

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

EVOLVING INTELLECTUAL PROPERTY MARKETPLACE
COMMENTS PROJECT No. P093900.

**COMMENTS SUBMITTED BY BENJAMIN MASSE IN RESPONSE TO FEDERAL TRADE
COMMISSION'S NOTICE OF PUBLIC HEARING SEEKING VIEWS OF INTERESTED
PARTIES AS TO THE EVOLUTION OF INTELLECTUAL PROPERTY MARKETPLACE.**

INTRODUCTION

On December 5, 2008 the Federal Trade Commission ("Commission") initiated a series of public hearings on new developments regarding intellectual property marketplace. The Commission issued a Notice of Public Hearings in the Federal Register seeking "*public comments discussing the current marketplace for intellectual property, in particular its impact on innovation incentives and competition concerns and the role of economic analysis in this assessment*". (73 Fed. Reg. 70, 645 at 70,647 (2008)). Short comments below address the issue identified in question 6 listed in the Commission's Notice of Public Hearings. (*Ibid.*).

The Supreme Court's decision in Illinois Tool Works v. Independent Ink Inc., 547 U.S. 28 (2006) has an impact on patent value, competition, and the level of technological innovation. By requiring proof of market power in tying patented product under *Sherman Act § 1*, Illinois Tool Works raises significantly the costs that must be incurred to challenge to the legality of tying arrangement— especially private antitrust enforcement. This is a new development the Commission should pay special attention to for the reasons set forth briefly below.

STATEMENT OF INTEREST

Benjamin Masse is a Canadian citizen living in *Montréal, province de Québec*. Mr. Masse is an entrepreneur developing software programs designed mainly for the entertainment industry. Lately, Mr. Masse has filed an application before the U.S. Patent and Trademark Office to obtain a patent for a software program. The Commission's hearings on new developments in the intellectual property marketplace

raise issues of prime interest to Mr. Masse who wishes to share views with the Commission on the proper balance between effective protection of innovation through intellectual property statutes and preservation of public domain's breadth. The views expressed in this document are those of Mr. Masse alone. Mr. Masse has retained Daniel Martin Bellemare, attorney at law, to prepare comments on a *pro bono* basis.

COMMENTS

The Supreme Court's decision in Illinois Tool Works is a new development having an impact on patent value. The evidentiary standard set forth in Illinois Tool Works imposes significant economic and legal hardships on licensee seeking to have anti-competitive tying arrangement involving tying patented product declared illegal under *Sherman Act § 1*. Before Illinois Tool Works there was a presumption of market power (U.S. v. E.I. du Pont de Nemours & Co 351 U.S. 377, 391 (1956)) in tying patented product stemming from patent ownership. Illinois Tool Works 547 U.S. 36-37 citing Jefferson Parish Hosp. Dist. No.2 v. Hyde 466 U.S. 2, 16 (1984)).

In Illinois Tool Works the Court rejected as a matter of law "*the presumption of market power in a patented product*" ruling, instead, licensee claiming illegality of tying arrangement under *Sherman Act § 1* must prove patentee has market power in tying product. Illinois Tool Works 547 U.S. 31 and 46. It is very unlikely also that a presumption of market power may be inferred from patent ownership under *Sherman Act § 2* either. U.S. v. Grinnell Corp. et al. 384 U.S. 563, 570-71 (1966). Accord, Walker Process Equipment v. Food Machinery & Chemical Corp. 382 U.S. 172, 174 (1965). This has a serious impact on the patent system and intellectual property marketplace as well. ¹

¹ In Illinois Tool Works the Court relied in large part on the *Patent Misuse and Antitrust Reform Act* 35 U.S.C. § 271 (d) in concluding no presumption of market power stems from patent ownership. ("*After considering the congressional judgment reflected in the 1988 amendment, we conclude that tying arrangements involving patented products should be evaluated under the standards applied in cases like Fortner II and Jefferson Parish rather than under the per se rule applied in Morton Salt and Loew's. While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy, that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof*". Illinois Tool Works 547 U.S. 42-43. (Citations

There is a double standard working to the detriment of licensee in patent litigation. Under 35 U.S.C. 271 (d) licensee must prove patentee has market power. “*Claimant*” (i.e. patentee) may be awarded treble damages under 15 U.S.C. § 284 while “*prevailing party*” (Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources 532 U.S. 598, 606 (2001)) (i.e. either patentee or licensee) can collect reasonable attorney fee— but only in “*exceptional cases*” (15 U.S.C. § 285). Furthermore, licensee must prove that patentee has market power in tying patented product before getting judgment and order declaring tying arrangement illegal under antitrust laws— with all attending costs— and awarding treble damages.

Recent Supreme Court decisions have delineated the scope of patent infringement remedy thereby preserving breadth of public domain. Nevertheless, barriers to private antitrust enforcement remain despite recent rulings limiting the scope of patent exhaustion doctrine (Quanta Computer Inc. et al. v. LG Electronics Inc. 128 S.Ct. 2109 (2008)) and obviousness (KSR International Co. v. Teleflex Inc et al. 550 U.S. 398 (2007)). Similarly, the Court has constrained the extraterritorial application of patent law. Microsoft Corporation v. AT&T Corp. 550 U.S. 437 (2007). See however, F. Hoffmann-La Roche Ltd, et al. v. Empagran S.A. et al. 542 U.S. 155 (2004) limiting scope of Sherman Act’s § 1 extraterritorial application under *Foreign Trade Antitrust Improvements Act of 1982*. 15 U.S.C. § 6A. And, federal declaratory judgment remedy may be used more readily by licensee. (Medimmune, Inc. v. Genentech., et al. 549 U.S. 118, 137 (2007). “*Licensee [is] not required, in so far as Article III is concerned, to break or terminate its [...] license agreement before seeking a declaratory judgment in federal court that the underlying patent is invalid, unenforceable, or not infringed*” . See however Bell Atlantic Corporation, et al. v. Twombly 550 U.S. 544 (2008)).

omitted). The above ruling in all likelihood extends to intellectual property rights generally (e.g. copyright, trade mark) since “*in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product*”. Illinois Tool Works 547 U.S. 46.

To sum up, patentee is entitled to treble damages for patent infringement under patent law without evidence that licensee has market power. On the other hand, licensee may be awarded treble damages where tying arrangement is declared illegal under antitrust laws. However, as already mentioned, in order for a court to declare tying arrangement illegal under *Sherman Act § 1* licensee must prove patentee possesses market power within relevant tying patented product market. The partial *per se* rule set forth in Illinois Tool Works results in substantially higher litigation costs to licensee— although licensee may be awarded treble damages and reasonable attorney fee if successful. (15 U.S.C. § 15 (a)).

Antitrust litigation is very expensive whether the legality of practice under review must be analysed under either the partial *per se* rule or the rule of reason. The partial *per se* rule applied to assess the legality of tying arrangement pursuant to *Sherman Act § 1*, necessitates a legal debate similar in substance to the one under the rule of reason analysis. Market power raises complex issues of material fact resolved through production of detailed and expensive expert evidence as to cross-elasticity of demand, alternative sources of supply and entry barriers. FTC/DOJ Horizontal Merger Guidelines (1992). See also, Eastman Kodak Co. v. Image Technical Services, Inc. 504 U.S. 451, 461-480 (1992).

Unlike the “*quick look analysis*” under the rule of reason used where “*an observer with even a rudimentary understanding of economics could conclude that the arrangements in question could have an anticompetitive effect on customers and markets*” (California Dental Ass’n v. F.T.C. 526 U.S. 756, 770 (1999)), the evidentiary standard embodied in the partial *per se* rule is unsuitable for judging the legality of tying arrangement in plaintiff’s favor by way of motion for summary judgment under Federal Rules of Civil Procedure 56. (“*Antitrust law limits the range of permissible inference from ambiguous evidence in a § 1 case*”). Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. 475 U.S. 574, 588 (1986). Still, summary judgment is an effective procedural vehicle to derail unsubstantiated private antitrust suit. Anderson et al. v. Liberty Lobby, Inc., et al. 477 U.S. 242, 248 (1986) citing First national Bank of Arizona v. Cities Services Co. 391 U.S. 253 (1968). See also, Celotex Corp. v. Catrett 477 U.S. 317 (1986).

CONCLUSION

The evidentiary rule set forth in Illinois Tool Works requires proof of market power in tying product market in every case where the legality of tying arrangement is challenged under Sherman Act § 1. Proof of market power necessitates considerable financial, economic, and professional resources. Public antitrust enforcement toward tying arrangement whereby tying product enjoying patent protection is tied to a distinct product becomes paramount in the wake of Illinois Tool Works. Extension of the partial *per se* rule to tying arrangement involving patented tying product— thereby increasing substantially litigation costs to private litigant— must be offset by increased public enforcement. Soft antitrust enforcement entails lesser competition and innovation— conditions conducive to inflated patent value and inefficiencies. Statutory grant of patent monopoly must be limited to specifically protected innovation in order to ensure sustainable technological development consistent with consumer welfare.

Signed this 5th day of February 2009

~~BENJAMIN MASSE~~

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