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PROOF OF ECONOMIC POWER IN A SHERMAN ACT TYING ARRANGEMENT CASE: SHOULD ECONOMIC POWER BE PRESUMED WHEN THE TYING PRODUCT IS PATENTED OR COPYRIGHTED?

J. Dianne Brinson*

INTRODUCTION

In a tying arrangement, a seller conditions a buyer's purchase of one product on the buyer's willingness to take a second product as well. The buyer can obtain the desired "tying" product only by agreeing to also take the seller's less desirable "tied" product.1 Over the years, various tying arrangements have been held illegal under section 1 of the Sherman Act2 and under section 3 of the Clayton Act.3

According to the most recent Supreme Court tying arrangement case, the Sherman Act case of Jefferson Parish Hospital District No. 2 v. Hyde,4 the "essential characteristic of an invalid tying arrangement lies

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1. The Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518 (1958). Other terms which courts have used for this type of contract include "tie-in," "tying agreement," and "tying device."


3. 15 U.S.C. § 14 (1982). For section 3 of the Clayton Act to apply, the tying and tied products must be "goods, wares, merchandise, machinery, supplies, or other commodities."

in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."

When such "forcing" occurs, "competition on the merits in the market for the tied item is restrained," in violation of the Sherman Act's prohibition of "contract[s] ... in restraint of trade." If the seller is able to force the buyer to take the unwanted product, the resulting restraint in trade, in the view of the Supreme Court, presents a two fold threat to competition: (1) Buyers are deprived of the opportunity to select the "best bargain" in the tied product market; and (2) other sellers of the tied product are deprived of the opportunity to have their versions of the tied product compete "on the merits" with the tying seller's tied product.

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6. Id.

7. Section 1 of the Sherman Act states in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade ... is declared to be illegal." 15 U.S.C. § 1 (1982).

8. Hyde, 466 U.S. at 15, 104 S. Ct. at 1560.

9. Id. at 14-15, 104 S. Ct. at 1559-60. According to earlier tying arrangement cases, the major threat that tying arrangements presented to competition was "leverage": A tying arrangement could be a means of extending a monopoly in the tying product to the tied product. See, e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 73 S. Ct. 872, 882 (1953); and United States v. Loew's Inc., 371 U.S. 38, 45, 83 S. Ct. 97, 102 (1962). The "leverage" theory has been widely criticized. See generally Pearson, supra note 3, at 639-51 (discussing and criticizing the "leverage" (monopoly extension) charge against tying arrangements); Posner, supra note 3, at 508; and Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 60 (1958). These criticisms are discussed more fully infra at notes 48-61 and accompanying text. The majority opinion in Hyde, possibly as a result of these criticisms, mentions the "monopoly extension" concern only in a footnote, 466 U.S. at 13 n.19, 104 S. Ct. at 1558 n.19 (quoting Justice White's dissenting opinion in Fortner I, 394 U.S. 495, 89 S. Ct. 1252 (1969)), emphasizing instead the harm a tie-in presents to tied product sellers and to consumers. 466 U.S. at 14, 104 S. Ct. at 1559. Justice O'Connor, in her opinion concurring in the judgment in Hyde, states that "[t]ying may be economically harmful primarily in the rare cases where power in the market for the tying product is used to create additional market power in the market for the tied product." 466 U.S. at 36, 104
Although the language of section 1 of the Sherman Act condemns all contracts in restraint of trade, judicial interpretation has long established that only those contracts that unreasonably restrain trade violate section 1. Some types of contracts are per se illegal, i.e., conclusively presumed to be "unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the excuse for their use." A tying arrangement is per se illegal if (1) the tying seller has sufficient economic power in the tying product to be able to force buyers to take the tied product; and (2) the tying arrangement has an effect on a "not insubstantial" amount of interstate commerce.

S. Ct. at 1571.

In Hyde, the Supreme Court also recognized the possibility that a tying arrangement may create barriers to entry in the tied product market, 466 U.S. at 14, 104 S. Ct. at 1559; and may be a vehicle for price discrimination, a view shared by economists, 466 U.S at 14-15 and n.23, 104 S. Ct. at 1559-60 and n.23. See generally Bowman, supra note 3, at 23-24; Butler, Lane & Phillips, The Futility of Antitrust Attacks on Tie-In Sales: An Economic and Legal Analysis, 36 Hastings L. J. 173 (1984); and Posner, supra note 3, at 508-10. Price discrimination is discussed infra at notes 55-61 and accompanying text.

10. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502 (1911).


As the Court further stated in Northern Pacific,

This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity of an incredibly complicated and prolonged economic investigation . . .[,] an inquiry so often wholly fruitless when undertaken.

Id.

For practices that do not fall in one of the categories of per se illegality, the trier of fact must, under the "rule of reason" approach, consider all factors and circumstances which might condemn or justify the defendant's behavior. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39, 38 S. Ct. 242, 244 (1918).


Despite the use of the per se rule to judge the legality of tying arrangements, the courts have been willing to consider possible business justifications for a tie-in. The most famous such case is United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 555-60 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567, 81 S. Ct. 755 (1961), which indicated that the use of a tie-in to facilitate the development of a new product (cable television equipment) could be lawful. The other common justification defense is the "goodwill defense," e.g., Pack Mfg. Co. v. General Motors Corp., 80 F.2d 641 (7th Cir. 1935), aff'd per curiam, 299 U.S. 3, 57 S. Ct. 1 (1936) (upholding a General Motors requirement that GM dealers use only GM parts). See generally W. Holmes, Intellectual Property and Antitrust Law § 20.02 (1985).

Justice O'Connor, concurring in the judgment in Hyde (together with Chief Justice Burger and Justices Powell and Rehnquist), stated that "[t]he time has . . . come to abandon the 'per se' label" for tying arrangements. 466 U.S. at 35, 104 S. Ct. at 1570. According to Justice O'Connor, the use of the per se rule in tying cases "incurs the costs of a rule-of-reason approach without achieving its benefits." Id. at 34, 104 S. Ct.
The focus of this article is on the economic power element of per se tying arrangement illegality. According to a 1962 Supreme Court at 1570. Since a tying arrangement is per se illegal only if the seller has economic power in the tying product, the per se doctrine is only applied to tying arrangements after an "elaborate inquiry into the economic effects" of the arrangement, an inquiry that is avoided in other areas of per se rule applicability (price-fixing agreements, for example). Id.

The Department of Justice, in its 1985 Guidelines on Vertical Distribution Restraints [hereinafter referred to as Guidelines] has indicated that it will not challenge a tie-in if the tying seller has a market share of thirty percent or less in the tying product market. The presumption that such a tie-in is legal can be overcome only by a showing that the tie-in has unreasonably restrained competition in the tied product market. If the tying seller has a market share over thirty percent, the Department will apply the per se rule if it finds that the seller has "dominant" market power. 50 Fed. Reg. 6263, 6272 (1985).

A tying arrangement that does not have the attributes of per se illegality could violate the Sherman Act under a rule of reason approach on the basis of evidence that the arrangement unreasonably restrained trade in the relevant market. Hyde, 466 U.S. at 18, 104 S. Ct. at 1561; Fortner I, 394 U.S. 495, 499-500, 89 S. Ct. 1252, 1256-57 (1969). This aspect of the Fortner I opinion is criticized in Dam, Fortner Enterprises v. United States Steel: "Neither a Borrower Nor a Lender Be," 1969 Sup. Ct. Rev. 1, 32-36. In Hyde, the Court, after concluding that the elements of a per se violation had not been established, scrutinized the allegedly illegal contract under the rule of reason. 466 U.S. at 29-31, 104 S. Ct. at 1567-68. The Court, not surprisingly, concluded that the respondent had not made out a case under the rule of reason. Id. at 31, 109 S. Ct. at 1568. A plaintiff is rarely able to establish an antitrust law violation under the rule of reason.

In Times-Picayune the Supreme Court developed different Sherman Act and Clayton Act standards for applying the per se rule to tying arrangements. 345 U.S. 594, 608-09, 73 S. Ct. 872, 880 (1953). Commentators have questioned whether there are still two tests or now only one test for both statutes, the harsher Sherman Act test set out in Times-Picayune. See 16A Business Organizations, Von Kalinowski, Antitrust Laws and Trade Regulation § 6G.05[2] (1986); Bauer, A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis, 33 Vand. L. Rev. 283, 285 (1980); and Note, The Logic of Foreclosure: Tie-in Doctrine after Fortner v. U.S. Steel, 79 Yale L.J. 86 n.1 (1969). In any event, this article will concentrate on Sherman Act standards for per se rule tying arrangement illegality.

Generally, the courts, before inquiring as to the existence of economic power, determine whether the seller has tied two products or sold a single multi-component product. If there is no linkage of two separate product markets, there is no tying arrangement. Hyde, 466 U.S. at 19-20, 104 S. Ct. at 1562; Times-Picayune, 345 U.S. at 613-14, 73 S. Ct. at 883-84.

According to Fortner I, in considering whether a tying arrangement has the "effect on commerce" that makes the per se rule applicable, "normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimus, is foreclosed to competitors by the tie." 394 U.S. at 501, 89 S. Ct. at 1258. One must, in deciding the substantiality of the volume of foreclosed commerce, look at all of the seller's tied sales, not just at sales to the plaintiff. Id. at 502, 89 S. Ct. at 1257. Hyde, citing Fortner I, states that the "commerce" requirement is met by a showing that "a substantial volume of commerce is foreclosed close thereby." 466 U.S. at 16, 104 S. Ct. at 1560. According to the Justice Department the tie-in must have "a substantial adverse effect in the tied product market" for the
case, *United States v. Loew's Inc.*,14 "the requisite economic power [for per se condemnation of the tying arrangement] is presumed when the tying product is patented or copyrighted."15 The Supreme Court has not reviewed a tying arrangement case involving a patented or copyrighted tying product since the *Loew's* decision.16 According to dicta in the two most recent Supreme Court tying arrangement cases, *Hyde* and *United States Steel Corp. v. Fortner Enterprises (Fortner II)*,17 the *Loew's* per se rule to apply. Guidelines § 5.2. The National Association of Attorneys General's December, 1985 Vertical Restraints Guidelines [hereinafter referred to as NAAG Guidelines] criticized the Justice Department's Guidelines on this point, stating that Justice, in requiring a finding of actual substantial adverse effect for per se illegality, imposed an additional element on the Supreme Court's *Hyde* per se test. NAAG Guidelines § 5.1 n.59.

15. Id. at 45, 103 S. Ct. at 102. For a discussion of whether the *Loew's* presumption is conclusive or rebuttable, see infra notes 116-38 and accompanying text.

The Supreme Court has never addressed the question of whether economic power should be presumed from the existence of a trademark on the tying product. Among the lower courts the majority view seems to be that economic power is not to be presumed from a trademark. See, e.g., Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974); and Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 48 (5th Cir. 1976). But see Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S. Ct. 1172 (1972), in which the court appears to have extended the *Loew's* presumption to trademarks. Some later trial court decisions have construed *Siegel* as having found that economic power had been established not just from the existence of the defendant's trademark on the tying product, but from the fact that the defendant's trademark was distinctive and carried with it goodwill and public acceptance. See, e.g., Cash v. Arctic Circle, Inc., 85 F.R.D. 618, 621 (E.D. Wash. 1979). The "trademark presumption" is discussed in Von Kalinowski, supra note 12, § 6G.05[2]; Lavey, Patents, Copyrights and Trademarks As Sources of Market Power in Antitrust Cases, 28 Antitrust Bull. 433, 448-51 (1982); and Smirti, Trademarks as Tying Products: The Presumption of Economic Power, 69 Trademark Rev. 1 (1979).

16. The Supreme Court declined the opportunity to reconsider the presumption's validity when it denied certiorari in *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908, 105 S. Ct. 3534 (1985). Justices White and Blackmun dissented to the denial of certiorari, stating that the case raised "substantial questions of antitrust law and policy." Id. at 909, 105 S. Ct. at 3535.


17. 429 U.S. 610, 97 S. Ct. 861 (1977). In *Fortner I*, 394 U.S. 495, 89 S. Ct. 1252 (1969), the Supreme Court reversed a summary judgment in favor of the defendants United States Steel Corp. and United States Steel Homes Credit Corp., a wholly-owned subsidiary of United States Steel. The facts were as follows: Plaintiff Fortner Enterprises had obtained a two million dollar loan for the purchase of land from Home Credit in exchange for Fortner's promise to buy prefabricated housing made by U.S. Steel. The Supreme Court in *Fortner I* found that the trial court had incorrectly applied standards
premise is still valid: If the tying product is patented or copyrighted, economic power is presumed to exist. Justice O’Connor, however, in her concurring opinion in Hyde, criticized the Hyde majority’s acceptance of the Loew’s presumption, stating that the “common misconception . . . that a patent or copyright . . . suffices to demonstrate market power” found no support in prior cases.

The thesis of this article is that Justice O’Connor’s criticism of the Loew’s presumption is well-founded: Market power should not be presumed from the existence of a patent or copyright on the tying product. Prior to Fortner II, the Supreme Court and the lower courts were easily convinced that the tying seller possessed market power in the tying product. In Fortner II and Hyde, the Court developed a more stringent standard for the proof of economic power in a tying arrangement case. In both of these cases, the Court, reversing lower court decisions for the plaintiff, determined that the tying seller did not have sufficient economic power in the tying product to provide a basis for applying the per se rule. The Fortner II and Hyde opinions contain extensive discussions of the nature of economic power and proof of its existence. The seller of a patented or copyrighted tying product does not, merely by virtue of the patent or copyright, have economic power under the

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19. 466 U.S. at 32-47, 104 S. Ct. at 1569-76. Chief Justice Burger and Justices Powell and Rehnquist joined Justice O’Connor in the separate opinion.
20. 466 U.S. at 37-38 n.7, 104 S. Ct. at 1571-72 n.7.
21. Pre-Fortner II proof of economic power is discussed at infra notes 67-75 and accompanying text.
22. Fortner II, 523 F.2d 961 (6th Cir. 1975) (upholding the trial court’s finding that the challenged tying arrangement was unlawful); Hyde, 513 F. Supp. 532 (E.D. La. 1981), rev’d, 686 F.2d 286 (5th Cir. 1982). In Hyde the federal district court denied relief to the plaintiff, but the court of appeals reversed, finding the challenged contract illegal per se.
24. Id.
guidelines set out by the Court in *Fortner II* and *Hyde.*

Statements of the presumption in *Loew's* and earlier Supreme Court cases are no more than loose applications of an earlier patent law doctrine.

**I. ECONOMIC POWER**

The Supreme Court has long recognized that "not every refusal to sell two products separately can be said to restrain competition." If the tying seller's tying product is a product which others will sell separately from the tied product, then buyers who want the tying product but not the tied product will simply go to one of the other sellers. As Justice Black stated in *Northern Pacific Railway Co. v. United States,* "[If] one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." If a tying seller cannot effectively use the tying product to pressure buyers into taking a second product, any restraint of trade resulting from the attempted tie-in will be insignificant. The "essential characteristic" of an illegal tying arrangement is "forcing," or the seller's "exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."
If the tying seller does not have, with respect to the tying product, a "special ability . . . to force a purchaser to do something that he would not do in a competitive market," buyers will simply refuse to buy the tying product from that seller.\(^3\)

The tying seller may lack the "special ability" to pressure buyers into accepting the tie because the tying product (or an acceptable substitute) is available from other sellers, as in Justice Black's *Northern Pacific* flour example, or because the tying product is not desired by consumers. More specifically, the seller's "special ability" to bring about forcing, called "market power" or "economic power,"\(^3\) is what economists refer to as "power over price,"\(^3\) or "the ability of a firm . . . to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."\(^3\) If buyer demand for the seller's version of the tying product is such that buyers could be "forced" to pay the higher price for the seller's product, then the seller may choose instead to force buyers to accept a tying arrangement, thus preventing the buyers from exercising independent judgment in the market for the tied product.\(^3\) In that event, the "higher price" paid by the buyer is the purchase of a second product,

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32. Absent "forcing," buyers may of course still buy the two tied products from the seller. In that event, competitors will be foreclosed from making the sale, but this foreclosure will not be a concern of the antitrust laws. As one commentator has stated: Any sale by one competitor forecloses his competitors to that extent, but such foreclosure is of no concern unless accomplished by unfair advantage of some sort. If a seller has no power over the tying product, if buyers can obtain the precise equivalent from any one of a large number of other sellers, foreclosure resulting from purchase of the package simply means that the buyers prefer buying the package to buying separately, or else prefer the seller's tied product "on the merits." The competing sellers deserve no protection against a wholly uninhibited buyer's choice.

Turner, supra note 9, at 61.

Buyer acceptance of a tie-in does not indicate forcing or market power; buyers may be simply exercising their own buying preferences when they accept the tie-in. In *Hyde*, the court noted that buyers often find package sales attractive. 466 U.S. at 12, 104 S. Ct. at 1558.

33. *Hyde* uses the term "market power," while *Fortner II* uses the term "economic power."

34. Another synonym is "monopoly power" in the sense of some amount of power over price, without any implication of the amount of power. When the phrase "monopoly power" is used in applications of section 2 of the Sherman Act, there is an implication that the power is large in amount. Slawson, supra note 25, at 673.


the "tied" product, that "the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." 37

The "forcing" involved in an effective tie-in is, of course, not an absolute coercion. A buyer faced with a seller's tying arrangement will simply weigh his desire for the tying product against the price of the tying and tied products. If the tied product is a product that the buyer does not want or would prefer to get elsewhere, then the seller's requirement that the buyer take the tied product represents a price increase for the desired tying product. 38 Whether the seller chooses to use his market power over the tying product to raise the dollar price of the tying product or to impose a tie-in, the buyer's ultimate decision is the same: Is the tying product worth the price? 39

The Supreme Court has indicated that the seller's use of market power to maximize the return on a product through a price increase is not, by itself, unlawful. 40 However, if the seller, instead of using his market power to exact a higher price for the tying product, uses the market power to force some unwanted second product on buyers, then free competition in the market for the second product is distorted and restrained. 41 As Justice Clark stated in Times-Picayune Publishing Co. v. United States, 42 "[B]asic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition." 43

37. Id. at 12, 104 S. Ct. at 1558.
39. As one commentator has stated:
   The Court has consistently maintained that one of the evils of tying arrangements is that "buyers are forced to forego their free choice between competing products" in the tied market. On one level this statement is clearly nonsensical. In principle, buyers always balance their desires for any product with its price. With or without a tie-in, buyers can be forced to accept goods they prefer less than others by the offering of a price differential which more than compensates for the difference in attractiveness. Whatever the buyer regards as burdens of the tie-in, whether low quality of the tied good, inability to deal with preferred tied good sellers, or the risk inherent in being restricted to a given purchase in advance, these burdens should be fully reflected in a decrease in what the buyer will pay for the package.
   Note, The Logic of Foreclosure, supra note 12, at 91 (footnote omitted). The author of that Note takes the position that the Court's tie-in doctrine really stems from concern with competitor foreclosure rather than concern with restraints on buyer freedom.
40. Hyde, 466 U.S. at 14, 104 S. Ct. at 1559. The Court's exact language is that "the competitive ideal of the Sherman Act is not necessarily compromised" if the seller uses his economic power to maximize his return on that product. Id.
41. Id. at 12, 104 S. Ct. at 1558.
42. 345 U.S. 594, 73 S. Ct. 872 (1953).
43. Id. at 605, 73 S. Ct. at 878; quoted in Hyde, 466 U.S. at 12-13, 104 S. Ct. at 1558.
The particular evil of the tying arrangement is that the tying seller "coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates [the tied product] from the competitive stresses of the open market." A potentially inferior tied product may, because of the tie-in, sell better than superior substitutes. This deprives existing or potential competitors of the opportunity of offering up their goods to a test of free competitive judgment, deters potential competitors from entering the market for the tied product, and deprives consumers of the freedom to pick the best bargain in the tied product market.

Some commentators, criticizing the Supreme Court's tying doctrine, have taken the position that a seller possessing market power will rarely, if acting rationally, attempt to impose a tie. A competitive seller selling at the prevailing price and attempting to impose a tie will be displaced by a seller who does not attempt a tie. A seller with market power who is charging a price which maximizes his return under applicable market considerations cannot improve his position by tying: If he attempts to impose a tie-in on his customers, then he will lose some sales. The customers will treat the tie-in as an increase in the price for the tying product, and the demand for that product will decline. Justice O'Connor expressed that point in her separate opinion concurring in the judgment in *Hyde*, stating that

> [t]he existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the tying product. A seller with a monopoly on flour, for example, cannot increase the profit it can extract from flour consumers simply by forcing them to buy sugar along with their flour. Counterintuitive though that assertion may seem, it is easily demonstrated and widely accepted.

While the Court has viewed tying arrangements as a means for extending market power from one market to another, many commen-

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44. Times-Picayune, 345 U.S. at 605, 73 S. Ct. at 878; *Hyde*, 466 U.S. at 13, 104 S. Ct. at 1558.
45. *Hyde*, 466 U.S. at 14, 104 S. Ct. at 1559.
46. Id.
47. Id. at 15, 104 S. Ct. at 1559-60.
48. See, e.g., R. Bork, supra note 3, at 372-73; Bowman, supra note 3, at 20-21; Posner, supra note 3, at 508-09. For a summary of this viewpoint, see Butler, Lane & Phillips, supra note 9, at 180-81.
50. Bowman, supra note 3, at 21. This view is summarized and then attacked in Bauer, supra note 12, at 291-305.
53. Butler, Lane & Phillips, supra note 9, at 181.
tators view leverage as an implausible motive for tie-ins. Instead, they view price discrimination or "metering" as the primary motivation for tie-ins. As one such commentator has stated, in the absence of price discrimination, a monopolist will gain nothing from the tie-in; tying does, however, enable the monopolist to practice price discrimination by allowing the tying seller to monitor the extent of a buyer's use of the tying product. The 1936 case of International Business Machines Corp. v. United States is generally viewed as providing the classic example of use of a tying arrangement as a metering device. In that case, IBM sold computers, the monopolized tying product, at a relatively low price. By requiring computer purchasers to use only IBM tabulating cards in the computer, IBM could vary the overall charge for computing according to the amount of the individual buyer's use of the computer. Heavy users of the computer would, in effect, pay for their heavy use by paying for more cards. By tying a second "counting product" to the tying product, a seller can charge heavy users more than light users for the tying product—price discrimination. In Hyde, Justice O'Connor stated that such tying arrangements may actually decrease the economic costs of the tying seller's market power. The theory here is that if tie-ins were not available, then the seller might charge all users a higher price for the tying product, thus leading to a lower net usage of the tying product and depriving buyers who do not place a high value on the tying product of that product.

The price discrimination theory of tie-ins has had no impact on antitrust policy, which has developed entirely from the Court's concern with monopoly extension. The Supreme Court first used the term "economic power" in a Sherman Act tying arrangement case in the

54. See, e.g., Bowman, supra note 3, at 20; Posner, supra note 3, at 508. Butler, Lane & Phillips, supra note 9, at 181 & n.46, summarizes the views of economists.
55. See, e.g., Bowman, supra note 3, at 23-24; Posner, supra note 3, at 508-09; Butler, Lane & Phillips, supra note 9, at 181 & n.49.
56. Posner, supra note 3, at 508. The price discrimination may be independently unlawful under the Robinson-Patman Act, 15 U.S.C. § 13 (1982), which prohibits discrimination in price between purchasers of commodities of like grade and quality where the purchases are "in commerce" and the effect of the discrimination may be substantially to lessen competition. See generally F. Rowe, Price Discrimination Under the Robinson-Patman Act (1962).
57. 298 U.S. 131, 56 S. Ct. 701 (1936).
59. Bowman, supra note 3, at 23.
61. See, e.g., R. Bork, supra note 3, at 398; Bauer, supra note 12, at 296 & n.42, which restates and criticizes this theory. Posner believes that there is a substantial economic basis for judicial hostility toward price discrimination. Posner, supra note 3, at 510.
1958 case of *Northern Pacific Railway v. United States*.63 In that case, the Court stated that tying arrangements are "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product."64 Market power "can be sufficient [to bring the per se rule into play] even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market,"65 if the resulting effect on interstate commerce is more than "insubstantial."66 The Court has never addressed the question of how strong the seller's economic power must be with respect to those buyers who are susceptible to being forced. A seller with economic power can raise his price for the tying product or, in the alternative, impose a tie. The seller with only a slight degree of economic power will only be able to impose a slight price increase (or a minimally sacrificial tie-in to the buyer) before losing sales so rapidly that the price increase or tie-in is unprofitable. The seller with a larger amount of economic power will be able to impose a larger price increase (or a more onerous tie-in) before losing sales.

As to evidence or proof of market power, several commentators have noted that the Supreme Court, prior to the *Fortner II* decision, was easily convinced of the existence of requisite market power.67 The *Northern Pacific*68 case provides an example: In *Northern Pacific* the

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63. 356 U.S. 1, 6, 78 S. Ct. 514, 518 (1958). In *Northern Pacific*, the Court, quoting from Standard Oil Co. v. United States [hereinafter referred to as *Standard Stations*], 337 U.S. 293, 69 S. Ct. 1051 (1949), stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition." *Northern Pacific*, 356 U.S. at 6, 78 S. Ct. at 518 (quoting from *Standard Stations*, 337 U.S. at 305-06, 59 S. Ct. at 1058). Compare that view of tying arrangements with the Department of Justice's view that tying arrangements often serve procompetitive or competitively neutral purposes (such as the seller's protection of a tying product's reputation) and generally do not have a significant anticompetitive potential. Guidelines, supra note 12, § 5.1.

64. *Northern Pacific*, 356 U.S. at 6, 78 S. Ct. at 518.

65. *Fortner I*, 394 U.S. 495, 503, 89 S. Ct. 1252, 1258 (1969). The Justice Department has indicated that in its view the seller must have "dominance" (defined by Justice as "a degree of market power that approaches monopoly proportions") for the tie-in to be per se illegal. Guidelines, supra note 12, § 5.2 and n.35. *Hyde* states that "[i]f only a single purchaser were forced with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." 466 U.S. 2, 16, 104 S. Ct. 1551, 1560 (1984).


67. See, e.g., Dam, supra note 12, at 19; and Jones, supra note 25, at 40, who stated that "[t]he antitrust laws generally have required a measure of economic power in the tying product in order to find a violation. The problem has been the readiness of the courts to accept almost any evidence as sufficient to show such power." Id. (footnote omitted).

government maintained that the defendant railroad's "preferential routing" clauses (requiring persons purchasing land from the railroad to ship products grown or made on the land purchased from the railroad over its rail lines) violated section 1 of the Sherman Act. In reviewing the trial court's grant of summary judgment against the railroad, the three dissenting Justices (Harlan, Frankfurter, and Whittaker) contended that the Court should have remanded the case to the trial court for factual findings on the issue of the railroad's market power in the tying product, the land.\footnote{Id. at 13-20, 78 S. Ct. at 522-25.} According to the dissenting opinion, the trial court had made no finding "that the [defendant] had a 'dominant position' or . . . 'sufficient economic power,' in the relevant land market."\footnote{Id. at 14, 78 S. Ct. at 523. As to the question of whether the majority in Northern Pacific changed the "economic power" requirement from "dominance" to some lower standard, see infra note 287.} The majority opinion, written by Justice Black, described the defendant's land as "strategically located," shown by testimony and "common sense" to be prized and "frequently essential" to the business activities of prospective buyers, and found that it had been "established beyond any genuine question that the defendant possessed substantial economic power."\footnote{356 U.S. at 7, 78 S. Ct. at 519.}

The Loew's case,\footnote{United States v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97 (1962).} decided four years after Northern Pacific, provides another example of the Court's readiness to find economic power. In Loew's, the Court stated that while proof of "market dominance"—defined by the Court as "some power to control price and to exclude competition"\footnote{Id. at 45, 83 S. Ct. at 102.}—would establish economic power, economic power can be established without a direct showing of the seller's power over price. Therefore, "[e]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."\footnote{Id.} As one writer has stated, "[I]t would be difficult to conceive of any tying arrangement which logically could not be found to be illegal" under this "flexible" Loew's test for economic power.\footnote{Day, Exclusive Dealing, Tying and Reciprocity—A Reappraisal, 29 Ohio St. L.J. 539, 547 (1968).}

In Fortner II and Hyde, both Supreme Court reversals of lower court opinions holding that economic power had been demonstrated,\footnote{The citations to the Fortner II and Hyde lower court opinions appear at supra} the Supreme Court tightened the test for market power, making it clear that market power is power over price, or the seller's ability with respect
to the tying product to force customers to purchase a second, unwanted product. In the view of the Supreme Court, neither the Fortner II seller (U.S. Steel) nor the Hyde seller (a hospital) had this power.

In Fortner II, the buyer, Fortner Enterprises, had obtained a two million dollar loan from United States Steel's financing subsidiary for the purchase of land on the condition that Fortner develop the land with prefabricated housing purchased from U.S. Steel. Fortner, in its Sherman Act suit against U.S. Steel, maintained that U.S. Steel had economic power with respect to the tying product, the loan, because the terms of the loan which U.S. Steel offered Fortner were uniquely advantageous and therefore highly desirable to Fortner. The Supreme Court reversed the trial court's and Sixth Circuit's findings on the economic power issue, stating that "[t]he unusual credit bargain offered to [the buyer]" merely demonstrated U.S. Steel's "willingness to provide cheap financing in order to sell expensive houses." According to the Court, the Fortner plaintiff needed to show something more than the uniquely desirable nature of U.S. Steel's loan offer; what was required for a per se Sherman Act tying case was proof that U.S. Steel had a unique product that its competitors were unable to offer. According to Fortner II, product desirability establishes market power only if "other competitors are in some way prevented from offering the distinctive product themselves."

The Fortner II plaintiff (buyer) had established economic power under the flexible Loew's test. According to Loew's, no showing of

note 22.

77. See Fortner II, 429 U.S. 610, 620, 97 S. Ct. 861, 867 (1977) (stating that the question is whether the seller has the "power . . . to raise prices or to require purchasers to accept burdensome terms"); and Hyde, 466 U.S. 2, 13-14, 104 S. Ct. 1551, 1559 (1984) (tying arrangements have been condemned when the seller has the "'power' to force a purchaser to do something that he would not do in a competitive market").


79. The uniquely advantageous features of the loan were as follows: The loan covered one hundred percent of Fortner's projected cost for both the acquisition and development of the real estate; U.S. Steel did not require any personal guarantees of the loan by shareholders of Fortner Enterprises (a corporation); and the interest rate for the loan was six percent, low under the then prevailing economic conditions. Fortner II, 429 U.S. at 616, 97 S. Ct. at 865-66.

80. Besides the unique desirability of the loan, the lower courts relied on three other "propositions" to support a finding of economic power. The Supreme Court viewed the other three propositions as insufficient to support the conclusion and disposed of them with little discussion. Fortner II, 429 U.S. at 614-16, 97 S. Ct. at 865-66.

81. 429 U.S. at 622, 97 S. Ct. at 868. The evidence indicated that U.S. Steel charged Fortner a higher-than-competitive price for the prefabricated homes. Id. at 614, 97 S. Ct. at 864-65.

82. Id. at 620-22, 97 S. Ct. at 867-69.

83. Id. at 621, 97 S. Ct. at 868 (quoting a Fortner I footnote, 394 U.S. 495, 505 n.2, 89 S. Ct. 1252, 1259 n.2 (1969)).
market dominance is required to establish economic power; "economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."\textsuperscript{84} The Fortner II tying product, the U.S. Steel loan, was both desirable to Fortner Enterprises, the buyer, and unique in the sense of being unavailable from other lenders. In Fortner II, the Court determined that uniqueness establishes an inference of economic power only if there are barriers to prevent other sellers from offering the unique product.\textsuperscript{85} According to the Fortner II opinion, earlier tying cases "focus[ed] attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms [i.e., a tie-in] that could not be exacted in a completely competitive market."\textsuperscript{86} In order to make the showing of economic power required for per se illegality, the tying case plaintiff must do more than show that the seller's competitors do not offer the tying product; the plaintiff must also show that the seller's competitors are unable to offer the product. According to the Court, the barriers to the competitors' duplication of the tying product may be legal, physical, or economic.\textsuperscript{87}

In Fortner II, the only possible barrier to competitors' duplication of the tying product, a loan, was the economic barrier of cost advantage. The Court indicated that there was no evidence that U.S. Steel had a cost advantage over its competitors in the credit market. Thus, in the view of the Court, there was no support for the lower courts' conclusions that the plaintiff had met its burden of proving that U.S. Steel had economic power in the tying market.\textsuperscript{88}

In Hyde, decided seven years after Fortner II, the plaintiff, an anesthesiologist, claimed that a hospital's exclusive contract with a particular firm of anesthesiologists was an illegal tying arrangement because hospital patients who underwent surgery at the hospital had to use the anesthesia services of the chosen firm. The trial court denied relief.\textsuperscript{89} The United States Court of Appeals for the Fifth Circuit reversed,
finding the contract to be illegal per se.\textsuperscript{90} The Supreme Court granted certiorari\textsuperscript{91} and reversed the Fifth Circuit's decision, holding that the plaintiff had failed to establish that the defendant hospital had economic power with respect to the tying product, hospital services.\textsuperscript{92}

The \textit{Hyde} plaintiff attempted to establish that the defendant-hospital had economic power with respect to the tying product, hospital services, through evidence of consumer preference for the hospital.\textsuperscript{93} The consumer preference shown was, in the words of the Court, "far from overwhelming,"\textsuperscript{94} for in the time period studied, seventy percent of the local residents needing hospitalization entered hospitals other than the defendant hospital.\textsuperscript{95} Furthermore, the Court concluded that there had been no "forcing" of the tied product, anesthesia, on patients who would have preferred to purchase anesthesia elsewhere, because consumers are generally indifferent as to which certified anesthesiologist serves them.\textsuperscript{96} In the view of the Court, the hospital did not have the "degree or the kind of market power"\textsuperscript{97} that makes forcing likely and per se prohibition appropriate.\textsuperscript{98} The Court in \textit{Hyde}, before considering the plaintiff's market power evidence, stated that market power can be established by showing that the tying seller had been granted a patent "or similar monopoly" over the tying product, by showing that the seller had a large share of the tying product market, or by showing that the seller's

\begin{itemize}
\item \textsuperscript{90} Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286 (5th Cir. 1982).
\item \textsuperscript{92} \textit{Hyde}, 466 U.S. 2, 28-29, 104 S. Ct. 1551, 1566-67 (1984). After concluding that the record did not provide a basis for applying the per se rule, the Court also considered the question of whether the challenged arrangement was illegal under a rule of reason analysis and found that it was not. Id. at 29-32, 104 S. Ct. at 1567-68.
\item \textsuperscript{93} Id. at 26, 104 S. Ct. at 1565-66.
\item \textsuperscript{94} Id., 104 S. Ct. at 1566.
\item \textsuperscript{95} Id. at 26-27, 104 S. Ct. at 1566. The Fifth Circuit, acknowledging that the hospital's market share alone was an insufficient basis for an inference of market power, found additional support for its conclusion that market power existed by relying on "market imperfections" in the hospital services product market (third-party payors and imperfect information). 686 F.2d. at 290. The Supreme Court stated that "[w]hile these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." 466 U.S. at 27, 104 S. Ct. at 1566.
\item \textsuperscript{96} 466 U.S. at 28, 104 S. Ct. at 1566. Cf. Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 674-75 (D.S.C. 1977), aff'd in relevant part, 594 F.2d 979 (4th Cir. 1979), where the trial court found that the challenged tie-in could not be a per se Sherman Act violation because the plaintiffs (buyers) were not forced to forego free choice in the tied product because no competitors offered the tied product. The court concluded that no commerce in the tied product market had been foreclosed.
\item \textsuperscript{97} 466 U.S. at 18, 104 S. Ct. at 1561.
\item \textsuperscript{98} Id. at 28-29, 104 S. Ct. at 1566-67.
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tying product is a unique product that competitors are unable to offer.  

II. THE LOEW'S PRESUMPTION

The Supreme Court's *Fortner II* and *Hyde* opinions make it clear that under the current law, tying arrangements are per se illegal only if the seller possesses "market power" in the sense of power over price. In the 1962 *Loew's* case, the Court, while acknowledging that a tying arrangement is per se illegal only if the seller has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product," stated that this required degree of economic power is presumed to exist when the tying product is copyrighted or patented. In dicta in *Fortner II* and *Hyde*, the Court indicated that the *Loew's* presumption is still valid.

99. 466 U.S. at 16-17, 104 S. Ct. at 1560-61. Presumably the Court's reference to monopoly "similar" to a patent was a reference to copyright protection. One commentator, however, has expressed the view that the *Hyde* Court, by omitting a specific reference to copyright, may have been shifting away from past parallel treatment of patented and copyrighted tying products. See W. Holmes, 1985 Antitrust Law Handbook, at 25-26.

As to market share, the Court has never stated what market share the seller must possess for the existence of market power to be probable. In *Times-Picayune Publishing Co. v. United States*, the Court stated that the seller's market share, found by the court to be forty percent, was insufficient to establish "that market 'dominance' which ... would result" in a per se rule Sherman Act violation. 345 U.S. 594, 612-13, 73 S. Ct. 872, 882-83 (1953). The Department of Justice's Guidelines state that the Department will not challenge the use of tying if the party imposing the tie has a market share of thirty percent or less in the tying product market. If the seller's market share is over thirty percent, the Department will attempt to determine whether the seller has "dominant" market power. If the seller has dominant market power and the other elements for a per se violation are present, the tie is per se illegal. Guidelines, supra note 12, § 5.3.


101. Id. at 45, 83 S. Ct. at 102, (quoting from Northern Pac. Ry. v. United States, 356 U.S. 1, 6, 78 S. Ct. 514, 518 (1958)).

102. Id. The *Loew's* opinion cited two earlier Supreme Court decisions as supporting that statement, *International Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12 (1947), and *United States v. Paramount Pictures*, 334 U.S. 131, 68 S. Ct. 915 (1948). There is no reference to the concept of economic power in either of these cases (see infra notes 217-312 and accompanying text). In *International Salt*, the Court, without referring to the concept of economic power, found illegal the defendant's lease provisions requiring lessees of the defendant's patented machines to use only the defendant's salt products. In the *Paramount* case, the Court found the defendants' "block booking" of films to be in violation of the Sherman Act, stating that a "refusal to license one or more copyrights unless another copyright is accepted" is per se illegal. 334 U.S. at 159, 68 S. Ct. at 930. The development of the *Loew's* presumption is discussed in text accompanying...
First, in *Fortner II*, the Court, discussing the trial court's erroneous conclusion that economic power could be presumed from the unique character of U.S. Steel's loan offer, reaffirmed the *Loew's* presumption as follows:

The most significant finding made by the District Court related to the unique character of credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding of illegality in prior cases. Thus, the statutory grant of a patent monopoly in *International Salt*; the copyright monopolies in *Paramount* and *Loew's*; and the extensive land holdings in *Northern Pacific* represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power.103

The Court in *Hyde*, discussing per se prohibition of tying arrangements, reaffirmed the *Loew's* presumption by citing *Loew's* and 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."104 According to *Hyde*, "the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful."105 Thus, while a tying arrangement not involving a patented or copyrighted tying product is per se illegal only on a showing that the seller has power over price with respect to the tying product the plaintiff need not prove that the seller has power over price where the tying product is copyrighted or patented.106 Any tying arrangement involving a patented

infra notes 217-312.

The Justice Department, stating that its vertical restraints Guidelines "do not apply to restrictions in licenses of intellectual property (e.g., patent, a copyright, trade secret, and know-how)", takes the position that rule of reason analysis rather than per se treatment is appropriate for such restrictions, because such restrictions "often are essential to ensure that new technology realizes its maximum legitimate return and benefits consumers as quickly and efficiently as possible." Guidelines, supra note 12, § 2.4. This position is directly contrary to the Supreme Court's *Loew's* statements concerning patented and copyrighted tying products.


105. Id. It is interesting to compare the Court's statement in *Hyde* with the Department of Justice's statement in its Guidelines that restrictions in intellectual property licenses "should not be condemned" unless they involve naked restraints of trade unrelated to development of the intellectual property. Guidelines, supra note 12, § 2.4.

106. Again, it is interesting to compare the Supreme Court's view of tying arrangements involving intellectual property—per se illegal, so long as there is a tie-in of two separate products and an effect on commerce—with the Justice Department's Guidelines view—
or copyrighted tying product will, because of this presumption operating to the benefit of the plaintiff, be more easily found per se illegal than will a tying arrangement involving a tying product that is not patented or copyrighted.\textsuperscript{107}

The Ninth Circuit's recent decision in \textit{Digidyne Corp. v. Data General Corp.}\textsuperscript{108} provides an example of what one commentator called "[the] harsh mechanical treatment of tie-ins''\textsuperscript{109} involving patented or copy-

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\item[107.] Several commentators have recently expressed this sentiment, including Bauer, supra note 12, at 333 n.179 (referring to "the harsh mechanical treatment of tie-ins involving patented tying products"); Note, supra note 16, at 1033, 1045; and Note, supra note 25, at 1311.

In \textit{post-Forner} cases \textit{not} involving patented or copyrighted tying products, the plaintiff has generally had a difficult time demonstrating that the seller has the required economic power. See, e.g., \textit{Will v. Comprehensive Accounting Corp.}, 776 F.2d 665 (7th Cir. 1985), cert. denied, 54 U.S.L.W. 3698 (1986); \textit{Jack Walters and Sons Corp. v. Morton Bldg., Inc.}, 737 F.2d 698 (7th Cir. 1984); \textit{Spartan Grain and Mill Co. v. Ayers}, 735 F.2d 1284 (11th Cir. 1984), reh'g en banc denied without opinion, 741 F.2d 1384 (11th Cir. 1984), cert. denied, 469 U.S. 1109, 105 S. Ct. 785 (1985); \textit{Yentsch v. Texaco, Inc.}, 630 F.2d 46 (2d Cir. 1980); \textit{Phillips v. Crown Cent. Petroleum Corp.}, 602 F.2d 616 (4th Cir. 1979), cert. denied, 444 U.S. 1074, 100 S. Ct. 59 (1980); and \textit{Spartan Grain and Mill Co. v. Ayers}, 581 F.2d 419 (5th Cir. 1978), cert. denied, 444 U.S. 831, 100 S. Ct. 59 (1979).

Other recent tying arrangement cases include \textit{Sensa-Gel Corp. v. Seiffart}, Nos. 85-2780 and 85-2781 (Fed. Cir. Oct. 2, 1986) (reported at 51 Antitrust and Trade Reg. Rep. (BNA) 522) (trial court's denial of defendant's motion for summary judgment on tying counterclaim affirmed); \textit{Microbyte Corp. v. New Jersey State Golf Ass'n.}, No. 84-949 (D.N.J. June 25, 1986) (reported at 51 Antitrust and Trade Reg. Rep. (BNA) 8) (granting the plaintiff, developer of a computer system for golf tournaments, summary judgment on the questions of whether state golf associations tied participation in golf tournaments to the use of a national association's computer handicap service and whether a substantial amount of commerce was affected); and \textit{S. Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.}, No. M-83-122 (M.D.N.C. April 22, 1986) (reported at 50 Antitrust and Trade Reg. Rep. (BNA) 829) (denying defendant's motion for judgment n.o.v. after a jury verdict of $300,000 in Sherman Act actual damages for plaintiff).

\item[108.] 734 F.2d 1336 (9th Cir. 1984), cert. denied, 105 S. Ct. 3534 (1984). The case is discussed and criticized in Note, supra note 16.

\item[109.] Bauer, supra note 12, at 333 n.279.
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righted tying products. In that case, the Ninth Circuit held that defendant Data General's refusal to license its popular copyrighted computer software to customers who refused to purchase Data General's less popular hardware was a per se violation of section 1 of the Sherman Act, and was also a violation of the Clayton Act. The procedural history of Data General is complicated. Although the jury had found that Data General possessed sufficient economic power in the software market to restrain competition appreciably in the hardware market, the trial court granted Data General's motion for a judgment notwithstanding the verdict, concluding that the evidence was insufficient to support the jury's factual finding. The court of appeals reversed, finding ample evidence to support the jury's verdict. In discussing the adequacy of the evidence, the Ninth Circuit observed that the defendant's tying software was copyrighted and quoted the Loew's presumption, noting that the presumption had been reaffirmed by the Supreme Court both in Fortner II and in Hyde. While the copyright presumption was not the only basis for the Ninth Circuit's reversal of the Data General trial court's judgment n.o.v., the presumption clearly played a key role in the decision.

Presumptions can be conclusive or rebuttable. If a presumption is conclusive, as McCormick has stated, "when fact B is proven, fact A

110. 734 F.2d at 1338.
111. 529 F. Supp. 801 (N.D. Cal. 1981). The jury trial was limited to the economic power issue, the trial court having previously, on the plaintiff's motion for summary judgment, found that there was no question as to the existence of the other elements of tying arrangement per se illegality. In re Data Gen. Corp. Antitrust Litig., 490 F. Supp. 1089, 1104-07, 1116-17 (N.D. Cal. 1980), aff'd in relevant part, 734 F.2d 1336 (9th Cir. 1984), cert. denied, 473 U.S. 908, 105 S. Ct. 3534 (1984).
112. 734 F.2d at 1344.
113. Id. at 1341.
114. Id. at 1341-42.
115. In finding sufficient evidence of economic power, the court of appeals also focused on the desirability of Data General's software and on the fact that many of the buyers, "original equipment manufacturers," were "locked in" to the use of Data General's software once they constructed their applications software for their equipment. 734 F.2d at 1341. One commentator has criticized the Ninth Circuit's "lock-in" theory, finding it circular. See Note, supra note 16, at 1041. The Ninth Circuit's "lock-in" theory is also discussed in Helein, Software Lock-In and Antitrust Tying Arrangements: The Lessons of Data General, 5 Computer L.J. 329 (1985).

The trial court rejected Data General's business justification defenses, 490 F. Supp. at 1120-24, and the Ninth Circuit agreed with trial court's ruling on that point. 734 F.2d at 1339 n.1. Business justification is discussed at supra note 12.

The Sixth Circuit in its decision in A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673 (6th Cir. 1986), discussed at supra note 106, distinguished Data General on the facts, stating that in Data General the tying product was unique and desirable as well as copyrighted, while in Root the tying product was not unique or desirable. 806 F.2d at 677.
must be taken as true, and the adversary is not allowed to dispute [that]." 116 A rebuttable presumption will get the party for whose benefit the presumption operates—usually the plaintiff, since the plaintiff generally has the burden of producing evidence on issues other than affirmative defenses—past the opponent’s motion for directed verdict and will even carry the burden of persuasion, should the opponent fail to introduce rebuttal evidence. If the opposing party presents rebuttal evidence, a question arises as to whether the presumption has shifted the burden of persuasion on the issue to the adversary or shifted only the burden of producing evidence. Under the “‘Thayer’ or ‘bursting bubble’” view of rebuttable presumptions, the only effect of a rebuttable presumption is to shift to the opponent (generally to the defendant) the burden of producing evidence with regard to the presumed fact. The opponent’s production of rebuttal evidence “bursts” the presumption, and the presumption disappears, leaving the question of the formerly presumed fact’s existence to the jury, and leaving the burden of persuasion where it was originally, generally on the plaintiff. 117 Under the other view, the rebuttable presumption shifts the burden of persuasion on the given issue to the opponent: Once the fact giving rise to the rebuttable presumption has been established, the party against whom the presumption operates has the burden of presenting sufficient counter-evidence to overcome the presumption. 118

The Supreme Court has never clearly indicated whether the Loew’s presumption is conclusive, rebuttable in the “‘bursting bubble’” sense of shifting only the burden of producing evidence to the defendant, or rebuttable in the sense of shifting to the defendant the burden of persuasion as to the nonexistence of economic power. As any antitrust trial attorney knows, presumptions often play a key role in the trial of antitrust cases; the question of which variety of presumption is involved can be crucial. 119 If the Loew’s presumption is conclusive, then a tying case plaintiff, on proving that the defendant’s tying product is copyrighted or patented, has satisfied the economic power requirement for

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116. Cleary, McCormick On Evidence § 342, at 966 (E. Cleary 3d ed. 1984). This sort of “presumption” is really a rule of law: If fact A is to be conclusively presumed from fact B’s existence, proof of fact A is really immaterial for the purpose of the plaintiff’s case. All that is required is proof of fact B.
117. Id. at § 344.
118. Id.
per se illegality, leaving only the de minimus "commerce requirement" and "two product tie-in" requirements to be satisfied to establish a Sherman Act violation.\textsuperscript{120}

In \textit{Loew's}, the Court, after stating that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted,"\textsuperscript{121} stated that "[t]here may be rare circumstances in which the doctrine we have enunciated under § 1 of the Sherman Act prohibiting tying arrangements involving patented or copyrighted tying products is inapplicable."\textsuperscript{122} The \textit{Loew's} Court may have been indicating with that language that the presumption is rebuttable rather than conclusive. On the other hand, the Court may have been indicating that under rare circumstances an otherwise per se illegal tying arrangement by a seller with economic power would be deemed reasonable and lawful because of a business justification defense.\textsuperscript{123} The \textit{Fortner II} and \textit{Hyde} opinions do not indicate whether the presumption is rebuttable or conclusive.\textsuperscript{124} The absolute nature of \textit{Hyde}'s language—"the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful"\textsuperscript{125}—seems to hint at a conclusive presumption.\textsuperscript{126} In \textit{Data General}, both the trial court and the appellate

\textsuperscript{120} See infra notes 1-25 and accompanying text.
\textsuperscript{121} United States v. Loew's Inc., 371 U.S. 38, 45, 83 S. Ct. 97, 102 (1962).
\textsuperscript{122} Id. at 49-50, 83 S. Ct. at 104.
\textsuperscript{123} See supra note 12.
\textsuperscript{125} 466 U.S. at 16, 104 S. Ct. at 1560 (emphasis added).
\textsuperscript{126} If the presumption is conclusive, then proof of a patent or copyright on the tying product would conclusively establish economic power (subject to a possible business justification or goodwill defense, see supra note 12).


See generally W. Holmes, supra note 12, § 20.02, at 20-5 to 20-6 n.30; 12A Business Organizations, Milgrim on Trade Secrets § 10.01[2] (1986); Bowman, supra note 3, at 31 ("When the sale or lease of a commodity is tied to a patented product, the tie-in is considered per se illegal. No exceptions to the rule have emerged . . . and indeed it
court viewed the presumption as rebuttable.\textsuperscript{127}

If the presumption is rebuttable, the question is whether the presumption (1) "bursts" on the defendant's introduction of counter-evidence of economic power; or (2) shifts the burden of persuasion as to lack of economic power to the defendant. The Federal Rules of Evidence have adopted the "bursting bubble" theory for actions "not otherwise provided for by Act of Congress" or by the Federal Rules.\textsuperscript{128} If the presumption is a "bursting bubble" rebuttable presumption and the defendant introduces evidence of its lack of market power in the tying product, then the jury must decide whether the plaintiff has met its burden of persuasion as to the existence of economic power.\textsuperscript{129} The only comment in the \textit{Loew's} opinion that could be relevant on the question of whether the \textit{Loew's} court viewed the presumption as rebuttable in the former or latter sense is the Court's statement that it is "difficult to conceive" of a case involving those "rare circumstances"\textsuperscript{130} in which economic power should not be presumed for a copyrighted or patented tying product. This comment is possibly an indicator that where a copyrighted or patented tying product is involved, the court viewed the burden of persuasion as to the non-existence of economic power as being on the defendant.

In \textit{Data General}, the trial court apparently viewed the \textit{Loew's} presumption as shifting to the defendant merely the burden of producing acceptance may be gauged by the fact that no defendant has even questioned the doctrine in recent years." (footnote omitted) (emphasis added)); and Lavey, supra note 15, at 444 (stating that in \textit{Loew's}, the Court "came close to announcing a conclusive presumption").

\textsuperscript{127} 490 F. Supp. 1089, 1113 (N.D. Cal. 1980) (stating that the trier of fact must "take note of material facts in the record which may rebut the presumption"); 529 F. Supp. 801, 811 (N.D. Cal. 1981); 734 F.2d 1336, 1344 (9th Cir. 1984), cert. denied, 473 U.S. 908, 105 S. Ct. 3534 (1985).

One commentator has stated that in \textit{Data General} the Ninth Circuit put so much emphasis on the existence of copyright on the tying product that the presumption of market power "was effectively rendered conclusive." Note, supra note 16, at 1044. See also W. Holmes, supra note 12, \S 20.02 (presumption of market power is, in theory, rebuttable, but courts that have considered the legality of patent tie-ins have found economic power with little analysis of market conditions).

\textsuperscript{128} Fed. R. Evid. 301.

\textsuperscript{129} The defendant's counter-evidence might include evidence that the tying product, even though patented or copyrighted, is not desirable or that the tying product industry is highly competitive, offering many substitutes for the defendant's version of the tying product. The relevance of product desirability is discussed at infra notes 141-159 and accompanying text; and the relevance of substitutes for a copyrighted or patented tying product is discussed at infra notes 160-204 and accompanying text.

If a copyright-based or patent-based presumption shifts the burden of persuasion to the defendant, then the defendant, in order to negate the inference of economic power raised by the presumption, must convince the jury by a preponderance of evidence that he lacks economic power in the tying product.

evidence as to its lack of economic power in the tying product, software. The trial judge, in his opinion granting a judgment n.o.v. for the defendants, stated that in submitting the economic power issue to the jury, he had "explained that copyright protection is presumed to constitute [a legal barrier to product duplication] and that the burden is on defendant to rebut that presumption by proving that its copyrights have not prevented others from developing the distinctive product themselves."\(^{131}\) He found the evidence of economic power to be insufficient to support the jury decision for the plaintiff, and stated that "no reasonable jury could find that the defendant possessed sufficient economic power in the relevant tying product market appreciably to restrain competition in the relevant tied product market."\(^{132}\) This comment may reflect the judge's view that the presumption disappeared once the defendant introduced rebuttal evidence.

The Ninth Circuit, on the other hand, may have viewed the *Loew's* presumption as imposing on Data General, the defendant, the burden of persuasion as to the non-existence of economic power—a view inconsistent with the "bursting bubble" theory of presumptions adopted in the Federal Rules of Evidence.\(^{133}\) According to the Ninth Circuit, the trial judge in his review of the evidence actually "erroneously imposed the burden of proof" as to the defendant's possession of economic power on the plaintiff.\(^{134}\) The appellate court viewed the copyright on the software as creating "a presumption of economic power sufficient to render the tying arrangement illegal *per se*. The burden to rebut the presumption shifted to defendant."\(^{135}\) At trial, Data General had introduced evidence of its lack of market power, including evidence that the computer market was highly competitive, that substitutes for the tying product were available, that Data General's software competed with more than one hundred other brands of software, and that Data General's pricing was competitive rather than monopolistic pricing.\(^{136}\) Apparently the trial judge viewed this counter-evidence as rebutting the copyright-based presumption of economic power. The Ninth Circuit, with only a cursory examination of the rebuttal evidence,\(^{137}\) reversed the


\(^{132}\) Id. at 814.

\(^{133}\) Fed. R. Evid. 301.


\(^{135}\) Id. (footnote omitted).

\(^{136}\) 529 F. Supp. at 813-16.

\(^{137}\) 734 F.2d at 1345-46. The handling of the presumption by the Ninth Circuit is criticized in Note, supra note 16, stating that "under the Ninth Circuit's view of the [economic power] issue, it is difficult to see how even the smallest computer manufacturer in the country could prove that its copyright did not give rise to market power." Id. at 1043.
trial court's judgment n.o.v., stating that it was "evident that there was ample direct and circumstantial evidence to support the jury's verdict" for the plaintiff on the issue of economic power.

Whether the Loew's presumption is conclusive, rebuttable in the "bursting bubble" sense, or rebuttable in the sense of shifting the burden of persuasion to the defendant, the presumption is consistent with the Court's current view of tying arrangement per se illegality only if, in general, the fact that the tying product is copyrighted or patented indicates that the seller is likely to be able to use the product to force buyers to accept a tie-in. The Court's validation of the Loew's presumption in Fortner II and Hyde is surprising, for the fact that a tying product is patented or copyrighted is no indication that the product's seller is likely to have economic power. The Court's explanations for the presumption in Fortner II and in Hyde are unconvincing and are based on an incorrect understanding of the true nature of copyright and patent rights.

One major flaw in the Loew's presumption can be recognized without even delving into copyright and patent law. In order to provide a basis for economic power (to give the seller the possibility of imposing a higher price, or, in the alternative, a tie-in), a product must be desired by potential buyers. Absent product desirability, the seller will not be able to impose a tie; the seller will not be able to use the tying product to pressure potential buyers into accepting the tied product if the buyers do not want the tying product. The fact that a tying product is patented or copyrighted does not indicate that the product is desirable to potential buyers. Neither product desirability nor likelihood of commercial success is a requirement for the grant of a patent or for the establishment of

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138. 734 F.2d at 1346. In two recent decisions involving tying arrangements with copyrighted software tying products, federal district court judges granted summary judgment for the defendant, finding that the plaintiff had not raised a disputed issue of fact on the question of the defendant's economic power. See A.I. Root Co. v. Computer Dynamics, Inc., 615 F. Supp 727 (N.D. Ohio 1985), aff'd, 806 F.2d 673 (6th Cir. 1986); and 3 P.M., Inc. v. Basic Four Corp., 591 F. Supp. 1350 (E.D. Mich. 1984). In 3 P.M. the court, relying on the Data General district court opinion, took the position that the existence of copyright has not been held sufficient to prove economic power. 591 F. Supp. at 1357. The Root district court, citing 3 P.M., rejected the plaintiff's contention that the copyright on the tying product established product uniqueness. 615 F. Supp. at 732. The Ninth Circuit affirmed, stating that a presumption of economic power "is not warranted merely by existence of a copyright or patent." 806 F.2d at 676.

139. See supra notes 103-05 and accompanying text.

140. Obviously, if the presumption lacks validity the injustice created by use of the presumption is most severe if the presumption is conclusive and least severe if the presumption merely shifts to the defendant the burden of going forward and not the burden of persuasion.
The grant of a patent on a product or establishment of copyright protection does not, in and of itself, create demand for the product. A patented or copyrighted tying product may or may not be desirable, just as any other product may or may not be desirable.

The Loew's case itself provides an illustration of this point. In Loew's, the government challenged six major motion picture distributors' copyright protection.

141. The United States Constitution provides that Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

Congress first exercised that power many years ago, enacting the first patent and copyright statutes in 1790. Since that time, the patent laws have been revised three times and the copyright laws four times. The provisions of the current patent law began at 35 U.S.C. § 101 (1982). The provisions of the current Copyright Act began at 17 U.S.C. § 101 (1982).

To qualify for a patent, a patent application must be filed showing the product or process for which the patent is sought to be new, useful, and non-obvious. 35 U.S.C. § 101 (1982). The patentee gets the exclusive right to make, use, or sell the patented invention for a period of seventeen years. 35 U.S.C. § 1154 (1982). The patent term is nonrenewable. At the end of the term, anyone can make, use, or sell the device. A patent is given in exchange for the full disclosure to the public of the new invention. The patent specifications filed as part of the patent application must reveal how the invention works and how to make the invention. 35 U.S.C. § 111 (1982).

Copyright protection exists for original works of authorship that are recorded in some tangible medium. 17 U.S.C. § 102 (a) (1982). The copyright protection, according to the current copyright law, arises as soon as the work is fixed in a tangible medium. Id. The copyright holder has the exclusive right to reproduce ("copy") the work, to distribute copies of it, to prepare derivative works, and to perform and display the work. 17 U.S.C. § 106 (1982). The copyright protection lasts for fifty years beyond the date of the author's death. 17 U.S.C. § 302(a) (1982). The creation of copyright protection, unlike patent protection, does not require government approval or the prior filing of an application or registration. Federal registration is required, however, to preserve certain remedies and as a prerequisite to an infringement suit. 17 U.S.C. §§ 408(a), 411(a), 412 (1982). The copyright protection that arises on creation of the work is preserved for the author by placing a notice of copyright (the word "copyright," abbreviation "copr.", or symbol "©"; name of copyright owner; and date of first publication) on any publicly distributed copy of the work. 17 U.S.C. § 401(b) (1982). Failure to affix the notice does not necessarily mean a forfeiture of copyright protection, since the Copyright Act contains "cure" provisions. 17 U.S.C. § 405(a)(2) (1982). A good faith infringer who infringes a copyright on a work for which copyright notice was omitted has no liability for any damages for infringement before his receipt of actual notice of federal copyright registration of the work. 17 U.S.C. § 405(b) (1982).

142. The Sixth Circuit Court of Appeals noted that a patented tying product may or may not be desirable in Nickola v. Peterson, 580 F.2d 898, 914 (6th Cir. 1978), cert. denied, 440 U.S. 961, 99 S. Ct. 1504 (1979), where the court stated that "[a]bsent demand for a product . . . there can be no commercial success. No patent can itself create market demand. A patent of the unwanted is worthless." Three commentators have expressed that same view, Austin, supra note 25, at 112; Turner, supra note 9, at 53; and Note, supra note 25, at 1150.

practice of "block booking" films. The distributors allowed television stations to buy films only in packages. A station, in order to get a highly desired film, had to accept less desirable films as well. The trial court found that the defendants' block booking practice had all the elements of a per se illegal tying arrangement. The Supreme Court agreed, repeating the trial judge's observation that "forcing a television station which wants 'Gone with the Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that . . . there is but one 'Gone with the Wind.'" The Court recognized that tying arrangements violate the Sherman Act only if the seller has economic power in the tying product, but stated that "economic power may be inferred from the tying product's desirability to consumers or from uniqueness of its attributes" and "is presumed when the tying product is patented or copyrighted."

Neither the trial court nor the Supreme Court in Loew's divided the defendants' films into tying products and tied products. If, however, "Gone with the Wind" is viewed as the tying product and "Getting Gertie's Garter" as the tied product, a conclusion that a film distributor selling those two films as a package possessed sufficient economic power with respect to the tying product to bring the per se rule into play is probably correct. Because television station owners wanted "Gone with the Wind," a distributor would be able to force them to take "Getting Gertie's Garter" as well. No one would suggest, however, that the Loew's distributors could have forced a station owner who did not want "Gone with the Wind" to take "Gone with the Wind" by refusing to sell the station owner "Getting Gertie's Garter," another undesirable film, without "Gone with the Wind." Although the film "Getting Gertie's Garter" is, like "Gone with the Wind," copyrighted, the undesirable copyrighted film would not provide the seller with a basis for forcing buyers to take some second, also unwanted, tied film.

144. Id. at 40-43, 83 S. Ct. at 99-101.
146. 371 U.S. at 52, 83 S. Ct. at 105. The Court modified the trial judge's injunction against block booking. Justices Harlan and Stewart concurred, agreeing with the majority on all points other than the majority's "trivial remedial glosses" on the trial court's decree. Id. at 56, 83 S. Ct. at 108.
147. Id. at 48 n.6, 83 S. Ct. at 104 n.6.
148. Id. at 45, 83 S. Ct. at 102.
149. Id.
150. The film packages varied in size.
151. The defendants argued that television stations, unlike movie theaters, had no great desire to get any particular film, since they were buying films for a tiny portion of programming time directed at a small late-night audience. The Court rejected that argument. 371 U.S. at 47-48, 83 S. Ct. at 103-04.
152. The commentator Lowin provided a patent law example of this premise:
The key to the *Loew's* distributors' success in getting television stations to buy film packages was that *some* of the films were desirable, not that the films were copyrighted.\textsuperscript{153} Some patented and copyrighted products are popular with consumers, while others are not. If there is to be a presumption of economic power for patented or copyrighted tying products, an initial inquiry must be made concerning the product: Is the patented or copyrighted item desirable? Some commentators\textsuperscript{154} and some lower courts\textsuperscript{155} have, in fact, viewed the *Loew's* presumption.

What about a combination toothpick-hairbrush-mop-hammer-knife-and desk lamp? Assuming that the requisite utility, novelty, unobviousness, and invention had been proven [for patentability] and that a patent had been granted on it, would the holder of this unique patent have the power to coerce any buyer to accept a tie-in? Regardless of its uniqueness and patented status, such an item does not possess great economic leverage.

Lowin, supra note 25, at 105.

Of course, if a patented or copyrighted tying product is truly undesirable, the attempted tie-in probably would not have even the minimal effect on commerce required for a per se section 1 violation.

153. One commentator has stated that the reason for the package sales was the distributors' desire to maximize revenues over sales to buyers who valued different films differently. See Stigler, *United States v. Loew's Inc.: A Note on Block-Booking*, 1963 Sup. Ct. Rev. 152. Another commentator has noted that if the uniqueness of a copyright really conferred economic power, there would never be a need to tie one copyrighted item to another copyrighted item—each copyrighted item would be a base for a seller's economic power. Lowin, supra note 25, at 104.

154. E.g., Austin, supra note 25, at 112.

155. See, e.g., Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974), stating that the presumption of economic power in *Loew's* arose not just from the copyright on the tying products but from "the attractiveness of some of the films, as contrasted to the inferior quality of the others also required to be purchased." The trial court in *Data General* quoted that portion of the *Capital Temporaries* opinion in support of its statement that "[n]otwithstanding implied suggestions to the contrary, the sole fact of the existence of a copyright notice has not been held . . . sufficient to prove economic power." In re *Data Gen. Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1112 (N.D. Cal. 1980), rev'd, 734 F.2d 1336 (9th Cir.), cert. denied, 473 U.S. 908, 105 S. Ct. 3534 (1984). The trial court concluded that the question of whether *Data General* had economic power in the copyrighted tying software could not be resolved without inquiry into product desirability at a trial on that issue. 490 F. Supp. at 1113. For purposes of ruling on *Data General's* motion for a judgment n.o.v., the trial court assumed the tying product to be uniquely desirable. 529 F. Supp. 801, 815 (N.D. Cal. 1981). The Ninth Circuit found that there was abundant evidence that the defendant's software was desirable. *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1341 (9th Cir. 1984).

Cf. *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), where the court indicated, after quoting the *Loew's* statement of the copyright presumption, that the "value of the patent, copyright or trademark is . . . directly proportionate to the consumer desirability of the protected product." 332 F.2d at 513. Judges Friendly and Medina, "[c]oncurring with most" of the *Susser* majority opinion, added that "[w]hatever has been said about the evils of 'ties' to patented or copyrighted items is meaningful only in the situation where the desirability of the patented item is what motivates the purchaser to make further
as involving a "desirability" component, restating the presumption in this manner (to paraphrase): Economic power is to be presumed from the existence of copyright or patent protection on a desirable tying product. The obvious response to that view is that the Court did not so state the presumption in Loew's and did not so restate the presumption in the Hyde or Fortner II dicta. On the other hand, even a first-year law student could point out that the Loew's opinion's abstract legal principle—economic power is to be presumed from the tying product's patent or copyright—is binding precedent only in the context of the Loew's facts, where, as to some of the films, tying product desirability did exist. At the Supreme Court level, the Loew's defendants phrased the issue concerning the economic power presumption in a form that did not involve any inquiry as to tying product desirability. The Loew's Court did discuss product desirability, but only in response to the defendants' argument that since television stations viewed all films as being interchangeable, stations did not desire any particular films but were merely buying films to fill late-night time. The Court rejected

commitments or to give up some liberty of choice as to other products." 332 F.2d at 519 (emphasis added).

See also A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673, 676-77 (6th Cir. 1986), where the court, citing Justice O'Connor's Hyde concurrence, rejected the presumption and characterized the Data General tying product as unique and desirable; and 3 P.M. Inc. v. Basic Four Corp., 591 F. Supp. 1350, 1359 (E.D. Mich. 1984), where the court, citing Capital Temporaries and Data General, stated that copyright alone does not establish economic power.

156. Cf. United States v. Loew's Inc., 189 F. Supp. 373 (S.D.N.Y. 1960). The Loew's trial court considered and rejected the defendant's argument that block booking (found illegal earlier in Paramount, discussed in infra notes 217-312 and accompanying text) may or may not be illegal depending on the setting: "It has been urged that the only antitrust action which specifically declared block-booking to be illegal was the Paramount case and that this decision was rendered in the setting of the particular case, involving as it did the broad area of monopoly and unfair practices." 189 F. Supp. at 379. The defendants sought to have the Court distinguish, on a factual basis, the sale of movies for theater showing and sale of movies for television showing. 371 U.S. at 47, 83 S. Ct. at 103.

157. The first "Question Presented" stated in Loew's Inc.'s Jurisdictional Statement filed with the Supreme Court was as follows:

Whether the legal requirement that dominance or sufficient economic power in the relevant market must exist to establish a "tying agreement" violative of Section 1 of the Sherman Act is automatically satisfied by the mere fact that products distributed in that market are copyrighted, despite factual findings that no defendant has market dominance and that there existed intense competition in the relevant market.


that argument with reference to the trial judge’s finding that the television market did not view films as interchangeable.\(^{159}\)

Even if the application of the Loew’s presumption is restricted to desirable copyrighted or patented tying products, the presumption is flawed. For the presumption (with the added “product desirability” component) to be valid, the presence of a patent or copyright on a desirable tying product should indicate that the product’s seller is likely to have economic power with respect to that product. The seller of a patented or copyrighted product has, based on the patent or the copyright, certain rights to exclude competitors from duplicating the protected product. In Fortner I, Fortner II, and Hyde, the Court attempted to justify the Loew’s presumption on the basis of the patent and copyright exclusionary rights. In Hyde, the Court, after stating that per se prohibition of a tying arrangement is appropriate only if anticompetitive forcing is likely, stated 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.”\(^ {160}\) In Fortner I and Fortner II, the Court, after stating that product “[u]niqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves,” referred to legal “barriers” that prevent competitors from offering the product, “as in the case of patented and copyrighted products.”\(^ {161}\)

The Court’s “exclusionary rights” explanation of the Loew’s presumption is based on an exaggeration of the extent to which intellectual property protection provides insulation from competitors’ development and sale of substitutes for the tying seller’s product. If the tying seller has a desirable tying product, then a true lack of acceptable substitutes would enable the seller to “force” buyers to (in the alternative) pay a higher price for the tying product or accept a tie-in. If the patent or copyright exclusionary rights truly prevented the tying seller’s competitors from offering a product that consumers would accept as a substitute product, then the Loew’s presumption, as applied to desirable tying products, would make sense. The fact that the desirable tying product was copyrighted or patented would indicate that the tying seller was able to charge a higher price for the desirable product or force a tie-in on buyers, because competitors would be unable to mimic the tying seller’s desirable product. Neither the patent nor the copyright exclusionary rights are that expansive, however.

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\(^{159}\) 371 U.S. at 48, 83 S. Ct. at 103. The trial judge found each film to be a unique product. 189 F. Supp. at 381. Uniqueness, however, is not the same as desirability.


As to patents, the patentee has the exclusive right to make, use, or
sell the patented invention for the term of the patent, seventeen years.\textsuperscript{162} One who makes, uses, or sells the patented invention without author-
ization from the patentee infringes the patent and is liable for damages.\textsuperscript{163} The crucial question in a patent infringement suit is this: Does the
allegedly infringing device, whether copied from the patented device or
independently created, do the same work, in substantially the same way,
and accomplish substantially the same result as the patented product?\textsuperscript{164} Where economic power is concerned, however, the proper inquiry is not the patent infringement case question of whether there is a legal barrier
that prevents the tying seller's competitors from offering a product that
does substantially the same work in substantially the same way as the
tying product. The proper tying case inquiry is whether the tying seller's
competitors are, by virtue of the patent, prevented from offering products
that are functionally equivalent to the tying product.\textsuperscript{165} If the seller of
a desirable patented tying product seeks to exact a higher price for that
product in the form of a tie-in, potential buyers who have the option
of switching to another seller's "untied" functionally equivalent product
would presumably do so. Consumer price sensitivity is determined in
part by the availability of suitable substitutes. A patent does not protect
the patentee from competition of functionally equivalent products\textsuperscript{166} (i.e.,
those that do substantially the same work and accomplish substantially
the same result, but in something less than substantially the same way
that the patented product does that work or accomplishes that result).
An idea itself is not patentable.\textsuperscript{167} There are, for example, a number

\begin{itemize}
\item \textsuperscript{162} 35 U.S.C. § 154 (1982).
\item \textsuperscript{163} 35 U.S.C. § 271 (1983). See generally Milgrim, supra note 126, § 9.02[5]; and
D. Chisum, Patents § 16.02 (1986).
\item \textsuperscript{164} Autogiro Co. v. United States, 384 F.2d 391, 399 (Ct. Cl. 1967). A determination
of patent infringement is a two-step process. First the patent claims (statements defining
what is covered in the patent) are examined. Then the allegedly infringing device is
examined to see if the patent claims substantially describe that device.

Independent creation of the infringing device is not a defense in a patent infringement
action. An unlawful infringement may be entirely unintentional. D. Chisum, supra note
163, § 16.02 (citing Webber v. Virginia, 103 U.S. 344 (1881)).

\item \textsuperscript{165} As one commentator has expressed this point, "[T]he relevant barrier to entry
[in determining whether economic power exists] is not the prohibition against unauthorized
use or duplication, but the inability of competitors to introduce successful product var-
iants." Note, supra note 25, at 1313.

\item \textsuperscript{166} Other commentators have made this point, including Bauer, supra note 12, at
333 n.179; Singer, supra note 25, at 661; and Lavey, supra note 15, at 437 n.15, 438.

\item \textsuperscript{167} A patent does not allow the patentee to take the idea, mental process, or abstract
intellectual process involved in his process or invention, for these "are the basic tools of
253, 255 (1972); accord, Diamond v. Diehr, 450 U.S. 175, 185, 101 S. Ct. 1048, 1056
(1981); Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130, 68 S. Ct. 440,
of microwave ovens presently on the market, all patented. Not only
does the patent not protect the patentee against competitors' sales of
functionally equivalent products, competitors are free to "invent
around" a patent, and, in the case of a desirable tying product, would
have clear economic incentive to do so.

A patent holder possesses, by virtue of his patent exclusionary rights,
control of the production and sale of his product, just as the fee simple
owner of a piece of land controls the sale of the land. This The Supreme
Court and lower courts have, over the years, referred to the patent-
based product control rights as a "statutory monopoly." The patent
"statutory monopoly" should not be confused with a market-wide mo-
nopoly. Often a patent is limited to a unique form or improvement
over an already existing patented product. Justice Black, writing for
the majority in Northern Pacific, acknowledged that fact and stated
that in such a situation "the economic power resulting from the patent
privileges is slight." Furthermore, frequently the patented article is

441 (1948). Thus, an idea itself is not patentable. Rubber-Tip Pencil Co. v. Howard, 87
U.S. (1 Wall.) 498, 507 (1874) (quoted in Diamond, 450 U.S. at 185, 101 S. Ct. at 1056).
168. Bauer, supra note 12, at 333 n.179.
169. This patent control right is really no more than property ownership, as the Sixth
Circuit stated in Nickola v. Peterson, 580 F.2d 898, 914 n.25 (6th Cir. 1978), cert. denied,
in Infringement Suits, 9 UCLA L. Rev. 76, 102 (1962).
(citation omitted) (referring to the grant of "a patent or similar monopoly over a product");
United States v. Loew's Inc., 371 U.S. 38, 46, 83 S. Ct. 97, 102 (1962) (referring to
"the statutorily granted patent monopoly"); and International Salt Co. v. United States,
(1932), in which the Court stated that a patent "is not, accurately speaking, a monopoly.")
Id. at 186, 53 S. Ct. at 557. The Court there stated that a monopoly takes something
from the people. A patentee takes nothing from the people, but instead, on expiration
of his patent, gives his knowledge to the people. Id. at 186, 53 S. Ct. at 557. In Dubilier,
the United States was seeking the assignment of patent rights on inventions made by a
government employee.
172. Northern Pac. Ry. v. United States, 356 U.S. 1, 10 n.8, 78 S. Ct. 514, 520 n.8
(1958). According to Turner, "often" is probably an understatement. Turner, supra note
9, at 57.
174. 356 U.S. at 10 n.8, 78 S. Ct. at 520 n.8. See also Austin, supra note 25, at
112 (stating that Justice Black's Northern Pacific footnote criticism is consistent with
reality); Bauer, supra note 12, at 333 n.179; Lavey, supra note 25, at 438 ("substitutable
products may exist such that a patent imparts only limited protection from competition");
Singer, supra note 25, at 661; and Slawson, supra note 25, at 691.
Cf. Turner, supra note 9, at 57 ("a patent proves no more than distinctiveness, and
there is no apparent reason why anything more should be required [to prove economic
power] in nonpatent cases," a viewpoint apparently rejected by the Court in Fortner I and
Fortner II; see Fortner I, 394 U.S. 495, 505 n.2, 89 S. Ct. 1252, 1259 n.2, and
Fortner II, 429 U.S. 610, 621, 97 S. Ct. 861, 868 (1977)).
only an insignificant component of the final product, in which case the
patent could only confer "anemic leverage." As Justice O'Connor
noted in *Hyde*, "a patent holder has no market power in any relevant
sense if there are close substitutes for the patented product." While
the patent holder has control rights over his product—just as the owner
of a piece of land has control of the disposition of the land—he does
not necessarily have a market-wide monopoly or the ability to impose
a tie-in.

When the tying product is copyrighted rather than patented, the
potential legal barrier to competitor duplication of the tying product is
even weaker. While a copyright holder has the exclusive right to re-
produce the copyrighted work, to distribute copies, to prepare derivative
works, and to publicly perform or display the copyrighted work, copyright
protection, like patent protection, presents absolutely no barrier
to the production and sale of functional equivalents to the copyrighted
tying product. If a motion picture producer hired a novelist to write
a Civil War-era novel set in Georgia with a strong-minded female main
coloration, that novel would not, without more, infringe the copyright
on "Gone with the Wind." If a software manufacturer created a

175. Austin, supra note 25, at 112.
concurring).
177. On this point, see Singer, supra note 25, at 661 ("implicit in the [Loew's]
presumption is the belief that since a patent or copyright is a statutory monopoly, it
follows that each must be a market monopoly"). For a discussion of the extent to which
confusion about the nature of the "patent monopoly" influenced the development of the
Loew's presumption, see infra notes 217-312 and accompanying text.

A patentee may, of course, have market control. See, e.g., *International Business Mach.
Corp. v. United States*, 298 U.S. 131, 56 S. Ct. 701 (1936) (IBM, one of only two
manufacturers of certain tabulating machines, leased its machines on the condition that
lessees use only IBM's tabulating cards with the machines. IBM's tying product market
share was higher than eighty percent.).

178. 17 U.S.C. § 106 (1982). The copyright holder's exclusive rights are subject to
179. Other commentators who have made similar statements are Jones, supra note 25,
at 41; Lavey, supra note 25, at 438; Matheson, supra note 25, at 880 n.102 ("[w]here
the copyright does not prevent others from developing functionally equivalent products,
as is the case of computer software, the presumption of power may be ill-founded");
F.2d 658, at 664 n.4 (2d Cir. 1974) (presence of a trademark does not prevent competitor
duplication); and *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 48 (5th Cir. 1976) (unlike
a patent or copyright, a trademark protects only the name or symbol used for a product).
180. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), where
the court held that a movie, "The Cohens and the Kellys," did not infringe the copyright
on the earlier play "Abie's Irish Rose," even though the movie, like the earlier play,
dealt with a quarrel between a Jewish and Irish father, the marriage of their children,
the birth of grandchildren, and a reconciliation.
software program that is functionally equivalent to an existing copyrighted program the second program would not, without more, infringe the copyright on the copyrighted program. Copyright protection only protects the copyright holder from a "taking" or copying of his particular expression. 181 Copyright protection does not prevent competitors from offering their own functional equivalents to copyrighted tying products unless the competitors "copy" the copyrighted product's expression to create that functional equivalent. 182 Furthermore, a competitor of a seller with a copyrighted desirable tying product can, without violating that copyright, study the tying seller's product and produce his own product based on the ideas or principles exhibited in the tying product. Copyright protection does not protect the copyright holder from the "copying" of the ideas or principles involved in the copyrighted work. 183 Thus, as one trial court has noted, copyright notices attached to computer software do not prevent competitors from developing functionally equivalent software. 184 Programmers are free to read copyrighted programs and use the underlying ideas in preparing their own works. 185


182. While the concept of infringement is not codified, most copyright infringement cases involve a plaintiff's claim that the defendant created his work by "copying" the plaintiff's work. See M. Nimmer, supra note 181, § 8.01[A].


The boundary between the taking of ideas and the taking of expression may, of course, be elusive, and is particularly likely to be so in copyright infringement cases involving computer software. Courts deciding software cases are beginning to struggle with the question of whether what was copied was the idea or the expression. See, e.g., Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d at 1234-40; Digital Communications Assoc., Inc. v. Softklone Distributing Corp., No. C86-128-A (N.D. Ga., March
Beyond that, a copyright holder, unlike a patentee, has no rights or remedies against a competitor who, working independently of the copyrighted holder's work, somehow creates and sells an exact duplicate of the copyright holder's work. As Judge Learned Hand has stated, "[I]f by some magic a man who had never known it were to compose a new Keats's Ode on a Grecian Urn, he would be an 'author', and if he copyrighted it, others might not copy that poem." While only "original" works qualify for copyright, the copyright "originality" requirement does not demand product novelty, in the patent sense. The copyright "originality" requirement is satisfied if the work "originated" with the author, meaning that the author did not copy someone else's work. An author who independently created a work identical to an existing work not only would not be an infringer, he would be entitled to copyright protection on his own work.

In Data General the trial court recognized that copyright is not a legal barrier to the development of functional equivalents for a desirable tying product. First, in its opinion ruling on the plaintiffs' motion for summary judgment, the trial judge noted that affidavits submitted by


186. See M. Nimmer, supra note 181, § 8.01[A].
187. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), cert. denied, 298 U.S. 669, 56 S. Ct. 835 (1936). Of course, in the "real world" a copyright case defendant who independently created an exact duplicate to a copyrighted product might have difficulty overcoming jurors' suspicion that he actually copied the copyrighted work.
190. In Alfred Bell, the court made the following comment:
The defendants' contention apparently results from the ambiguity of the word "original" [in the copyright law]. It may mean startling, novel or unusual, a marked departure from the past . . . . "Original" in reference to a copyrighted work means that the particular work "owes its origin" to the "author." No large measure of novelty is necessary.
191 F.2d at 102. See generally Milgrim, supra note 126, § 9.05[3] (comparing copyright "originality" and patent "novelty").
191. As Milgrim states, in a copyright infringement suit, the question of whether a given work is an infringing "copy" or an independently created work is evidentiary. If the alleged infringer had access to the copyrighted work, copying is presumed if the alleged copy is substantially similar to the copyrighted work. The presumption is rebuttable.
Milgrim, supra note 126, § 9.05[5].
defendant Data General's experts stated that "copyright notices attached to computer software do not prevent others from developing functionally equivalent programs." In its later opinion granting Data General's motion for a judgment n.o.v., the trial court stated that the plaintiffs had failed to prove that Data General's competitors were prevented from developing functionally equivalent software. The court noted that "[n]o evidence was offered as to the actual effect of copyright notices on the development of comparable software." The court of appeals, on the other hand, viewed copyright as "a legal bar to its [the software's] reproduction by competitors." The Ninth Circuit, in addition to citing Loew's for that proposition, referred to the "abundant evidence" in the case that Data General's software "could not be reproduced without infringing defendants' copyright." The appropriate inquiry for the case was not, however, whether there was a legal barrier to exact reproduction of Data General's software. The appropriate inquiry was whether there existed a legal barrier to competitors' production of functionally equivalent software. The Ninth Circuit, dismissing the trial court's concern with this question as a mistaken belief by the trial court that economic power throughout the entire tying product was required to establish a Sherman Act section 1 violation, clearly did not understand the relevance of functional equivalents to copyrighted tying products.

194. Id. at 1113 (footnote omitted). The court noted that those statements were consistent with a recent decision by another federal trial court, Data Cash Systems, Inc. v. JS&A Group, Inc., 480 F. Supp. 1063 (N.D. Ill. 1979).
195. 529 F. Supp. at 816.
196. 529 F. Supp. at 816.
198. Id. at 1342.
199. Id. at 1344-46. The Ninth Circuit rejected (with a puzzling reference to its recent decisions in Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521 (9th Cir. 1984), and Apple Computer v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983)), the trial court's statement (529 F. Supp. at 816) that the Loew's presumption may be inappropriate for software because copyright protection does not necessarily prevent others from taking the material embodiment of the source program. 734 F.2d at 1344 n.5. If the trial court was stating that software is not protected by copyright, the appellate court was correct in rejecting the statement. The trial court may, however, have been saying that since copyright protects only the expression in the work, copyright presents no real legal barrier to competitors' duplication of the product—a statement that is true not just for copyrighted software, but for all copyrighted products.

In Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), cert. denied, 54 U.S.L.W. 3698 (1986), the Seventh Circuit criticized the Ninth Circuit's Data General opinion, stating that "[t]o the extent" that Data General "holds that a plaintiff may prevail, without establishing power over price . . . by showing that rivals cannot produce exactly the same package," Data General is in conflict with other cases. 776 F.2d at 673 n.4.
Copyright, like patent, has been termed a "statutory monopoly."\footnote{200} Because copyright protection gives the copyright owner rights only against those who "copy" his product's expression, and not against those who take his underlying ideas or independently create the product, a copyright presents even less of a barrier to the creation of product substitutes than does a patent. Thus, copyright is even further removed than patent from market-wide monopoly. As Milgrim stated in his treatise, a copyright is "not a monopoly in any ordinary sense of the word, since the author has a 'monopoly' of his own work only in the sense that a laborer has in his labor."\footnote{201} The Court in Loew's, in attempting to justify its presumption of economic power on the basis of the "distinctiveness" required for patent or copyright, apparently viewed both patents and copyrights as conferring market monopolies, for the Court stated that "[s]ince one of the objectives of the patent laws is to reward uniqueness . . . the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences."\footnote{202} The "distinctiveness" required for the grant of a patent, product novelty,\footnote{203} is no measure of the product's desirability or likely commercial success. Any attempted tie-in using an undesirable patented tying product will have no anticompetitive consequences. In the event of an attempted tie-in involving a desirable patented product, it is important to remember that the patent does not prevent others from developing and selling functional substitutes for the tying product; some other inventor could come up with a functional substitute that did not infringe the seller's patent and could even itself meet the novelty requirement for a separate patent.\footnote{204} As to copyrighted tying products, the only "distinctiveness" required for copyright is that the


\footnote{201} Milgrim, supra note 126, § 9.05[1], at 9-147. Appellant Loew's in its Supreme Court brief pointed out the difference between the copyright "monopoly" and a market monopoly, stating that "the copyright monopoly enjoyed by each defendant over each film which it licensed was no different from any seller's absolute ownership of the goods it offers in the market." Brief for the Appellants at 15, United States v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97 (1962) (in 10 P. Kurland and G. Casper, Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States, 1955 Term—1975 Term 257, 274 (1979)).


\footnote{204} See Singer, supra note 25, at 661: "Since it does not necessarily follow that a statutory monopoly implies a market monopoly, the presumption of illegality in patent cases appears to rest on a weak foundation."
work have originated with the author. The copyrighted tying product seller's competitors are free to come out with their own "original" (as opposed to copied) functional substitute to the tying product and to copy anything other than the author's expression.

A copyrighted or patented tying product should not be presumed to give its seller power over price, for the copyright or patent is not a guarantee or even an indicator of product desirability and not a barrier to competitor creation of comparable products. A patent or copyright may, however, help the tying seller achieve market power, as Justice O'Connor noted in Hyde.205 As one commentator has noted, when, because of a legal barrier to product duplication, a seller "is able to convince some buyers that there is no exact substitute for his product,"206 the possibility of a successful tie-in exists.207 In such a case there really are, for the buyers so convinced, no acceptable functional equivalents, although in a broader sense, functionally equivalent products do exist. Buyers who would otherwise, because of the higher product price represented by the tie-in, purchase substitute products, will instead accept the tie, because they so strongly desire the tying seller's particular version of the tying product. "Gone with the Wind" provides an example of this consumer loyalty phenomenon. There is, as the Court said in Loew's, "but one 'Gone with the Wind,'"208 and movie viewers would presumably have a high preference for viewing this movie rather than some other movie—even some other movie set in Georgia involving the Civil war era adventures of a young woman.209 It is easy to see that movie theater owners and television station owners, aware of the strong consumer preference for "Gone With the Wind", could be forced to pay a higher-than-usual dollar price for that movie, or in the alternative, accept a tie-in. Even other similarly-themed movies really would not be acceptable

206. Note, supra note 12, at 94 (quoted by the Court in Fortner II, 429 U.S. 610, 521 n.14, 97 S. Ct. 861, 868 n.14 (1977)).
207. According to the author of the work referenced in the preceding note, a seller who faces a negative sloping demand curve for his tying product can impose a tie. The negative sloping demand curve shows the seller's ability to raise the tying product's price by imposing a tie-in. In the view of the author of that Note, the negative sloping demand curve will exist when "the tying product is significantly 'differentiated,' that is, when through use of patents . . . copyrights . . . or other variations which cannot be freely reproduced, the seller is able to convince some buyers that there is no exact substitute." Note, supra note 12, at 94 (footnotes omitted).
209. In Loew's the defendants unsuccessfully argued that the buyers, television stations, really had no such preferences for any particular movie—they merely wanted movies to fill late-night programming. 371 U.S. at 47-48, 83 S. Ct. at 103-04.
substitutes for viewers (and stations) wanting "Gone with the Wind." 210

A product such as "Gone with the Wind" is "differentiated" or "distinctive" not only in the sense of having the minimal level of "originality" required for copyright and the minimal protection from competitor reproduction provided by copyright; it is "distinctive" in the sense of being so strongly desired by consumers as to give its seller power over price.211 For the truly unique, highly desirable product such as "Gone with the Wind," or "Cabbage Patch Kid" dolls, copyright protection is one weapon in the seller's arsenal of weapons for the prevention of competitor duplication and encroachment. For many products, trademark law rights,212 state unfair competition law,213 and marketing strategy,214 together with copyright protection, can help the seller create and protect a desirable market position. The question, though, is whether the Loew's presumption should exist. While the patent or copyright legal barriers will, in the case of a desirable tying product for which some buyers see no exact substitute, help the seller gain and keep economic power by protecting the seller against product duplication, without product desirability and this specialized buyer-level product perception, the product's seller will have no economic power. In a given

210. The Justice Department, in its Northern Pacific Supreme Court brief, took the position that International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12 (1947), was decided on the grounds of consumer preference for the defendant's particular salt machines and did not rest on any finding that the defendant had a market-wide monopoly in salt machines: "Since no other machine could be exactly like those of International Salt, persons who for whatever reasons preferred International Salt's machines were forced to deal with the latter." Brief for the United States at 14, Northern Pac. Ry. v. United States, 336 U.S. 1, 78 S. Ct. 514 (1956) (emphasis added) (in 4 P. Kurland and G. Casper, Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States, 1955 Term—1975 Term 71, 87 (1979)).

211. In the opinion of this author, the author of Note, supra note 12, while correct in stating that it is tying product differentiation that is the key to seller ability to impose a tie, has exaggerated the extent to which patent or copyright prevents competitor reproduction of the tying product and has thus exaggerated the "uniqueness" or differentiation resulting from patent or copyright. That writer views the "uniqueness" as an indication that a tie-in is likely to result in foreclosure of competition. Id. at 94.


213. Unfair competition law, among other things, protects a seller from "passing off" by other sellers.

214. Marketing strategy aimed at convincing buyers that they must have this particular seller's product would appear to be an important factor in creating economic power.
case, the jury can consider, as part of the evidence of a tying seller's economic power, the existence of copyright or patent protection on the tying product, the exact nature of such protection, the extent to which the copyright or patent has prevented competitor duplication, and the extent to which buyers perceive that they must have this seller's particular product. In a case involving a desirable tying product for which some buyers see no acceptable substitute, the "Gone with the Wind" situation, the jury will reach the correct conclusion, that the seller has economic power.

III. ORIGIN OF THE LOEW'S PRESUMPTION

The Court's first statement of the principle referred to in this article as the "Loew's presumption" actually appeared as dictum in the Court's 1953 Times-Picayune decision. In that case, Justice Clark, writing for the majority, stated that in tying arrangement cases "dominance," or control by the seller of the tying product market, was a necessary element

215. See A.I. Root Co. v. Computer Dynamics, Inc., 615 F. Supp. 727 (N.D. Ohio 1985), aff'd, 806 F.2d 673 (6th Cir. 1986); and 3 P.M., Inc. v. Basic Four Corp., 591 F. Supp. 1350 (E.D. Mich. 1984). Both of these cases are trial court decisions granting summary judgment for the defendant based on the plaintiff's failure to raise a disputed issue of fact as to whether the defendant possessed economic power with respect to a copyrighted tying product. In 3 P.M. the trial judge does not appear to have given any weight to the Loew's presumption of economic power. In the judge's view the plaintiff had the burden of showing that none of the defendants' competitors could have produced functional equivalents to the tying product, but did not even try to make such a showing. 591 F. Supp. at 1358. In Root the district court relied heavily on 3 P.M.

216. Accord, Austin, supra note 25, at 112 (urging that the jury makes the determination of whether economic power exists on a case-by-case basis, whether the tying product is patented or unpatented. He states that while the Loew's "tying" films were unique, "a blanket policy of viewing all patented tying products" as possessing that strength is "myopic and unrealistic"). The opposing view is expressed in Note, supra note 12.

Consumer desire for a particular seller's product may be easier to achieve in the area of copyrighted creative works than in the area of patented utilitarian works, as Milgrim has stated. Milgrim, supra note 126, § 10.01[2], at 10-73 n.156. If that is true, then copyright, while presenting less of a legal barrier to competitor production of a functional equivalent than patent, may be more likely than patent to generate economic power. Another commentator has stated that a copyrighted computer operating system is not unique in the same sense that a movie is, for "[t]wo copyrighted software programs that are functionally equivalent will be indistinguishable to the average consumer, whereas two movies, even with similar plot lines, will not." Note, supra note 16, at 1044.

Cf. Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 48 (5th Cir. 1976), stating that the existence of economic power with respect to a trademarked tying product is a question of fact.

of a Sherman Act violation.\textsuperscript{218} According to Justice Clark, in earlier Sherman Act tying arrangement cases\textsuperscript{219} patents or copyrights had supplied proof of market control.\textsuperscript{220} Justice Clárk's statement is, in the view of this author, judicial fiction. The \textit{Times-Picayune} opinion was the first Supreme Court Sherman Act tying arrangement case to require proof of market power as an element of the per se violation.\textsuperscript{221} The earlier cases, contrary to Justice Clark's statement, contained no discussion of the seller's economic power; there was, when those earlier cases were decided, no requirement that the seller be shown to possess market power in the tying product. Justice Clark appears to have begun the process of creating the Loew's presumption when, in \textit{Times-Picayune}, after imposing market power as an element of the per se violation for tying arrangements, he sought to reconcile the Court's earlier tying cases with his \textit{Times-Picayune} view of Sherman Act tying arrangement doctrine.

In the years preceding the three earliest Sherman Act tying arrangement cases, \textit{International Salt};\textsuperscript{222} \textit{United States v. Paramount Pictures},

\begin{footnotesize}
\begin{enumerate}
\item Id. at 612-13, 73 S. Ct. at 882-83.
\item The earlier cases mentioned by Justice Clark were \textit{International Salt Co. v. United States}, 332 U.S. 392, 68 S. Ct. 12 (1947); \textit{United States v. Paramount Pictures Inc.}, 334 U.S. 131, 68 S. Ct. 915 (1948); and \textit{United States v. Griffith}, 334 U.S. 100, 68 S. Ct. 941 (1948). The major portion of Justice Clark's discussion of these cases in \textit{Times-Picayune} appears at 345 U.S. at 608, 73 S. Ct. at 880.
\item Justice Clark's exact words were as follows: "Unlike other 'tying' cases where patents or copyrights supplied the requisite market control, any equivalent market 'dominance' in this case must rest on comparative marketing data." 345 U.S. at 611, 73 S. Ct. at 882 (footnote omitted).
\item The following commentators have made similar observations: Lavey, supra note 15, at 442 (stating that while the Court had, before \textit{International Salt Co. v. United States}, 332 U.S. 392, 68 S. Ct. 12 (1947), engaged in economic analysis in two Clayton Act tying arrangement cases, \textit{United Shoe Mach. Corp. v. United States}, 258 U.S. 451, 52 S. Ct. 363 (1922), and \textit{United States v. International Business Mach. Corp.}, 298 U.S. 131, 56 S. Ct. 701 (1936), the Court abandoned economic analysis in \textit{International Salt}); Note, supra note 12, at 87 (stating that the \textit{International Salt} opinion did not discuss economic power).
\item Slawson indicates, correctly, that the two cases that the \textit{Times-Picayune} Court cited for the "dominance" or monopoly power requirement (345 U.S. at 608, 73 S. Ct. at 880) do not support such a requirement. Slawson, supra note 25, at 685. One of those cases is \textit{Paramount}, discussed in infra notes 217-312 and accompanying text. In the other "supporting" case, \textit{United States v. Griffith}, 334 U.S. 100, 68 S. Ct. 941 (1948), the government challenged agreements between motion picture distributors and theater owners granting the theater owners the exclusive rights in their areas to show first- and second-run films. The trial court dismissed the complaint, 68 F. Supp. 180 (W.D. Okla. 1946), based on its finding that there was no showing of conspiracy to monopolize between the distributors and the exhibitors. The Supreme Court reversed and remanded, holding that it is not always necessary to find specific intent to restrain trade or build a monopoly to find an antitrust violation. 334 U.S. at 105, 68 S. Ct. at 944.
\end{enumerate}
\end{footnotesize}
Inc., and United States v. Griffith, the Supreme Court reviewed a number of patent infringement cases in which a patent holder sought to enforce patent licensing restrictions requiring the licensee to use the patented device only with unpatented supplies purchased from the patentee. For example, in the 1942 case of Morton Salt Co. v. G.S. Suppiger Co., the plaintiffs' lease agreement for patented machines used to place salt in canned food contained a provision requiring that lessees use the machines only with the plaintiff's salt tablets. In Motion Picture Patents Co. v. Universal Film Manufacturing Co., the plaintiff, holder of a patent on a film-feeding device, required manufacturers licensed to make the film feeder to agree that they would sell the device only to purchasers who agreed to use the feeder with the plaintiff's film. In Carbice Corp. v. American Patents Development Corp., the plaintiff, holder of a patent on a refrigerated transportation package, licensed the package for use only with solid carbon dioxide sold by the plaintiff.

In Morton Salt, Motion Picture Patents, Carbice, and similar cases the patent holder seeking to enforce a use restriction was denied patent relief on equitable grounds because of what the Court viewed as an unlawful attempt to "extend the patent monopoly" to unpatented products. These "patent misuse" cases, like the later Sherman Act tying

228. While the earliest of the patent misuse cases merely held that no patent infringement was involved when contract restrictions on the use and purchase of unpatented supplies were violated, later cases denied the patentee relief for clear patent infringement because of the illegal "monopoly extension" to unpatented supplies. Compare Carbice, 283 U.S. 27, 51 S. Ct. 334, with Morton Salt, 314 U.S. 488, 62 S. Ct. 402.

For years the practice of conditioning sales or licenses of patent rights on the purchase of unpatented materials from the patentee was considered legal. See, e.g., Henry v. A.B. Dick Co., 224 U.S. 1, 32 S. Ct. 364 (1912), in which the Court held that the patentee of a mimeograph machine could lawfully require that the machine be used only with supplies purchased from the patentee. In Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 100 S. Ct. 2601 (1980), the Court characterized Henry as the "high-water mark" of this pro-tying climate, followed five years later by "what may be characterized through the lens of hindsight as an inevitable judicial reaction" in the Motion Picture Patents case. Id. at 190-91, 100 S. Ct. at 2610.

According to Bowman, Justice White entered a vigorous dissent in Henry, advancing "the proposition that a tie-in to a patented commodity was the equivalent of allowing a monopoly over the tied product." Bowman, supra note 3, at 30 (footnote omitted). This "patent extension" theory became the majority viewpoint in the Motion Picture Patents case. Id. For a full discussion of the patent misuse cases, see Lowin, supra note 25, and Nicoson, supra note 169, at 76-88. Some of these cases were direct infringement cases,
arrangement cases, involved some conditioning of the availability of a desired product on the buyer/lessee's agreement to take other products (unpatented supplies) as well. The patent misuse cases, like the Sherman Act tying cases, involved product tie-ins. The patent misuse cases differed from Sherman Act tying cases in that they required no allegations or proof of an "unreasonable restraint of trade," a prerequisite for Sherman Act illegality. At issue in the misuse cases was the question of whether the plaintiff should be granted or denied injunctive and compensatory relief for patent infringement. While, in the patent misuse cases, the defendants (infringers) used the plaintiffs' product tie-in as a shield (an equitable defense to admitted infringement), in *International Salt*, the Justice Department attacked a tie-in directly, suing under both the Sherman Act and the Clayton Act. In *International Salt*, the Justice Department sought an injunction against the defendant's enforcement of a lease provision requiring lessees of the defendant's patented salt machines to use the machines only with salt purchased from the defendant. The trial court had granted summary judgment for the government as to both the Sherman Act violation and the Clayton Act violation. The Supreme Court, in a short opinion written by Justice Jackson, affirmed. As to the Sherman Act violation, the Court found that there was no question but that the defendant's restraint on trade was unreasonable. The Court, comparing the defendant's tying arrangement to price-fixing, stated that "it is unreasonable, per se, to foreclose competitors from any substantial market." The Court did not discuss the defendant's strength in the salt machine market; in fact, the Court upheld the trial court's refusal to take the defendant's evidence of the

229. The Court's decision in the *Motion Picture Patents* case mentioned the Clayton Act, but only as an expression of public policy concerns that motivated the Court to deny patent relief to the plaintiff. 243 U.S. at 517-18, 37 S. Ct. at 421.


231. The restriction for one of the patented machines read as follows: "It is further mutually agreed that the said Salt Tablet Depositor(s) . . . shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor." 332 U.S. at 395 n.6, 68 S. Ct. at 14 n.6.


233. Appeal was taken directly to the Supreme Court. 332 U.S. at 394, 68 S. Ct. at 14.


As to the Clayton Act violation, the *International Salt* Court stated that "the tendency of the arrangement to accomplishment of monopoly seems obvious." 332 U.S. at 396, 68 S. Ct. at 15.
availability of other salt machines.\textsuperscript{235} In response to the defendant's contention that summary judgment should not have been granted because a trial was needed to determine whether an unreasonable restraint of trade existed, the Court, comparing the tie-in with price-fixing, stated that "the admitted facts left no genuine issue,"\textsuperscript{236} as "[t]he volume of business affected by [the defendant's] contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious."\textsuperscript{237}

The Court had, in the earlier patent misuse cases, refused relief for patent infringement because of plaintiffs' tie-ins of patented products and unpatented supplies, viewed by the Court as a patentee's attempt to extend a patent monopoly to unpatented products. In \textit{International Salt}, the Court found a tie-in involving a patented tying product to be an unreasonable restraint of trade, a per se violation of the Sherman and Clayton Acts. The Court in \textit{International Salt}, echoing the language of the earlier patent misuse cases, viewed the defendant's tying clauses as an attempt by the defendant to extend the "monopoly" on the patented salt machines to salt:

The appellant's patents confer a limited monopoly of the invention they reward. From them appellant derives a right to restrain others from making, vending, or using the patented machines. But the patents confer no right to restrain use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the anti-trust laws.\textsuperscript{238}

The Court cited as support for that last sentence three patent misuse cases.\textsuperscript{239} In that sentence the Court appears to be expressing two different ideas: (1) the defendant's tie of salt to the desired patented salt machines was an illegal restraint of trade; and (2) nothing in the patent laws immunized the defendant from liability for that restraint of trade.\textsuperscript{240} In the first point, the Court echoed the hostility expressed in the earlier patent misuse cases toward patent "extensions": A patent holder must

\textsuperscript{235} Northern Pac. Ry. v. United States, 356 U.S. 1, 10 n.8, 78 S. Ct. 514, 520 n.8 (1958).
\textsuperscript{236} 332 U.S. at 396, 68 S. Ct. at 15.
\textsuperscript{237} Id. Possibly the defendant was being used by International Salt as a metering device, as suggested by Justice O'Connor in her concurring opinion in \textit{Hyde}, 466 U.S. 2, 36 n.4, 104 S. Ct. 1551, 1571 n.4 (1984), and by various commentators.
\textsuperscript{238} 332 U.S. at 395-96, 68 S. Ct. at 15 (citations omitted).
\textsuperscript{240} As one commentator stated concerning \textit{International Salt}, "absence of immunity is surely different than per se violation." Lowin, supra note 23, at 98.
be strictly limited in enjoyment of patent rights and not allowed to expand those rights; if the patentee is allowed to expand those rights to unpatented products, salt, for example, he will be getting more than his due, to the detriment of competitors, other salt sellers. Just as hostility toward "patent extensions" had, in the earlier patent misuse cases, led the Court to deny relief for patent infringement, that hostility provided the basis for the conclusion in International Salt that the Sherman Act had been violated.\(^{241}\)

Justice O'Connor, criticizing the Hyde majority's acceptance of the Loew's presumption, stated that in Hyde the patent misuse doctrine "may have influenced the Court's willingness to strike down the arrangement at issue in International Salt."\(^{242}\) This author's view is that the patent misuse cases not only influenced the Court to uphold the trial judge's decision in International Salt, the Court actually approached International Salt as a patent misuse case, allowing hostility toward "patent extensions" developed in patent misuse cases, to substitute for a real inquiry into the likely impact of the defendant's practices on competition.

Justice O'Connor views Paramount, decided one year after International Salt, as having been decided not under "the schema of the tying cases" but under the "principle of 'patent misuse.'"\(^{243}\) In Paramount, the Court affirmed a trial court decree prohibiting motion picture distributors from block booking movies.\(^{244}\) The Paramount trial court had condemned the block booking policies based on the theory that the licensing of a desired film only on the condition that another film be taken "adds to the monopoly of a single copyrighted picture, that of another copyrighted picture which must be taken and exhibited in order to secure the first."\(^{245}\) The Supreme Court, citing several patent misuse cases as the source of the concern, later expressed in an antitrust context as the "leverage" evil of tie-ins, that tying arrangements allow the extension of a monopoly from the tying product to the tied product. Bowman, supra note 3, at 30-31. In Hyde, the Court repeated the traditional concern with "monopoly extension," stating that "[a]ny effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market." Hyde, 466 U.S. 2, 16, 104 S. Ct. 1551, 1560 (1984). The Court there appears to have mistakenly assumed that all patents confer market power. See supra notes 100-216 and accompanying text.

241. Bowman views the patent misuse cases as the source of the concern, later expressed in an antitrust context as the "leverage" evil of tie-ins, that tying arrangements allow the extension of a monopoly from the tying product to the tied product. Bowman, supra note 3, at 30-31.

In Hyde, the Court repeated the traditional concern with "monopoly extension," stating that "[a]ny effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market." Hyde, 466 U.S. 2, 16, 104 S. Ct. 1551, 1560 (1984). The Court there appears to have mistakenly assumed that all patents confer market power. See supra notes 100-216 and accompanying text.

242. Hyde, 466 U.S. at 38 n.7, 104 S. Ct. at 1572 n.7.

243. Id.

244. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158, 68 S. Ct. 915, 929 (1948), aff'g 66 F. Supp. 323 (S.D.N.Y. 1946) and 70 F. Supp. 53 (S.D.N.Y. 1946). Block booking was only one of the many allegedly anticompetitive practices involved in that case.

245. 66 F. Supp. at 349, quoted in the Paramount Supreme Court opinion, 334 U.S.
cases, affirmed,\textsuperscript{246} adopting the trial court's "copyright enlargement" hostility without discussing the differences between patent and copyright qualifications and protection:

Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other . . . . [T]he result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.\textsuperscript{247}

The same hostility to "extensions of the copyright monopoly" was expressed in \textit{United States v. Griffith}.\textsuperscript{248} In neither of these cases did the Court inquire as to whether the defendants had economic power in the tying product or even identify particular tying and tied products.

In \textit{Times-Picayune},\textsuperscript{249} the Justice Department challenged a newspaper publisher's requirement that advertisers wanting advertising space in either the publisher's morning or evening paper purchase advertising space in both papers. While there was a rival evening paper, the defendant had no competition in the morning paper market. The government challenged the practice under sections 1 and 2 of the Sherman Act. The trial court found both a section 1 and a section 2 Sherman Act violation and enjoined the defendants from continuing the practice.\textsuperscript{250} The Supreme Court reversed the trial court. The Court acknowledged the evil of tying arrangements, quoting dictum from the 1949 \textit{Standard Stations} decision holding that Standard Oil's exclusive dealing contracts with service stations violated section 3 of the Clayton Act:

\begin{quote}
[T]ying arrangements serve hardly any purpose beyond the suppression of competition. By conditioning his sale of one
\end{quote}


\textsuperscript{247} 334 U.S. at 158, 68 S. Ct. at 929. The Court's only discussion of the nature of copyright consisted of a quotation from Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S. Ct. 546 (1932), in which the Court considered the question of whether the state of Georgia could tax copyright royalties.

\textsuperscript{248} 334 U.S. 100, 68 S. Ct. 941 (1948). \textit{Griffith} is discussed supra note 221.

\textsuperscript{249} Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S. Ct. 872 (1953).

\textsuperscript{250} 105 F. Supp. 670 (E.D. La. 1952), rev'd, 345 U.S. 594, 73 S. Ct. 872 (1953). Appeal was taken directly to the Supreme Court under the Expediting Act. 345 U.S. at 598, 73 S. Ct. at 874.

\textsuperscript{251} Standard Oil Co. v. United States, 337 U.S. 293, 59 S. Ct. 1051 (1959) [hereinafter referred to as \textit{Standard Stations}].
commodity on the purchase of another, a seller coerces the 
abduction of buyers’ independent judgment as to the “tied” 
product’s merits and insulates it from the competitive stresses 
of the open market. But any intrinsic superiority of the “tied” 
product would convince freely choosing buyers to select it over 
others, anyway. Thus [in the usual case only the prospect of 
reducing competition would persuade a seller to adopt such a 
contract and only his control of the supply of the tying device, 
whether conferred by patent monopoly or otherwise obtained, 
could induce a buyer to enter one.252

Justice Clark, writing for the majority in *Times-Picayune*, then went 
on to say that not every tying arrangement violates the Sherman Act: 
For a Sherman Act violation to exist the seller must have “a monopolistic 
position in the market for the ‘tying’ product” and must restrain “a 
substantial volume of commerce in the ‘tied’ product.”253 The Court 
traced the “monopoly” requirement back to a 1920 case brought under 
section 5 of the Federal Trade Commission Act,254 *Federal Trade Com-
mission v. Gratz*,255 in which it had been held, on a point of pleading, 
that a complaint which charged a seller with conditioning his sale of 
steel ties on purchases of jute bagging did not state an actionable claim 
because the complaint failed to allege that the defendant had monopol-
istic purpose or market control.

In *Standard Stations*,256 a Clayton Act exclusive dealing case decided 
by the Court after *International Salt* and before *Times-Picayune*, the 
Court had considered the question of what proof satisfied the require-
ment of section 3 of the Clayton Act that agreements held illegal under 
that section be found to have the effect of substantially lessening com-
petition. In *Standard Stations*, the Court stated that section 3 of the 
Clayton Act “was directed to prohibiting specific practices even though 
not covered by the broad terms of the Sherman Act.”257 Specifically, 
the Court in *Standard Stations* asked whether “the requirement of 
showing that the effect of the [challenged] agreements ‘may be to sub-

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253. *Times-Picayune*, 345 U.S. at 608-09, 73 S. Ct. at 880-81. The Court stated that the “narrower standards” expressed in section 3 of the Clayton Act would be satisfied from a showing of either factor because the Clayton Act’s prerequisite to illegality, potential 
lessening of competition, could be inferred from either factor. Id.
254. 15 U.S.C. § 45 (1982), which states that “[u]nfair methods of competition in or affecting commerce . . . are declared unlawful.”
257. 337 U.S. at 297, 50 S. Ct. at 1054 (footnote omitted).
stantially lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish. The Court included in its review of earlier Clayton Act cases International Salt, a Sherman Act-Clayton Act case, as well as two other Clayton Act tying cases, United Shoe Machinery Corp. v. United States, and International Business Machines Corp. v. United States. In Standard Stations, the government apparently argued that International Salt had held that no showing of "economic consequences" was required to establish a section 3 Clayton Act violation, once it had been established that the volume of business affected was not insignificant and that the effect of the challenged contracts was to foreclose competitors from a substantial market. The Standard Stations Court acknowledged that International Salt, "at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences," but found important economic differences between exclusive dealing contracts, the subject of Standard Stations, and tying arrangements: While, in the view of the Court, pro-competitive factors could be involved in the use of exclusive dealing contracts, tying arrangements "serve hardly any purpose beyond the suppression of competition." The Court in Standard Stations explained

258. Id. at 229, 69 S. Ct. at 1055 (footnote omitted).
259. 237 U.S. at 300, 69 S. Ct. at 1055.
260. 258 U.S. 451, 42 S. Ct. 363 (1922). In United Shoe, the government challenged, under the Clayton Act, a contractual requirement that had the effect of prohibiting lessees of the defendant's machinery from using, for other steps in shoe manufacturing, competitors' machinery. 258 U.S. at 458, 42 S. Ct. at 365. The Supreme Court affirmed the decree of the trial court enjoining defendant's use of the lease restrictions. A few years earlier the Court had affirmed a trial court decision holding that these restrictions did not violate the Sherman Act. United States v. United Shoe Mach. Co., 247 U.S. 32, 38 S. Ct. 473 (1917).
261. 298 U.S. 131, 56 S. Ct. 701 (1936), finding a Clayton Act section 3 violation in IBM's keypunch machine lease restriction requiring lessees to use only IBM's cards in the machines. IBM argued unsuccessfully that the restriction was necessary to prevent the use of unsuitable cards in the machines. The Court stated that "[t]he Clayton Act names no exception to its prohibition of monopolistic tying clauses." Id. at 140, 56 S. Ct. at 705.
262. See 337 U.S. at 304, 69 S. Ct. at 1057.
263. Id. (quoting International Salt Co. v. United States, 332 U.S. 392, 396, 62 S. Ct. 12, 15 (1947)).
264. The defendant's contracts required independent dealers in petroleum and automobile accessories to purchase from the defendant all of their requirements of various products sold by the defendant. 337 U.S. at 295-96, 69 S. Ct. at 1053.
265. 337 U.S. at 306-07, 69 S. Ct. at 1058-59. The Court noted that requirements contracts and exclusive dealing contracts may be of economic advantage to buyers and the consuming public as well as to sellers.
266. 337 U.S. at 305, 69 S. Ct. at 1058.
that (1) a tying seller could have no motive for a tie-in other than "the prospect of reducing competition"; and (2) the tie would be successful—buyers would accept the tie—only if the seller had control of the supply of the tying device, "whether conferred by patent monopoly or otherwise obtained."

The Court explained that in a Clayton Act tying case the "existence of market control of the tying device . . . affords a strong foundation for the presumption that [the tying arrangement] has been or probably will be used to limit competition in the tied product also." Addressing itself specifically to the holding in International Salt, the Standard Stations Court stated that a "patent, moreover, although in fact there may be many competing substitutes for the patented article, is at least prima facie evidence of such [market] control."

The Supreme Court in Times-Picayune, reviewing the trial court's decision, agreed with the trial court that the volume of commerce affected by the defendant newspaper's "unit system" of advertising was not insignificant. Thus, the question of the magnitude of defendant's "market position [became] critical to the case." The majority felt that the relevant market was the local newspaper advertising market as a whole and viewed the defendant as not having a "dominant" position in that market. The Court viewed the "essence of illegality in tying agreements" as "the wielding of monopolistic leverage" by a seller using "his dominant position in one market to expand his empire into the next." The Court found the defendant's forty percent share of the overall newspaper market to be too low to confer "that market 'dominance' which . . . would result in a Sherman Act offense under the rule of International Salt."

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267. 337 U.S. at 306, 69 S. Ct. at 1058.
268. Id.
269. Id.
270. Id. at 307, 69 S. Ct. at 1054 (emphasis added).
272. Id.
273. Id. at 612-13, 73 S. Ct. at 882-83.
274. 345 U.S. at 611, 73 S. Ct. at 882.
275. Id.
276. 345 U.S. at 612-13, 73 S. Ct. at 882-83. The defendant clearly had a monopoly over the morning newspaper advertising market, as the four dissenting Justices (Burton, Black, Douglas, and Minton) pointed out. 345 U.S. at 628, 73 S. Ct. at 892. Turner contends that the Court misdefined the market and defendant's market share. Turner, supra note 9, at 55 n.21. The defendant had a 100% share of the morning newspaper market.

As an alternative grounds for its reversal of the trial court, the Times-Picayune Court found that the defendant's morning and evening papers were not separate products but a single product. 345 U.S. at 613, 73 S. Ct. at 883. Thus, there could be no forced purchase of a second distinct product tied with the purchase of a desired product.
The Times-Picayune Court's view of International Salt was that proof of market dominance was required in International Salt, and was "found to exist because the tying product was patented": "The patents on their face conferred monopolistic, albeit lawful market control." 277 The only possible source that International Salt provides for that assertion is the statement in International Salt that "appellant's patents confer a limited monopoly of the invention they reward." 278 In that statement, however, the International Salt Court was not indicating that it viewed the defendant as having a market-wide monopoly (or dominance) over the salt machine market, but was, instead, expressing its hostility to "patent extensions." The International Salt Court simply did not decide that the defendant in that case had, by virtue of its patent on salt machines, a dominance in the salt machine market. Instead, the Court in International Salt held the defendant's tie-in to be illegal without making any such inquiry.

Justice Clark, however, creating in Times-Picayune a requirement that the seller in a Sherman Act tying arrangement case be shown to possess economic power in the tying product, apparently felt compelled to trace the economic power element back to International Salt. 279 The Times-Picayune Court, by imagining that in International Salt the patent was viewed as supplying proof of market control, reconciled International Salt, a case that was really decided under the theory of the patent misuse cases, with this new model of Sherman Act tying arrangement law. Justice Clark drew support for his view of the role played by

277. 345 U.S. at 608, 73 S. Ct. at 880.
278. International Salt Co. v. United States, 332 U.S. 392, 395, 68 S. Ct. 12, 15 (1947). Times-Picayune cites page 396 of the International Salt opinion instead of 395. The full sentence from Times-Picayune reads as follows: "The patents on their face [in International Salt] conferred monopolistic, albeit lawful, market control, and the volume of sale affected by the tying practice was not 'insignificant or insubstantial.' Id. [referring to International Salt] at page 396." Times-Picayune, 345 U.S. at 608, 73 S. Ct. at 880. This Times-Picayune reference to page 396 of the International Salt opinion is accurate only for the second part of that sentence (that the International Salt opinion found that a "not insignificant" volume of business was affected by the defendant's salt machine lease restrictions).

279. Justice Clark's concept of economic power may have originated with an article published in 1952 (one year prior to the Times-Picayune decision) by Lockhart and Sacks, who stated that "when economic power over the controlled product is used as leverage to market the tied product, harm to competition is reasonably certain." Lockhart and Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L. Rev. 913, 944 (1952). According to those writers, "prior to International Salt" the "usual approach" in measuring the effect of all exclusive arrangements was to consider all relevant economic evidence. Id. at 951. They view International Salt as changing that practice with respect to patented products. Id. The article is cited in Times-Picayune in support of the statement that tying arrangements serve only to suppress competition. 345 U.S. at 605 n.20, 73 S. Ct. at 878 n.20.
patents in *International Salt* from the *Standard Stations* dictum concerning tying arrangements found illegal under the Clayton Act,\[280\] quoting the *Standard Stations* statement that a "patent ... is at least prima facie evidence of market control."\[281\]

*Loew's*,\[282\] like *Paramount*, involved a claim by the government that motion picture distributors' block booking policies were illegal under section 1 of the Sherman Act.\[283\] In *Loew's*, however, unlike *Paramount*, the Court had to make an inquiry as to whether the defendants possessed economic power in the tying product market. The market "dominance" requirement for per se illegality had, by the time of the Court's decision in *Loew's*, been created in *Times-Picayune*\[284\] and reformulated by the Court in its *Northern Pacific* decision.\[285\] In *Northern Pacific*, decided five years after *Times-Picayune*, the Court rejected the defendant's contention, based on *Times-Picayune*, that the seller had to have "dominance" or "monopoly power" over the tying product (land) for a per se Sherman Act violation to be established.\[286\] According to *Northern Pacific*, for Sherman Act section 1 illegality the tying seller had to be shown to have "sufficient economic power [in the tying product] to impose an appreciable restraint on free competition in the tied product."\[287\]

The *Times-Picayune* dictum indicating that in prior tying cases "patents or copyrights supplied the requisite market control"\[288\] would seem, for the *Loew's* decision, to be sufficient to resolve the question of


\[281\] *Times-Picayune*, 345 U.S. at 611 n.30, 73 S. Ct. at 882 n.30 (quoting *Standard Stations*, 337 U.S. at 307, 69 S. Ct. at 1059). That statement, of course, confuses the patentee's control over the patented device with marketwide control. See supra notes 100-216 and accompanying text.


\[283\] The block booking in *Paramount* was imposed on movie theater owners, while in *Loew's* the buyers were television stations.

\[284\] *Paramount* was decided in 1948, *Times-Picayune* in 1953, and *Loew's* in 1962.


\[286\] Id. at 11, 78 S. Ct. at 521.

\[287\] Id. *Northern Pacific* may or may not have watered down the *Times-Picayune* majority's view of the economic power prerequisite for a per se violation. If Justice Clark, stating in *Times-Picayune* that a tying arrangement is per se illegal under the Sherman Act if the tying seller has a "monopolistic position" in the tying product market, meant to require monopoly power in the section 2 Sherman Act sense, then *Northern Pacific* did water down the *Times-Picayune* requirement. If, on the other hand, Justice Clark, in stating that the tying seller had to have a monopolistic position, was only referring to "monopoly" in the economist's sense of power over price, the *Northern Pacific* and *Times-Picayune* standards are not dissimilar.

whether the Loew’s defendants had economic power with respect to their copyrighted films. However, prior to Loew’s, in Northern Pacific, the majority opinion called into question Times-Picayune’s statement that economic power had been presumed in International Salt from the patents on the tying products. In Northern Pacific, Justice Black, who had been one of the dissenters in Times-Picayune, wrote as follows:

The defendant attempts to evade the force of International Salt on the ground that the tying product there was patented while here it is not. But we do not believe this distinction has, or should have, any significance. In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful despite the fact that the tying item was patented, not because of it.

The question before the court in Northern Pacific was whether the defendant’s “preferential routing clauses” in contracts for the sale or lease of land violated section 1 of the Sherman Act. These clauses required purchasers or lessees of the land to ship all commodities produced on the land over Northern Pacific’s rail lines. The trial judge ruled for the government on its motion for summary judgment. On appeal the defendant argued (1) that the agreements did not constitute per se unreasonable restraints of trade; and (2) that the pleadings had raised material issues of fact concerning the economic consequences of the agreements, precluding the grant of summary judgment.

The Court

290. Id. In a footnote the Court stated:

Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight. As a matter of fact the defendant in International Salt offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant. 356 U.S. at 10 n.8, 78 S. Ct. at 529 n.8.
291. Purchasers and lessees were allowed to use another shipper if that shipper’s rates were lower than Northern Pacific’s. 356 U.S. at 12, 78 S. Ct. at 521.
292. 142 F. Supp. 679 (W.D. Wash. 1956). Appeal was taken directly to the Supreme Court under the Expediting Act of 1903. 356 U.S. at 4, 78 S. Ct. at 517.
293. See 356 U.S. at 7-9, 78 S. Ct. at 519-20.
The Northern Pacific Court's statement concerning the role played by patents in *International Salt* came in response to Northern Pacific's contention that, under the *Times-Picayune* rule, economic power must be established by market share data unless the tying product was, as in *International Salt*, patented. In addition to Northern Pacific's denial that any patent presumption was used in *International Salt*, the reasonableness of such a presumption was, in the years between *Times-Picayune* and *Loew's*, questioned in the *Report of the U.S. Attorney General's National Committee to Study the Antitrust Laws*. The Report stated in part:

From an antitrust standpoint, a tying clause in a patent license is like a tying clause in any other contract. The Committee feels,

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294. 356 U.S. at 7, 78 S. Ct. at 519. The Court also stated that the "very existence of the host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints." Id. at 7-8, 78 S. Ct. at 519. According to *Fortner II*, "this approach [to proof of economic power] depends on the absence of other explanations for the willingness of buyers to purchase the package." *Fortner II*, 429 U.S. 610, 618 n.10, 97 S. Ct. 861, 867 n.10 (1977).

The Northern Pacific dissenting Justices would have remanded the case to the trial court "for a trial on the issue whether appellants' landholdings gave them that amount of control over the relevant market for land necessary under this Court's past decisions" for a per se violation. 356 U.S. at 13, 78 S. Ct. at 522.

The government in its *Northern Pacific* Supreme Court brief argued that a given piece of land is just as unique as a patented product. Brief for the United States at 17, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958) (in 4. P. Kurland and G. Casper, Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States 1955 Term-1975 Term 71, 90 (1979)). According to the government's *Northern Pacific* brief, the availability of other salt machines was considered irrelevant in *International Salt*: Since no other salt machine could be exactly like International Salt's patented machine, buyers who for whatever reason preferred the International Salt machine had to contract with International Salt. Thus, according to the government's *Northern Pacific* brief, in *International Salt*, market control of the patented article was sufficient to enable the seller to impose a tie (and similarly, Northern Pacific's control of its unique land enabled Northern Pacific to impose a tie). Brief for the United States at 17.

295. 356 U.S. at 9, 78 S. Ct. at 520. Northern Pacific acknowledged that a section 1 violation was found in *International Salt* without any market share evidence, but explained that "[because the *International Salt* case turned on the use of patents as a tying device," that case was different. Brief for Appellants at 26, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958) (in 4 Kurland and Casper, supra note 294, at 54-55).

During oral argument in *Northern Pacific* one of the Justices, questioning the government's attorney, asked "Isn't it true that in a Sherman Act case there has to be some monopolization of the market that restrains competition?" When, in response, the attorney stated that no proof of monopolization had been required in *International Salt*, the Justice warned him, "I don't think you ought to rely too much on *International Salt*, because in the determining consideration there was the abuse of the patent, and that goes a long way." 4 Kurland and Casper, supra note 294, at 140.

296. The *Report* was transmitted to the Attorney General in 1955.
however, contrary to the apparent trend of Supreme Court opinions, that in determining whether a tying clause may substantially lessen competition under the Clayton Act, or is unreasonable under the Sherman Act, the fact that the tying product is patented need not be decisive of illegality. The patent may be broad and basic, in which event the economic power incident to the patent makes the tying clause illegal. On the other hand, the patent may be narrow and unimportant, in which event it may confer virtually no real market power. Accordingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting, including the scope of the patent in relation to other patented or unpatented products, the patent does not create the market power requisite to illegality of the tying clause.297

According to the Report, "On a number of occasions the Court . . . regarded the patent itself as involving sufficient market power to make any tying clause [involving a patented tying product] a violation of the antitrust law."298

The Loew's trial court,299 possibly because of this Report statement and Northern Pacific's questioning of whether a patent presumption was used in International Salt, relied primarily on Paramount's condemnation of block booking's "enlargement of the monopoly of the copyright" to decide that the defendants had violated the Sherman Act.300 The Supreme Court affirmed, stating that Loew's and the other "appellants cannot escape the applicability of Paramount Pictures"301 and that appellants block booked contracts were "covered by the flat holding in Paramount Pictures . . . that 'a refusal to license one or more copyrights unless another copyright is accepted' is 'illegal.'"302 For the Supreme

298. Report at 238 n.57.
302. Id. at 50, 83 S. Ct. at 105 (emphasis added).
Court, however, Paramount's prohibition of block booking was not a sufficient basis for affirming the trial court's decision. While Paramount was decided before Times-Picayune, Loew's was decided after Times-Picayune and the creation of the "dominance" or "economic power" element of per se illegality. The influence of Times-Picayune apparently compelled the Court in Loew's to do more than rely on the Paramount prohibition of block booking. The Loew's Court, acknowledging that tying arrangements are per se illegal under section 1 of the Sherman Act only if the seller has economic power in the tying product,\(^{303}\) stated that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted."\(^{304}\) In support of this statement, the Court did not cite Times-Picayune, where the only earlier dictum to that effect appears. Instead, the Court cited International Salt and Paramount.\(^ {305}\) The Court, presented in Loew's for the first time with the necessity of deciding whether economic power should be presumed from a copyright on the tying product, adopted the Times-Picayune view of the role played by patents in International Salt. The Loew's Court, stating that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted," cited International Salt as direct support for that statement.\(^ {306}\) International Salt provides support for the Loew's presumption of economic power only if the Times-Picayune view of International Salt is correct—if, in International Salt, the Court viewed the patents on the tying product as supplying proof of market control.\(^ {307}\) According to Northern Pacific, however, the fact that the International Salt tying products were patented played no role in that decision.\(^ {308}\) Paramount provides no support at all for the presumption, for there was no discussion of economic power in Paramount.\(^ {309}\)

The Court in Loew's attempted to reconcile the Paramount basis of its decision with Times-Picayune's requirement that a tying seller be shown to have economic power. The Court stated in response to Loew's argument that the government had failed to establish that the defendants had economic power, that "[a]pplicability of Paramount Pictures brings with it a meeting of the test of Northern Pacific, since Paramount Pictures is but a particularized application of the general doctrine as reaffirmed in Northern Pacific."\(^ {310}\) Here the Court was clearly engaging

\(^{303}\) Id. at 45, 83 S. Ct. at 102.

\(^{304}\) Id. The Loew's trial court had not inquired as to whether the defendants had economic power in the tying products. See 189 F. Supp. at 381.

\(^{305}\) 371 U.S. at 45-46, 83 S. Ct. at 102.

\(^{306}\) Id.


\(^{309}\) See notes 243-47 supra and accompanying text.

\(^{310}\) Loew's, 371 U.S. at 50, 83 S. Ct. at 104.
in fiction. *Paramount* was decided as a "copyright misuse" case, by analogy to the patent misuse cases (if it is illegal for a seller to enlarge a patent monopoly by requiring those wanting a patented tying product to also take unpatented supplies, it must be illegal for a seller to require those wanting a high quality copyrighted film to also take inferior films).

*Paramount* was decided in 1948, five years before the Court, in *Times-Picayune*, decided that tying arrangements are per se illegal only if the seller has "dominance" or economic power in the tying product.

The *Loew's* Court acknowledged the influence of patent misuse cases on the *Loew's* presumption, stating that the principle of presuming economic power if the tying product is patented or copyrighted "grew out of a long line of patent [misuse] cases." The influence of the patent misuse cases on the development of the *Loew's* presumption was actually very direct. One basis of the *Loew's* decision is *Paramount*, really a "copyright misuse" case condemning block booking on the theory that movie block booking was, like patent tie-ins to unpatented supplies, an illegal attempt to extend a statutory intellectual property monopoly. The other basis of the *Loew's* Supreme Court decision, the premise that patents supplied proof of economic power in *International Salt*, arose when the *Times-Picayune* Court created the economic power requirement and then attempted to reconcile *International Salt*—a patent misuse decision—with the new view of tying arrangement illegality by explaining that patents supplied proof of economic power in *International Salt*.

### IV. CONCLUSION

Economic power should not be presumed from the fact that the tying product is patented or copyrighted. The Supreme Court in its most recent tying arrangement cases has made it clear that a tying arrangement is illegal only if the tying seller has "power over price" with respect to the tying product. The existence of patent or copyright protection on a tying product does not indicate that the product's seller has economic power with respect to that product. For economic power to exist, the tying product must, first of all, be a product that is desired by consumers. The fact that a tying product is patented or copyrighted does not indicate that the product is desirable. For *desirable* tying products the existence of patent or copyright protection would give the seller economic power if the patent or copyright prevented the seller's

312. 371 U.S. at 46, 83 S. Ct. at 102.
competitors from creating functional equivalents for the tying product. Although the Supreme Court has justified the presumption of economic power on the basis of the patent and copyright exclusionary rights, the exclusionary rights do not enable the patentee or copyright holder to prevent the development and sale of substitutes for the tying product. Neither a patent nor a copyright creates a market-wide monopoly, and neither form of intellectual property protection prevents the production of functionally equivalent products.

The Loew's presumption developed from an inappropriate application of patent misuse principles to Sherman Act tying doctrine. The development of the presumption involved no real inquiry into the question of whether a patent or copyright conferred power over price. The presumption, as Justice O'Connor has stated, finds no real support in the Court's tying cases.
