

## ANTITRUST “MARKET POWER” AND INTELLECTUAL PROPERTY: WHY FTC AND DOJ ACTION IS NECESSARY

### Introduction

In 1989 and again in 1995, the Judiciary Committee of the House of Representatives considered legislation that would have prohibited courts in antitrust cases from drawing a presumption of a relevant market, or of the existence of market power, based merely on the possession of a patent or copyright.<sup>1</sup> In both instances, the Department of Justice endorsed the substance of the proposed legislation but questioned whether a substantial and compelling justification for amending the antitrust laws existed.<sup>2</sup> In 1996, when Assistant Attorney General Joel Klein testified on behalf of the Antitrust Division before the Committee, he described the Ninth Circuit opinion in *Digidyne Corp. v. Data General Corp.*<sup>3</sup> as the “lone decision” since the Supreme Court’s *dicta* in *Jefferson Parish Hospital District No. 2 v. Hyde*<sup>4</sup> to presume market power from the existence of intellectual property. Mr. Klein, citing several post-*Digidyne* cases in which the use of such a presumption was rejected, concluded that the “inexorable development and maturation of court decisions in this area” was one reason why legislative action was unnecessary.<sup>5</sup>

Since the time of Mr. Klein’s testimony, the case law in this area has not matured in the direction he thought it would. To the contrary, despite virtually unquestioned economic logic undermining the use of the presumption, some courts, in decisions we examine below, continue to apply it. Thus, the House Judiciary Committee once again finds itself considering a legislative correction to the problem.<sup>6</sup> On behalf of the Association of the Bar of the City of New York, we urge the FTC and DOJ (the “Agencies”) to seek to clarify the law in two respects. First, the Agencies should participate as amici in any petition for certiorari to the Supreme Court addressing the presumption that market power arises from intellectual property. Second, in the event the House or Senate considers an overall package of intellectual property legislation, the Agencies should support legislation as part of such a package that states that a patent, copyright, or trademark does not alone support a presumption that its holder possesses market power or that the intellectual property constitutes its own relevant market.

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<sup>1</sup> “Intellectual Property Antitrust Protection Act of 1989”: Hearing on H.R. 469 Before the Subcomm. on Econ. & Com. Law of the House Judiciary Comm., 101st Cong., 2d Sess. (1989); “The Intellectual Property Antitrust Protection Act of 1995”: Hearing on H.R. 2674 Before the Subcomm. on Econ. & Com. Law of the House Judiciary Comm., 104th Cong., 2d Sess. (1996). Two similar proposals were considered in the 99th Congress, and four by the 100th Congress.

<sup>2</sup> Joel Klein, Statement of Joel Klein Before the Committee on the Judiciary of the U.S. House of Representatives Concerning H.R. 2674, “The Intellectual Property Antitrust Protection Act of 1995”, 1996 WL 253568 (D.O.J.) (May 14, 1996).

<sup>3</sup> 734 F.2d 1336 (9th Cir. 1984).

<sup>4</sup> 466 U.S. 2 (1984).

<sup>5</sup> Klein, 1996 WL 253568 at \*4.

<sup>6</sup> “Market Power and Intellectual Property Litigation”: Hearings Before the House Subcomm. on Cts., the Internet & Intell. Prop. of the Comm. on the Judiciary, 107th Cong., 1st Sess. (Nov. 8, 2001).

## **The Presumption Makes No Economic Sense**

The antitrust laws and the patent laws are complementary in that both seek to promote “innovation, industry and competition.”<sup>7</sup> Continued judicial reliance on a presumption that the mere existence of intellectual property confers market power, however, risks undermining this harmony. As Professor Hovenkamp has put it, “presum[ing] market power in a product simply because it is protected by intellectual property is nonsense.”<sup>8</sup>

The mere grant of a patent or copyright does not create demand for a particular product, nor shield it from competition. It tells us nothing about the presence or absence of substitutable products, the nature or extent of barriers to entry, or the ability of its owners to profitably raise price or reduce output. That is to say, the mere existence of intellectual property tells us nothing about whether market power exists. In Professor Areeda’s words, “[e]xcluding others from using a particular name, word, image, product, or process does not imply any substantial market power when substitutes are plentiful. Trademark, copyright, or patent excludes others from duplicating the covered name, word, or product (etc.) but does not typically exclude rivals *from the market*. Accordingly, market power cannot be inferred, even presumptively, from the possession of intellectual property.”<sup>9</sup>

There is certainly nothing inherent in the nature of intellectual property that justifies a difference in treatment under the antitrust laws from any other type of product. While it might as a general proposition be true that intellectual property is characterized by high fixed costs and extremely low marginal costs, thus rendering traditional marginal cost pricing insufficient to recoup the sunk R&D investments, pricing above marginal cost does not imply the existence of market power. It does not make the question of whether substitutes or entry barriers exist irrelevant. Competition and new (or potential) entry in markets in which a patented technology is deployed will still constrain the exercise of market power. Rather, it is the inherent nature of intellectual property that makes use of the presumption so potentially harmful to incentives to innovate – it is relatively easy to obtain and, as former Chairman Pitofsky has noted, “[o]n average, market power probably is less durable in the high-tech sector of the economy.”<sup>10</sup>

Simply put, continued judicial use of the presumption defies common sense and risks harming the very competitive process the antitrust laws are designed to protect. The implicit justification for using the presumption – that, like *per se* categories of unlawfulness, it creates a rule that is simple, comprehensible, and easy to administer – fails to withstand scrutiny. Economic theory has done much to limit the range of conduct subject to *per se* condemnation, and similarly has much to offer in demonstrating that a presumption of market power based simply on ownership of intellectual property risks condemning conduct that may be welfare-enhancing and procompetitive.

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<sup>7</sup> Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).

<sup>8</sup> Herbert Hovenkamp, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, 136 (1994).

<sup>9</sup> IIA P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 518a, at 138 (2d. ed. 2002) (emphasis original).

<sup>10</sup> Robert Pitofsky, Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, Prepared Remarks at The Antitrust, Tech., & Intell. Prop. Conf. 2001, WL 206413 at \*3 (March 2, 2001) (F.T.C.). See also, William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 Colum. L. Rev. 1140 (1985).

## **The Antitrust Agencies' Guidelines**

Noting that the law is “unclear,” the Agencies’ *Antitrust Guidelines for the Licensing of Intellectual Property (1995)*<sup>11</sup> nonetheless state that the Agencies “will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.”<sup>12</sup> This guiding principle of Agency enforcement policy is a direct corollary of the fundamental proposition underlying the *Guidelines* – that intellectual property should be treated no differently from any other form of property.

The *Guidelines*, however, are not binding on the courts, do not preclude private litigation, and do not obviate the need to clarify the law. That there is an inconsistency between Agency enforcement policy and the position taken by some courts further confuses the state of the law. Judicial use of the presumption is economically irrational and risks creating, rather than remedying, a market failure by undermining the incentives to invest that the patent laws strive to promote. The *Guidelines* stand out starkly as further evidence of the need for Supreme Court clarification or, in the event that the House or Senate considers overall changes in the intellectual property statutes, legislative clarification.

## **The Jurisprudence**

The question of intellectual property and market power arises most frequently in tying cases, where the existence of market power is nearly outcome-determinative to a finding of antitrust violation. Unlawful tying occurs where the seller conditions the sale or license of one product (the tying product) on the sale or license of another (the tied product). The Supreme Court, in *United States v. Loew's, Inc.*, stated that the “economic power” required for a tying violation is “presumed when the tying product is patented and copyrighted.”<sup>13</sup> In many tying cases since, the Supreme Court has stated that the existence of a patent or copyright on the tying product creates a presumption of market power, and the Court has never suggested any retreat from this principle.<sup>14</sup> In its most recent decision addressing this subject, *Jefferson Parish*, the Court in dictum gave new life to the controversy by stating 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.”<sup>15</sup> Justice O’Conner, for the minority

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<sup>11</sup> U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995) [hereinafter GUIDELINES], *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

<sup>12</sup> *Id.* at § 2.2 and n.1.

<sup>13</sup> 371 U.S. 38, 44 (1962).

<sup>14</sup> *United States Steel Corp. v. Fortner Enters.* (Fortner I), 429 U.S. 610, 620 (1977); *United States v. Paramount Pictures, Inc.* 334 U.S. 131, 166 (1948); *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). *See also* pre-*Loew's* Supreme Court decisions such as *International Salt Co. v. United States*, 332 U.S. 392, 395-96 (1947); *Standard Oil Co. v. United States*, 337 U.S. 293, 307 (1949); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 608 (1953); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 10 n.8 (1958).

<sup>15</sup> *Jefferson Parish*, 466 U.S. at 16, citing *Loew's* and *Paramount Pictures*.

in a 5-4 concurrence, criticized the presumption by stating that “a patent holder has no market power in any relevant sense if there are close substitutes for the patented product.”<sup>16</sup>

The use of intellectual property as a proxy for market power is particularly troublesome in the tying context given the currently confused state of tying law itself. Tying doctrine today is governed largely by the Supreme Court’s decision in *Jefferson Parish*. That Court established as a threshold element to an unlawful tying arrangement a showing that there is significant market power in the tying product, such that the power is of “the degree or the kind” that enables the seller of the tying product to “force” customers to purchase the tied product.<sup>17</sup> If such market power exists, then under *Jefferson Parish* the tying can be declared unlawful *per se* and no inquiry into the possible procompetitive benefits or efficiency justifications for the tie-in will be considered.<sup>18</sup> The Court of Appeals ruling in *United States v. Microsoft Corp.*<sup>19</sup> contributed substantially to the erosion of this *per se* rule by attempting to carve out what might be called a “technology exception” to that rule. Reasoning that in the “pervasively innovative” platform software industry, traditional *per se* analysis risks condemning ties that may be welfare enhancing and procompetitive, the D.C. Circuit declined to apply the *per se* rule to strike down Microsoft’s “bundling” of Internet Explorer (the tied product) with the Windows operating system (the tying product).<sup>20</sup>

The *Microsoft* ruling, though arguably inconsistent with *Jefferson Parish*, does accord with the tying analysis in the *Guidelines*, which reject *per se* treatment of tying even in the face of evidence of market power. Tying is likely to be challenged by the Agencies where “(1) the seller has market power in the tying product; (2) the arrangement has an adverse effect on competition in the relevant market for the tied product; and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effects.”<sup>21</sup>

In weighing the risks of investment in R&D against the strength of protection for the resulting invention, companies currently have the following guidance: The Supreme Court has said that if the tying product is protected by patent or copyright the existence of market power should be presumed. At least two federal appellate courts agree.<sup>22</sup> The Agencies and some lower and appellate courts disagree, and treat intellectual property no differently from other property. The Supreme Court has said that, where all the elements of a tying claim have been met, it should be struck down as *per se* illegal without a balancing of any potential efficiency gains against harm to competition. The Agencies and some lower courts disagree, arguing that a rule of reason market analysis to measure net efficiencies is indispensable to achieving the welfare-maximizing outcome, particularly in hi-tech industries.

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<sup>16</sup> *Id.* at 38 n.7

<sup>17</sup> *Id.* at 17-18.

<sup>18</sup> In addition to a showing of market power, the other necessary elements of the *per se* offense must be met: the tying and tied product must in fact be separate products, and a “not insubstantial” amount of commerce must be affected. *See, e.g., Fortner I*, 394 U.S. at 498-99.

<sup>19</sup> 253 F.3d 34 (D.C. Cir. 2001) (en banc).

<sup>20</sup> *Microsoft*, 253 F.3d at 93.

<sup>21</sup> GUIDELINES, at § 5.3

<sup>22</sup> *Digidyne; MCA Television Limited v. Public Interest Corporation*, 171 F.3d 1265 (11<sup>th</sup> Cir. 1999).

Such uncertainty leaves the law in this economically significant area in a state of turmoil and unreliability. Post-*Jefferson Parish* lower court jurisprudence provides little comfort. In *Digidyne*, the Ninth Circuit held that a copyright in an operating system was sufficient to trigger a presumption of market power in that product market, thus rendering the linking of sales of that operating system to sales of central processing units *per se* unlawful tying. Rather than analyzing whether customers, in this instance OEMs, had alternatives to the tying product, the Court expressly refused to review the record for “what it may reveal as to defendant’s position in a defined market,” and instead focussed only on considering whether the tying product was “sufficiently unique and desirable to an appreciable number of buyers...”<sup>23</sup> Citing *Loew’s* for the proposition that a copyright establishes such uniqueness as a matter of law, the Court concluded that the copyright “created a presumption of economic power sufficient to render the tying arrangement illegal *per se*.”<sup>24</sup> Not only did this analysis deem demand-side substitutability to be irrelevant in the face of a copyright, but, even *if* it existed, incapable of diminishing the “adverse impact on competition in the tied product”.<sup>25</sup>

Nor has judicial use of the presumption been confined to tying. In *Image Technical Services, Inc. v. Eastman Kodak Co.*,<sup>26</sup> the Ninth Circuit concluded that, when a seller has market power, a mere refusal to license a patented product to a competitor can violate Section 2 of the Sherman Act as an act of monopolization. The liability finding was based on the patent owner’s subjective intent and the assumption of market power for the patented product – introducing enormous uncertainty into whether an IP owner has the right to refuse to license intellectual property. This analysis was rejected in *In re Independent Service Organizations Antitrust Litigation*,<sup>27</sup> where the Federal Circuit agreed that “[a] patent alone does not demonstrate market power.”<sup>28</sup> In fact, most appellate courts have recognized that a presumption of market power is economically unsupportable in Section 2 cases, and have declined to follow the *Jefferson Parish* dictum.<sup>29</sup> No economic theory has been advanced to suggest why application of the presumption might be more appropriate in tying cases.

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<sup>23</sup> *Digidyne*, 734 F.2d at 1341.

<sup>24</sup> *Id.* at 1344.

<sup>25</sup> *Id.* at 1345.

<sup>26</sup> 125 F.3d 1195 (9th Cir. 1997).

<sup>27</sup> 203 F.3d 1322 (Fed. Cir. 2000). *See also* *Abbott Lab. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991), where, in the context of a Section 2 monopolization claim, the Court held that “[a] patent does not of itself establish a presumption of market power in the antitrust sense”, citing *Walker Process Equip. Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 178 (1965).

<sup>28</sup> *Id.* at 1325. Former FTC Chairman Pitofsky has criticized this ruling for other reasons, noting that “because intellectual property is now a principal, if not the principal, barrier to new entry in high-tech markets, . . . . I am concerned that recent cases, and particularly the Federal Circuit’s opinion in [*In re Independent Service Organizations Antitrust Litigation*], have upset th[e] traditional balance [between intellectual property and antitrust] in a way that has disturbing implications for the future of antitrust in high-technology industries.” 68 *Antitrust L.J.* 913, 919 (2001). Chairman Pitofsky referred to a danger that the market power that may result from intellectual property protection could be “used to distort competition in, for example, related product or service areas.” *Id.*

<sup>29</sup> *See, e.g.*, *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1367 & n.7 (Fed. Cir. 1998); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479-480 (3d Cir. 1992) (en banc); *Abbott Labs*, 952 F.2d at 1354; *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676-77 (6th Cir. 1986); *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1367 (Fed. Cir. 1984); *Will v. Comprehensive Acc. Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985); *Nobel Scientific Indus. v. Beckman Instr., Inc.* 670 F. Supp. 1313, 1329, *aff’d* 831 F.2d 537 (4th Cir. 1987); *In re Pabst Licensing*, 2000 U.S. Dist. LEXIS 12076 (E.D. La. 2000).

Nor does the Supreme Court seem inclined to resolve the inconsistency. In two pre-*Digidyne* cases, the Supreme Court twice denied *certiorari* in cases presenting the question of whether market power should be presumed from the existence of intellectual property.<sup>30</sup> In its most recent opportunity to confront the issue, it also declined to hear *Digidyne*, though Justices Blackmun and White dissented, urging the Court to address the issue of “what effect should be given the existence of a copyright or other legal monopoly in determining market power.”<sup>31</sup> The Court denied *certiorari* notwithstanding clearly divergent lower court jurisprudence, but also in the face of inconsistency with the Supreme Court’s own prior decisions. In *Walker Process*, the question before the Court was whether enforcement of a patent obtained by fraud could be the basis of a Section 2 monopolization claim. Expressing a reluctance to find *per se* illegality “absent examination of market effect and economic consequences,”<sup>32</sup> the Court held that even in the face of a fraudulently procured patent, all the elements of a Section 2 claim must be established, including market power. “There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof....”<sup>33</sup> Yet this case was decided after *Loew’s*, where that very factual analysis was deemed unnecessary in a tying case.

As a matter of antitrust policy and sound economics, *Digidyne* was wrongly decided. Most disturbing, however, as a strict matter of law, the outcome was correct. It was consistent with established Supreme Court precedent both in use of the presumption of market power and in application of the *per se* rule against tying. As the Supreme Court has said on several occasions, lower courts – even a court of appeals sitting en banc – lack the power to overrule prior Supreme Court decisions.<sup>34</sup>

### **Déjà Vu All Over Again**

In Assistant Attorney General Klein’s 1996 testimony to the House Judiciary Committee, he questioned the need for legislation in light of the “inexorable development and maturation of court decisions,” but supported its substance.<sup>35</sup> To illustrate the baselessness of the presumption, Mr. Klein used the following example:

[A]s the Court mused in a footnote in *Loew’s*, the film distributors’ ability to foist undesirable films on unwilling television stations may have stemmed from ‘the fact that to television as well as motion picture viewers there is but one *Gone With the Wind*.’ Had the Court relied on that point, *Loew’s* would be a far more compelling – but much narrower – case, in which the market power finding was premised on the actual attributes of a tying product. Instead, though, the Court presumed market power from the very existence of the copyright, which vested no more power in *Gone With the Wind* than it did in *Getting Gertie’s Garter*, one of the tied movies. But if that were what mattered, the movie studios would not

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<sup>30</sup> American Hoist, *cert. denied*, 469 U.S. 821 (1984); Will, *cert. denied*, 475 U.S. 1129 (1986).

<sup>31</sup> 473 U.S. at 909.

<sup>32</sup> Walker Process, 382 U.S. at 178.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

<sup>35</sup> Klein, 1996 WL 253568 at \*4.

have needed to tie in the first place – market power would exist for every copyrighted movie. This is one of the clearest examples of why it is wrong to infer market power from the mere existence of an intellectual property right.<sup>36</sup>

Yet, in *MCA Television Limited v. Public Interest Corporation*,<sup>37</sup> decided three years after Mr. Klein’s testimony and in precisely the same “block booking” context, the Eleventh Circuit employed the presumption. MCA licensed several syndicated television shows to PIC, and conditioned these licenses on agreement by PIC that it would also license a show called *Harry and the Hendersons*. PIC later alleged that it would not have licensed *Harry* had MCA not insisted on this contractual provision. The Eleventh Circuit, without so much as a footnote devoted to the uncertainty in the case law regarding a presumption of market power, simply applied *Loew’s* and presumed that MCA’s copyright in the tying television shows conferred upon it economic leverage sufficient to induce PIC to take the tied product (*Harry*). The court concluded:

Conditioning the licensing of the shows PIC did wish to license on its cash purchase of *Harry* thus allowed *Harry* to best the competition for the slot it eventually filled on PIC’s roster entirely apart from its intrinsic appeal to PIC’s programmers. This is precisely the sort of anticompetitive effect the *per se* rule of *Paramount* and *Loew’s* intended to protect against, and unless and until the Supreme Court explicitly overrules these cases, we must adhere to the rule that they establish.<sup>38</sup>

The Court does not even mention by name what the tying products are, let alone conduct any sort of analysis to determine whether these shows were sufficiently popular to *actually* give to MCA the ability to charge supracompetitive prices, and thereby “force” PIC to also license *Harry*. Demand for programming turns not on whether it is copyrighted, but on whether it is desirable. Similarly, desirability has nothing to do with the presence or absence of a copyright. To borrow Assistant Attorney General Klein’s words, “[t]his is one of the clearest examples of why it is wrong to infer market power from the mere existence of an intellectual property right.”<sup>39</sup>

### **The Patent Laws Do Not Provide the Solution**

Given recent history, the Agencies must urge the Supreme Court to take the first opportunity to correct the Jefferson Parish dictum. Moreover, if overall intellectual property legislative reform is under consideration, then a provision to cure this particular inconsistency appears appropriate. The patent laws have been repeatedly amended over the years to provide greater protection to intellectual property. Most recently, for example, Section 271(d) of title 35 was amended in 1988 to provide:

No patent owner otherwise of a patent entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of

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<sup>36</sup> *Id.* at \*2 (citations omitted) (emphasis added).

<sup>37</sup> 171 F.3d 1265, 1277 (1999).

<sup>38</sup> *Id.* at 1278 (citations omitted).

<sup>39</sup> Klein, 1996 WL 253568 at \*2.

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 or sale is conditioned.

Though the economic logic of this amendment is unquestionable, some courts have taken the position that Section 271(d) applies only to patent misuse defenses in infringement cases, not antitrust cases.<sup>40</sup> The Agencies have apparently taken a similar position – Section 271(d) is not mentioned in the *Guidelines*.

## **Conclusion**

In his 1996 testimony before the Committee, Assistant Attorney General Klein stated, we think correctly, that “modification of the application of the antitrust laws should occur only when there is a substantial and compelling justification in favor of the change.”<sup>41</sup> That justification exists today. The case law is confused and the patent laws do not solve the problem. Adherence to governing Supreme Court precedent compels application of the presumption in tying cases – a result inimical to the aims of both the patent laws and the antitrust laws.

The incentives that the patent laws provide to foster innovation may well be undermined if the innovator can be saddled with a presumption of market power – the presumption increases the risk of litigation being filed, the threat of treble damages and of ultimate liability, and so correspondingly reduces the value of intellectual property. “The benefits from innovation are generally not fully recovered by the inventor, particularly where the legal regime for protecting the invention is weak. Antitrust rules which reduce the value of intellectual property or discourage broad exploitation of intellectual property may therefore impose a more substantial social cost than similar rules applied to other forms of property.”<sup>42</sup>

The Agencies should encourage the Supreme Court, through amici submission in support of petitions for certiorari and on the merits of the issues presented, to correct the *Jefferson Parish* dictum that market power should be presumed from a “patent or similar monopoly over a product.” Alternatively, in the event the House or Senate considers overall intellectual property reform, the Agencies should support legislation as part of that package that a patent, copyright,

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<sup>40</sup> *Grid Sys. Corp. v. Texas Instrs., Inc.* 771 F. Supp. 1033, 1044 n.2 (N.D. Col. 1991) (“Section 271(d) relates only to the defense of patent misuse as a defense to an infringement claim.”); *accord, e.g., ITS v. Kodak*, 125 F.3d 1195, 1241 n.7 (9<sup>th</sup> Cir. 1996). Other courts, however, have held that this section does apply in antitrust cases. *See, e.g., Polysius v. Fuller*, 709 F. Supp. 560, 576 (E.D. Pa.) (Under 271(d), absent market power, a party “cannot be guilty of either antitrust violations or patent misuse....”), *aff’d mem.*, 889 F.2d 1100 (Fed. Cir. 1989); *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1347, 1362-63 (Fed. Cir. 1999); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1187 (1<sup>st</sup> Cir. 1994).

<sup>41</sup> Klein, 1996 WL 253568 at \*1.

<sup>42</sup> James Langenfeld, *Intellectual Property and Antitrust: Steps Toward Striking a Balance*, 52 Case W. Res. L. Rev. 91, at 93 (2001).



or trademark does not alone support a presumption that its holder possesses market power or that the intellectual property constitutes its own relevant market.<sup>43</sup>

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<sup>43</sup> The ABA Section of Intellectual Property law also advocates such a legislative amendment. *See* Charles P. Baker, Statement of Charles P. Baker on Market Power and Intellectual Property Litigation, Before the Subcomm. on Cts., the Internet, & Intell. Prop., Comm. on the Judiciary of the U.S. House of Reps. (Nov. 8, 2001).