

**March 3, 2006**

HIGH COURT REJECTS RULE EQUATING PATENT AND MARKET POWER

(Illinois Tools Works, Inc. v. Independent Ink, Inc.)

The U.S. Supreme Court issued a ruling today limiting antitrust actions against intellectual property owners by rejecting a presumption that the owner of a copyright or patent possesses market power under the antitrust laws. The Washington Legal Foundation (WLF) filed a brief in the case on August 4, 2005, urging the Court to reject that presumption.

Illinois Tool Works, the defendant, is the parent of a company that manufactures print heads for makers of bar code printers; the company also manufactures ink supply systems for those printers. Plaintiff Independent Ink alleged unlawful tying – *i.e.*, that the defendant violated the Sherman Act by requiring purchasers of its print head assemblies to purchase its ink and ink supply systems, as well. The Supreme Court has long held that in tying cases, the plaintiff must prove that the defendant company has market power. The U.S. Court of Appeals for the Federal Circuit, however, ruled in this case that “patent and copyright tying, unlike other tying cases, do not require an affirmative demonstration of market power.”

In its brief, WLF argued that intellectual property has no inherent characteristics that justify shifting the burden of proof to the owner of that property. The fact that a product involved in a tying arrangement has apparently met the requirements of copyright or patent law does not justify a presumption of market power for a copyrighted or patented product in a tying case. WLF noted that the Federal Circuit’s rule would encourage frivolous nuisance suits, since it would render it much easier for a suit to survive a motion to dismiss or a summary judgment motion, even where the patent or copyright owner possesses no market power whatsoever. Faced with the prospect of an antitrust trial, with the threat of treble damages, owners of intellectual property will be under great pressure to settle such cases. WLF also argued that the Federal Circuit’s rule would encourage defendants in patent infringement actions to bring antitrust counterclaims, thus bypassing the requirements of the patent misuse defense created by Congress.

In its 8-0 decision (with Justice Alito not participating), the High Court agreed that the plaintiff in a tying case must prove that the defendant possesses market power, and that the mere existence of a copyright or a patent is not sufficient to establish market power.

WLF's brief was drafted on a *pro bono* basis by William C. MacLeod, a member of Collier Shannon Scott specializing in antitrust, and by Samuel M. Collings, an associate at the firm.

WLF is a public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in the Supreme Court and other federal courts to address the proper scope of the antitrust laws. In the Court's current Term, WLF also filed briefs in the antitrust cases *Texaco, Inc. v. Dagher* and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, in which the Justices also accepted WLF's positions.

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For further information, contact WLF Senior Vice President for Legal Affairs David Price, (202) 588-0302. A copy of the comments is posted on WLF's web site, www.wlf.org.