THE NEW YORK PATENT, TRADEMARK AND COPYRIGHT LAW ASSOCIATION

NYPTC BULLETIN

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PRESIDENT'S CORNER

A meeting was held on January 14 of the Committee on Past Presidents of the NYPTCLA. In attendance were:

Granville M. Brumbaugh	1953-1954
W. Houston Kenyon, Jr.	1956-1957
Alfred L. Haffner, Jr.	1970-1971
Frank W. Ford, Jr.	1971-1972
Hon. William C. Conner	1972-1973
Joseph J. Previto	1973-1974
Lorimer P. Brooks	1975-1976
William F. Eberle	1979-1980
Albert Robin	1981-1982
John O. Tramontine	1985-1986
Paul H. Heller	1987-1988

The Committee is charged with proposing to the Board of Directors ways in which the Association and its objectives and public image may be improved.

Three issues were discussed.

1. Legislative Initiatives

The Association should take more of a leadership role in studying and proposing legislative initiatives rather then reacting to pending legislative proposals. An important activity of our Association is to study legislative proposals and to provide our comments to Congress or the U.S. Patent and Trademark Office. Often this results in a critical analysis and opposition to the proposals of others. The Committee felt that we should spend more effort on the initiation of legislative proposals as a way to exert a greater influence in a more positive manner.

2. Judicial Appointments

The Committee also discussed the judicial appointment procedure and the difficulty of having lawyers with backgrounds in intellectual property appointed to the Court of Appeals for the Federal Circuit. One recommendation was that our Appointments Committee should seek out the best possible candidate, convince him to seek an appointment and to marshal support for that candidate through bar associations, corporations and contacts with the Congress and Administration. Another approach is the institutional one of promoting the concept of appointment of a lawyer with intellectual property experience. Once that concept is accepted by the Administration it is believed that suitable candidates would be available

3. Committee Terms

The practice of appointing committee chairmen for a one-year period provides them with too short a period of time to

CALENDAR OF EVENTS

February 11, 1988	**Luncheon Meeting**
March 3-4, 1988	**U.S.T.A. Strategies for Managing a Trademark Operation**
March 18, 1988	**Luncheon Meeting**
March 23, 1988	**Joint Meeting with Association of the Bar of the City of New York. Judge William Mulligan will speak on "Opportunities for Minorities in Property Law" at the Bar Building**
March 24-25, 1988	**ABA-PTC Section: Intellectual Property Law-Agency, Licensing, Litigation & Corporate Practice (Arlington, VA)**
March 25, 1988	**NYPTCLA 66th Annual Dinner in Honor of the Federal Judiciary. Hon. Charles L. Brieant, Chief Judge, United States District Court for the Southern District of New York (Waldorf Astoria Hotel, 6:30 pm, New York, New York)**
April 21, 1988	**Conn. Patent Law Assoc. Annual Judges Dinner. Hon. Jean G. Bissell, U.S. Court of Appeals for the Federal Circuit, Guest Speaker (New Haven, Connecticut)**
May 1-4, 1988	**U.S.T.A. Annual Meeting (Phoenix, Arizona)**
May 19, 1988	**Annual Meeting of the Association Topic to be announced**

undertake and accomplish many objectives which should be pursued by committees. Many other organizations have longer terms. It was suggested that a two or three-year term be considered with, however, the chairman continuing to serve at the discretion of the President and Board of Directors of the Association.

4. Board Meeting

At a meeting of the Board of Directors on January 19 the foregoing matters were discussed. The first two items will be referred to the appropriate committees for discussion and implementation. On the third item the Board agreed to propose an amendment to our Bylaws giving the President and Board of Directors the option to appoint committee chairmen for a period of one to three years. Present plans are to make appointments for two-year periods in which each incoming President will appoint new chairmen for half of the standing committees.

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USTA FOUNDATION LAUNCHES ITS FIRST PROJECT

The USTA Foundation, the new charitable organization of The United States Trademark Association, has announced that its first event will be the Boal Memorial Lecture, to be held at New York University Law School's Tishman Hall, 40 Washington Square South, on Wednesday, March 2 at 4:30 p.m. The lecturer will be Richard A. Posner, Judge of the U.S. Court of Appeals for the Seventh Circuit (Chicago, IL). He will present his paper, "Trademark Law: An Economic Perspective."

The lecture, supported by the law firm Cooper & Dunham and gifts from friends, is in memory of R. Bradlee Boal, a senior trademark litigator with the firm, then known as Cooper, Dunham, Griffin & Morgan. Mr. Boal died unexpectedly on October 3, 1986, at the age of 52.

Admission to the lecture is free. Admission to the wine and cheese reception, immediately following the lecture, is $10.50.

INVENTOR NOMINATIONS TO CLOSE MARCH 15

The deadline to submit nominations for the 1988 Inventor of the Year Award closes March 15. This is a unique opportunity for recognition of inventors by members of the patent bar. Each nominator will be acknowledged in writing by the Association.

You may nominate as many inventors as you wish. You may nominate sole or joint inventors. The recipient will be chosen by the Board of Directors of the Association. The criteria used by the Board in making its choice is that the Inventor of the Year:

a) must have been issued one or more U.S. patents;

b) must be able to attend to the presentation of the Award at the NYPTCLA annual meeting and dinner in May, 1988; and

c) must be respected by the nominee's professional peers.

A nominating form for your use in this regard is enclosed with this issue of the Bulletin.

Should you require any additional information or assistance in making a nomination, please contact the Chairman of the Committee on Public Information and Education, Julius Fisher, at McAuley, Fields, Fisher, Goldstein & Nissen, 405 Lexington Avenue, New York, NY 10174; Tel. (212) 986-4090.

MARK YOUR CALENDARS

Continuing Legal Education Weekend Seminar

Mohonk Mountain House New Paltz, New York

November 11-13, 1988 (Veterans' Day Weekend

LEGISLATIVE UPDATE

by David Lee

PROCESS PATENT REFORM

The United States patent laws provide that "whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." Section 271(a). Use or sale of an unpatented product made by a patented process does not constitute infringement under current law.

Thus, a foreign manufacturer is free under current law to practice a patented process abroad and sell the unpatented products in this country. The owner of a process patent can prevent this only by bringing suit on a foreign patent in the country of manufacture (if he has one), or by seeking the assistance of the International Trade Commission, which has the power under Section 337 of the 1930 Tariff Act to bar importation of products made by a process that would infringe a United States patent if practiced in this country.

The absence of authority in the patent laws to prevent importation of products made abroad by a patented process has been a subject of concern for some time now. The importance of increasing protection for domestic process patents was recognized as early as 1966 by President Johnson's Commission on the Patent System. Pressure for change has been mounting ever since for a number of reasons, including the advance of foreign technological and marketing capabilities, a growing recognition that many foreign nations provide greater protection for process patents than does the United States, and a mounting belief that the existing avenues for protecting domestic process inventions — foreign patents and the International Trade Commission — are inadequate.

In 1983, the Reagan Administration made concrete proposals for strengthening process patent protection by making the use or sale of products made by a process patented in this country an infringement of the process patent. These proposals were taken up by both the House and Senate in 1983. By the close of the 98th Congress in 1984, the House and Senate had passed separate process patent bills but

had been unable to resolve their differences. By the close of the 99th Congress in 1986, the House and Senate had passed separate new patent process bills but again had been unable to resolve their differences.

As of this moment, approximately a year into the 100th Congress, history has repeated itself. The House and Senate have passed separate omnibus trade reform bills that incorporate separate new process patent provisions, but have been unable to resolve their differences. Moreover, the Administration is opposed to the Senate process patent provisions, less than pleased with the House process patent provisions, and opposed on several grounds to the omnibus trade bills of both the Senate and House. Whether these differences can be resolved remains to be seen.

The political forces responsible for the deadlock over process patent reform have been many and varied. In the beginning, when the legislative proposals were relatively simple, they generally were favored by the Administration, by manufacturing concerns, by labor and by the patent bar. Principal opponents of the legislation included the generic drug industry and retail merchants, who objected to the proposed legislation because of the impact it would have on an innocent purchaser of infringing products — that is, a party that purchased products made by a foreign manufacturer without knowledge that a patented process had been used to make the products. Over time, as the legislative proposals have become more complex at the insistence of the generic drug industry and retail merchants, the original proponents of the legislation have lost much of their enthusiasm for it.

The pages that follow detail the progress of process patent reform through the House and Senate since 1983. Generally speaking, the proposals for reform have focused on Section 154 (contents of a patent), Section 251 (infringement) and Section 287 (limitation on damages), with particular focus on the latter two sections. There also has been considerable debate over a new section that would raise a presumption of infringement where the patent owner is unable to discover the process used abroad.

98th CONGRESS

ADMINISTRATION PROPOSALS

In March 1983, the Administration proposed amendments to the patent laws to enhance protection of patented processes. Specifically, the Administration proposed that Section 154 be amended to recite that every patent shall contain a recitation, "if the invention is a process[,] of the right to exclude others from using or selling products produced thereby." The Administration also proposed that Section 271 be amended to include this new subsection:

> If the patented invention is a process, whoever without authority uses or sells in the United States during the term of the patent therefor a product produced by such process infringes the patent.

Finally, the Administration proposed that a new section be added to raise a statutory presumption, in certain circumstances, with respect to a product that was made by a patented process:

> In actions alleging infringement of a process patent based on use or sale of a product produced by the patented process, if the court finds (1) that a substantial likelihood exists that the product was produced by the patented process and (2) that the claimant has exhausted all reasonably available means through discovery or otherwise to determine the process actually used in the production of the product and was unable so to determine, the product shall be presumed to have been so produced, and the burden of establishing that the product was not produced by the process shall be on the party asserting that it was not so produced.

HOUSE ACTION

In July 1983, Representative Moorehead (R-Cal.) introduced a bill incorporating these provisions (HR 3577). In November 1983, Representative Kastenmeier (D-Wis.) introduced a bill that differed from the Moorehead bill in several respects (HR 4526). First, the Kastenmeier bill added to the Moorehead amendment of Section 271 a limitation that the product be "made in another country." Second, at the suggestion of the AIPLA, the Kastenmeier bill proposed that Section 287 be amended to add a notice requirement:

> No damages may be recovered for an infringement under Section 271 (e) of this title [the process infringement amendment] unless the infringer was on notice that the product was made by a process patented in the United States.

Third, the Kastenmeier proposal omitted the infringement presumption of the Moorehead proposal, Representative Kastenmeier being of the view that "it will be possible to establish infringement in these cases without such a legislative presumption." Finally, the Kastenmeier proposal added a clause providing that process patent reforms would apply to any United States patent granted before, on or after the date of enactment.

In March 1984, the House Subcommittee on Courts, Civil Liberties and the Administration of Justice ("Subcommittee on Courts") held hearings on the two bills. The Commissioner of Patents testified that the Kastenmeier bill, with its limited focus on products made abroad, would violate the GATT requirement that the United States not discriminate against foreign made products. The Commissioner favored the Moorehead bill for this reason, and also because it set forth a presumption of infringement. The IPO testified against the presumption insofar as it required the patent owner to exhaust all reasonably available means to discover the process used abroad. A patent law expert testified against the presumption in any form, and also against the proposal in the Kastenmeier bill that damages be recoverable only from an infringer on notice that a product was made by a patented process.

In September 1984, the Subcommittee adopted the Kastenmeier bill in principal part, the most significant change being a limitation of the reforms "to patents granted after the date of enactment." The revised Kastenmeier bill as incorporated in a clean bill together with other legislation effecting reforms of the patent laws (HR 6286) and passed by the House in October 1984. Prior to passage, Representative Kastenmeier made it known that most of the differences between the process patent reforms in the House bill and those of Representative Moorehead were a response to concerns of the generic drug industry. He also disputed the claim of the generic drug industry that process patent reform was unnecessary in light of

the remedy provided by Section 337 of the 1930 Tariff Act, as well as the Administration claim that the process patent legislation as drafted would run afoul of GATT.

SENATE ACTION

In June 1983, Senator Mathias (R-Md.) introduced a bill proposing a number of patent law reforms, including enhanced protection for process patents (S. 1535). The Mathias bill set forth a proposed revision of Section 271 similar to that of the Kastenmeier bill, without more. In September 1983, Senator Thurmond (R-S.C.) introduced a bill embodying the Administration's patent process proposals (S. 1841).

In April 1984, hearings on these bills where conducted by the Senate Subcommittee on Patents, Copyrights and Trademarks ("Subcommittee on Patents"). As in related House hearings, the Commissioner of Patents backed the Administration bill and urged that the Mathias bill would violate GATT. The AIPLA also backed the Administration bill, adding that damages for infringement should be awarded only against infringers with notice that the product was made by a patented process. The IPO disputed the requirement of the Administration bill that the presumption of infringement be conditioned on costly exhaustion of all reasonably available means for discovery of the process practiced abroad. And the generic drug industry opposed enactment of any process patent reform on the ground that the remedies of Section 337 of the 1930 Tariff Act were adequate to protect owners of domestic process patents.

THE DEMISE OF PROCESS REFORM

In October 1984, with the 98th Congress drawing to a close, the Senate took up the House bill for consideration. The process patent reforms were deleted from the bill in response to input from the generic drug industry, as were certain other provisions. The bill was passed by the Senate and the House without process patent reform.

99th CONGRESS HOUSE ACTIONS

In February 1985, Representative Moorehead introduced a bill (HR 1069) similar to his 1983 bill, with three principal differences. First, the new bill proposed an addition to Section 287 that required notice of infringement as a prerequisite to damage liability. This provision was similar to, but more extensive than, the additional earlier proposed by Representative Kastenmeier:

> No damages shall be recovered by the patentee for infringement under section 271 (a)(2) of this title from an infringer who did not sue the patented process except on proof that such infringer knew of or was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered for infringement occurring after such knowledge or notice. Filing of an action for infringement shall constitute such notice.

Secondly, the new Moorehead bill made it easier to establish a presumption of infringement by requiring that "the claimant has made a reasonable effort to determine the process actually used" — as compared with the earlier requirement that "he has exhausted all reasonably available means through discovery or otherwise...." Finally, the new Moorehead bill added a grandfather clause making its amendments applicable "only to products produced or imported after the date of enactment."

The Administration expressed support for the Moorehead bill in hearings before the House Subcommittee on Courts in February 1986. The Administration suggested that the bill be modified to encompass only products made "directly" by the patented process. Further support for the bill was expressed by the International Trade Commission and domestic manufacturing concerns. The generic drug industry opposed the bill. Further support for the bill was expressed by the International Trade Commission and domestic manufacturing concerns. The generic drug industry opposed the bill. Further support for the bill was express by the AFL-CIO and the National Association of Manufacturers during hearings in May 1986.

At the close of the hearings, Representative Kastenmeier proposed a substitute bill that materially enlarged the proposed amendments to Sections 271 and 289 and materially diminished the scope of the proposed section establishing a presumption of infringement. This substitute bill (HR 4899) was approved by the Subcommittee, subsequently approved by the House Judiciary Committee with further amendments, and ultimately passed by the House in September 1986.

The House revisions to Section 271 set forth two limitations on infringement not seen in previous bills:

> ... [1] In an action for infringement of a process patent, no remedy may be granted for infringement on account of the use of a product unless there is no adequate remedy under this title for infringement on account of the importation or sale of that products. [2] A product which is made by a patented process will, for purposes of this title, not be considered to be so made after —
>
> (1) it is materially changed by subsequent processes;
>
> or
>
> (2) it becomes a minor or nonessential component of another product.

Similarly, the House revisions of Section 287 set forth numerous requirements and limitations not seen in previous bills, including a limitation of damages to a reasonable royalty in certain circumstances:

> (1) No damages may be recovered for an infringement under section 271 (g) of this title [the process patent amendment] with respect to a product unless the infringer knew or was on notice that the product was made by a process patented in the United States. Damages may be recovered only for such infringement occurring after such knowledge or notice and, with respect to —
>
> (A) a product obtained before such knowledge or notice, or
>
> (B) a product which —
>
> (i) is purchased pursuant to a contract that is entered into before such knowledge or notice and that provides for the delivery of a fixed quantity of the product in a specified period of time, and
>
> (ii) is in the inventory of or in transit to the purchaser, or is received by the purchaserwithin 6 months after such knowledge or notice, shall be limited to reasonable royalties therefor.
>
> (2) For purposes of paragraph (1), 'notice' means the receipt of facts set forth in writing which are sufficient to establish that there is a substantial likelihood that the product was made by an infringing process.

The House bill also eliminated any presumption of infringement.

In remarks from the floor, Representative Kastenmeier commented that the bill contained "provisions which attempt to meet some ... objections which have been

heard from a variety of quarter ... [and] go part of the way toward meeting the objections of the bill's opponents." Deletion of the infringement presumption was said to be "a move favored by [the] retailer community and generic drug companies." The Representative also noted that additional amendments under consideration in the Senate (discussed next) had been considered and rejected:

> The view is based on concerns about the impact of such proposals on nonpharmaceutical industry process patent holders, workability and fairness to patent holders. It is my understanding that the administration, through the Secretary of Commerce, shares these views.

SENATE ACTIONS

In July 1985, Senator Mathias introduced a bill (S. 1543) similar to the Moorehead bill in the House, except that the Mathias bill eliminated any reference to a presumption of infringement and set forth this enlarged grandfather clause:

> This Act shall apply only to products produced or imported after the date of enactment. This Act shall not abridge or affect the right of any persons or their successors in business to continue to use, sell or import any specific product already in substantial and continuous commercial production on July 31, 1985, or for which substantial preparation for production was made before that date, to the extent equitable for the protection of investments made or business commenced before that date. This Act shall not deprive a patent owner of any other remedies available under 35 U.S.C. 271, 19 U.S.C. 1337, or any other statutory provision.

The Senate Subcommittee on Patents held hearings on the Mathias bill in October 1985. The Commissioner of Patent testified in favor of the bill, suggesting amendments to establish a presumption of infringement like that of the Moorehead bill and to clarify that the bill applies only to products "directly" produced by the patented process. Other Administration witnesses, a representative of the OCAW and numerous representatives of industrial patent owners also expressed support for the bill. The generic drug industry attacked the bill as disruptive of business and unnecessary in light of Section 337 of the 1930 Tariff Act.

The NYPTCLA testified in writing in favor of process patent reform, but criticized the Senate proposals as being unnecessarily broad in their coverage of all sales and uses in this country of a product made by a patented process. The NYPTCLA proposed that liability be extended only to persons that import or make the first sale in the United States.

In March 1986, Senator Mathias offered modifications to his bill. Most were similar to modifications of the Moorehead bill adopted by the House. However, Senator Mathias also proposed a presumption of infringement like that appearing in the Moorehead bill (but later rejected by the House). The Senate Subcommittee on Patents approved the Mathias bill with these modifications.

This bill was taken up by the Senate Judiciary Committee in September 1986, substantially amended and approved as amended. In October 1986, the Senate took up the bill passed by the House, voted to replace it with the amended Mathias bill and passed the replacement (HR 4899).

The Senate bill added significantly to the House bill in a number of respects, particularly in its amendments to Section 287. Among other things, the Senate bill introduced the concept of a request for disclosure to the patent owner by a prospective infringer:

> (5)(A) For purposes of this paragraph, a 'request for disclosure' means a written request made to a party then engaged in the manufacture of a product to identify all process patents owned by or licensed to that party as of the time of the request that could reasonably be asserted to be infringed under section 271 (a)(2) if that product were imported into, or sold or used in, the United States by an unauthorized party. A request for disclosure is further limited to a request—
>
> (i) made by a party regularly engaged in the sale of the same type of products as the party to whom the request is directed, or a request which includes facts showing that the requester plans to engage in the sale of such products; and
>
> (ii) made prior to such party's first importation, use, or sale of units of the product produced by an infringing process and prior to notice of infringement.

Absent a request for disclosure, an infringer was deprived of certain benefits:

> The remedy for the importation, use, or sale of units of the infringing product ordered prior to notice and imported, used or sold in a manner consistent with the normal business practices of the infringer during the six months after the date of notice shall be limited to a reasonable royalty. The limitation in this subparagraph shall not be available to any party who failed to make a request for disclosure, as defined in subparagraph (5), of the party asserting infringement or its licensee.

Furthermore, an infringer was deprived of all limitations on damages set forth in Section 287 if he did not notify his supplier of the patents identified in response to a request for disclosure.

Similarly, absent a timely response to a request for disclosure, the patent owner was deprived of certain benefits:

> In any action where the infringer made a request for disclosure from the party asserting infringement and the infringed patent was not identified within 60 days, the remedy for the importation, use, or sale of units of the infringing product which are imported, used, or sold by the infringer in a manner consistent with the normal business practices of the infringer during the eighteen months after the date of notice shall be limited to a reasonable royalty.

Moreover, the patent owner was deprived of any remedy for a period of 18 months after an infringer had notice of infringement:

> No remedy may be obtained during the eighteen months after the date of notice for retail sales of a normal volume of products in inventory of an order at the time of notice, obtained from a party in the United States who did not use the patented process, provided the retailer discloses to the patentee, within 30 days from notice the identity and location of the party from whom the products were purchased. Normal quantity of products in inventory and on order shall be determined by previous business practices, and could include units of a product ordered prior to notice and received within a period not to exceed eighteen months after notice.

Other provisions above and beyond the House bill included a presumption of infringement like that in the 1985 Moorehead bill and a grandfather clause like that in the 1985 version of the Mathias bill.

The Administration objected to several aspects of the Senate bill. These objections were expressed by the Secretary of Commerce in a letter sent to Senator Mathias before the Judiciary Committee approved the Senate bill:

> These amendments would add compulsory licensing and burdensome procedural features. They will give retailers a royalty-fee license to continue selling an offending product eighteen months after they have received a notice of infringement. They will also give importers, wholesalers and distributors a license to continue importing, selling or using an offending product six months after they have received a notice of infringement if the goods were ordered before notice is received and a reasonable royalty is paid. Notice itself will be ineffective in triggering these delayed or limited damages unless it contains much more information than is now required in patent infringement cases.
>
> The Administration cannot support these provisions as drafted. Compulsory licensing has no place in U.S. patent law. Inclusion of these features will undermine U.S. efforts to persuade other nations not to adopt them in their own laws or to limit their use. It will also undermine our efforts to make certain features of our patent law compatible with the laws of our major trading partners.

THE SECOND DEMISE OF PROCESS PATENT REFORM

In October 1986, as the 99th Congress was drawing to a close, the House took up the Senate bill and amended it to overcome objections expressed by the Administration. Time ran out before the House and Senate could work out their differences.

100th CONGRESS HOUSE ACTIONS

In January 1987, Representative Moorehead introduced a bill (HR 380) identical to the bill he had introduced in 1985. In February 1987, Representative Michel (R-I11.) introduced a bill that embodied broad Administration proposals for patent law reform. The process patent aspects of this bill were virtually identical to those of the Moorehead bill, except for an addition to Section 271 that exempted a product from infringement where it "is materially changed by a subsequent process, or it becomes a minor or nonessential component of another process." The full text of this recent Administration proposal is set forth in the appendix.

In March 1987, Representative Kastenmeier introduced a bill (HR 1718) identical to that passed by the House in 1986. When this bill was taken up by the Subcommittee on Courts in April 1987, Representative Moorehead offered a substitute that made substantial changes, among them the addition of a presumption of infringement and elimination of royalty liability for use or sale of products in the possession of an infringer or in transit to him before notice of infringement.

This bill was approved by the Judiciary Committee in April 1987, added to an omnibus trade reform legislation pending in the House (HR 3) and passed by the House later in April. The full text of the process patent provisions of this bill are set forth in the appendix.

SENATE ACTIONS

In February 1987, Senator Dole (R.-Kan.) introduced a bill (S. 539) embodying the same Administration proposals as the Michel bill in the House (reproduced in the appendix). Later in February, Senators DeConcini (DA-riz.) and Hatch (R-Utah) introduced a process patent reform bill identical to that passed by the Senate in 1986 (S 568). At the same time, Senator Lautenberg (D-N.J.) introduced a similar bill eliminating most of the limitations on remedies for infringement (S.573).

In hearings before the Subcommittee on Patents in April 1987, the Commissioner of Patents testified in favor of the Administration proposal, expressed reservations about the Lautenberg bill and criticized at length the DeConcini/Hatch bill, concluding that the Administration would rather forego process patent reform than accept this bill. The DeConcini/Hatch bill also was criticized by the AIPLA and the IPO, but was supported by the generic drug industry. The National Retail Merchants Association opposed any process patent reform.

As it had in 1985, the NYPTCLA criticized all three bills as being unnecessarily broad. The NYPTCLA proposed that liability be extended only to persons that import or make the first sale in the United States and that other proposed provisions, including those relating to notice and limitations on liability, be deleted as unnecessary. The NYPTCLA also criticized the provisions establishing a presumption of liability because it shifted not only the burden of going forward with the evidence on the issue of infringement, but also the burden of proof on that issue.

In May 1987, the Subcommittee passed a compromise of the DeConcini/Hatch and Lautenberg bills. The compromise bill was introduced by Senator DeConcini as a clean bill (S.1200), approved by the Judiciary Committee in June 1987 and added to omnibus trade reform legislation pending in the Senate. In July 1987, the Senate took up the omnibus reform trade bill passed by the House, substituted its own version of the legislation and passed it. The process patent provisions of this bill are set forth in the appendix.

THE FUTURE

The appendix sets forth a comparison of the process reform provisions of the most recent Administration proposal, the House bill and the Senate bill. The differences between these provisions are substantial.

It is anticipated that the House and Senate will confer in an attempt to resolve these differences, as well as numerous other differences between the two omnibus trade reform bills. In anticipation of these conferences, staff members have prepared a comparison of the two bills.

The next conference on the bills is scheduled for January 25, 1988. No hearings have been scheduled. Congress has set itself a deadline of March 1, 1988 for resolution of differences over the bills.

The prospects for process patent reform are uncertain. The Administration has objected to the Senate and House omnibus trade bills as being overly protectionist and as unduly limiting presidential authority. On January 12, 1988, the White House Chief of Staff publicly expressed doubts that differences over the bills would be resolved:

> [The President] hopes a satisfactory trade bill can be crafted out of the two bills taken together. I don't think the prospects are good that that will happen, but there are some prospects that may occur.

One part of each omnibus trade bill to which the Administration particularly objects is the part relating to process patent reform.

Informed sources in Congress and in the Patent and Trademark Office report that the Administration has threatened to veto any bill that includes the Senate

process patent reforms, but might be willing — reluctantly — to accept the House reforms. It is considered possible, though not likely, that process patent reforms might be broken out of the omnibus trade bills for separate consideration and passage if negotiations bog down over other aspects of the trade bills. It also is considered possible, though not likely, that a trade bill will be passed without process patent reform, as happened at the close of the 98th Congress.

APPENDIX

Section 154

Administration

Section 154 of Title 35, United States Code is amended by inserting after "United States," the following: "and, if the invention is a process, of the right to exclude others from using or selling products produced thereby throughout, or importing products produced thereby into, the United States,".

House

Section 154 of title 35, United States Code, is amended by inserting after "United States", the following: "and, if the invention is a process of the right to exclude others from using or selling throughout the United States, or importing into the United States, products made by that process,".

Senate

Section 154 of title 35, United States Code is amended by inserting after "United States," the following: "and, if the invention is a process, of the right to exclude others from using or selling throughout the United States, or importing into the United States, products made by that process,".

Section 271

Administration

(a)(2) If the patented invention is a process, whoever without authority uses or sells within, or imports into, the United States during the term of the patent therefor, a product produced by such process, infringes the patent. A product produced by a patented process will, for purposes of this Title, not be considered to be so produced after it is materially changed by a subsequent process, or it becomes a minor or nonessential component of another product.

House

(g) Whoever without authority imports into the United States or sells or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement of a process patent, no remedy may be granted for infringement on account of the use or retail sale of a product unless there is no adequate remedy under this Act for infringement on account of the importation or other sale of that product. A product which is made by a patented process will, for purposes of this Act, not be considered to be so made after—

"(1) it is materially changed by subsequent processes;

"(92) it becomes a minor or non-essential component of another product.

Senate

(g) Whoever without authority imports into the United States or sells or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after—

"(1) it is materially changed by subsequent processes; or

"(2) it becomes a trivial and nonessential component of another product.

Section 287

Administration

(b) No damages shall be recovered by the patentee for infringement under section 271(a)(2) of this title from an infringer who did not use the patented process except on proof that such infringer knew or was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such knowledge or notice. Filing of an action for infringement shall constitute such notice.

House

(b)(1) An infringer under Section 271(g) shall be subject to all the provisions of this act relating to damages and injunctions except to the extent those remedies are modified by this subsection or section 106 of the Process Patent Amendment Act of 1987. The modifications of remedies provided in this subsection shall not be available to any person who—

(A) practiced the patented process;

(B) owns or controls, or is owned or controlled by, the person who practiced the patented process; or

(C) had knowledge before the infringement that a patented process was used to make the product the importation, use, or sale of which constitutes the infringement.

(b)(2) No remedies for infringement under section 271(g) of this Act shall be available with respect to any product in the possession of, or in transit to, the infringer had notice that the product was made by a process patented in the United States.

Senate

(b)(1) An infringer under section 271(g) shall be subject to all the provisions of this title relating to damages and injunctions except to the extent those remedies are modified by this subsection or section 105 of the Process Patent Amendments Act of 1987. The modifications of remedies provided in this subsection shall not be available to any person who—

(A) practiced the patented process;

(B) owns or controls, or is owned or controlled by, the person who practiced the patented process; or

(C) had knowledge before the infringement that a patented process was used to make the product the importation, use, or sale of which constitutes the infringement.

(b)(2) No remedies for infringement under section 271(g) of this title shall be available with respect to any product in the possession of, or in transit to the party, or which the party had made a binding commitment to purchase and which has been partially or wholly manufactured, before the party had notice of infringement as defined in Paragraph(5). The party shall bear the burden of proving any such possession, transit, binding commitment, or manufacture. If the court finds that (A) the party maintained or ordered an abnormally large amount of infringing product, or (B) the product was acquired or ordered by the party to take advantage of the limitation on remedies provided by this paragraph to that portion of the product supply which is not subject to such a finding.

(b)(3) In an action brought for infringement under section 271(g), the court shall take into consideration the good faith and reasonable business practices demonstrated by the infringer and the need to restore the exclusive rights of the patentee.

[(b)](3)(A) In making a determination with respect to the remedy in an action brought for infringement under section 271(g), the court shall consider—

(i) the good faith and reasonable business practices demonstrated by the defendant.

(ii) the good faith demonstrated by the plaintiff with respect to the request for disclosure as provided in paragraph (4), and

(iii) the need to restore the exclusive rights secured by the patent.

(B) For purposes of subparagraph (a), the following are evidence of good faith; a request for disclosure by a party, a response by the party receiving the request for disclosure within 60 days, and submission of the response by the party who received the disclosed information to the manufacturer, or if not known, the supplier with a request for a written statement that the process claimed in the disclosed patent is not used. The failure to perform any such acts is evidence of absence of good faith unless there are mitigating circumstances. Mitigating circumstances shall include the case in which, due to the nature of the product, the number of sources for products, or like commercial circumstances, a request for disclosure is not necessary or practicable to avoid infringement.

[b] (4) For purposes of paragraph (3), a 'request for disclosure' means a written request made to a party then engaged in the manufacture of a product to identify all process patents owned by or licensed to the party as of the time of the request that the party then reasonably believes could be asserted to be infringed under section 271(g) if that product were imported into, or sold or used in, the United States by an unauthorized party. A request for disclosure is further limited to a request—

(A) made by a party regularly engaged in the United States in the sale of the same type of products as the party to whom the request is directed, or a request which includes facts showing that the requester plans to engage in the sale of such products in the United States:

(B) made prior to such party's first importation, use, or sale of units of the product produced by an infringing process and prior to notice of infringement; and

(C) which includes a representation by the requesting party that it will promptly submit the patents identified to the manufacturer, or if not known, the supplier of the product to be purchased by the requestor, and will request from that manufacturer or supplier a written statement that none of the processes claimed in those patents is used in the manufacture of the product.

[b](4) For the purposes of this subsection, notice of infringement means actual knowledge, or receipt of notification, that a product was made by a patented process without authorization of the patentee. A notification shall constitute notice of infringement only if it is in writing and sets forth facts which are sufficient to establish that there is a substantial likelihood that the product was made by the infringing process. Filing an action for infringement shall constitute notice of infringement only if the pleadings or other papers filed in the action meet the requirements of a notification set forth in the preceding sentence. For the purposes of this subsection, a person who obtains a product made by a process patented in the United States in a quantity which is abnormally large in relation to the volume of business of such person or an efficient inventory level shall be rebuttably presumed to have actual knowledge that the product was made by such patented process.

[(B)] (5) (A) For the purpose of this subsection, notice of infringement means actual knowledge, or receipt by a party of a written notification, or a combination thereof, of information sufficient to persuade a reasonable person that it is likely that a product was made by a patented process.

(B) A written notification from the patent holder charging a party with infringement shall specify the patent alleged to have been used and the reasons for a good faith belief that such process was used. If the patent holder has actual knowledge of any commercially feasible process other than the patented process which is capable of producing the allegedly infringing product, the notification shall set forth such information with respect to the other processes only as is reasonably necessary to fairly explain the patent holder's belief and is not required to disclose any trade secret information.

(C) A party who receives a written notification as described in the first sentence of such subparagraph(B) and fails to thereafter seek information from the manufacturer, or if not known, the supplier, as to whether the allegations in the notification are true shall, absent mitigating circumstances, be deemed to have notice of infringement. This provision shall apply even though the notification does not establish notice of infringement under subparagraph(A).

(D) A party who fails to make the submission referred to in subsection (b)(4)(C) shall be deemed to have notice of infringement.

(E) Filing of an action for infringement shall constitute notice of infringement only if the pleadings or other papers filed in the action meet the requirements of subparagraph (A).

Section 295 (new)

Administration

In actions alleging infringement of a process patent based on use, sale, or importation of a product produced by the patented process, if the court finds (1) that a substantial likelihood exists that the product was produced by the patented process and (2) that the claimant has made a reasonable effort to determine the process actually used in the production of the product and was unable so to determine, the product shall be presumed to have been so produced, and the burden of establishing that the product was not produced by the patented process shall be on the party asserting that it was not so produced.

House

In actions alleging infringement of a process patent based on the importation, sale, or use of a product which is made from a process patented in the United States, if the court finds—

(1) that a substantial likelihood exists that the product was made by the patented process, and

(2) that the claimant has made a reasonable effort to determine the process actually used in the production of the product and was unable so to determine,

the product shall be presumed to have been so made, and the burden of establishing that the product was not made by the process shall be on the party asserting that it was not so made.

Senate

In actions alleging infringement of a process patent based on the importation, sale, or use of a product which is made from a process patented in the United States, if the court finds—

(1) that there is evidence establishing a substantial likelihood that the product was made by the patented process, and

(2) that the claimant has made a reasonable effort to determine the process actually used in the production of the product and was unable so to determine,

the product shall be presumed to have been so made, and the burden of establishing that the product was not made by the process shall be on the party asserting that it was not so made.

Reports to Congress

Administration

None

House

(a) CONTENTS.—The Secretary of Commerce shall, not later than the end of each one-year period described in subsection (b), report to the Congress on the effect of the amendments made by this Act on the importation of ingredients to be used for manufacturing products in the United States, in those domestic industries that submit complaints to the Department of Commerce, during that one-year period, alleging that their legitimate sources of supply have been adversely affected by the amendments made by this Act.

(b) WHEN SUBMITTED.—A report described in subsection (a) shall be submitted with respect to each of the five one-year periods which occur successively beginning on the date of the enactment of this Act and ending five years after that date.

Senate

(a) CONTENTS.—The Secretary of Commerce shall, not later than the end of each one-year period described in subsection (b), report to the Congress on the effect of the amendments made by this title on the importation of ingredients to be used for manufacturing products in the United States in those domestic industries that submit complaints to the Department of Commerce, during that 1-year period, alleging that their legitimate sources of supply have been adversely affected by the amendments made by this title.

(b) WHEN SUBMITTED.—A report described in subsection (a) shall be submitted with respect to each of the five 1-year periods which occur successively beginning on the date of the enactment of this Act and ending five years after that date.

Effective Date

Administration

None

House

(a) IN GENERAL.—The amendments made by this Act shall apply only to products made or imported after the date of the enactment of this Act, but shall not abridge or affect the right of any person or any successor in business of such person to continue to use, sell, or import any specific product already in substantial and continuous sale or use by such person in the United States on January 1, 1987, or for which substantial preparation by such person for such sale or use was made before such date, to the extent equitable for the protection of commercial investments made or business commenced in the United States before such date.

(b) RETENTION OF OTHER REMEDIES.—The amendments made by this Act shall not deprive a patent owner of any remedies available under subsections (a) through (f) of section 271 of title 35, United States Code, under section 337 of the Tariff Act of 1930, or under any other provision of law.

Senate

(a)(1) IN GENERAL.—The Amendments made by this title shall apply only to products made or imported after the date of the enactment of this Act.

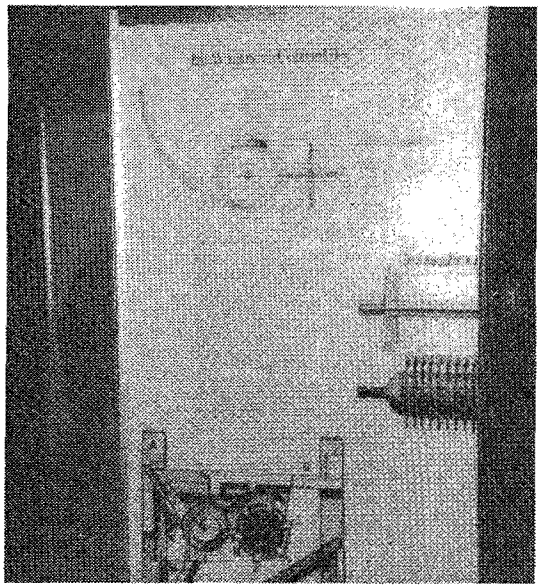
(2)EXCEPTIONS.—This title shall not abridge or affect the right of any person or any successor in business of such person to continue to use, sell, or import any specific product already in substantial and continuous sale or use by such person in the United States on May 15, 1987, or for which substantial preparation by such person for such sale or use was made before such date to the extent equitable for the protection of commercial investments made or business commenced in the United States before such date. This paragraph shall not apply to any person or any successor in business of such person using, selling, or importing a product produced by a patented process that is the subject of a patent process enforcement action commenced before January 1, 1987, before the International Trade Commission, that is pending or in which an order had been entered.

(b) RETENTION OF OTHER REMEDIES.—The amendments made by this title shall not deprive a patent owner of any remedies available under subsections (a) through (f) of section 271 of title 35, United States Code, under section 337 of the Tariff Act of 1930, or under any other provision of law.

NYPTCLA EXHIBIT OPENS AT COURTHOUSE

On December 15, 1987, the NYPTCLA formally opened its exhibit at the Federal Courthouse in Foley Square to celebrate the bicentennial of the United States patent system, with a program featuring three noted speakers.

Judge James Oakes of the Second Circuit Court of Appeals, who is Chairman of the Circuit's Committee on the Bicentennial of the United States Constitution, gave the opening remarks. Judge Lawrence Pierce of the Second Circuit, who is co-chairman of the Circuit's History Exhibits Subcommittee, then introduced the evening's principal speaker, Donald J. Quigg, the United States Commissioner of Patents and Trademarks.



Sample Exhibit

COMMISSIONER QUIGG ON PATENT SYSTEM

Commissioner Quigg summarized the history of the U.S. patent system, including the various Patent Acts and the different kinds of patent review and registration procedures the country has had over the last 200 years. He also reviewed some of the measures the Patent and Trademark Office has taken to modernize the patent review system since patent application fees were raised earlier this decade — eleven hundred additional examiners were hired and completed an examiner training program; new review programs were implemented to check on and improve the quality of the examiners' work, with the goal of making certain that issued patents will be found valid; and patent applications are being put onto magnetic tape to make the examiners' searches more efficient.

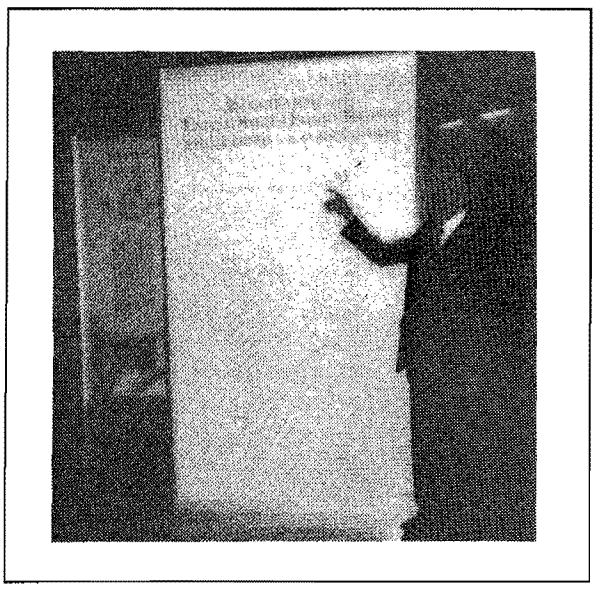
Turning to the future, Commissioner Quigg said he expected patent disputes, given the significant costs of litigation, to be resolved more often through alternative methods. He also hoped, although he conceded that presently this thought is only a "personal dream", that at some point a patent could issue simultaneously in several countries and be enforceable in any of these nations.

The Commissioner concluded his remarks by urging the patent bar to make certain that people do not take our patent system for granted, but that the bar does what it can to make the system attractive and make the public realize how important it is.

WYATT AND GOLDSMITH CITED

The NYPTCLA is particularly grateful to Del Goldsmith for all the work he did in organizing the exhibit and to Douglas Wyatt who supervised and helped coordinate the exhibit. The exhibit's panels were created by Heather McRae.

We invite you to stop by and see the exhibit the next time you are in Foley Square. It is located in the lobby of the federal courthouse.



Del Goldsmith and patent exhibit

Commissioner Quigg enjoying the reception

REPORT FROM EUROPE

A report on developments in intellectual property topics of interest to New York practitioners.

NEW FRENCH TRADE MARK LAW

A bill introduced into the National Assembly on 21 September 1987 is expected to become law during May or June of 1988. The bill introduces a new scheme of trade mark legislation in France and radically alters some of the prime characteristics of the present law of 31 December 1964. The motivation for reforming the law was to some extent an effort by interested parties to harmonize French law with the anticipated community law. Even more important, however, France found itself out of step with several of the larger European states in respect of certain aspects of its trade mark legislation.

OPPOSITION SYSTEM PROPOSED

Probably the most dramatic part of the change will be the introduction of an opposition system. The ordinary basis of opposition will be limited to prior registrations for a mark which is perceived to be the same or similar to the mark published for opposition. The opposition must be entered within three months of the date of publication of the application for registration. The new legislation provides several extraordinary bases for opposition as well. For example, the holder of a right in a mark which is "famous" in the sense of Article 6bis of the Paris Convention can also bring an opposition. Furthermore, in keeping with developments in other jurisdictions, an opposition can be founded on rights arising from a literary or artistic work or a protected model or design, as well as one's patronymic name or one's pseudonym. The accompanying document in the National Assembly sponsoring the legislation indicates that the legislation is drafted such that it is limited to rights that are easily verifiable, therefore it can be expected that if one bases an opposition on a right other than a registered trade mark that substantial evidence of, for example, the fame in the mark or designation must be submitted.

The law also changes the definition of a trade mark to "a sign susceptible of material representation serving to distinguish products or services of a fiscal or moral person". The alterations to the definition will allow for the possibility of registration of auditory marks and make it clear that organizations such as trade unions and fraternal organizations have standing to register marks. Another change is to remove a feature of the 1964 law whereby renewal applications were examiner like new filings. The new law introduces a simplified renewal procedure.

In an acknowledgement of the rights of the holders of "famous" marks the new law provides that the use of such a mark by a third party will attract the possibility of an infringement action if such use "prejudices" the owner of the mark whether or not such products or services are similar to those included in the registration of the "famous" mark. The introduction of this provision follows those of a number other European countries (most recently Switzerland) which have provided for similar benefits to the holder of "famous" trade marks.

Article 15 of the new legislation provides that the registration of a trade mark will not be an obstacle to the use of an identical or similar company name, commercial name or sign where such use

precedes the date that a trade mark is registered. In practice, if the holder of a right in a company name, for example, does not oppose the registration for a trade mark, or does oppose and loses, the trade mark registrant will not *ipso facto*, thereby gain rights which can be deployed against the owner of the company name. It is arguable whether this result is consistent with Article 8 of the Paris Convention.

There is also a provision in the legislation for free use of a patronymic name (e.g., Ford, Porsche) in connection with the furnishing of accessories or spare parts provided clear reference is made such that confusion is avoided. If such use jeopardizes the rights of the trade mark registrant, its owner can demand that use thereof be prohibited. Procedurally, the new law will provide that recourse against the decisions of the director of industrial property can be had not only at the Court of Appeals of Paris (as in the past) but also "courts-designated courts of appeal by decree". In effect the appeal actions would be decentralized throughout France. This modification should accelerate the rate of disposing of appeals.

Any readers who would care to have an English translation of the proposed new law are invited to contact the writer or simply post a business card to the writer's attention (at 14 South Street, London W1) and a copy will be furnished by return. The French National Assembly is expected to enact the bill into law without further amendment. Such action is anticipated during this Spring.

John R. Olsen

RECENT DECISIONS OF INTEREST

By Thomas A. O'Rourke

PATENTS - ATTORNEY CLIENT PRIVILEGE

The scope of the attorney client privilege was discussed in the C.A.F.C. decision *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734 (C.A.F.C. 1987). In *American Standard* a third party Biomet retained outside counsel to provide a legal opinion on the validity of American Standard's patent in suit. The legal opinion was based on prior art patents and not confidential information from the client. A copy of the opinion had been provided to American Standard after the action against Pfizer had commenced.

American Standard contended that the sharing of the opinion waived Biomet's attorney client privilege. The C.A.F.C. rejected American Standard's arguments that the privilege was waived and concluded that the opinion was not a privileged documents and as it was not privileged, there could be no waiver of the attorney client privilege.

The C.A.F.C. based is conclusion that there was no attorney client privilege that attached to the opinion because the opinion was based on publically available information and did not reveal confidential communications from the client.

TRADEMARKS - LICENSEE ESTOPPEL

Although the doctrine of Licensee Estoppel in patent license agreements met is demise for the purpose of patent validity in *Lear v. Atkins*, the doctrine has had some viability in trademark license agreements. However, the Seventh Circuit's 1965 decision in *Donald F. Duncan v. Royal Tops Manufacturing Company*, 343 F. 2d 655 (7th Cir. 1965) stated that the "estoppel by a license to deny the validity of a licensor's trademark expires with the license." Thus, the view was that the application of the doctrine was limited to challenges to the validity of a trademark only when the license was still in effect.

The language of the *Duncan* case was rejected in the recent decision in *Chrysler Corporation v. Alloy Automative* 34 BNA PTCJ No. 842 at 383 (N.D. Ill. 1987). In *Chrysler* the Court held that the doctrine of licensee estoppel bars a former licensee under the trademark from attacking the validity of the mark based on facts that arose during the term of the licensing arrangement even after the license had terminated.

Alloy was licensed to manufacture automative parts under a license from Chrysler which expired in 1981. Subsequently Chrysler brought suit contending that Alloy continued to sell parts under the Chrysler mark. When Chrysler sued for trademark infringement Alloy interposed the affirmative defense that Chrysler abandoned its marks by failing to exercise control over the quality of the products sold under the mark during the license term.

Chrysler moved to strike the defense and the Court granted the motion. The Court distinguished the language in *Duncan* because in the Court's view, the application of the language of *Duncan* would effectively eliminate the doctrine of licensee estoppel as most disputes involving licenses do not arise until after the license terminated. Accordingly, the Court held that even after termination of a license the former license is estopped from challenging its former licenser's mark based on facts which arose during the term of the license.

PATENTS - PRELIMINARY INJUNCTION

For many years almost the only time a preliminary injunction would be granted was where a patent had been held valid in one decision and the patent owner was suing a second infringer on the same patent. See e.g. *Carter-Wallace, Inc. v. David Edward Pharmaceutical Corporation*, 443 F. 2d 867 (2d Cir. 1971). More recently, the C.A.F.C. had affirmed the grant of a preliminary injunction in *Atlas Power Company v. Ireco Chemicals* 773 F. 2d 1230 (C.A.F.C. 1985), where the infringer relied upon the prior art considered by the Patent Office. In a further expansion of the rights of patent owners to obtain preliminary relief, a preliminarya injunction was recently grante in *Pittway v. Black & Decker*, 34 BNA PTCJ No. 850 589 (N.D. Ill. 1987), on a patent that had only recently been issued.

Pittway was the owner of a patent on a portable rechargeable flashlight which was an immediate commercial success. Black & Decker, in attempting to compete with Pittway, sent a sample of the Pittway flashlight to a Japanese company to make a competing flashlight. On the day the patent was issued, Pittway sued Black & Decker for patent infringement and shortly thereafter moved for a preliminary injunction. Black & Decker admitted infringement.

In examining the factors for the grant of a preliminary injunction, the Court found that there was a likelihood of success on the merits because Black & Decker failed to present "clear and convincing evidence of invalidity." In addition, in view of the well established name Black & Decker had in the public's mind, plaintiff would be irreparably harmed by the continued infringement of Black & Decker through the loss of market share.

PATENTS - INEQUITABLE CONDUCT

In the C.A.F.C.'s decision in *A.B. Company v. Burroughs Corporation*, 798 F.2d 1932 (C.A.F.C. 1986), the Court affirmed the District Court's holding of inequitable conduct even though the examiner had independently discovered the undisclosed prior art references. In *Thyssen Edelstahlwerke AG v. Turbine Components Corporation*, 4 U.S.P.Q. 2d 1235 (D. Conn. 1987), the defendant moved for summary judgment on the same ground. The Court denied the motion and held the failure to disclose a material prior art reference did not compel summary judgment on the issue of inequitable conduct.

The Court, in considering the facts, held that the omission of the material information was not a misrepresentation to the Patent Office. The Court, in reaching its conclusion, focused on the fact that the original determination by the applicant was that the references in question were not material to the prosecution of the patent application. Even though the applicant was required to amend its claims to distinguish over these references, the patent was ultimately issued. Accordingly, the Court held that although "plaintiff's inititial view that patents 175 and 748 were not material was erroneous in view of their citation by the PTO and their similarity to the patent in suit....[it] cannot be considered to reflect such a high degree of deceptive intent inasmuch as patents 789 and 338 were granted".

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