

-Working paper-

A Weak Model of Market Power Presumption:

In-between Intellectual Property Law and Antitrust Law

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1. INTRODUCTION

“The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.”¹

One of the most intriguing and interesting interfaces between intellectual property law, most notably patent law, and antitrust law (hereinafter: Antitrust) is how these two legal frameworks conceptualize and define monopolies and market power. A presumption commonly referred to as "*Market Power Presumption*" plays an important role in this area of friction between the two legal frameworks. The Market Power Presumption is a judicial presumption (*Rraesump juris tantum*) which states that in the absence of evidence to the contrary, IP rights which are patent protected, confer significant market power. Significant market power is a crucial element in determining the existence of a monopoly.

Nowadays, courts work under a different presumption. Not only that IP rights do not confer any market power - as the market power presumption assumes – but the existence of IP rights indicate the absence of market power. The courts now follow a presumption one might call "*Anti Market Power Presumption*".

Despite extensive support for the Anti Market Power Presumption some cast doubt as to its validity. Most notable among the heretics is Ariel Katz. The criticism of the reversed presumption stems from a variety of claims, some doctrinal whilst others more economic in nature.

This article partly supports the critics' arguments, according to which granting IP rights should be viewed *prima facie* as conferring market power upon the IP holder. At the same time, the article acknowledges the disadvantages and risks associated with the adoption of a full market power presumption (e.g., the heavy burden which lies on the defendant-IP-holders to prove their lack of market power and unnecessary interference with the free market mechanisms). Hence, I will argue that by using a weak form of the market presumption, a more balanced and clearer approach to the IP Law and Antitrust

1 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995)(hereinafter:"**AGLIP**"). Can be found also at: <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>

Law interface is achieved. The "weak" market power presumption assumes that IP rights do confer market power to the IP holder most of the time, but under few specific cases the burden to prove the existence of the defendant's market power will shift back to the plaintiff. The cases in which the burden of proving the existence shifts are: (1) clear existence of substitute goods; (2) the goods' price is not substantially higher than the marginal cost; (3) the product's market contains a monopson and the IP is not an essential input in the monopson production; (4) the IP involved in the law suit has negligible economic value; and (5) the lawsuit is allegedly frivolous and its main end is to damage the defendant.

This summary comprises four parts. In the first part, I will review, in a nut shell, the tension between IP law and Antitrust law alongside the history of the "rise and fall" of the market power presumption in the US and Israel. In the second part I will present the main arguments supporting the anti market power presumption, and the main criticisms regarding these arguments. The third part will deal with the need for a presumption in general. The fourth and final part will present the weak form of the market power presumption, its consequences and flaws, and will include a short recap of the ideas presented in this summary.

2. PART ONE: ABOUT THE TENSION BETWEEN IP LAW AND ANTITRUST LAW, AND THE HISTORY OF MARKET POWER PRESUMPTION IN THE US, EUROPE AND ISRAEL

It is not without reason that the two legal frameworks, IP law and Antitrust law, are often dealt with together, both by regulators² and by scholars.³ The two legal systems, both trying to maximize welfare, are often in conflict with each other and thus require a regulation that would encompass both systems simultaneously.

2.1 The Tension between IP Law and Antitrust Law

Intellectual property is one of the pillars of modern economy. In many cases, a patent accounts for the company's main asset, or even the only one. Therefore, extending legal protection to IP rights is crucial in order to have an innovative environment. A short glance at the software in which this paper was written in is enough in order to understand the centrality of IP law; without it, Microsoft would be left without one of its major sources of its income. The main impetus driving the protection of IP rights is to encourage innovation.⁴ Indeed, the more we limit the protection of IP rights, the more we decrease the incentive for innovation, thus diminishing social welfare. The latter derives from the fact that IP is, in many cases, a public good – an economic good that is

2 About the balance of Antitrust Law and IP law within Europe and US regulators see: OECD REPORT ON COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS (OECD, Paris 1998) (Hereinafter: "**OECD**"). To an online version of OECD see: <http://www.oecd.org/dataoecd/34/57/1920398.pdf>; TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW POLICY (Federal Trade Commission, Oct 2003).

3 John H. Barton, *Paradigms on Intellectual Property and competition balances in the Information Sector* EUROPEAN COMPETITION LAW REVIEW. (1997) 7 ECLR 440; Robert Anderson and Nancy Gallini, editors: *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (Calgary: University of Calgary Press for the Industry Canada Research Series, 1998); Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, Arizona Law Review 49.4 (2007): 837-909.

4 Louis Kaplow, *The Patent-Antitrust Intersection: a Reappraisal* 97 HAR L. REV (1984)1813; Dan L. Burk and Mark A. Lemley, *Policy Levering Patent Law*, VA. L.REV 89 (2003), 1575.

non-rivaling and non-excludable – and can therefore be copied, imitated, or consumed without being paid for. From an economic point of view, *ex-ante*, resources would not be invested in developing goods with a profit expectancy which is lower than the initial investment, a situation which is more than reasonable for public goods without patent protection.

Antitrust law (or competition law as it is referred to in the OECD) is concerned with the maximization of social welfare through the encouragement of market competition. The main goal of antitrust laws is to encourage and maintain a free and effective market, through, *inter alia*, reduction in prices, increase of production quantity and encouragement of the development of goods.

The conflict⁵ between the two legal frameworks arises when the goal of wealth maximization by innovation or competition, wears more practical forms: IP law grants patents with "monopoly" over the invention; and Antitrust law interferes when monopolies conduce illegitimate actions, prevent mergers that will result with a new monopoly, and ban non-competitive agreements from being executed. Nevertheless, this conflict does not stretch over the entire realm of Antitrust, nor it is stretched over the entirety of the IP one, but rather in the undefined area where innovation incentive stops promoting the social welfare.

Indeed, the balance between the extent of the IP rights' protection and the degree to which Antitrust law will interfere with the IP rights is a delicate one. It may vary with time, place or the area in which the patent was granted. However, the market power presumption plays an important role in shaping this balance, and more specifically, in shaping the balance between Antitrust and Patent law.

2.2 The History of Market Power Presumption in the US

The issuance of the Antitrust Guidelines for the Licensing of Intellectual Property in 1995, jointly by the US Department of Justice and the Federal Trade Commission, marked, more than any other judicial or legal landmark, the understanding that Antitrust

⁵ Some claim that the two legal frameworks are complementary rather than conflicting ones. It is very hard to accept these claims due to the inability to settle the two frameworks. See original paper for further information.

and IP rights are distinct spheres. According to the AGLIP, IP rights do not confer, *prima facie*, any market power, and if such power exists, it needs to be proven. In a seminal article, Willard Tom and Joshua Newberg divide the history of the market power presumption into three historical periods⁶, moving in a pendulum movement from a solid market power presumption to an "anti"-market power presumption, portrayed in the AGLIP in 1995.

The first period, starting with the Sherman act in 1890 and lasting for two decades, is characterized with the courts understanding that: (1) a patent granted a legal monopoly, and therefore conferred market power upon its holder; and that (2) within the IP rights realm, all practices were considered legal *per se*.⁷

The second period lasted until the late 1970's and represented the understanding that not all actions within the scope of IP rights can be defined as legal *per se*. In fact, this period is defined by Willard Tom and Joshua Newberg as the "Nine No-No's"⁸ - a list of nine illegal *per se* practices likely to attract scrutiny by the Justice Department. The "Nine No-No's" reflects two perceptions that were common in the second period: (1) as in the first period, a patent confers market power upon its holder, and (2) not all practices within the IP rights realm are legal *per se*, but rather some practices are considered anti-competitive *prima facie*.

6 Willard K. Tom & Joshua A. Newberg, *Antitrust and Intellectual Property: From Separate Spheres to Unified Field*, 66 ANTITRUST L.J. 167, 168 (1997).

7 A good example for the first period approach can be found at the 1902 *E. Bement & sons v. National Harrow Co.*, where the U.S. Supreme Court approved a price fixed by a cartel of two patent holders:

"the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

E. Bement & sons v. National Harrow Co. 186 U.S. 70, 91 (1902)

8 Bruce B. Wilson, Deputy Assistant Attorney Gen., Remarks before the Fourth New England Antitrust 32 Conference, *Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions* (Nov. 6, 1970):

- (1) tying the purchase of unpatented materials as a condition of the license;
- (2) requiring the licensee to assign back subsequent patents;
- (3) restricting the right of the purchaser of the product in the resale of the product;
- (4) restricting the licensee's ability to deal in products outside the scope of the patent;
- (5) a licensor's agreement not to grant further licenses;
- (6) mandatory package licenses;
- (7) royalty provisions not reasonably related to the licensee's sales;
- (8) restrictions on a licensee's use of a product made by a patented process, and;
- (9) minimum resale price provisions for the licensed products.

With the growing influence of the economic approach to law, the Nine No-No's were interpreted gradually in a lenient way, and until in 1981 they were completely cancelled.⁹

The **third period**, continuing nowadays, is characterized with a different perspective altogether, which reflects the beliefs that: (1) IP rights do not confer market power upon its holder, and even more so, IP rights suggests that there is no market power to its holder. (2) There are no illegal actions *per se*, and every practice is scrutinized, once it is proven that the IP holder has market power. This approach derives from the proposition that all property, including IP, do not confer market power upon its holder, *prima facie*. Accordingly, if A is the owner of a piece of land and B is the owner of a patent, both of them do not confer market power up on their holders, *prima facie*.¹⁰ However, the AGLIP goes even further and claim that, often, IP **do not confer** market power upon its holder. This approach reveled in section 2 of the AGLIP:

"Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power"

The AGLIP, followed by the regulators and the courts in the US, states that often IP rights have close substitutes, and hence will not have a "real" market power. If every product has a substitute, then one cannot deduce from the existence of a monopoly over the specific item, that there exists a monopoly over all substitutes – or that even the owner of the IP rights has any special privilege or market power in this broader market. This is what Ariel Katz calls an "anti" market power presumption – to assume, *prima facie*, not only that IP rights do not confer market power upon its holder, but rather that it is likely that he does not have market power. In 2007 the United States supreme court

9 Abbott B. Lipsky Jr., *Current Antitrust Division Views on Patent Licensing* 50 ANTITRUST L.J.515,517 (1982)

10 This approach towards IP can be seen in section 2 of the AGLIP: "*For the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to **any other form of property***" and later on "*The Agencies will not presume that a patent, copyright, or trade secret **necessarily confers market power upon its owner.***"

stated clearly that the market power, in its historical form, will not apply to the patent realm.¹¹

2.3 The Market Power Presumption in Israel

The Israeli regulators and courts soon followed the American approach towards the market power presumption. In a memo written by the Anti-competitive agency it was said that:

"In Antitrust law: a formal definition of a monopoly is when an entity controls more than half of the supply capacity in a market. In patent law: the patent owner has a monopoly over his invention. However, it is quite possible that within the patent market there are other substitutes that can play the same function as the patent effectively... hence, the patent itself do not create a different distinct market, and one should differentiate between a "real" monopoly and a pseudo one."¹²

And indeed, courts soon followed this approach. For instance, judge Proccacia, from the Israeli Supreme Court, stated that *"A patent indeed give his inventor a monopoly over its invention but it does not gives him a monopoly over the good market"*.¹³

2.1 The Market Power Presumption in Europe

Generally, the European system has shifted from a *per se* approach, much like in the second period in the US described above¹⁴, to a more economic-oriented regime. Under this economical approach the "rule of reason" applies, mainly but not only, in the patent realm. European Guidelines and rulings, although generally following the US approach

11 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281, at 1293:

"Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."

12 Dror strum, the head of the Israeli Anti-Competitive Agency *"Antitrust and IP – the inherent contradiction and five practical ways"*.

13 613/93 (Jerusalem) Tivoll Mutzari Mazon v. Shamir food industries.

14 European Guidelines on the Technology Transfer Block Exemption Regulation (April 27, 2004).

by not applying the market power presumption, differ in presuming a market power to a patent holder in tying arrangements. Tying practices are subject to scrutiny as restrictive agreements under Article 81 (formerly 85) EC, and as abuse of dominant position under Article 82 (formerly 86) EC – the need for a market power proof needed in the latter. A large market share (above 20%) is presumed (but may be rebuttable) to be "Dominant". The European Commission decisions, in some cases, uses structural factors, among them the existence of a patent, to prove market power.¹⁵

Although according to the European approach the existence of a patented IP does not confer market power upon the patent holder, the judicial framework consists of specified definitions, mainly for tie-in agreements, that result with different levels of scrutiny. For instance, if the patentee is in the safety zone (i.e., below 20% or 30%, depending on the circumstances), normally its tying practices are not subject to antitrust scrutiny; If the market share of the patentee is higher than 30%, and other concurring circumstances occur (e.g. existence of barriers to entry, oligopoly structure of the market and the involvement of a patent), the tying practices might be subject to antitrust scrutiny, as both a restrictive agreement (where the market share is above the safety zone and in the grey area between 20-30% and 50-60%) and as an abuse of dominant position (where the market share is above 50-60%). Therefore, the definition of the relevant market and the proof of the firm's economic power therein are key factors, while the efficiency defense might be relied upon as a justification.

15 AstraZeneca (Decision 2005/175/EC of June 15, 2005, in COMP/A.37.507/F3 Re AstraZeneca Plc [2006] 5 CMLR 6).

3. PART TWO: MAIN ARGUMENTS CONCERNING THE MARKET POWER PRESUMPTION

During the years, mainly within the third period, there have been several arguments were made supporting the claim that the market power presumption is factually and theoretically wrong. This part will summarize these arguments and their critique.

The main problem which stems from claiming that there is no *prima facie* market power to a patent is the incompatibility with the standard economic approaches. According to basic economic analysis, granting a patent gives the patent owner the ability to set the price higher than the marginal cost. Moreover, if a patent does not confer market power then why don't we grant patent protection for 30, 50 or 100 years? These kinds of problems caused both the academia and the courts to proclaim the following arguments.

3.1 Market-Power in the Antitrust Sense

The first argument used to prove that the market power presumption is faulty, is that market power in the antitrust sense is not the same as market power in the patent sense.¹⁶ Generally, the terms "market power", "monopoly" "monopoly in the antitrust sense", "monopoly in the patent sense" and an "economic monopoly" are misused, so that they cause obscurity more than clarity. Courts in the US, followed by the Israeli ones, used the distinction between "economic monopoly" (which is also "monopoly in the antitrust sense") and "patent monopoly":

*"The law is unsettled concerning the effect under the antitrust laws, if any, that **the evolution of a patent monopoly into an economic monopoly** might have upon a patent holder's right to exercise the exclusionary power ordinarily inherent in a patent."*¹⁷

¹⁶ "Monopoly power which is predicate for illegal monopolization. not necessarily make the patentee a monopolist in an economic sense: there may be other products that compete with the subject-matter of the patent." R. WHISH, COMPETITION LAW (2001, 4th ed.) at p. 676: "...intellectual property rights do not ipso facto confer monopoly power...there is a vast difference between an exclusive right and the sort of economic monopoly that is the concern of antitrust Law" H. Hovenkamp & M.D. JANIS & M. A. LEMLEY, IP AND ANTITRUST, (2003 supplement, Vol. I), p. 1-11

¹⁷ *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), per 42.

And in the Israeli courts:

*"A monopoly, derived from the patent law, as far as one can call it a monopoly, is **not a monopoly in the antitrust sense...**"*¹⁸

Nevertheless, when taking a closer look, one finds out that the terms "economic monopoly" and "patent monopoly" are not so different, or can even be considered the same. Scholars, the Horizontal Merger Guidelines and the AGLIP define monopoly in the following way: "*The ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.*" Posner, regarding the difference between a patent monopoly and economic one claim that the difference lays within the extent of the deviation from the marginal price:

*"[W]hen the **deviation of price from marginal cost is trivial, or simply reflects certain fixed cost, there is no occasion for antitrust concern, even though the firm has market power in our sense of the term**"*¹⁹

And so, even when accepting Posner's claim that a monopoly in the antitrust sense is only defined as one when the patent owner can set the price substantially above the marginal cost, the legal and economic analysis stays the same – monopoly in the antitrust sense and in the economic sense cannot be defined in a different way. Thus, the right way to scrutinize the existence of market power, in the two legal systems, should be conducted using the same means, and under the same methodology.

18 3/97 *Magal security systems v. Israel Antitrust Authority*

19 William M. Landes & Richard A. Posner, *Market Power in Antitrust Case* 94 HARV. L. REV. 937, 937 (1981).

3.2 The price of IP goods is expected to be substantially higher than its marginal cost

The price of a patent is expected to be substantially higher than its marginal because of two main reasons. The first: the marginal cost of patented IP is, usually, very low. The second: setting the price of a patent in its marginal cost is not feasible, *ex ante*.

As mentioned in the preface, a patent is usually a public good. As such, it can be copied, replicated or imitated very easily. And indeed, most of the patented goods marginal costs tend to zero. A simple market power index – the Lerner Index - can easily demonstrate this point:

The Lerner index²⁰, based on the definition of monopoly mentioned above, defines the market power as the relational deviation of the price above the marginal cost to the price:

$$L = \frac{(P - MC)}{P}$$

If a patented goods marginal cost is very low, and maybe tends to zero,

almost every price set above the marginal cost will result with a high Lerner index grade.

Moreover, patented goods are characterized with large initial (or sunk) investments costs and low marginal costs. It is not surprising then, that investors would not invest in developing goods that will not yield profit, because of low pricing after the development stage. Therefore it is more than likely that investors will invest in a product that could be priced high above its marginal cost. For example: two companies invest \$100 each in research and development in period 1. In period 2 there is a 50% chance to develop a product and get \$250 or to fail producing it and get \$0. The return over the investment, *ex-ante*, for each one of the companies is 25%. ; However, the return over the investment, *ex-post*, is 150%. A rational investor will invest money only when the projected price could be higher.

20 A. P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934).

3.3 Is there an Empirical basis to the market power presumption?

One of the common arguments to prove that the market power presumption is wrong is an empirical one. According to this claim most of the patents have no economic value, let alone market power. Although this claim is relatively true, and can be supported by empirical evidence (around 95% of the patents have no economic value), it is still not a solid claim regarding the market power presumption. The Market Power Presumption is a judicial presumption; therefore, it is used in courts when a case is litigated. It is reasonable to believe that patents which do get to court have some economic value, or else they would not be worth suing for. Furthermore, antitrust and IP cases are considered to have relatively high litigation expenses, and therefore it is also reasonable to believe that the cases which do get to the courts will deal with a valuable patent.

4. PART THREE: WHY IS THE MARKET POWER PRESUMPTION NEEDED?

Adopting a judicial presumption does not necessarily imply that the presumption describes reality accurately. In fact it is possible that in many cases a patent confers a small amount, if any, of market power. But, sometimes other considerations are taken into account in order to promote different goals. In the Market Power Presumption such values can be the empowering of a relatively weaker side; the promotion of competitive practices in a market full of powerful patent holders or; incentivizing innovation in an un-innovative market. The following are general claims support the existence of Market-Power Presumption.

4.1 Proving Market Power -The efficiency parameter

Ordinarily, when not using a judicial presumption, the burden of proving market power rests on the plaintiff. To prove that the defendant committed anti-competitive actions, one must prove first that the defendant holds market power - usually an expensive process. The existence of market power starts with the definition of the market, or "*small but significant non-transitory increase of price*"(SSNIP).²¹ The process of proving SSNIP requires econometric tests based on vast empirical data which is not always at hand. Substitutes to the SSNIP, when too expensive or impossible to execute, can be: the purpose and the use of the goods; the objective-physical traits of the goods; the prices; the supply and demand structure, and the main customers and suppliers; other characteristics of the goods that can reveal the level of interchangeability. As can be seen, most of the data on substitutes can easily be found by the defendant. Therefore, requiring the defendant to prove the lack of his market power can be efficient in this sense.

²¹ The examination of market power existence is none as SSNIP and was adopted in 1982 in U.S. Department of Justice *Merger Guidelines* <http://www.ftc.gov/bc/docs/horizmer.htm>; and by the European Union in *Notice on Market Definition* <http://www.cerna.ensmp.fr/Documents/Enseignement/CoursEUCompetitionLaw/6-CommissionNotice.pdf>

4.2 Mistake costs, when anti-competitive restriction are made on an entity without substantial market power

There are two types of judicial mistakes that may stem from the use of the two presumptions: false negatives and false positives. A false negative (in an anti market power presumption) describes a world in which the court erroneously declares a holder of IP rights as a non-monopoly. A false positive (in a market power presumption) describes a world in which the court held that a non-monopoly is a monopoly. In the first instance, of the false negative, the social costs are the activities that the holder of the IP right would have engaged in, had it not been for the wrong ruling of the court. A false negative, on the other hand, entails two different types of costs. First, if a monopoly is deemed to be a non-monopoly, the market will suffer from lack of competition where one was possible. Second, as mentioned above, costs of litigation under this presumption would be higher, since proving the existence of a market power is more expensive than proving the non-existence of such.

Indeed, it is difficult to conclude in which state of the world the cost of a judicial mistake is higher. Nevertheless, it is reasonable to believe that the litigation costs in a world without market power presumption are higher due to the fact that all the related data can be found and processed in an easier way by the defendant.

4.3 Other Arguments Against the Market Power Presumption

A few more arguments were made against accepting the market power presumption as a judicial presumption. The first argument states that the presumption will lead to more judicial errors, and many pro competitive practices will be eliminated. As mentioned above, in order to achieve the right balance between antitrust law and IP law, with respect to maximizing the general wealth, there are many merits to using the market power presumption. Indeed, putting too much stress on the presumption might achieve the opposite goal and diminish the general wealth. However, a subtle use of the presumption might lead to maximizing the general wealth while reducing the chances of an error, and diminishing the litigation expenses.

The second argument states that, pragmatically, the courts will be flooded with antitrust claims against patent holders. There are a few problems with this argument. Firstly, even if the number of claims will rise dramatically, it is not certain that this will not lead (if the cases are just) to a maximization of the general wealth. Second, one should remember that the market power presumption already implemented by the courts in the US. Indeed, at the times of the presumption the economy, and specifically the information and technology economy, was different than today. Nevertheless, it is reasonable to believe that the results of re-implementing the market power presumption will surely not be catastrophic.

The third argument states that the incentive to innovate will decrease, and eventually will decrease social welfare. One cannot underestimate the importance of innovation for the general wealth. The famous line by Easterbrook argues that:

“An antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the costs of production would be a calamity. In the long run a continuous rate of change, compounded, swamps static losses”²²

Solow, the Nobel Prize laureate for economics, said that:

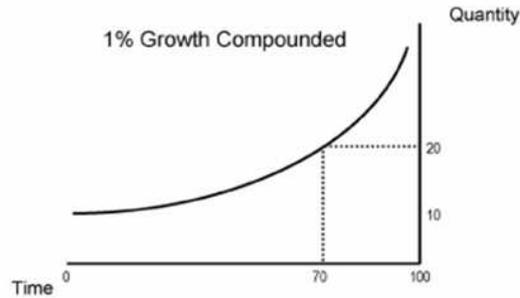
”Adding a couple of tenths of a percentage point to the growth rate is an achievement that eventually dwarfs in welfare significance any of the standard goals of economic policy”²³

The American authority’s states parallel claims, according to which, within approximately the life time of a human being (70 years), growth of 1%, derived from innovation, leads to double the wealth. The following graph clearly describes it:²⁴

22 Frank H. Easterbrook "IGNORANCE AND ANTITRUST", ANTITRUST, INNOVATION & COMPETITIVENESS (Thomas M. Jorde and David J. Teece – eds.,1992), 119.

23 Robert M. Solow, *Growth Theory and After*, Prize Lecture for the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1987 (Dec. 8, 1987).

24 Thomas Barnett *Maximizing welfare through Technological Innovation*, Presentation to Mason University Law 82 .Review, 11th Annual Symposium on Antitrust.



Indeed, the value of innovation for the general wealth is shared by many. However, the value of innovation cannot be overestimated, or it will lead, perhaps like nowadays, to a decrease in the social wealth.

5. PART FOUR: A "WEAK" MARKET POWER PRESUMPTION

So far, arguments supporting and opposing the Market Power Presumption were discussed. A more suitable solution to the tension between antitrust and IP legal systems can be found in a "weak" form of the presumption in which – given a few specific facts – the burden to prove the existence of market power will return to the plaintiff.

When the following situations are proven, the judicial default will be that the patent does not confer any market power upon the defendant:

5.1 Evident Existence of Close Substitutes of the Patent

In situations where the market structure is known (for instance, if the goods are a basic product or the market was already declared in a different court) one might say that the patent owner does not hold any market power. In order to enter this realm, the defendant needs to prove two things: the right market definition and the existence of the proximate substitutes to the goods. It was already mentioned before that deciding which market is the goods market is not an easy task. Nevertheless, there are "easy" cases in which the market can be defined more easily – as in basic products, for instance.

One option is to define the relevant market within the eyes of the "reasonable man", or the "reasonable consumer". The usage of the "reasonable man", is known mainly from torts, and is used as a way to define objective behaviors is different scales of abstractly. The borrowed usage of the judicial tool of "reasonable man" is not meant to replace the neither the SSNIP nor other economical instrument of defining a specific market. Rather, it's meant to be used when the market is whole most agreed upon. For instance – the cellular phone market can be defined, while using the rational man tool, as the market comprises of all the companies selling cell phone possibilities of using a regular wireless line (not including advanced technology, land line or other non-close substitute). Within the eyes of the reusable consumer there are three wireless operators in Israel, from which he can choose. As much as a land line can be, practically, a substitute to a wireless operator, here is the reasonable consumer will indeed (under regular circumstances) point out at 3 wireless operators.

5.2 A Prima Facie Proof that the Price does not Deviate Substantially from the Marginal Cost

As mentioned above, the common way to define market power (or monopoly) is by showing that the price of goods deviates from the marginal cost (some demand substantial deviation). One of the main arguments supporting the market power presumption is that patented products tend to have low marginal costs, and commonly need legal protection. However, not **all** of the patents are public goods and have low a marginal cost. There are some of exceptions, to which the weak presumption should address.

In the view of this, it is reasonable to believe that a defendant, mainly if it is a big firm, has more ability and means to *prima facie* prove that its price does not deviates substantially from its marginal costs. Therefore, if the defendant can show that its marginal costs are do not diverge substantially from the marginal cost – the presumption will shift back to the plaintiff.

5.3 The relevant Market Comprises of a Monopson, and the Patent is not Crucial for the Monopson

A market that comprises of one consumer is a market referred to as Monopson. A Monopson, although being the consumer and not on the seller, have some market power. But more importantly – the monopson has a substantial market power. When the patent is not considered as being an essential input within the monopson – it is right to pass the burden of proof back to the plaintiff.

5.4 The Case Involves a Patent without any Economic Value

Another common argument against the market power presumption is that the majority of patents, have no economic value, and in fact, more than 95% of the patented goods have no economic value. As I mentioned, due to the costs of litigation, it is unlikely that cases involving patents with little economic value will get to the courts. But even that will happen, it is relatively inexpensive to do so – and the burden of proof can be shifted back to the plaintiff. If the good, dealt with in a litigation process, does not have any economical value – and there is an efficient way to prove it – the market power presumption needs not to affect the chances of winning the trial. For example, many times a Due Diligence is made to a company – reflecting the price of the patented good. When it is cheap and easy to prove that a patent has no economical value, it is reasonable to transform the burden proof back to the plaintiff.

5.5 The Case involves, allegedly, frivolous or invidious Purposes

One of the presumption main disadvantages is the ability of the plaintiff to file frivolous, or false, claims against the defendant, using the presumption as a legal tactic "ramming" tool. The weak presumption addresses this issue by allowing the defendant to claim that the lawsuit is frivolous or invidious. Indeed, the vexing purpose is always a threat over a success of any presumption. This threat is usually balanced by different means such as paying rational fees to the claim; rule expenses etc. In order to balance the

surplus power the presumption grants with the plaintiff, the defendant have the ability to prove the opposite. If the defendant can prove that, allegedly, there are other, unjustified, reasons for the lawsuit, he will not need to prove that he does not hold market power.

6. SUMMARY

The interface between IP and Antitrust is extensive and complex. In this summary I tried to elaborate and discuss one of the friction areas, as it express in the Market Power Presumption. The judicial history of the presumption revels three periods that shifted from using the presumption in 1870, until using an informal "anti" presumption nowadays. In Europe the presumption does not exists anymore, much like in the US, though a more complex market share proof system allow the plaintiff to prove a lower market share in order to presume its dominancy.

Although based on economical grounds, the criticisms, lead to the perception that the anti presumption should prevail, lack of fool economical and pragmatic analysis that could lead to different results. In this summary I tried to show the main arguments supporting and opposing the market power presumption, and the balance of power between using the presumption and using and anti presumption, in the patent realm.

I showed that through using a "weak" form of the market power presumption one can reach a different balance between Antitrust and IP, thus maximizing the social welfare. In the weak model of the presumption, some situations defined where it is likely that the pillars on which the presumption lies miss, and therefore the burden of proof for the existence of market power shifts back to the plaintiff.