
Direct Proof of Market Power Now Necessary When Challenging Tying Arrangements of Patented Products

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In a tying arrangement, the sale of a "tying product" is conditioned on the buyer's purchase of an additional "tied" product from the same seller, or on the buyer's agreement not to purchase the tied product from anyone else. When the seller has market power in the tying product, courts typically have found tying arrangements to be illegal under antitrust laws, even without direct proof of anticompetitive effect. A seller has market power in the tying product if it can unilaterally sell tying products at an increased price by reducing the number of products that it sells. Courts have often presumed market power when a tying product is patented. In *Illinois Tool Works Inc. v. Independent Ink, Inc.*, the Supreme Court rejected such a presumption. Plaintiffs challenging tying arrangements involving patented products must now provide more direct proof of market power in the tying product.

Trident, Inc., a subsidiary of Illinois Tool Works Inc., sold printing systems to original equipment manufacturers (OEMs). The printing systems included three components: a patented printhead, a patented ink container and unpatented ink.

Independent Ink—which had developed ink suitable for use in Trident's printheads—brought a declaratory judgment action alleging that Independent did not infringe certain Trident patents, and that Trident's licensing agreements constituted illegal tying and monopolization under antitrust laws. Finding that Independent had failed to create an issue of fact as to whether or not Trident had market power in the tying product, the district court granted Trident's motion for summary judgment stating that its agreements did not violate antitrust laws.

With respect to one of the antitrust claims, the Federal Circuit reversed the district court's decision, holding that a patent on a tying product "creates a presumption of power within [the relevant] market." Although the Federal Circuit acknowledged that such a presumption had "been subject to heavy criticism," the Federal Circuit believed that Supreme Court precedent "squarely establish[ed] that patent and copyright tying, unlike other tying cases, do not require an affirmative demonstration of market power."

The Supreme Court granted certiorari to re-examine the presumption that a patent confers market power in a tying product. The Court observed that Congress's 1988 decision to remove such a presumption from the law on patent misuse, though not controlling, "certainly invites a reappraisal."

Noting that "[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market," the Court concluded that, consistent with the treatment of other types of tying arrangements, tying arrangements involving patented products should only be found to violate the antitrust laws where there has been "proof of power in the relevant market rather than...a mere presumption thereof." The Supreme Court consequently remanded the case, making clear that Independent should have an opportunity to prove market power in the tying product.

The Supreme Court's decision in *Illinois Tool Works* clarifies an aspect of tying law that had long been controversial. Courts and parties now know that in tying cases that involve patented products, the plaintiff bears the burden of proving market power in the tying product. Nonetheless, to prove a tying claim, an antitrust plaintiff still does not need to provide direct proof of actual anticompetitive effects from the tying arrangement. Under existing law, a showing of market power in the tying product will still typically suffice to support a finding that a tying arrangement is illegal.

For more information on this or other intellectual property matters, contact the authors listed above.

Authors



**Richard
Goldenberg**
SENIOR COUNSEL

✉ richard.goldenberg@wilmerhale.com

☎ +1 617 526 6548



Leon B. Greenfield
PARTNER

✉ leon.greenfield@wilmerhale.com

☎ +1 202 663 6972