News Release

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WLF ASKS HIGH COURT TO REJECT RULE EQUATING PATENT AND MARKET POWER

(Illinois Tools Works, Inc. v. Independent Ink, Inc., No. 04-1329)

The Washington Legal Foundation (WLF) filed a brief today in the U.S. Supreme Court asking the Court to overturn an appeals court ruling that would greatly expand antitrust liability by creating a presumption that the owner of a copyright or patent possesses market power under the antitrust laws.

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 alleges 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. The rule therefore poses a risk to patent owners simply trying to enforce their rights under their patents. As a result, the presumption of market power undermines the incentives that the patent laws were intended to provide.

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. *See*, *e.g.*, *Texaco, Inc. v. Dagher* (Sup. Ct. No. 04-805); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co.*, *537 U.S. 1148 (2003)*; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

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