause would be stare decisis.

"It is, of course, beyond dispute that we are not bound by the dicta of our prior opinions."

—PRINTZ V. UNITED STATES, 521 U.S. 898, 964
(STEVENS, J., DISSENTING)

Yet the stare decisis argument is weak, for several reasons. Prior to *Illinois Tool*, the unquestioned "source" of the presumption in the Supreme Court was the 1962 decision in *Loew's*. To be sure, the *Loew's* court had cited Justice Jackson's 1947 opinion in *International Salt*,³⁵ which had pronounced all tie-ins per se illegal because "the tendency of the arrangement to the accomplishment of monopoly seems obvious."³⁶ But the fact remains that *International Salt* did not discuss any concept of power (much less market power) in the tying product, nor make any mention of presumptions at all.

Loew's, by contrast, was the first decision ever to speak of applying a presumption to a tying product subject to intellectual property rights—just as it was the last decision ever to apply such a presumption to reach its result. The Petitioners

before the Supreme Court thus framed the stare decisis issue strictly in terms of *Loew's*: "The question presented in this case is whether the Court should overturn the market power presumption announced in *Loew's*."³⁷ As if to drive the point home, the only authority cited by *Hyde* for the proposition that a patent "gives the seller market power" was *Loew's* itself.³⁸

If *Loew's* is the source of the presumption, however, the stare decisis argument founders. As I have shown in detail elsewhere, Justice Goldberg's famous statement that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted,"³⁹ does not use the words "market power." Rather, the term that it did use, "requisite economic power"—was defined in the immediately preceding sentence as "the tying product's desirability to consumers or . . . the uniqueness of its attributes."⁴⁰ This amorphous concept was expressly distinguished from "some power to control price and to exclude competition."⁴¹ If there were any doubt, the Court added in a footnote to the same sentence that, "[s]ince the requisite economic power . . . does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act," it would "seldom be necessary" to inquire as to "the scope of the relevant market . . . [or] the seller's percentage share in that market."⁴²

Loew's, therefore, is a bad case to rely on for a presumption of actual market power, because it specifically denied that market power was the test. The *Loew's* presumption of uniqueness, moreover, was rendered obsolete (1) by the Court's later decision in *Fortner II*, which rejected evidence of "uniqueness" as insufficient to establish market power, and (2) its decision in *Hyde*, which specifically engaged in the inquiry into the seller's "percentage share of the market"—finding a 30 percent share insufficient to show market power—that *Loew's* said was unnecessary. The plaintiff in *Illinois Tool* tellingly abjured any reliance on *Loew's*, at one point referring back to an earlier question, and stating that "[y]ou need not reach, Justice O'Connor, the question of copyrights here. They are not presented. *Loew's* was a copyright bundling case."⁴³

I find it odd that some resist reading *Loew's* to mean what it says because, if you do, the conundrums and inconsistencies that afflict the presumption of market power disappear. It is no longer surprising that no case has ever argued that the presumption of market power was grounded in economic fact—because that was not the presumption at issue. A presumption of uniqueness, on the other hand, is "true" by definition in the case of intellectual property, which must be distinctive to some extent to qualify for protection. For the same reason, a definitional presumption of uniqueness can never be rebutted, and the practical problems of litigating the presumption also disappear. Even *Walker Process* makes sense. The Section 2 monopolization claim there required genuine market power, while the presumption of *Loew's* implied far less, and hence was irrelevant in *Walker Process*. The *Loew's* presumption was, to be clear, economically jejune and harmful to consumers, but its very circularity made it immune to

the charges of empirical falsity and legal inconsistency that make the presumption of market power not only harmful, but risible. The real *Loew's* "presumption of uniqueness" could be toppled only by destroying its premise—the notion that competition could be harmed by tying without actual market power in the tying product—and that is the very premise already destroyed by *Fortner II* and *Hyde*.

Despite all of these weaknesses, however, one undeniable arrow in the plaintiff's stare decisis quiver is the dictum in *Hyde*. It is the only unambiguous statement in the Supreme Court Reports (prior to the first sentence of *Illinois Tool*) that the presumption in patent tying cases was one of "market power." It was seized upon by the lower courts, which pronounced themselves "bound" to treat the presumption of *Loew's* as one of market power, allowing them to ignore what *Loew's* actually said.⁴⁴ If the correct reading of *Loew's* is to prevail, and the internal contradictions of a presumption of market power are to be avoided, therefore, that dictum must be disregarded. It is the only piece that does not fit. We must acknowledge that it conflicts with the actual reasoning and language of *Loew's*, and finds no support elsewhere. It should be treated as, well, dicta.

That might have happened in *Illinois Tool*, but for one detail. The author of the opinion in *Illinois Tool* and the author of the dictum in *Hyde* were the same person.

"There was, of course, no admission that any change had taken place. Merely it became known, with extreme suddenness and everywhere at once, that Eastasia and not Eurasia was the enemy."

—GEORGE ORWELL, 1984

For Justice Stevens, reconciling his *Hyde* dictum with rejection of the presumption required answering two questions: Where did the presumption of "market power" originally come from? And why is it appropriate to abandon such a "well-settled proposition" now? Both questions were answered by a four-step syllogism:

(1) The Court's early patent decisions had recognized a presumption of market power when they condemned tying as a "misuse," preventing enforcement of the patent.⁴⁵

(2) "The presumption that a patent confers market power migrated from patent law to antitrust law in *International Salt*."⁴⁶

(3) In 1988 (and hence well after *Hyde*), Congress amended the patent law to remove the presumption of market power, thereby "invit[ing] a reappraisal of the *per se* rule announced in *International Salt*."⁴⁷

(4) The Court will therefore "import" the new "congressional judgment" about market power in patent law into antitrust law as well, and reject the presumption of market power.⁴⁸

In other words, we got this antitrust notion from patent law in the first place, and now that Congress has changed patent law, we can change antitrust law too. QED, I guess.

Except that the premises are false. The "old" patent misuse cases, such as *Mercoind* and *Morton Salt*, clearly held that any tie involving a patented product constituted "misuse," but they made no mention of any type of power, much less market power, in the tying product, and they did not apply a presumption of any kind.⁴⁹ So there was no "presumption that a patent confers market power" in patent law available to "migrate" to antitrust law.

But even if there were, where can any such migration be found in *International Salt*, which is just as silent on the questions of power and presumptions? Justice Stevens concedes that "the Court's opinion [in *International Salt*] does not discuss market power or the patent misuse doctrine,"⁵⁰ but he is undaunted. Rather, the doctrine "can be traced to the Government's brief in *International Salt*, which relied heavily on our earlier patent misuse decision in *Morton Salt*."⁵¹ Yet the language he quotes from the government's brief also fails to mention market power or presumptions, arguing simply that all patent ties are, by definition, unlawful. The conclusion, for Justice Stevens, is nonetheless plain: "Our 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."⁵²

Let us take stock. We are told that *International Salt* "clearly shows" that the Court embraced (1) a presumption (2) of market power (3) found in patent misuse cases like *Morton Salt*, even though the opinion (1) never mentions presumptions, (2) fails to consider the concept of power in the tying product at all, and (3) refers to *Morton Salt* only in passing without any reference to patent misuse. The term "Orwellian" is surely overused, but not here.

It gets worse, moreover, for I have read the government's brief. That brief may have made an impression on a young John Paul Stevens, who was clerking for Justice Wiley Rutledge when *International Salt* was decided,⁵³ but some of the details have apparently faded. Far from arguing that there was (or ought to be) a presumption of market power, the government repeatedly stressed that a patent tie is illegal no matter how clearly the patentee *lacks* market power. The tie should be condemned, they argued, "even if it is assumed that other types of salt machines . . . performed the same functions as appellant's machines."⁵⁴ In relying on the *IBM* case, the government made clear that market power in the tying product (by presumption or otherwise) was simply irrelevant: "In [the *IBM*] case, as in this one, there was nothing to prevent the lessee from also leasing machines from other manufacturers and from using other cards in such machines."⁵⁵

So the syllogism fails, even though it consumes the vast bulk of the opinion, and does not change the result. At the conclusion of his laborious analysis, Justice Stevens present-

ed a final sentence announcing the Court's new rule:

While some such [tying] arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy, *see, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 145–146, 68 S. Ct. 915, 92 L.Ed. 1260 (1948), that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.⁵⁶

This, then, is the legacy of *Illinois Tool*, the guidance for the bench and bar. What is meant by the words “true monopoly” is far from clear. If a plaintiff provides “proof of power in the relevant market,” does that suffice to invoke the “true monopoly” rule? And what does a “marketwide conspiracy” mean here? Is a tying “conspiracy” legal if it is something less than “marketwide”? If you have proved a marketwide conspiracy, moreover, do you really need more “proof of power in the relevant market”?

None of these obvious questions (or many others like them) is addressed in *Illinois Tool*. Nor do the terms Justice Stevens used have any obvious pedigree in the law of tying, and thus provide any clues to their meaning. The Court's citation to *Paramount Pictures* only heightens the mystery, for the pages cited do not discuss tying or block-booking of copyrighted materials at all; they deal with contract provisions called “clearances and runs,” to which the *Paramount Pictures* Court applied the rule of reason.⁵⁷ Is the Court suggesting that the holding of *Paramount Pictures* survives *Illinois Tool* in a way that the holding of *Loew's* does not? The Court may someday answer these questions, but be prepared for it to take another generation. And for the explanation to begin with: “As you know . . .”

“If [Dylan] Thomas had devoted half of the time and energy he lavished on begging to actually writing poetry, his oeuvre might have been twice as big.”

—PAUL JOHNSON, *CREATORS*

I conclude, therefore, that the opinion in *Illinois Tool* represents an opportunity lost. If Justice Stevens had devoted half of the time and energy he lavished on defending his own dictum from *Hyde* to explicating the law of tying and how a presumption of market power undermines it, we might have twice the guidance.

As it is, those who wish to assert that *Illinois Tool* augers the end of the per se rule can point to the Court's failure to state in *Illinois Tool*, as it did in *Hyde*, that it “is far too late in the history of our antitrust jurisprudence to question” the per se rule against tying.⁵⁸ Or they can argue that the Court has stated that all tying is subject to a rule of reason analysis unless it is imposed by a “true monopoly” (whatever that means) or a “marketwide conspiracy.” Those who take the

opposite view can point to the Court's conspicuous failure to suggest that sellers with market power can still offer pro-competitive justifications, and they can argue that their case resembles *Paramount Pictures*, which somehow survived the Court's express rejection of *Morton Salt* and *Loew's*.⁵⁹

My conclusions are also colored by the quotations sprinkled throughout this article, which are intended to show more than my devotion to high school literature. There are two things that have always struck me about Keats's “On First Looking Into Chapman's Homer,” quoted at the outset: that I love the title, and that he said “Cortez” when he really meant “Balboa.” The latter point came to mind each time Justice Stevens described *International Salt* as the “opinion that imported the ‘patent equals market power’ presumption into our antitrust jurisprudence.”⁶⁰

Recalling the episode in Orwell's *1984* (the year that *Hyde* was decided) in which the government leaders so blandly denied historical reality by changing the identity of their wartime opponent, I was reminded that they also forced the protagonist and hundreds of others to work around the clock to expunge every reference to the original opponent in all “the political literature of the last five years.”⁶¹ That does not happen in the Supreme Court. No matter what the Court says, the words of its prior decisions (and the government's briefs) remain available to all those who care to see if history has been changed. This demonstrates, among other things, that Orwell's imagination could not conceive of a government body as powerful as a unanimous Supreme Court.

And, finally, when considering Justice Stevens's struggles to justify his past dicta in *Hyde*, I recall that Neil Armstrong, who took the most famous small step in the right direction in human history, was facing backward when he stepped onto the moon. Perhaps it was necessary, or made no difference. But I can't help but notice that we haven't been back. ■

¹ *Independent Ink, Inc. v. Illinois Tool Works Inc.*, 396 F.3d 1342 (Fed. Cir. 2005).

² *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006) (my brackets, of course).

³ *Id.* at 1284.

⁴ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 7–8 (1958). As Ward Bowman would point out in his seminal book, *Patent and Antitrust Law*, the “[c]ircular but simple” concept of power in Northern Pacific Railway bore no relation to the “proportion of . . . [the] relevant economic market these holdings composed.” WARD S. BOWMAN, JR., *PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL* 154 (1973).

⁵ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 37 n.7 (1984).

⁶ *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). For a useful collection of the lower court case law assessing the meaning of the *Loew's* presumption after *Hyde*, see the Petition for a Writ of Certiorari 22–24 & n.8, *Illinois Tool*, 126 S. Ct. 1281 (2006) (No. 04-1329).

⁷ *Intellectual Property Antitrust Protection Act of 1995: Hearings on H.R. 2674 Before the House Comm. on the Judiciary*, 104th Cong. 16–18 (1996) (testimony of Assistant Attorney General Joel Klein) (discussing *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336 (9th Cir. 1984)).

- ⁸ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 518 at 197 (2005 Supp.) (footnote omitted).
- ⁹ United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 620 n.13 (1977) (*Fortner II*).
- ¹⁰ Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 796 (1st Cir. 1988).
- ¹¹ See Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281, 1287; Independent Ink, Inc. v. Illinois Tool Works, Inc., 396 F.3d 1342, 1347 (Fed. Cir. 2005).
- ¹² Grappone, 858 F.2d at 794.
- ¹³ 9 AREEDA & HOVENKAMP, *supra* note 8, ¶ 1720a, at 220 (2d ed. 2004) (footnote omitted).
- ¹⁴ ARIEL KATZ, INTELLECTUAL PROPERTY ANTITRUST, AND THE PRESUMPTION OF MARKET POWER 55, (Univ. of Toronto Public Law Research Paper No. 05-02 Draft of June 2005), at <http://ssrn.com/abstract=702462>.
- ¹⁵ Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 876 (Stevens, J. dissenting) (Jan. 10, 2006) (citing ROBERT BORK, THE ANTITRUST PARADOX 382 (1978)).
- ¹⁶ Transcript of Oral Argument 18, Illinois Tool Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (No. 04-1329) (2006) [hereinafter Oral Argument]; see *id.* at 19.
- ¹⁷ *Id.* at 51.
- ¹⁸ *Id.* at 27.
- ¹⁹ *Id.* at 28. The Deputy Solicitor General could also have noted that both federal enforcement agencies have taken the position in their guidelines that they will assess patent tying arrangements under the rule of reason, not necessarily because the law demands it, but “[i]n the exercise of their prosecutorial discretion.” U.S. Dep’t of Justice & Federal Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 5.3 (1995), available at <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm> [IP Guidelines].
- ²⁰ Oral Argument, *supra* note 16, at 17.
- ²¹ *Id.* at 48.
- ²² Brief for the Petitioners at 39, Illinois Tool Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (No. 04-1329) (2006). For a description of the overwhelming consensus against the presumption, see the Petitioners’ brief at 24–26 & 37–39, and Kevin D. McDonald, *There’s No Tying in Baseball*, ANTITRUST SOURCE, Sept. 2005, at <http://www.abanet.org/antitrust/at-source/05/09/sep05-McDonald9=27.pdf>. After the petitioner’s brief on the merits in the Supreme Court was filed, the plaintiff produced two amicus briefs by four law professors making a new argument for a limited, rebuttable version of the presumption, which (as I note below) the Court scuttled quickly.
- ²³ Act of Nov. 19, 1988, Pub. L. No. 100-703, § 201, 102 Stat. 4674, 4676 (codified at 35 U.S.C. § 271(d)(4), (5)).
- ²⁴ IP Guidelines, *supra* note 19, §§ 2.2 & 5.3.
- ²⁵ Brief for the United States as Amicus Curiae Supporting Petitioners 7, *Illinois Tool Works*, 126 S. Ct. 1281 (2006) (No. 04-1329).
- ²⁶ For a critique of the arguments by the plaintiff and its amici, see Kevin D. McDonald, *Why the Presumption of Market Power in Patent Tying Cases Never Existed, and Won’t Much Longer*, Paper Presented at ABA Section of Antitrust Law Spring Meeting 24–33 (Feb. 16, 2006) I also noted that two of the four professors, Professor Scherer and Professor Sullivan, had rejected the presumption in their prior work, a difficulty which their lawyers deemed unworthy of mention at the Supreme Court. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 428–29 (2000) (“Establishing that a typing [sic] product possesses market power should require more than introducing evidence that a valid patent was issued.”); Comments of F.M. Scherer, *Panel Discussion, The Value of Patents and Other Legally Protected Commercial Rights*, 53 ANTITRUST L.J. 535, 547 (1985) (Q: “Mike, does the existence of a patent or copyright, in and of itself mean anything to you, in terms of market power? A: “No.”).
- ²⁷ Oral Argument, *supra* note 16, at 44.
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ Walker Process Equip., Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172, 177–78 (1965).
- ³¹ *Id.* at 178.
- ³² Independent Ink, Inc. v. Illinois Tool Works, Inc., 396 F.3d 1342, 1351–52 (Fed. Cir. 2005). Quoting the very same sentence from *Hyde*, the Federal Circuit stated that “[i]t would stretch the language of ‘fair to presume’ beyond the breaking point to say that such a presumption is irrebuttable. *We are obliged to follow such clearly articulated Supreme Court dicta.*” *Id.* at 1351 (emphasis added) Without acknowledging this dutiful language, Justice Stevens quoted the same passage from *Hyde* in *Illinois Tool*, and reached a rather different conclusion: “Notably, nothing in our [*Hyde*] opinion suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good.” 126 S. Ct. at 1288.
- ³³ *Independent Ink*, 396 F.3d at 1352.
- ³⁴ Brief of the American Bar Association as Amicus Curiae In Support of Petitioner at 13, *Illinois Tool Works v. Independent Ink, Inc.*, No. 04-1329.
- ³⁵ *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947).
- ³⁶ *International Salt*, 332 U.S. at 396.
- ³⁷ Brief of Petitioners at 2, *Illinois Tool* (No. 04-1329).
- ³⁸ *Hyde*, 466 U.S. at 16 (citing *Loew’s*, 371 U.S. at 45–47).
- ³⁹ *United States v. Loew’s, Inc.* 371 U.S. at 45. See *supra* note 22, at 13–14.
- ⁴⁰ *Loew’s*, 371 U.S. at 45.
- ⁴¹ *Id.*
- ⁴² *Id.* at 45 n.4.
- ⁴³ Oral Argument, *supra* note 16, at 45. Illinois Tool Works, Inc. v. Independent Ink, Inc. (No. 04-1329). Justice O’Connor retired from the Court after the oral argument in *Illinois Tool* but before the decision was rendered. The opinion was thus decided 8–0, with Justice Alito not participating.
- ⁴⁴ See, e.g., *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d at 1348 & 1350; *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d at 1342.
- ⁴⁵ *Illinois Tool*, 126 S. Ct. at 1288 (citing *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944), and *Morton Salt Co. v. G.S. Suppinger Co.*, 314 U.S. 488 (1942)).
- ⁴⁶ *Illinois Tool*, 126 S. Ct. at 1289.
- ⁴⁷ *Id.* at 1290–91.
- ⁴⁸ *Id.* at 1291.
- ⁴⁹ See *Mercoid*, 320 U.S. at 664–68; *Morton Salt*, 314 U.S. at 492–94. Neither case so much as implies that unwanted “forcing” of the purchase of the tied product is required to condemn the tie, much less considers how much economic power the patentee may have by virtue of its patent.
- ⁵⁰ *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. at 1289.
- ⁵¹ *Id.*
- ⁵² *Id.*
- ⁵³ THE SUPREME COURT JUSTICES, ILLUSTRATED BIOGRAPHIES, 1789–1993 at 502 (Clare Cushman ed., Supreme Court Historical Society 1993). For this fun fact, I am indebted to Professor Stephen Calkins, who mentioned it at the ABA Antitrust Section 2006 Spring Meeting.
- ⁵⁴ Brief for the United States at 25–26, *International Salt Co. v. United States*, 332 U.S. 392 (1947).
- ⁵⁵ *Id.* at 45 n.14.
- ⁵⁶ *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. at 1291 (emphasis added).
- ⁵⁷ *United States v. Paramount Pictures, Inc.*, 334 U.S. at 145–46.
- ⁵⁸ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).
- ⁵⁹ *Illinois Tool*, 126 S. Ct. at 1291 (rejecting “the per se rule applied in *Morton Salt* and *Loew’s*”).
- ⁶⁰ *Id.* at 1292.
- ⁶¹ GEORGE ORWELL, 1984, at 150 (Signet Classic ed. 1949).