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Antitrust Modernization Commission  
Attn: Public Comments  
1120 G Street, N.W., Suite 810,  
Washington, D.C. 20005  
email: [comments@amc.gov](mailto:comments@amc.gov)

Re: *Topic VIII.B.1 of the Commission's Request for Public Comment, 70 Fed. Reg. 28902 (May 19, 2005)*

Dear Mr. Heimert:

We are providing the following comments for consideration by the Antitrust Modernization Commission ("AMC") on behalf of the Motion Picture Association of America, Inc. ("MPAA"). The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The MPAA's members produce and distribute copyrighted entertainment for theatrical, television and home video/DVD viewing, and own many patents related to methods utilized in creating or delivering such products.

In this submission we address Topic VIII.B.1 of the AMC's Request for Public Comment, 70 Fed. Reg. 28902 (May 19, 2005):

Should there be a presumption of market power in tying cases when there is a patent or copyright? What significance should be attached to the existence of a patent or copyright in assessing market power in tying cases and in other contexts?

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In short, we share the view of the U.S. Department of Justice and the Federal Trade Commission as reflected in their *Antitrust Guidelines for the Licensing of Intellectual Property* §§ 2.1-2.2 (1995), that “the same general antitrust principles [apply] to conduct involving intellectual property that . . . apply to conduct involving any other form of tangible or intangible property” and that there should be no “presum[ption] that a patent, copyright, or trade secret necessarily confers market power upon its owner.”

This topic is directly implicated in *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed Cir. 2005), *cert. granted*, 73 U.S.L.W. 3733 (June 20, 2005), where the Supreme Court recently granted *certiorari* on the question of:

Whether, in an action under Section 1 of the Sherman Act, 15 U.S.C. §1, alleging that the defendant engaged in unlawful tying by conditioning a patent license on the licensee’s purchase of a non-patented good, the plaintiff must prove as part of its affirmative case that the defendant possessed market power in the relevant market for the tying product, or market power instead is presumed based solely on the existence of the patent on the tying product.

In the court below, the Federal Circuit had held that “the Supreme Court cases in this area squarely establish that patent and copyright tying, unlike other tying cases, do not require an affirmative demonstration of market power. Rather, . . . the necessary market power to establish a section 1 violation is presumed.” 396 F.3d at 1348-49. Nonetheless, the Federal Circuit applied the presumption primarily on *stare decisis* grounds, and not due to any inquiry into the merits of the presumption. *See id.* at 1351. As the Federal Circuit put it, “[e]ven where a Supreme Court precedent contains many ‘infirmities’ and rests upon ‘wobbly, moth-eaten foundations,’ it remains the ‘[Supreme] Court’s prerogative alone to overrule one of its precedents.’” *Id.* (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

The MPAA and several other associations of intellectual property (“IP”) owners intend to seek leave from the Supreme Court to file an amicus brief on the merits in *Illinois Tool Works* supporting the position of the Petitioner that market power should not be presumed based solely on ownership of a patent, but focusing particularly on the equally erroneous proposition that market power may be presumed from mere copyright ownership. Among other points, we expect our brief to explain that:

- The Supreme Court’s decisions in *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962), *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and *International Salt Co. v. United States*, 332 U.S. 392 (1947), to the extent that they employ a presumption of market power arising from the mere ownership of a copyright or

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patent, should be reconsidered (along with certain precedents upon which these decisions were based) in light of the Court's more recent antitrust jurisprudence.

- Presumptions that lack commercial and empirical validation — so that there is no assurance that the presumed fact is a reliable characterization of the real world — have been rejected by the Supreme Court as a basis for resolving modern antitrust cases. *See, e.g., California Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756 (1999); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 459 (1993); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). “Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.” *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986) (“courts should not permit factfinders to infer [unlawful antitrust conduct] when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct”) (citation omitted).
- The great weight of analysis and opinion, whether of independent scholars or the federal agencies entrusted with enforcing the antitrust laws, is to reject as erroneous any presumption that the mere ownership of an IP right, such as a copyright or patent, confers antitrust market power on the owner, any more than would the ownership of any other kind of property right.<sup>1</sup> *See, e.g.,* H. Hovenkamp, M. Janis & M. Lemley, *IP and Antitrust*, §§ 4.2-4.3 (2005 Supp.); W. Landes and R. Posner, *The Economic Structure of Intellectual Property Law*, 373-74 (2003); IIA P. Areeda, H. Hovenkamp, & E. Elhauge, *Antitrust Law: An Analysis of Antitrust Principles and*

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<sup>1</sup> Additionally, members of Congress have sharply criticized the market power presumption. *See, e.g.,* 141 Cong. Rec. E90, 91 (1997) (statement of Rep. Hyde) (“The market power presumption is wrong because it is based on false assumptions. Because there are often substitutes for products covered by intellectual property rights or there is no demand for the protected product, an intellectual property right does not automatically confer the power to determine the overall market price of a product or the power to exclude competitors from the marketplace.”); *Market Power and Intellectual Property Litigation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 2 (2001) (statement of Rep. Berman, Member, House Comm. on the Judiciary) (“I know of no reason to believe that antitrust violations occur with any greater frequency [by intellectual property] owners than similar violations in other industries.”).

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*Their Application* 136-37 (2d ed. 2004); X *id.* at 79, 83; R. Posner, *Antitrust Law* 197-98 (2d ed. 2001); U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* §§ 2.2, 5.3 (1995); W. Montgomery, Note, *The Presumption of Economic Power for Patented and Copyright Products in Tying Arrangements*, 85 Colum. L. Rev. 1140, 1149-52 (1985); R. Bork, *The Antitrust Paradox* 365-68 (1978). These authorities recognize that IP ownership is fully consistent — and empirically *most often* associated — with the absence of market power (indeed, it appears that just 5% of patents are even licensed or litigated, see Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1507 (Summer 2001)) and that the proper question is not whether the defendant owns a copyright or patent, but whether a finding of market power is supported by hard proof of economic factors of relevance under standard antitrust analysis, such as the range of substitutes that are available for the copyrighted or patented good.

- This conclusion that intellectual property ownership is not a sound basis in itself for any presumption or inference of antitrust market power is applicable to all forms of IP. Thus, the lack of viability of any such presumption or inference does not depend on the type of intellectual property at issue. Copyright ownership, however, is grievously unsuited to serving (without more) as the predicate for a presumptive finding of antitrust market power. Of course, the case against presuming market power from the possession of a copyright follows *a fortiori* from the overwhelming case against presuming such power from the ownership of a patent, since copyrights may be inexpensively and easily obtained and bestow rights of more limited scope.<sup>2</sup>

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<sup>2</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003) (“[D]istinguishing the two kinds of intellectual property, copyright gives the holder no monopoly on any knowledge. A reader of an author's writing may make full use of any fact or idea she acquires from her reading. The grant of a patent, on the other hand, does prevent full use by others of the inventor's knowledge.”); *Antitrust Guidelines for the Licensing of Intellectual Property* §§ 1.0 (1995) (“Unlike a patent, which protects an invention not only from copying but also from independent creation, a copyright does not preclude others from independently creating similar expression”); R. Blair & T. Cotter, *Intellectual Property: Economic and Legal Dimensions of Rights and Remedies* 28-29 (2005) (“the rights of a copyright owner remain somewhat less expansive than the corresponding patent owner's rights”); H. Hovenkamp, M. Janis & M. Lemley, *IP and Antitrust*, §2.3a (2005 Supp.) (“Copyrights are subject to a variety of defenses and limitations (e.g., fair use, compulsory licensing) having no analog in patent law”); H. Varian, J. Farrell & C. Shapiro, *The Economics of*

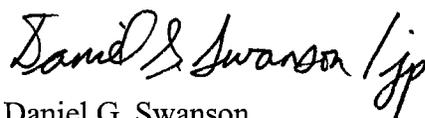
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While the Supreme Court's grant of *certiorari* is limited to analyzing the market power question in the context of antitrust tying cases, for all these reasons we do not believe that IP ownership should give rise to a presumption of market power in *any* legal context.

We anticipate that the brief will be filed on August 4, 2005. We will submit a copy to the AMC promptly after filing. In the event of questions, please do not hesitate to contact Daniel Swanson at the above-stated address, telephone, or email address, or Daniel Robbins, whose contact information is as follows: 15503 Ventura Boulevard, Encino, CA 91436; (818) 382-1766; [dan\\_robbins@mpaa.org](mailto:dan_robbins@mpaa.org).

Very truly yours,



Daniel G. Swanson  
Gibson, Dunn & Crutcher LLP  
Counsel for Motion Picture Association of America, Inc

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[Footnote continued from previous page]

*Information Technology: An Introduction* 54-55 (2004) (“Compared with patents . . . copyrights are ‘narrow’ in the sense that they do not prevent others from creating or distributing similar works: the copyright on one movie does not prevent others from making movies with similar themes or plot lines”); IIA P. Areeda, H. Hovenkamp, & E. Elhauge, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 143 (2d ed. 2004) (“While the patent application process is relatively costly and requires a showing that something is new, useful, and nonobvious, virtually any novel expression can be copyrighted upon the payment of a nominal fee”).