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Enforcement of Patent Rights in The United States: Injunctions And Damages (Expanded Outline)

I. Introduction

The "Golden Age" for patents in which we have been living the past two decades recently turned into a patent "revolution", "explosion", "frenzy". Bill Gates speaks of a new "Gold Rush." Patent filings and issuances are skyrocketing, especially in the areas of biotechnology and business methods. The U.S. Patent & Trademark Office is granting now almost 200,000 patents, almost three times as many as in 1980.

Courts read the riot act to infringers. Holding patents valid more often nowadays, they award billion dollar damages. "The recent *Litton v. Honeywell* verdict of 2 billion dollars, is representative of this trend." (Insight Press, February 1999). And preliminary injunctions and treble damages are no longer rare and permanent injunctions are no longer stayed during appeals.

Thus, patents now are more enforceable and valuable and it no longer pays to infringe as in the 60s and 70s when, in the unlikely event the patent in suit was upheld, only reasonable-royalty damages were assessed.

II. Patent Infringement Law

A patentee has the right to exclude others from making, using, offering for sale, selling or importing the patented invention for 20 years from the date of filing (Section 154 of the U.S. patent code). To enforce this right to exclude others, a patentee may bring a lawsuit in a federal district court for patent infringement.

A. Types of Infringement

Section 271 sets out several types of infringement.

1. Direct Infringement

The first type of infringement occurs when someone makes, uses, offers to sell, sells, or imports a patented invention during the term of the patent without the authorization of the patent owner (Section 271(a)).

a. Literal Infringement

The most basic case of direct infringement occurs when the infringement exactly meets the language of the claims. If an

accused product or process falls clearly within a claim, infringement is made out.

b. Doctrine of Equivalents
Even if an accused product or process is outside of a claim and there is no literal infringement, infringement may still be found under the judicially developed "doctrine of equivalents", if it performs substantially the same function in substantially the same way to obtain the same result (function/way/result test) as the claimed product or process. In other words, there are only insubstantial differences.

c. Prosecution History Estoppel
This doctrine, also known as file wrapper estoppel, prevents a patentee from enforcing its claims against an otherwise equivalent feature in an accused product or process if that feature was excluded by claim limitations added by the patentee in order to receive the patent.

d. Reverse Doctrine of Equivalents
Under this doctrine an accused product or process, even if literally within a claim, may not infringe, if it is so far changed in principle from a claimed product or process that it performs the same or a similar function in a substantially different way.

2. Inducement of Infringement
Section 271(b) provides that one who actively induces another to infringe may be liable for infringement even though not infringing himself. Inducement of infringement requires knowledge by the inducer that a direct infringement will result or intent to cause an infringing result. The sale of a staple item accompanied by advertisements or other action encouraging the infringement, may constitute inducement of infringement.

3. Contributory Infringement
This type of infringement involves a sale of a component of a patented machine, manufacture or composition, or a material or apparatus for use in practicing a patented process. (Section 271(c)) The item sold must not be a staple article or commodity of commerce suitable for any non-infringing use and it must be especially adapted for use in the infringing product or process and must constitute a material part of the patented invention.

4. Other Types of Infringement
Infringement may also occur when:
a. a patented device is reconstructed rather than permissibly repaired;
b. a U.S. patented process is practiced abroad and the resulting product is imported into the U.S. (Section 271 (g));

c. uncombined components are supplied from the U.S. for final assembly abroad when such assembly carried out in the U.S. would constitute infringement (Section 217(f)); and

d. a petition is filed at the Food and Drug Administration (FDA) for an Abbreviated New Drug Application (ANDA) with respect to a drug patented by another, accompanied by allegations of patent invalidity and/or non-infringement (Section 271(e)).

B. Defenses

1. The alleged infringer has the following non-infringement defenses:
   a. The properly interpreted claims do not read on the accused product or process.
   b. The alleged infringer is acting within the scope of a license.
   c. The alleged infringer has an implied license.
   d. The alleged infringer's use is experimental and completely noncommercial.
   e. The alleged infringer is entitled to the reverse doctrine of equivalents.
   f. The patent owner is not entitled to apply the doctrine of equivalents because of prosecution history esstoppel.
2. And a number of invalidity defenses can be relied upon, e.g. that the inventor(s) did not satisfy one or more of the conditions or requirements of patentability (Section 101-103). However, a duly issued patent is presumed valid and only clear and convincing evidence will invalidate it.
3. Also non-enforceability can be pled, based on patent misuse, inequitable conduct before the Patent and Trademark Office (PTO), laches or estoppel.

III. <u>Actions Prior to or in Lieu of Litigation</u>

A. Opportunity Letters or Cease and Desist Letters

So-called opportunity letters or cease and desist letters are written by a patentee to another party that is infringing his patent. The primary purpose is to encourage the infringer to stop the infringing activity and/or take a license under the patent. An opportunity letter should be subtle and non-threatening. A strong cease and desist letter could precipitate a Declaratory Judgment (DJ) action against the patentee. If the patentee is seriously considering filing an infringement suit, it may be preferable to do so without first sending out an opportunity or cease and desist letter.

B. Arbitration or Other ADR

As an alternative to litigation, parties to a patent dispute may attempt a resolution to the dispute through an arbitration proceeding. Section 294 provides that arbitration clauses in patent related contracts shall be enforceable and the parties may agree to submit their patent related disputes to arbitration, which may result in a resolution.

Other ADR measures are: mediation, mini-trial, private judge, fact-finding expert, etc. Resort to the "Rocket Docket" court, the U.S. District Court for the Eastern District of Virginia, is also an alternative to litigation in other district courts. Proceedings there are very compact and speedy and only take months rather than years, as elsewhere.

Of course, the parties can always negotiate a settlement at any time, but often do so only at the "courthouse steps."

C. Reexaminations

Alternatives to a lawsuit in a federal district court are the *ex parte* and *inter partes* reexamination proceedings within the PTO (Section 302-318), which any party can request. However, in reexamination, a patent is not presumed valid and the PTO need only meet the lower standard of showing by a preponderance of the evidence that the invention is not novel or nonobvious.

IV. Infringement Trial

A. Parties and Venue

If litigation is unavoidable, the first issue is deciding what parties should be named in the action. Usually, the plaintiff will be the patent owner and/or an exclusive licensee. Since anyone who makes, uses, sells, offers to sell or imports a patented invention may be an infringer, the defendants can be selected from anyone in the distribution chains, e.g., the manufacturer, importer, distributors, retailers, or ultimate customers.

The next issue, choosing the place of suit, is not as easy as in other types of business litigation since the general federal venue provision relating to corporations does not apply to a patent infringement case. A more limited patent venue statute offers two venue choices. One is where the infringer resides, which for a corporate infringer is the state where it is incorporated. The other, is any venue where the defendant has a regular and established place of business and has committed an act of infringement.

B. Jury Trials

Whether to demand a jury is another important decision. Jurors are perceived as being more reluctant than federal district judges to find patents invalid. Thus jury trials have become quite popular. This may not be true, of course, if the judge has a record of upholding patents or if the district has an overcrowded caseload.

C. Motion Practice

After plaintiff files the Complaint and the defendant, the Answer (with or without Counterclaims), various motions may be filed, to wit:

1. Dismiss the action for improper venue because of the restrictive venue statute for patent cases.
2. Bifurcate liability and damages.
3. Sever dispositive issues for separate trial, such as inequitable conduct, on-sale or prior public use, laches, license, or non-infringement. Most importantly, the defendant may successfully

move for summary judgment on such dispositve issues as noninfringement, license, on-sale or prior public use, and laches. Summary judgment motions are unsuitable for issues such as obviousness under Section 103 or intent involving assessment of the demeanor and credibility of witnesses.

D. Discovery Practice

In American trials, there are no surprises. All the facts pertaining to any and all issues involved in a trial can be ferreted out in the pre-trial discovery stage by way of such discovery devises as requests for document production, written interrogatories, and depositions by oral examinations. The hope is to find a "smoking gun" or at least enough evidence to induce settlement or prevail at trial. Hence, discovery is equally available in all patent infringement and validity trials, regardless of the subject matter, regardless of whether products or processes are involved. That is to say, all information, documentation and materials in the possession of an accused infringer have to be made available to the patentee for scrutiny. Broad "fishing expeditions" to harass the defendants and increase their costs are not permitted. Civil Procedure rules and special local court rules limit the extent and scope of discovery to information and documentation that is material to the issues at bar. Still, judges have much discretion in permitting broad discovery and often give the parties the benefit of the doubt. There are stiff penalties and sanctions for destroying or hiding relevant evidence. Thus, in patent infringement and validity trials in the United States, the parties have to hand over to their opponents "on a silver platter" even the most damaging evidence. This applies equally, if not a fortiori, to information and documentation relative to processes employed in factories in secrecy.

E. Trial

Opening statements start the trial except for jury selection in jury cases. The plaintiff's statement will cover the PTO's grant of a U.S. patent after thorough examination by an expert patent examiner; the inventor's struggle to make the invention work; overcoming problems that others had been unable to solve despite years of unsuccessful work; commercial success won by the inventor's efforts; and the infringement of the invention. The defendant's statement may suggest that the patent should never have been granted because it was for an invention already known or obvious, that the owner deceived the examiner to obtain it, that by independent effort the defendant created a product different from what the patent covers, and that the ill-gotten patent is being used to suppress competition.

The inventor, the designer of the defendant's product, and the expert witnesses have leading roles in patent suit. The inventor's account of difficulties he had to overcome to achieve success with the invention, only to see it copied by the infringer, can provide a prime aspect of the patentee's case. The story of the designer of the defendant's product can

be equally critical since the questions of whether defendant's product was the result of copying or independent design can make or break a jury case.

It is the technical experts, however, who often determine the outcome of the patent case. On validity issues, technical experts provide a comparison of the differences and similarities between the patented invention and prior art and may give their opinions on the ultimate issues of anticipation or obviousness of the claimed invention. This may influence the decision of the trier of fact on these issues. On infringement, the technical experts' conflicting comparisons of the application of the language of patent claims to the accused product and on technical issues of equivalency may strongly influence the decision on infringement.

Another common expert witness in these lawsuits is a patent law expert, often a prominent patent lawyer with past experience in the PTO. His role is to explain the mechanics of obtaining a patent, PTO procedures, the prosecution history of the patents at issue, and the relationship between the claim terminology and accused product. His role can be much expanded, particularly in bench trial, where opinions on ultimate questions of patent law are often permitted. Some trial judges regard patent law experts highly; others will not permit their testimony or will restrict it severely.

At the trial's end, it is better for the court to require jurors to decide the case on special interrogatories rather than deliver a general verdict. If the case is tried to the bench, it is more common not to proceed immediately to final argument at the trial closing but to have post-trial submission of findings and conclusions, briefing, and final argument.

F. Appeals

Appeal is exclusively to the Court of Appeals for the Federal Circuit (CAFC) in Washington, D.C. Because the U.S. Supreme Court seldom grants certiorari from the CAFC, the outcome of that appeal will often effectively end the case.

V. Burden of Proof and Its Reversal

A. Burden of Proof

Since a patent is presumed valid as well as each claim of a patent – a presumption that never changes – the defendant has the burden of proof to show, and do so by clear and convincing evidence, that the patent is invalid for one or more of the reasons listed above (see II. B). On the other hand, the patentee has the burden of proof on the issue of infringement by a preponderance of the evidence.

B. Reversal of Burden of Proof

The plaintiff in process patent infringement cases has, for obvious reasons, a particularly difficult time proving unauthorized use of a patented process. This problem is exasperated when the infringer is outside of the United States jurisdiction, since in such instance the infringer may not even be subject to the discovery procedures and effectively escape liability

for lack of proof of infringement. To remedy this problem, Congress passed the Process Patent Amendments Act of 1988, adding Section 295 to the United States patent code. This section reads:

> "In actions alleging infringement of a process patent based on the importation, sale, offer for 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 plaintiff has made a reasonable effort to determine the process actually used in the production of the product and was unable to so 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."

Thus, in legislating a presumption that certain products were made with patented processes, Congress has set two limitations that need to be met before the presumption applies. The plaintiff must first show a substantial likelihood that the product was made using the patented process; and second, that the plaintiff made a reasonable, even if not successful, effort to determine whether the patented process was actually used.

1. Substantial Likelihood That Process Was Used
   The standard of substantial likelihood is between "slight possibility" and a "fair preponderance of the evidence" standard. Plaintiff can show substantial likelihood that the product was made using the patented process via chemical analysis, correlation between the costs of various methods of production with the prices charged, evidence that the patented method is the only practical manufacturing method, etc.
2. Reasonable Effort Employed to Determine Process Used
   The plaintiff must have made a reasonable effort to discover whether the product was made using the patented process in order to meet the second condition. Some of the ways in which the plaintiff can show reasonable efforts is through discovery procedures or through direct requests for the information from the manufacturer if the manufacturer is outside of United States jurisdiction. However, the process patentee does not need to resort to such expensive measures as letters rogatory or suits in a foreign country in order to fulfill the second condition of the Section 295 presumption. This presumption, which is the tantamount to, or the United States equivalent of, provisions elsewhere for reversal of the burden of proof, can be very useful to process patentees against infringers in cases of evasion of the discovery process, deliberate or accidental destruction of records, unavailability of key personnel, etc.

VI. Patent Infringement Remedies

A. Equitable Relief

The principal motivation in patent litigation is often not damages but the patentee's desire for an injunction under Section 283 ("(C)ourts ... may grant injunctions in accordance with the principles of equity to prevent violation of any right secured by patent, on such terms as the court deems reasonable.") An injunction that keeps a valuable market free from competition may have far greater economic value to the patentee than damages or license royalties.

1. Permanent Injunctions

"Absent a sound reason for denying [an] injunction," courts will grant a patentee injunctive relief once infringement of the valid patent is established. A permanent injunction will only be denied in light of "very persuasive evidence that further infringement will not take place." Therefore, courts will rarely deny a permanent injunction against an infringer.

A court may deny a permanent injunction where the injunction would cause "irreparable hardship" to the infringer without any concomitant benefit to the patentee.

An injunction should be broad enough to prohibit future infringement by the products found to infringe and products that are slightly different which clearly would still infringe.

2. Preliminary Injunctions

The patentee can also move for a preliminary injunction to restrain infringement until trial (which may be years off). Hence, for effective enforcement of patents, preliminary injunctions are very important if not crucial and indispensable.

Beginning with *Smith International v. Hughes Tool* (CAFC, 1983), the federal courts began a long line of cases clarifying and liberalizing the criteria for obtaining injunctions in patent cases. As the court in *Smith International* put it, "without this injunctive power of the courts, the right to exclude granted by the patent would be diminished, and the express purpose of the Constitution and Congress, would be seriously undermined. [And] the patent owner would lack much of the 'leverage,' afforded by the right to exclude, to enjoy the full value of his invention in the marketplace. Without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research."

The determination of whether a preliminary injunction is appropriate involves an analysis and balance of four factors: (1) reasonable likelihood of success on the merits; (2) the likelihood of irreparable harm to the plaintiff without injunctive relief; (3) the

balance of hardship between the plaintiff and defendant; and (4) the impact on the public interest.

a. Likelihood of Success

A likelihood of success on the merits is established by demonstrating that the patent at issue is valid and has been infringed by the defendant. Treatment of the validity issue in a preliminary injunction context is clearly the area of most significant change in the law. The law has evolved from the point where the patentee had to show an overwhelming certainty that he would succeed on the validity issue at trial, e.g. where the patent had been held valid in prior litigation, to the point where the patentee has no burden at all on the issue of validity, or where he has the burden of showing that his adversary is not likely to be able to carry his trial burden of proving invalidity by clear and convincing evidence. As regards the infringement issue, infringement need be proved only by a "reasonable probability" that infringement will be made out at trial.

b. Irreparable Harm

Where there is a strong showing of patent validity and infringement, irreparable harm may be presumed. "The nature of the patent grant thus weighs against holding that monetary damages will always suffice to make the patentee whole, for the principal value of the patent is the statutory right to exclude."

c. Balance of the Hardships

Although balance of the hardship is a factor to be considered in granting a preliminary injunction, there is no requirement that a court expressly find that the balance tips in favor of the patentee. "One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against a continuing infringement destroys the business so elected."

d. The Public Interest

Protecting rights secured by valid patents is an important public interest because Congress has determined that the public interest is not served by cheaper goods when the cheaper price is due to patent infringement.

These factors are not weighed equally. When the balance of hardships favors the patentee, the probability of success is not required and the injunction should be granted if the patentee raises serious issues, which provide reasonable grounds for litigation.

3. Temporary Restraining Orders

Rule 65(b) of the Federal Rules of Civil Procedure sets out the rules for temporary restraining orders (TROs). The three differences between TROs and preliminary injunctions are that (1)

TROs are effective until the preliminary injunction hearing or trial date or, have specific dates of enforcement; (2) TROs can be granted whether there is notice to opposing party or not; and (3) TROs can and often are granted on a lower standard of proof. A party seeking to impose a TRO on an opposing party will be analyzed under the same four-factor test as preliminary injunctions. However, other than the element of "plaintiff's likelihood of success on the merits", all the other elements are analyzed with the shorter time period of the temporary injunction in mind.

B. Monetary Relief

Section 284 of the U.S. patent Code provides for recovery by the patentee of damages not less than reasonable royalty, together with interest and costs, and for damages, that may be increased by the court up to three times the amount found. This is interpreted to provide alternate measures of damages in patent infringement cases: lost profits to the infringing sales, or a combination of both. A reasonable royalty sets the floor below which damage award may not fall. Recovery of lost profits is preferable, as it is likely to be greater than a reasonable royalty.

1. Lost Profits

Lost profits are those profits the patentee would have made "but for" the infringement -- to be proven with a reasonable probability.

Test for determining lost profits:

a. Demand for Patented Device

Normally demand for the patented product sold by the infringer is inferred from the fact that those sales were made. Evidence of a long-felt need and commercial success of the patented product helps.

b. Absence of Acceptable Non- infringing Alternatives

Absence of Acceptable Non-Infringing Substitutes is necessary to show that, but for the infringement, the infringer's sales would have gone to the patentee rather than third parties. Continued infringement after an infringement suit is filed, is evidence of the absence of an acceptable non-infringing substitute.

c. Capacity to Meet Demand

The patent owner must also show that he had the capacity to meet the total sales of both the patentee and the infringer, i.e. he had sufficient facilities to manufacture the product or the patentee could have expanded his facilities, or the work could have been subcontracted.

d. Measure of Lost Profits

The amount of damages cannot be speculative, but need not be proved with unerring precision. Doubts are resolved against the infringer. Fixed costs such as management salaries, property tax

and insurance are not included in the damages calculation. The amount of damages to be awarded for infringement is a question of fact, with the patent owner bearing the burden of proof.

2. Reasonable Royalty

When damages are not measured by lost profits, the patentee is entitled to a reasonable royalty.

There are three accepted methods for determining the royalty rate: (1) constructing a hypothetical negotiation; (2) using the established royalty rate; and (3) using a analytical method.

a. Hypothetical License

Using a hypothetical licensing negotiation between the patentee and a willing licensee at the time infringement began to determine the reasonably royalty, is based upon the premise that a reasonable royalty is the amount the infringer would have been willing to pay, prior to the infringement, in an arm's length negotiation. Fifteen factors -- the so-called Georgia-Pacific factors -- are considered to help determine a reasonable royalty, to wit.

1) The royalty received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.
2) The rates paid by the licensee for the use of other patents comparable to the patent in suit.
3) The nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.
4) The licensor's established policy and marketing program to maintain his patent monopoly (*sic*) by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly. (*sic*)
5) The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business, or whether they are inventor and promoter.
6) The effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales.
7) The duration of the patent and the term of the license.
8) The established profitability of the product made under the patent; its commercial success; and its current popularity.
9) The utility and advantage of the patent property over the old modes or devises if any, which had been used for working out similar results.
10) The nature of the patented inventions; the character of the commercial embodiment of it as owned and produced by the licensor, and the benefits to those who have used the invention.

11) The extent to which the infringer has made use of the invention; and any evidence of the value of that use.

12) The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous invention.

13) The portion of the reliable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risk, or significant features or improvements added by the infringer.

14) The opinion testimony of qualified experts.

15) The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily tried to reach an agreement; that is; the amount which a product licensee-who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention -- would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

b. Established Royalty Rate

A royalty rate is established when (1) it was widely applied in numerous licensing agreements with similar terms and (2) those terms are what the infringer would have basically needed to avoid infringement.

c. Analytical Method

A typical analytical approach begins with subtracting the infringer's overhead expenses from the anticipated gross profit of the infringer. An acceptable net profit is given to the infringer and the remaining profit is awarded to the patentee.

3. Mixed Awards – Lost Profits Plus Reasonable Royalty

If the patentee is able to prove he would have made some of the infringer's sales, the patentee may be entitled to a combination of the lost profits on the sale he is able to prove he would have made a reasonable royalty on the remaining infringing sales.

4. Additional Damage Measures

A patentee may be entitled to additional compensation if evidence shows that, "but for" the infringement, he would have made more sales, would have sold at higher prices, or would have sold other non-patented products along with the sales of the patented product sold by the infringer.

a. Price Erosion

A patentee is entitled to recover his losses if he was prevented from raising prices, or forced to lower prices or give discounts as a result of the infringement.

b. Diminution of Value of Product/Market Spoilage

When an infringer offers a product, which is of lesser quality than that of the patentee, the reputation and sales of the product may be adversely affected.

c. Convoying / "Entire Market" Rule

A patentee is entitled to lost profits on un-patented components which accompany the sale of patented components where, in reasonable probability, the patentee would have made the convoyed sales which the infringer made. One key factor in applying the "entire market value" rule, is determining whether the patentee could reasonable have anticipated the convoyed sales. Other factors include the way products are marketed, the price lists, the industry custom of selling the un-patented product with the patented one, the marketability of the un-patented product by itself, and the physical dependence of the un-patented product on the patented product. The un-patented components must function together with the patented component in some manner so as to produce a desired end product or result.

d. Un-patented Goods

Recovery of lost sales can include sales of items not expressly covered by the patent. In order to fully compensate the patentee, profits related to sales of an un-patented item that the infringer "anticipated taking away" should be included in the damage award.

e. Accelerated market Re-Entry

This theory entitles a patentee to an award of the profits or the profits expected to be lost to the infringer after the patent expired as a result of the infringer's pre-expiration market penetration. Infringement may have allowed the infringer to get a 'head start" in the market for the formerly patented product. Therefore, the patentee is damaged even after patent expires.

5. Prejudgment and Post Judgment Interest

Both prejudgment and post judgment interest are elements of damages under Section 284. Interest is not to be included in any punitive portion of the damage award.

6. Enhanced Damages

a. Willful Infringement

Under Section 284 a patentee whose patents have been willfully infringed may be awarded damages " up to three times the amount found or assessed." The purpose of this provision is to punish the willful infringer, to deter like conduct in the future, and to protect the integrity of the patent system.

To willfully infringe, the infringer must have acted in disregard of the patent without a good faith belief that the patent was not infringed, invalid, or unenforceable. Willfulness is determined by looking at the "totality of the circumstances," e.g. deliberate copying, failure to exercise due care

after notice of a patent, concealment of fringing activities, and the continuation of litigation in bad faith.

The advise of counsel is apparently the most important factor to be considered whether the infringement was willful. For the advise of counsel to be effective it should be given as soon as possible after notice or knowledge of the patent and before the infringement starts, competent and well-founded, authored by a patent attorney rather than a general attorney or technical/management personnel, and adhered to by the infringer.

b. Attorneys' Fees and costs

Under Section 285, if the court finds that the case is "exceptional" by clear and convincing evidence, attorney fees may also be awarded. The purpose of Section 285 is to compensate the prevailing party for the prosecution or defense of the suite, to discourage infringement by penalizing the infringer and to prevent gross injustice when the accused litigated in bad faith.

7. Limitations on Damages

a. Patent Marking

Generally, damages cannot be awarded unless constructive notice was given by marking the patented product or unless the infringer had actual notice of the alleged infringement.

b. Laches

A laches defense bars relief for damages accrued prior to suit where the patentee delayed filing suit and the delay was unreasonable and inexcusable and prejudicial to the alleged infringer.

c. Equitable Estoppel

Equitable estoppel, which may bar all damages, requires proof of (1) affirmative conduct by the patentee which led the alleged infringer to believe that he would not sue on his patent; (2) alleged infringer's detrimental reliance on the patentee's conduct and (3) material prejudice to the infringer due to the reliance, if the patentee is allowed to proceed with its suit.

VII. Conclusion

As can be seen from the foregoing, the United States patent system, which unquestionably is a very robust system, also includes very effective and strong enforcement measures in terms of injunctions and damages for patent infringement. Efficient enforcement is crucial. A law, a patent law, that is not enforced is worse than no law. Reliable enforcement must also count not only on permanent injunctions but also temporary restraining orders and preliminary injunctions. Also, remedial measures as regards the burden of proof, such as, reversal of the burden of proof in process patent infringement cases, are essential. While there is no provision in the United States patent code denominated and phrased as reversal of the burden of proof, there is Section 295, providing for a presumption that an accused product was made by a patented process and placing the burden of establishing that the product

was not made by the patented process on the defendant. In addition, the United States legal code has effective discovery provisions for ferreting out all information and documentation in possession of defendant, that pertains to the manufacturing process used by him. Furthermore, the pro-patent climate which prevails in our judicial system, enhances patentee's ability to enforce his patent rights and obtain adequate remedies for any infringement.

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