

# THE CURSE OF “COPYING”

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# THE CURSE OF “COPYING”

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## I. INTRODUCTION

The concept of a “copy” or “copying” has long been involved with various aspects of intellectual property law, particularly in regard to patents and trademarks.<sup>2</sup> In patent precedent, “copying” may affect issues of willfulness and obviousness, among others. In view of recent Supreme Court and Federal Circuit decisions, “copying” may take on a more significant role in connection with such issues. For example, in view of the Federal Circuit’s recent en banc decision in Seagate Technology,<sup>3</sup> which heightened the standard for proving willfulness to “objective recklessness,” patentees are likely to turn more than ever to evidence of “copying” to establish willfulness. Whether evidence of “copying” rises to the level of “objective recklessness” remains to be seen, but patentees will certainly try to establish that it does.<sup>4</sup> Moreover, now that the Supreme Court has adopted a more lenient test for establishing obviousness,<sup>5</sup> evidence of “copying” has never been more important, as it may be a powerful tool in rebutting a prima facie showing of obviousness. Indeed, in the wake of the Supreme

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2. “Copying” is unquestionably an integral part of the copyright law. 17 U.S.C. § 101 et seq. This article leaves to the expertise of Professor Goldstein and others the intricacies of that jurisprudence.

3. In re Seagate Technology, 497 F.3d 1360 (Fed. Cir. 2007).

4. See, e.g., VNUS Medical Technologies, Inc., No. 05-2972, 2007 WL 3165548 (N.D. Cal. October 24, 2007) (plaintiff relied almost exclusively on allegations of “copying” to satisfy the willfulness standard articulated in Seagate Technology).

5. See KSR Intern. Co. v. Teleflex Inc., 127 S.Ct. 1727, 82 U.S.P.Q.2d 1385 (2007).

Court's KSR decision, the lower courts are giving increased attention to secondary considerations, including copying.<sup>6</sup>

Because the term “copying” carries an undercurrent of disapproval, of unfavorable practices, of “its just not on,” it is a favorite of patentees looking to portray an accused infringer in the most negative light. In jury cases, the term is doubly damning, in that a juror’s everyday experience, stemming from earliest school days, generates the lay biases and pejorative flavor the word “copy” carries. All too often, fuzzy thinking and indistinct drafting has resulted in precedent which uses the term without sufficient analysis or proper precision, painting with too broad a brush where a refined touch is needed to avoid overreaching and misapplication of legal theory. Such precedent then fails to preserve to the public the right freely to do that which is not the subject of an enforceable intellectual property right. Hence the curse of “copying”: a misfortune that may arise as from retribution, without true fault, that patentees will attempt to use to their advantage whenever possible, particularly given the new willfulness and obviousness standards articulated in Seagate Technology and KSR.

This article will review the current state of “copying”, by addressing the substantive precedent in areas where “copying” has traditionally had a substantive effect: willfulness of any accused infringing conduct and obviousness of the patented invention. With respect to

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6. See, e.g., Muniauction, Inc. v. Thomson Corp., No. 01-1003, 2007 WL 2225847 (W.D. Pa. July 31, 2007) (finding patent not obvious). There, the plaintiff introduced evidence that the defendant deliberately copied the patented invention. This evidence supported both the jury’s conclusion of willful infringement as well as nonobviousness of the patent: “We further note that plaintiff presented sufficient evidence of secondary considerations to shed light on the circumstances surrounding the origin of the patented subject matter. Plaintiff presented evidence of skepticism, legally appropriate praise, copying, and commercial success. This evidence supports the jury’s conclusion that the claims of the ‘099 Patent were not obvious”. Id. at \*11. See also Friskitt, Inc. v. Realnetworks, Inc., 499 F. Supp. 2d 1145, 1154(N.D. Cal. July 26, 2007) (acknowledging that “[c]opying by a competitor may be a relevant factor in the secondary factor analysis[,]” but concluding that the patentee failed to introduce evidence to support its copying claim). Cf., Asyst Tech, Inc. v. Empak, Inc., No. C 98-20451 JF (EAI), 2007 WL 2255220 (N.D. Cal. Aug. 3, 2007) (recognizing the significance of secondary considerations but noting that a “strong showing of obviousness cannot be overcome based upon secondary considerations,” citing Leapfrog Ent. Inc. v. Fisher-Price, Inc., 485 F.3d 1157, 1162 (Fed. Cir. 2007) (patent was invalid for obviousness, despite strong showing of secondary considerations)).

“copying” and willful infringement, this article outlines two important considerations that the precedent is weak upon — “copying” what? and “copying” when? These issues will be discussed, and suggestions are advanced throughout as to how one might lift the curse once it is pronounced.

## **II. “COPYING” AND THE THEORY OF ITS IMPROPRIETY**

The theory of “copying” is addressed at length by Professor McCarthy, his discussion touching upon not only trademark and unfair competition law but also patent law.<sup>7</sup> A corollary to the policy of free economic competition, he states, is the principle of free “copying” of things that are in the public domain: “Free copying and imitation are the rule, and exclusive rights such as patents, trademarks and copyrights are the exception.”<sup>8</sup> A thing is in the public domain only if no intellectual property right protects it.<sup>9</sup> In the context of a patent, anything disclosed but not within the literal coverage of the claims of that patent (or another patent) is in the public domain, save for the question of the doctrine of equivalents.

In 1989, the United States Supreme Court in Bonito Boats v. Thunder Craft Boats, Inc. restated the basic precept that the principle of free competition and free “copying” is the rule, while exclusive rights in intellectual property are the exception.”<sup>10</sup> There, the Court continually emphasized the importance of maintaining an informed balance between free competition and fair competition, that is, between the policy of the public domain and the policy of intellectual

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7. See 1 McCarthy on Trademarks and Unfair Competition, § 1.15 (4th ed.) (hereafter “McCarthy”).

8. Id. § 1:27 at 1-51.

9. Id. § 1:31 at 1-63.

10. 489 U.S. 141, 151, 109 S.Ct. 971, 977-78 (1989) (“[F]ree exploitation of ideas will be the rule, to which the protection of a federal patent is the exception. Moreover, the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure. . . . To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use”).

property. Bonito Boats, in McCarthy’s view,<sup>11</sup> qualified Judge Rich’s earlier statement in Mine Safety Appliances Co. v. Electric Storage Battery Co.<sup>12</sup> where, in rejecting a party’s contention that the patent laws put things into the public domain when a patent expires, he wrote that:

Patent laws function only to keep things out of the public domain temporarily. They have nothing to do with putting things into it... “Public domain” moreover, is a question-begging legal concept. Whether or not things are in or out of the public domain and free or not free to be copied may depend on all sorts of legal concepts including patent law, anti-monopoly policy and statutes, the law of unfair competition, copyright law, and the law of trademarks and trademark registration. What we really do is to determine these legal rights; then we may express the ultimate conclusion by saying something is in the “public domain” — or not in it.<sup>13</sup>

Indeed, McCarthy notes that in Bonito Boats, Justice O’Connor took issue with Judge Rich’s generalization in this quotation to the effect that the patent laws say nothing about the right to copy or use. Instead, Justice O’Connor commented that federal patent law “must determine not only what is protected, but also what is free for all to use.”<sup>14</sup>

In the absence of legally defined exclusive rights, McCarthy states, imitation and “copying” is permitted, and in fact, encouraged, as an essential element of free competition.<sup>15</sup> The public interest in competition outweighs any interest in granting a reward for ingenuity, unless a competitor who “copies” these new features transgresses the law. McCarthy concludes that it is permissible in a competitive economy for the second comer to try to capture as much of the innovator’s market as it can. The limitation is that such competition must not be

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11. 1 McCarthy, § 1:30 at 1-62.

12. 405 F.2d 901, 160 U.S.P.Q. 413 (CCPA 1969) .

13. 405 F.2d at 902 n. 2, 160 U.S.P.Q. at 414 n.2 (emphasis added).

14. 489 U.S. at 146, 151, 9 U.S.P.Q.2d at 1852, 1857.

15. Id.

accomplished by infringing on exclusive rights.<sup>16</sup> In the patent context, it is the claims that demarcate the exclusive rights, in the sense of a right to exclude competitors. Theory currently appears to favor, then, the second comer as long as he or she stays outside at least the literal coverage of the patent claims.

So why is “copying” so frequently alleged by plaintiffs asserting patents? Because, as McCarthy plainly recognizes, the inherent pejorative flavor of “copying” is plain and powerful:

“Copying” is sometimes denigrated as being somehow inherently immoral, unfair and illegal. The popular folklore is that a “copycat” is a pirate and that all commercial copying and imitation must be an illegal form of competition. That is not so. In fact, legitimate copying is a large part of what makes a free market economy work. The successful competitor offers an identical or equivalent product at a lower price or with greater quality. It is important to emphasize that there is absolutely nothing legally or morally reprehensible about exact copying of things in the public domain. It is fallacious to reason that because some exclusive rights of intellectual property are needed as an incentive to innovation and quality, then even more and broader rights of exclusion would be even better for the economy. Like salt in the soup, there can be too much of a good thing.<sup>17</sup>

One of the areas in which “copying” can be most powerful is with respect to a claim of willful infringement.

### **III. “COPYING” AND WILLFULNESS**

#### **A. The Role Of “Copying” In The Spectrum Of Willful Infringement**

“Copying” has had an effect on a number of areas of patent law, not the least of which has been in helping to establish a prima facie showing of willful infringement.<sup>18</sup> In the wake of

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16. Id. at 1-55.

17. 1 McCarthy, § 1:28 at 1-54 (emphasis added).

18. See e.g. nCube Corp. v. SeaChange Intern., Inc., 436 F.3d 1317, 1325, 77 U.S.P.Q.2d 1481, 1487 (Fed. Cir. 2006) (holding that evidence of deliberate copying supported an award of enhanced damages); Jurgens v. CBK, Ltd., 80 F.3d 1566, 1571, 38 U.S.P.Q.2d 1397, 1400 (Fed. Cir. 1996) (affirming a jury finding of willful infringement based in part on evidence of blatant copying of a commercial embodiment of a patent); BIC Leisure Products, Inc. v. Windsurfing International Inc., 1 F.3d 1214, 1223, 27 U.S.P.Q.2d 1671, 1678 (Fed. Cir. 1993)

the Federal Circuit’s recently issued en banc decision in Seagate Technology, the role of “copying” as it relates to willful infringement may become even more pronounced. Future cases may include a contention that the first part of the Seagate Technology standard is prima facie satisfied by the presence of copying.

In Seagate Technology, the Federal Circuit overruled the Court’s previous standard for finding willful infringement, and replaced it with a heightened standard of “objective recklessness.” Relying on a number of non-patent decisions from the United States Supreme Court, the Federal Circuit provided some guidance as to the meaning of “objective recklessness”:

[T]he civil law generally calls a person reckless who acts in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. Accordingly, to establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. The state of mind of the accused infringer is not relevant to this objective inquiry. If this threshold objective standard is satisfied, the patentee must also demonstrate that this objectively-defined risk . . . was either known or so obvious that it should have been known to the accused infringer. We leave it to future cases to further develop the application of this standard.<sup>19</sup>

While the Federal Circuit left it “to future cases to further develop the application of this standard,” there is little doubt that patentees will argue that evidence of “copying,” especially if blatant, will help satisfy this heightened standard, particularly the first, “objectively high likelihood that its actions constituted infringement of a [presumptively] valid patent” part of the standard.

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(continued...)

(“Windsurfing produced no evidence of direct copying. The district court’s determination that Windsurfing did not show willfulness was not clearly erroneous”).

19. Seagate Technology, 497 F.3d at 1371. (Emphasis added; internal citations and punctuation omitted)..

“Copying’s” place in the spectrum of willfulness and enhancement of damages was earlier explained in Read Corp. v. Portec, Inc.,<sup>20</sup> where the Federal Circuit reviewed its prior precedent on this issue, including Bott v. Four Star Corp.<sup>21</sup> Speaking generally, at first, Chief Judge Nies explained that a damages award may be enhanced up to three times the compensatory award, and that enhancement is committed to the discretion of the trial court. The statutory scheme does not, however, provide a framework for determining when such enhancement would be appropriate. While the Federal Circuit historically approved enhanced damages awards when the infringement is found to be willful, such enhancements are not mandatory.<sup>22</sup>

To gauge the egregiousness of the accused infringer’s conduct, based on all the facts and circumstances, consideration must be given to factors that render that conduct more culpable, as well as factors that are mitigating or ameliorating. The Read court provided a list of nine (9) factors, beginning with the Bott factors and adding others:

- (1) whether the infringer deliberately copied the ideas or design of another;
- (2) whether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; and
- (3) the infringer’s behavior as a party to the litigation.
- (4) defendant’s size and financial condition;
- (5) closeness of the case;
- (6) duration of defendant’s misconduct;
- (7) remedial action by the defendant;

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20. 970 F.2d 816, 23 U.S.P.Q.2d 1426 (Fed. Cir. 1992) (superseded on other grounds as recognized in Golden Blount, Inc. v. Robert H. Peterson Co., 438 F.3d 1354, 1368-69, 78 U.S.P.Q.2d 1004, 1015-16 (Fed. Cir. 2006)).

21. 807 F.2d 1567, 1 U.S.P.Q.2d 1210 (Fed. Cir. 1986).

22. 970 F.2d at 826, 23 U.S.P.Q.2d at 1435-35 (emphasis original).

(8) defendant's motivation for harm; and

(9) whether defendant attempted to conceal its misconduct.<sup>23</sup>

As to the first factor, "copying," the court dropped footnote 7 to explain that "ideas" and "design" would encompass, for example, copying the commercial embodiment, not merely the elements of a patent claim.<sup>24</sup>

Inasmuch as a finding of willful infringement does not mandate enhancement of damages, these factors taken together assist the trial court and jury in evaluating the degree of the infringer's culpability and in determining whether to award enhanced damages (the jury) and if, and by how much, the damages should be increased (the court). To enable appellate review, a trial court must explain the basis for the award, particularly where the maximum amount is imposed. For the latter, the court's assessment of the level of culpability must be high.

**B. Analysis Of Case Law Involving Allegations Of "Copying"**

**1. Numerous Cases Have Relied On "Copying" As A Basis For Finding Willful Infringement And/Or Enhanced Damages**

"Copying" allegations have often been the basis historically for a finding of willful infringement and enhanced damages. "Copying" was a key factor in the finding of willful infringement in Stryker Corp. v. Intermedics Orthopedics, Inc., where the district court based its determination in part on the fact that the accused infringer deliberately copied the ideas or design

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23. 970 F.2d at 826-27, 23 U.S.P.Q.2d at 1435-36 (emphasis added). While Seagate Technology heightens the standard for establishing willfulness, these considerations will likely still be useful in analyzing the issue of willfulness.

24. 970 F.2d at 827 n.7, 23 U.S.P.Q.2d at 1435 n.7. See Lam, Inc. v. Johns-Manville Corp., 668 F.2d 462, 475 n.6, 213 U.S.P.Q. 1061, 1071 n.7 (10th Cir. 1982) ("when a party intentionally takes the ideas of another and puts them in its own 'very similar' design with only nonmeaningful deviations, the party has 'copied' the other's design.") This footnote may have brought Read Corp. into conflict with certain of the court's earlier decisions, including, inter alia, Stratoflex, Specialty Composites, Panduit and Vandenberg, which held that whatever was "copied" had to fall literally within the claims. There can be no "copying" in the air, because the public is free to use whatever is not covered by an intellectual property right, which, in the case of a patent, is only that which the claims specify and (possibly) equivalents. See infra, discussion of "'Copy' what?"

of the patent.<sup>25</sup> Significantly, the Federal Circuit in Stryker rejected the idea that a showing of “slavish copying” is needed to support a finding of willful infringement.<sup>26</sup> Thus, evidence showing that the accused infringer exactly copied the claimed invention is not necessary to establish “copying” for the purpose of showing willfulness.

Like Stryker, “copying” was a key factor in the trial court’s finding of willful infringement in Kaufman Co. v. Lantech, Inc., the court finding that Kaufman faithfully “copied” the claimed invention.<sup>27</sup> On appeal, Kaufman argued that an award of increased damages was improper since its “copying” activities took place before the patent issued, and its infringement ceased four months after issuance. The court rejected Kaufman’s argument because the evidence demonstrated Kaufman’s intentional “copying” activities constituted willful infringement.<sup>28</sup>

Similarly, in nCube Corp. v. SeaChange Intern., Inc., “copying” was an important factor in the trial court’s decision to award enhanced damages.<sup>29</sup> In nCube, the evidence established that “SeaChange deliberately copied the invention in its products without investigating the scope of the patent” and, thus, “had not formed a good faith belief excusing its conduct.”<sup>30</sup> As a result, the court awarded enhanced damages.<sup>31</sup>

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25. 96 F.3d 1409, 1413-14, 40 U.S.P.Q.2d 1065, 1068 (Fed. Cir. 1996) (emphasis added); see also Acumed LLC v. Stryker Corp., 483 F.3d 800, 811, 82 U.S.P.Q.2d 1481, 1489 (Fed. Cir. 2007).

26. 96 F.3d at 1414; 40 U.S.P.Q.2d at 1068 (“We have found no authority in our precedent for the proposition that the fact finder must find ‘slavish copying’ in order to conclude that the infringer copied the patentee’s invention.”) (internal citations omitted; emphasis added).

27. 807 F.2d 970, 978, 1 U.S.P.Q.2d 1202, 1208 (Fed. Cir. 1986).

28. 807 F.2d at 979, 1 U.S.P.Q.2d at 1208-09 (emphasis added).

29. 436 F.3d 1317, 77 U.S.P.Q.2d 1481 (Fed. Cir. 2006).

30. 436 F.3d at 1325, 77 U.S.P.Q.2d at 1487.

31. Id.

In Pacific Furniture Manufacturing Co. v. Preview Furniture Corp., evidence of “copying” also led to an award of increased damages in a design patent infringement case.<sup>32</sup> The infringer had direct access to the patented chairs; its chairs were virtually identical to those of patentee, and it admitted “copying” the chair designs. Finding the infringer’s opinion of counsel evidence insufficient, the court held that the infringement was willful.<sup>33</sup>

In some cases, a finding of willful infringement was based, at least in part, on activity that occurred before the asserted patent issued.<sup>34</sup> For example, in Stryker Corp. v. Davol Inc., the Federal Circuit affirmed a finding of willful infringement despite the fact that the copying predated the issuance of the asserted patent.<sup>35</sup>

Similarly, in Avia Group International Inc. v. L.A. Gear California, Inc.,<sup>36</sup> LAG tried to overturn the district court’s enhanced damages award, arguing that much of its accused conduct occurred before the patents issued. The Federal Circuit rejected this argument:

LAG’s contention that infringement could not be willful because the patents issued after LAG placed its last order is unavailing. “The fact that [an infringer] may have started its infringement before the patents issued (or before [it was] aware of the patents) does not bar an award of increased damages or attorney fees.” LAG continued to sell the infringing shoes after the patent issued, well after it had notice the patent was pending for a particular design, and even after this suit for infringement was filed. By such conduct, LAG intentionally accepted the risk of infringement.<sup>37</sup>

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32. 800 F.2d 1111, 1114-15, 231 U.S.P.Q. 67, 69 (Fed. Cir. 1986) (affirming Pacific Furniture Manufacturing Co. v. Preview Furniture Corp., 626 F. Supp. 667, 228 U.S.P.Q. 235 (M.D.N.C. 1985)).

33. Id.

34. The Federal Circuit’s views on this point have varied; see infra, discussion of “‘Copy’ when?”.

35. 234 F.3d 1252, 1259, 57 U.S.P.Q.2d 1133, 1138 (Fed. Cir. 2000).

36. 853 F.2d 1557, 7 U.S.P.Q.2d 1548 (Fed. Cir. 1988).

37. 853 F.2d at 1566, 7 U.S.P.Q.2d at 1555-56 (internal citations omitted; emphasis added). See also Milgo Electronic Corp. v. United States Business Communications, Inc., 623 F.2d 645, 206 U.S.P.Q. 481 (10th Cir. 1980) (finding that “copying” activities that took place before the asserted patent issued were relevant to the issue of willful infringement).

In contrast to these authorities, the Federal Circuit in State Industries, Inc. v. A.O. Smith Corporation<sup>38</sup> focused the issue of willful infringement on activity that occurred after the asserted patent issued and found that the accused infringement had not been willful. In State Industries, the Federal Circuit found that “[t]o willfully infringe a patent, the patent must exist and one must have knowledge of it.”<sup>39</sup> The Federal Circuit concluded that because State did not have the patent-in-suit until “22 days before suit, Smith had a perfect right to make and sell its LIME TAMER, without question, because State had no ‘patent rights’ which covered it.”<sup>40</sup> The Federal Circuit distinguished Milgo (see footnote 37) because there the defendant had engaged in “a most elaborate and detailed copying (‘slavish copying’ according to the trial judge) of complex electronic circuitry in a ‘modem’ by a corps of engineers working in secrecy over a period of a couple of years to pry loose the secret of Milgo’s inventions,” in contrast to the State Industries defendant who copied a device before it had been patented.<sup>41</sup>

State Industries, then, suggests that punishable “copying” could not take place before issuance of the patent, because one willfully infringes a patent, more precisely, the issued claims of a patent, not a product or a product which later turns out to be covered by the claims of the later-issued patent. Under State Industries, issuance of the patent did not, retroactively — nunc pro tunc, as it were (or ex post facto, insofar as impact is concerned) — convert Smith into a willful infringer. The State Industries court did not view the pre-issuance “copying” as an inchoate basis for a later finding of willfulness, which might mature into a problem for the accused infringer at a later date.

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38. 751 F.2d 1226, 224 U.S.P.Q. 418 (Fed. Cir. 1985).

39. 751 F.2d at 1236-37, 224 U.S.P.Q. at 425.

40. Id.

41. 751 F.2d at 1237-38; 224 U.S.P.Q. at 425-26; see also Deere & Company v. International Harvester Co., 658 F.2d 1137, 1147, 211 U.S.P.Q. 11, 21 (7th Cir. 1981) (distinguishing Milgo Electronic on the fact that the Milgo defendant made no effort to secure an opinion of counsel).

The varying views expressed in the foregoing cases (e.g., Stryker, Avia, Milgo, and State Industries) highlight the uncertainty in the law regarding when “copying” can result in willfulness. This issue is discussed infra in the discussion of “‘Copy’ when?”

2. **Opinions Of Counsel Do Not Necessarily Insulate An Accused Infringer From A Finding Of Willful Infringement**

Even when an accused infringer has obtained opinions of counsel, evidence of “copying” can result in a finding of willful infringement and enhanced damages.<sup>42</sup> For example, evidence of “copying” was critical in the trial court’s finding of willful infringement in Liquid Dynamics Corp. v. Vaughan Co., Inc., despite the fact that the accused infringer had obtained and relied on opinions of counsel.<sup>43</sup> On appeal, Vaughan argued that there was no basis for the jury to disregard its reliance on an opinion of counsel and that there was insufficient evidence to conclude Vaughn copied the claimed invention. Relying mostly on circumstantial evidence and inferences, the court affirmed the finding that Vaughan’s “copying” activities nonetheless constituted willful infringement.<sup>44</sup> The court concluded that Vaughan’s opinions of counsel were unreliable because they were based on erroneous facts.<sup>45</sup>

A number of other cases track the analysis in Liquid Dynamics. For example, in Jurgens v. CBK, Ltd., the accused infringer presented evidence that it immediately contacted an experienced attorney and obtained an opinion that either it was not infringing or that the patent was invalid when it learned of its potential infringement.<sup>46</sup> The jury found that the accused infringer’s conduct was willful, but the trial judge declined to award enhanced damages, because

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42. Where an opinion of counsel will fit into a post-Seagate Technology analysis remains to be worked out by the Federal Circuit, but it may well have effect in regard to the second part of the new willfulness standard, if the “copying” prima facie satisfies the first part of the standard.

43. 449 F.3d 1209, 79 U.S.P.Q.2d 1094 (Fed. Cir. 2006).

44. 449 F.3d at 1225-26, 79 U.S.P.Q.2d at 1105.

45. Id.

46. 80 F.3d 1566, 1571, 38 U.S.P.Q.2d 1397, 1400 (Fed. Cir 1996)

the defendants immediately sought the advice of counsel.<sup>47</sup> The Federal Circuit affirmed the finding of willfulness, but reversed the trial judge's decision not to award enhanced damages.<sup>48</sup> The Federal Circuit also reversed the trial court's decision not to award attorney's fees.<sup>49</sup>

In a jury trial, a finding of willfulness when the accused infringer relied on opinions of counsel, might be expected to fall before a F. R. Civ. P. 50 JMOL motion. Not necessarily. In Amsted Industries, Inc. v. Buckeye Steel Castings Co.,<sup>50</sup> Buckeye moved for JMOL or a new trial on the issues of willful infringement and damages, while Amsted moved for enhanced damages and attorneys' fees. The trial court refused to set aside the jury's verdict of willful infringement and granted Amsted's motion for enhanced damages and attorneys' fees. On appeal, Buckeye argued that no reasonable jury could have found that infringement was willful. In support of this argument, Buckeye relied on written opinions and the testimony of its engineering director that the decision to copy was made only after forming a good faith belief that the patent was invalid.<sup>51</sup>

In setting the legal standard applicable to Buckeye's position, the court stated that just because "an opinion of counsel was obtained does not 'always and alone' dictate a finding that the infringement was not willful."<sup>52</sup> What matters is the nature of that opinion and what effect it

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47. 80 F.3d at 1571-72, 38 U.S.P.Q.2d at 1400-01.

48. Id. Similarly, in Stryker Corp. v. Davol Inc., the Federal Circuit affirmed the jury's verdict of willful infringement despite the accused infringer's reliance on opinions of counsel. 234 F.3d 1252, 57 U.S.P.Q.2d 1133 (Fed. Cir. 2000). The court noted that "the jury reasonably could have credited the testimony that [the accused infringer's] reliance on the opinions of counsel was not reasonable, that it did not in fact follow those opinions, and that the designs for the accused devices were finalized before obtaining an opinion of counsel." 234 F.3d at 1259, 57 U.S.P.Q.2d at 1138. See also VNUS Medical, 2007 WL 3165548, \*3-4 (denying motion for summary judgment of no willful infringement even though the accused infringer was relying on opinions of counsel; alleged "copying" was the basis for asserting willfulness).

49. Jurgens, 80 F.3d at 1572, 38 U.S.P.Q.2d at 1401.

50. 24 F.3d 178, 30 U.S.P.Q.2d 1462 (Fed. Cir. 1994).

51. Id.

52. 24 F.3d at 181-82, 30 U.S.P.Q.2d at 1464-65.

had on an infringer's actions."<sup>53</sup> Close scrutiny of both the outside counsel opinions and the engineering director's "good faith belief" showed that the validity opinions relied upon were not final, requests for review and further information to opining counsel had not been answered, and, in fact, the opinions may have been provided, even in preliminary form, on the basis of less than all existing information supportive of the patent's validity.<sup>54</sup> Enhancement of damages, therefore, was affirmed, inter alia, on the basis of Buckeye's deliberate "copying," in view of Read Corp. v. Portec.<sup>55</sup>

Transmatic, Inc. v. Gulton Industries, Inc.,<sup>56</sup> however, had a different outcome, despite Gulton's alleged effort to make a "clone" of the patented invention.<sup>57</sup> At least six opinions had been received from Gulton's patent counsel on whether or not its efforts to develop a device to compete with Transmatic would infringe the patent. In reviewing the Bott v. Four Star factors as to increased damages, the court disarmed the "hot-button" term, "clone," quite adroitly, stating that "the Defendant experimented with a number of possibilities in an effort to design around the patent," and that "the product Gulton ultimately went to market with as not an exact clone of the Domas patent."<sup>58</sup> Moreover, the court noted in a footnote that even if the accused device were a direct copy, that fact would not be dispositive proof of willfulness if the defendant had a good faith, well-informed belief that the patent was invalid.<sup>59</sup>

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53. Id.

54. 24 F.3d at 182, 30 U.S.P.Q.2d at 1465.

55. 24 F.2d at 183, 30 U.S.P.Q.2d at 1466.

56. 849 F. Supp. 526, 31 U.S.P.Q.2d 1225 (E.D. Mich. 1994), aff'd in part, rev'd in part, 53 F.3d 1270 (Fed. Cir. 1995).

57. 849 F. Supp. at 532, 31 U.S.P.Q.2d at 1229. The term "clone" appeared in an internal Gulton memorandum authored by its president, David Turney.

58. 849 F. Supp. at 536, 31 U.S.P.Q.2d at 1232 (emphasis added).

59. 849 F. Supp. at 536, n.12, 31 U.S.P.Q.2d at 1232, n.12 ("It is simply not a willful infringement if there is a good faith, well-informed belief that the patent itself is invalid. Copying may be probative of a willful infringement, but it is not dispositive.").

Thus, an opinion and a good faith belief of invalidity may fend off a “copying”-based willfulness charge where the “copying” is contended to prima facie satisfy the first part of the Seagate Technology willfulness standard, and a perceptive court, on post-trial, Fed. R. Civ. P. 50 motion and enhancement motion practice,<sup>60</sup> may itself prevent any untoward or undeserved damage done by use of a prejudicial term such as “clone” before a jury.

When “copying” is present, these cases demonstrate the potential, continued importance of competent advice of counsel and good faith reliance thereon, and/or other evidence of good faith in proceeding after the accused infringer had knowledge of the patent being infringed, to dissipate any prima facie willfulness effects “copying” may cause under Seagate Technology’s willfulness standard.

### **3. The Importance Of Designing Around**

The Federal Circuit has noted in a number of rulings that any “copying” that results from an unsuccessful effort to “design around” the claimed invention will most likely not result in an inference or finding of willfulness, and hence exposure to multiple damages and attorneys fees on that basis. There should be no different result under Seagate Technology.

The importance of “designing around” towards ameliorating the effects of a charge of “copying” was pointed out by Judge Rich in State Industries.<sup>61</sup> In that case, the court reversed the trial court’s holding of willfulness, finding State’s case “to be fatally flawed as based on a

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60. In Transmatic, the court had earlier ruled that infringement under the doctrine of equivalents and willful equivalent infringement were matters for the court, not the jury. 849 F. Supp. at 529, n.4, 31 U.S.P.Q.2d at 1227, n.4. The jury rendered an advisory verdict on equivalents infringement, but not on willfulness. 849 F. Supp. at 529, 31 U.S.P.Q.2d at 1227. That ruling explains the procedural status of the willfulness/enhancement issues in Transmatic, as to how willfulness was an issue for the court and not the jury. It also may indicate lack of the usual, expected impact of a term such as “copy” or “clone” upon a jury, because willfulness was not decided by them

61. 751 F.2d 1226, 224 U.S.P.Q. 418 (Fed. Cir. 1985).

mixture of fact with non-fact and erroneous legal presumptions.”<sup>62</sup> The court discussed at length the evidence supporting the defendant’s efforts to design around:

Conduct such as Smith’s, involving keeping track of a competitor’s products and designing new and possibly better or cheaper functional equivalents is the stuff of which competition is made and is supposed to benefit the consumer. One of the benefits of a patent system is its so-called “negative incentive” to “design around” a competitor’s products, even when they are patented, thus bringing a steady flow of innovations to the marketplace. It should not be discouraged by punitive damage awards except in cases where conduct is so obnoxious as clearly to call for them. The world of competition is full of “fair fights,” of which this suit seems to be one.<sup>63</sup>

Applying the same analysis as it did in State Industries, the Federal Circuit in Amstar Corp. v. Envirotech Corp.,<sup>64</sup> found there was no error in refusing to find willfulness. There, the accused infringer tried to work its way clear of the patent-in-suit. After being advised of Amstar’s claim of infringement, Envirotech engaged in a good faith colloquy with Amstar and modified its design in an attempt, albeit unsuccessful, to avoid infringement. While the evidence was susceptible to multiple interpretations, the Federal Circuit deferred to the jury’s determination that Envirotech attempted to design around the patent, and its infringement was not willful.<sup>65</sup>

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62. 751 F.2d at 1234, 224 U.S.P.Q. at 423.

63. 751 F.2d at 1235-36, 224 U.S.P.Q. at 424 (emphasis original and added). See also Rolls-Royce Limited v. GTE Valeron Corp., 800 F.2d 1101, 1109, 231 U.S.P.Q. 185, 191 (Fed. Cir. 1986) (affirming the trial court’s holding that the infringer did not willfully infringe the patent in suit because it designed around the patent claims instead of intentionally copying them); Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 227 U.S.P.Q. 352 (Fed. Cir. 1985) (court held licensor-infringer’s attempt to “design around” licensed patent, which attempted to avoid exclusive license granted to plaintiff, coupled with a non-frivolous attempt to avoid infringement by changed design, was not sufficiently obnoxious to premise the enhancement of damages, because it advanced one of the purposes of the patent law, to encourage “design around” activities)..

64. 823 F.2d 1538, 3 U.S.P.Q.2d 1412 (Fed. Cir. 1987).

65. 823 F.2d at 1546-1547, 3 U.S.P.Q.2d at 1418.

The benefits of “designing around” are also evident from the Federal Circuit’s decision in Read Corp. v. Portec, Inc.<sup>66</sup> In that case, Read had pressed Portec’s “copying” as the key to its enhancement case. The Federal Circuit considered those allegations. It recognized that determining when a patented device has been “designed around” enough to avoid infringement is a difficult determination to make, and that Portec was properly found liable for damages caused by its miscalculation respecting infringement of the patent.<sup>67</sup> However, the court concluded that Portec’s conduct was not sufficiently egregious to justify finding it had willfully infringed, because there was no evidence contradicting Portec’s claim that it had tried to design around the ‘194 patent.<sup>68</sup>

Westvaco Corp. v. International Paper Co.<sup>69</sup> exemplifies just how important evidence of designing around can be, even when minimal. At the trial court level, the court found that Westvaco’s infringement was willful, based upon its conclusion that Westvaco had copied IPC’s product, a carton for holding orange juice. The Westvaco employee that had developed the accused product, Dr. Debora Massouda, kept a lab notebook that included the notation “trying to duplicate IP[C] structure.”<sup>70</sup> Westvaco obtained an opinion of counsel that concluded that the accused product did not infringe any valid claims of the patent-at-issue.<sup>71</sup>

In finding the infringement to be willful, the trial court cited its findings regarding the references to IPC’s product in Dr. Massouda’s notebook and outline:

A finding of willfulness is not precluded by the fact that Westvaco sought validity and infringement opinions from competent outside

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66. 970 F.2d 816, 23 U.S.P.Q.2d 1426 (Fed. Cir. 1992).

67. 970 F.2d at 828, 23 U.S.P.Q.2d at 1436.

68. 970 F.2d at 830, 23 U.S.P.Q.2d at 1438.

69. 991 F.2d 735, 26 U.S.P.Q.2d 1353 (Fed. Cir. 1993).

70. 991 F.2d at 738, 26 U.S.P.Q.2d at 1356.

71. Id.

counsel. . . . Here, Westvaco engaged in deliberate and obvious attempts to copy successful IPC products after IPC patented the structures embodied by the products. Westvaco should not be insulated from increased damages and an attorney's fee award by its after-the-fact efforts to justify these actions by encouraging positive opinions from an initially uncertain outside counsel.<sup>72</sup>

Despite a starting point that certainly had all of the trappings of improper "copying", the Federal Circuit reversed the lower court, recharacterizing Westvaco's conduct as appropriate attempts to "design around" as opposed to wrongful "copying."<sup>73</sup> Even though Dr. Massouda stated that Westvaco was trying to "duplicate" the structure of IPC's product, the Federal Circuit determined that "Westvaco made specific structural changes to its product so that its product was not a copy of IPC's product" and evidenced an attempt to design around IPC's product.<sup>74</sup>

Based on the foregoing, evidence of designing around the asserted patent can weigh heavily against a finding of willful infringement.<sup>75</sup> However, care must be given not to abandon one's own independent design efforts and "copy" a patented invention, because a willfulness finding may result.<sup>76</sup>

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72. 991 F.2d at 740, 26 U.S.P.Q.2d at 1357.

73. 991 F.2d at 745, 26 U.S.P.Q.2d at 1361.

74. *Id.*

<sup>75</sup> See 5 Chisum, *Patents*, 20.03[4][G]; *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, 924 F. Supp. 994, 1020 (C.D. Cal. 1996) (noting that attempts to design around the patent may also negate a finding of willfulness); *Mobil Oil Corp. v. Amoco Chemicals Corp.*, 779 F. Supp. 1429, 1484-85 (D. Del. 1991), *aff'd*, 980 F.2d 742 (Fed. Cir. 1992) (Amoco scientists used Mobil patents to develop infringing catalyst, but activity did not amount to copying, because Amoco legitimately attempted to "design around" the Mobil patents); *Schering Corp. v. Precision-Cosmet Co.*, 614 F. Supp. 1368, 1383, 227 U.S.P.Q. 278, 284 (D. Del. 1985) (doubled damages rather than tripled, where defendant did not simply copy patent owner's product, but had been independently developing own product); *Atlas Powder Co. v. E.I. duPont de Nemours & Co.*, 588 F. Supp. 1455, 1472, 221 U.S.P.Q. 426, 440 (N.D. Tex. 1983), *aff'd*, 750 F.2d 1569, 224 U.S.P.Q. 409 (Fed. Cir. 1984) (infringer did not simply copy patent owner's product but rather in good faith did basic research to develop an improved product); cf. *Chaparral Industries Inc. v. Boman Industries*, 697 F. Supp. 1113, 7 U.S.P.Q.2d 1784 (C.D. Cal. 1988) (copying of patented invention in "design around" attempt, willfulness found).

76. *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1260, 43 U.S.P.Q.2d 1666, 1671 (Fed. Cir. 1997) (finding that the district clearly erred in finding no willful infringement because it "overlooked overwhelming evidence in the record that Becton Dickinson's efforts to develop a safety catheter were a failure. . . . [and that i]t must be more than coincidence that Becton Dickinson managed to commercialize its design by adopting features disclosed in the [asserted patents] soon after it became aware of their existence"); *W.R.*

C. **IMPORTANT CONSIDERATIONS CONCERNING WILLFUL INFRINGEMENT: “COPY” WHEN? AND “COPY” WHAT?**

Two key concepts have been alluded to and/or addressed in passing to this point in connection with the issue of willful infringement: “‘Copy’ when?” and “‘Copy’ what?”. In truth, these are the linchpins by which the theory of “copying” is held together. Because it is here that the precedent sometimes staggers or falls down, these issues require careful thought and analysis.

1. **“Copy” When?**

That an accused infringer begins conduct later challenged as infringement before a United States patent has issued, or before he or she became aware of an issued United States patent, apparently does not per se bar a finding of willfulness on that basis, according to the Federal Circuit’s current view. Infringement and any basis for increasing thereafter-incurred damages, however, cannot begin until the issuance of a U.S. patent and notice of the existence of the U.S. patent.<sup>77</sup> Whether willfulness thereafter exists in that infringement should be judged by the “totality of the circumstances,” including the presence of opinions of counsel and other evidence of good faith conduct.<sup>78</sup>

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(continued...)

Grace & Co.-Conn. v. Intercat, Inc., 7 F. Supp. 2d 425, 475 (D. Del. 1997), aff’d, 155 F.3d 572 (Fed. Cir. 1998) (finding willful infringement because although there was evidence that the defendant attempted to design around, the plain fact was that the new product was practically identical to the patented product); Padco, Inc. v. Newell Companies, Inc., 13 U.S.P.Q.2d 1607, 1611-1612 (E.D. Wis. 1988), aff’d, 878 F.2d 1445 (Fed. Cir. 1989) (Newell abandoned independent design efforts, intentionally copied Padco’s patented paint roller, to prevent loss of sales of other products; willful infringement found).

77. State Industries, 751 F.2d at 1236, 224 U.S.P.Q. at 425.

78. Graco, Inc. v. Binks Mfg. Co., 60 F.3d 785, 792, 35 U.S.P.Q.2d 1255, 1260 (Fed. Cir. 1995) (holding that “[t]here are no hard and fast rules regarding a finding of willfulness . . . . [A] number of factors enter into a willfulness determination and, as such, the issue is properly resolve by evaluating the totality of the surrounding circumstances.”) While the standard for establishing willfulness may have changed under Seagate Technology, there is no reason to believe that the proper analysis for determining whether that standard has been met is anything other than an analysis of the totality of the circumstances.

The Federal Circuit's governing precedent in these "jump the gun" infringement situations is represented by Gustafson, Inc. v. Intersystems Indus. Prods. Inc.<sup>79</sup> Prior to Gustafson, Chisum notes that "Federal Circuit decisions have oscillated on the question of willfulness when the infringer allegedly copied the patentee's technology before the patent issued."<sup>80</sup> One line of authority provided that pre-issuance "copying" could not evidence willfulness,<sup>81</sup> while another line of authority found to the contrary.<sup>82</sup>

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79. 897 F.2d 508, 13 U.S.P.Q.2d 1972 (Fed. Cir. 1990).

80. See 7 Chisum, Patents, 20.03[4][b][v][H].

81. State Industries Inc. v. Mor-Flo Industries Inc., 17 U.S.P.Q.2d 1706, 1709 (E.D. Tenn. 1990), aff'd, 948 F.2d 1573, 20 U.S.P.Q.2d 1738 (Fed. Cir. 1991) ("copying . . . [does not constitute] evidence of willful infringement . . . inasmuch, as there was no patent at that time, and no indication that there was even a patent pending."); State Industries, 751 F.2d at 1235, 224 U.S.P.Q. at 425 (Fed. Cir. 1985) (discussed supra); American Original Corp. v. Jenkins Food Corp., 774 F.2d 459, 227 U.S.P.Q. 299 (Fed. Cir. 1985) (trial court did not err in declining to increase damages when defendant began developing its process before issuance of the patent; the infringer did not obtain an opinion letter of counsel after issuance of the patent; accused infringer did alter its system in the hope of avoiding infringement; and the patent owner never notified the infringer of the charge of infringement until filing suit.); John O. Butler Co. v. Block Drug Co., Inc., 620 F. Supp. 771, 226 U.S.P.Q. 855 (N.D. Ill. 1985) (no willful infringement when the defendant did not know of the plaintiff's design patents when it began production and learned of those patents only after suit was filed against it).

82. See Stryker Corp., 234 F.3d at 1259, 57 U.S.P.Q.2d at 1138; Shiley, Inc. v. Bentley Labs, Inc., 794 F.2d 1561, 1568, 230 U.S.P.Q. 112, 115 (Fed. Cir. 1986); see also, supra, discussion of Avia Group International, 853 F.2d 1557, 7 U.S.P.Q.2d 1548; Milgro Elec. Corp. v. United Business Communications, Inc., 623 F.2d 645, 665-66, 206 U.S.P.Q. 481, 497 (10th Cir. 1980) (copying prior to issuance of patent: "there can be no liability for infringement before a patent issues . . . [but] the issue here is not infringement, but rather willfulness, that is UBC's state of mind . . ."); GTE Products Corp. v. Kennametal Inc., 772 F. Supp. 907, 918 (W.D. Va. 1991) (accused infringer copied product of patent applicant before the patent issued; after issuance, re-designed away from patent; willful infringement for period before re-design); Joy Mfg. Co. v. CGM Valve & Gauge Co. Inc., 730 F. Supp. 1387, 1393, 1398 (S.D. Tex. 1989) (willfulness found when accused valves were designed based on patentee's product, were substantially identical, and defendant did not get a written opinion of counsel nor did it modified the design of the accused valves); Afros S.p.A. v. Krauss-Maffei Corp., 671 F. Supp. 1402, 1438-39, 5 U.S.P.Q.2d 1145, 1174-75 (D. Del. 1987), aff'd mem., 848 F.2d 1244 (Fed. Cir. 1988) ("The issue of willfulness does not rest solely on the timing or knowledge of the patent, but on the totality of the circumstances."); Indecor Inc. v. Fox-Wells & Co., Inc., 642 F. Supp. 1473, 1491-92, 1 U.S.P.Q.2d 1847, 1861 (S.D.N.Y. 1986) ("An infringer's decision to continue production after notice of a patent is evidence of willfulness. . . . Fox-Well's failure to conduct a patent search or to receive an opinion of counsel as to the validity of the '195 Patent serves to aggravate the circumstances. . . . [While Fox-Well's copying of the Indecor fabric before the patent was issued does not constitute infringement, such copying activities] provide evidence that its conduct in manufacturing and selling [the infringing product after issuance of the patent] was intentional and deliberate in willful disregard of [Indecor's] rights, rather than merely accidental or negligent. . . .").

According to Chisum, Gustafson effectively reconciled the two lines of cases.<sup>83</sup> In that decision, the court notes that, in a sequence of cases involving claims of willful infringement, the Federal Circuit “has evolved a jurisprudence applicable to situations in which a product found to infringe had first been manufactured before the patent issued.”<sup>84</sup> When one learns of the U.S. patent coincident with filing of suit, such as being sued on the day the patent issues, Gustafson says, as Chisum reads it, no pre-issuance “copying” may be used as evidence of willfulness if one continues the pre-suit challenged course of conduct; the accused infringer is relieved of the inchoate risk. However, when one has knowledge of the U.S. patent before suit is filed, even if the delay between knowledge and suit is a matter of days, the inchoate risk may vest and then must be dealt with. A showing of the propriety of continuing the pre-issuance conduct may need to be made, and/or the alleged “copying” disproved, to avoid “copying” acting as proof of satisfaction of the Seagate Technology willfulness standard.

Under Gustafson, then, the true nature of the curse of “copying” shows through: pre-issuance “copying,” which is entirely legal and proper, and in fact favored by theory and Constitutional rights and benefits, presents an inchoate risk of a finding of willfulness and all of the horrors that that may bring. This inchoate risk may vest, as it were, if what was “copied” later turns out to fall literally within the claims of a subsequently issued United States patent, as properly construed under the Federal Circuit’s well-defined rules of claim construction. And if Read Corp.’s footnote 7 is broadly read, that risk may arise from “copying” the patentee’s

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83. 5 Chisum, Patents, 20.03[4][H] at 20-361 to -362.

84 897 F.2d at 510, 13 U.S.P.Q.2d at 1974.

product or portions of disclosure, even if that product or that disclosure does not literally encroach upon the claims that later issue.<sup>85</sup>

In one post-Gustafson decision, Conopco, Inc. v. May Dept. Stores Co.,<sup>86</sup> the Federal Circuit vacated and remanded the trial court's findings as to willfulness, but affirmed the findings of infringement as to two of the defendant's products. On remand, the trial court was cautioned to avoid finding willfulness based upon the defendant's conduct before the patent issued:

In resolving the willfulness, enhanced damages, exceptional case, and attorney fees issues, the court is cautioned not to place undue reliance on defendants' activities prior to the issuance of the patent. Although these activities may have been undertaken with knowledge that a patent application covering the relaunch lotion formulation was pending (in view of the "patent pending" notice affixed to the relaunch product), that is insufficient to support a finding of willfulness.<sup>87</sup>

The patent-in-suit in Conopco issued, and the suit was filed one month later. The defendants did not have actual knowledge of the patent until the lawsuit was filed.<sup>88</sup> The court's cautionary instruction on remand is consistent with Gustafson, as interpreted by Chisum.

## 2. "Copy" What?

The courts have also been uncertain regarding what it is that one must "copy" to engage in prohibited conduct, as cases noted supra have demonstrated. Even the Federal Circuit has and is seemingly suffering from a diffusion of views on this critical issue.

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85. Note that in Read Corp., the copied commercial device did literally fall within claims of the '194 patent found to be infringed.

86. 46 F.3d 1556, 32 U.S.Q.P.2d 1225 (Fed. Cir. 1994)

87. 46 F.3d at 1562, 32 U.S.Q.P.2d at 1229 (emphasis added).

88. Conopco, Inc. v. May Dept. Stores Co., 784 F. Supp. 648, 662, 24 U.S.P.Q.2d 1721, 1729 (E.D. Mo. 1992).

The Seventh Circuit had earlier wrestled with the “‘copy’ what?” issue in Union Carbide Corp. v. Graver Tank & Mfg. Co.,<sup>89</sup> where the Master’s report on damages was before the court. The Master had found that Lincoln’s 660 flux, which was found to infringe only under the doctrine of equivalents, “was copied from the teachings of the patent.” Based upon that finding, the trial court characterized Lincoln as a conscious and willful infringer, notwithstanding the fact that the Master had refused to do so. The Seventh Circuit reversed that finding, both as a matter of fact and law.<sup>90</sup>

In coming to this conclusion, the court considered the issue of exactly what Lincoln had copied. It did not appear that the product claimed by the patent had been copied, but rather it appeared that what was disclosed by the specification, rather than that specified in the claims, had been copied.<sup>91</sup> More to the point, the court stated that “[i]t strikes us as an anomaly to find that Lincoln copied from the patent but that infringement was found only by application of the doctrine of equivalents.”<sup>92</sup> Hence, “[i]n our view, the word ‘copied’ as used to describe Lincoln’s conduct is a misnomer. It is a conclusion arrived at by process of reasoning with which we do not agree.”<sup>93</sup> For this reason, and because Lincoln had obtained an opinion of invalidity or non-infringement, the court concluded the infringement was not willful.<sup>94</sup> As Union Carbide plainly points to the issued claims of the patent as what “copying” must be judged

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89. 282 F.2d 653, 127 U.S.P.Q. 3 (7th Cir. 1960).

90. 282 F.2d at 663, 678, 127 U.S.P.Q. at 11, 22.

91. 282 F.2d at 657-58, 127 U.S.P.Q. at 6.

92. 282 F.2d at 658-59, 127 U.S.P.Q. at 7.

93. Id.

94. Id. Significantly, Union Carbide argued that Lincoln had failed to inform its counsel that its flux was “copied” from the teachings of the patent. The trial court seemed to embrace that theory, going so far as to state that Lincoln’s failure to advise counsel that it had “copied” showed that it was aware of possible infringement, because otherwise it would not have sought patent counsel’s advice. The Seventh Circuit disagreed. 282 F.2d at 660, 127 U.S.P.Q. at 8 (finding good faith reliance on opinion of counsel and noting that obtaining a competitor’s product for analysis could have been done for the purpose of copying as much as for the purpose of designing a product around the scope of the patent’s claims).

against, if the doctrine of equivalents is the only grounds for infringement liability, “copying” is apparently not put in play as a basis for finding willfulness.

As noted, some courts clearly have focused on whether the claimed invention is what has been “copied.” In VNUS Medical, the three defendants jointly moved for summary judgment of no willful infringement.<sup>95</sup> VNUS opposed the motion, arguing that there was evidence in the form of deposition testimony and statements made in 501(k) statements that supported a finding of willful infringement under the standard set forth in Seagate Technology.<sup>96</sup> The court granted the motion with respect to two of the defendants because the evidence pertaining to those two defendants, even if true, did not establish “copying” of the claims of the asserted patent. For example, with regard to the evidence against one of the defendants, the court stated:

The above-referenced statements on which VNUS relies cannot be reasonably interpreted by a trier of fact as an admission that AngioDynamics “copied” the patented claims. . . The statement by biolitec in its Form 501(k) cannot be understood as a representation pertaining to the patented claims. Additionally, the above-referenced testimony by AngioDynamic's expert does not make reference to AngioDynamics, let alone suggest AngioDynamics copied the claimed methods. . .<sup>97</sup>

The court denied the motion with respect to one of the three defendants because the proffered evidence did relate to “copying” of the claims.<sup>98</sup> Hence, the court was clearly focused on whether the claims were copied, not the plaintiff’s products or the specification of the asserted patent.

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95. 2007 WL 3165548, \*1.

96. Id.

97. Id. (Emphasis added).

98. Id. (“a trier of fact could reasonably find that [the defendant] had obtained actual knowledge [of] VNUS’s patented methods.” (Emphasis added)).

A similar analysis was performed in Amsted Industries, Inc. v. Buckeye Steel Castings Company.<sup>99</sup> There, the trial court, in deciding whether to award enhanced damages through application of the Read Corp. factors (it did), discussed Buckeye's admitted "copying" of Amsted's patent.<sup>100</sup> The court noted that Buckeye's deviations from the invention did not avoid the fact that it deliberately copied the patented invention. This, coupled with the fact that Buckeye did not have a good faith belief that the patent was invalid, supported the finding that Buckeye's infringement was willful.<sup>101</sup>

Based on these cases, it would seem that mere "copying" a competitive product cannot per se lead to enhanced liability and the other punishments of willful infringement. Or can it, under Read Corp.'s footnote 7, if broadly read? Such a broad reading of Read Corp.'s footnote 7 seems inconsistent with other Federal Circuit precedent finding that the deciding factor is where the "copy" falls with respect to the claims of the patent in issue. Consider Rawlplug Co., Inc. v. Illinois Tool Works, Inc.<sup>102</sup> There, an ITW employee obtained a copy of the Rawl Spike, Rawlplug's commercial product made under exclusive license to the '445 patent in suit, and a copy of the '445 patent, "with the intent of developing a competing product that would not infringe on Rawlplug's pending patents."<sup>103</sup> The court found nothing improper about such activities:

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99. 28 U.S.P.Q.2d 1352 (N.D. Ill. 1993)

100. Id. The '269 patent related to the under-frame of a railway car, and had five elements. Buckeye sold only one of those elements--the center plate--to customers who assembled that element, along with the remaining elements, into a combination that infringed the patent.

101. Id. at 1355 (emphasis added). Cf. Vandenberg v. Dairy Equipment Co., where the record established that DEC had used the exact dimensions from the patent in designing the infringing system. Because the dimensions were not claimed, the court found that the "copying" of the patent was not strong evidence of nonobviousness. 740 F.2d at 1567, 224 U.S.P.Q. at 199.

102. 23 U.S.P.Q.2d 1054 (S.D.N.Y. 1992), reversed on other grounds, 11 F.3d 1036, 28 U.S.P.Q.2d 1908 (Fed. Cir. 1993).

103. 23 U.S.P.Q.2d at 1056.

As pointed out above, ITW knew all about the Rowl Spike and intended to copy it without infringement of the patent. However “keeping track of a competitor’s products and designing new and possibly better or cheaper functional equivalents is the stuff of which competition is made and is supposed to benefit the consumer.” . . . Such conduct, in and of itself, is not sanctionable, because “[o]ne of the benefits of a patent system is its so-called ‘negative incentive’ to ‘design around’ a competitor’s products, even when they are patented, thus bringing a steady flow of innovations to the marketplace.”

The essential question before the court, then, is did ITW successfully “design around” and avoid the claims of the Rowlplug patents?<sup>104</sup>

In State Industries, Inc. v. A.O. Smith Corp.,<sup>105</sup> the accused infringer designed its “copied” product in response to the introduction of the patentee’s product onto the market. The infringer introduced its product before issuance of the patent, and in fact the patentee added claims in a continuation-in-part application for the specific purpose of covering the accused infringer’s product. After issuance of the patent, the patentee almost immediately filed suit, which was the accused infringer’s first notice of the patent. The Federal Circuit reasoned that the “patent pending” notice on the initial product gave no notice of what the patentee might claim in its patent.<sup>106</sup> Also, while the accused infringer knew of a prior patent that had issued on a parent application to that of the patent-in-suit, the latter did not have claims covering the infringer’s product.<sup>107</sup> Willfulness was not found, because the patent contained claims which the “copy” infringed had not been known to the accused infringer until suit was filed.<sup>108</sup>

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104. 23 U.S.P.Q.2d at 1057 (internal citation omitted; emphasis added).

105. 751 F.2d 1226, 1235, 224 U.S.P.Q. 418, 425 (Fed. Cir. 1985).

106. Id.

107. Id.

108. 751 F.2d at 1235, 224 U.S.P.Q. at 425.

Similarly, in American Original Corp. v. Jenkins Food Corp.,<sup>109</sup> the court affirmed the trial court's refusal to find willfulness because the facts established that Jenkins could not have "copied" the Marvin patent because the patent had not yet issued when Jenkins installed its original eviscerator.<sup>110</sup> Lack of willfulness was also supported by evidence that once the Marvin patent was brought to Jenkins' attention, it responded by altering its system in the hope of avoiding infringement.<sup>111</sup>

That the claimed invention is what must be copied is supported by the Federal Circuit's decision in Hilton-Davis,<sup>112</sup> as well as the Supreme Court's review of that decision.<sup>113</sup> These cases are consistent in that the focus of what is being "copied" is the claimed invention, although there are a few loose references to the terms "product" and "someone else's invention." While the decisions in Hilton Davis dealt with "copying" as it relates to the doctrine of equivalents, it would seem unlikely that the requirements for what is being "copied" would be different for considerations of willfulness. Without making it the focus of the opinion, then, the Court helped resolve the uncertainty about what must be "copied" to be relevant.

Thus, with the exception of the Read Corp. footnote 7 comment that prohibited "copying" that extends to the ideas or design of another outside the elements of a patent claim, such as the "copying" of the patentee's commercial embodiment, the Federal Circuit precedent appears to establish that prohibited "copying" must be of the literally claimed invention for it to

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109. 774 F.2d 459, 227 U.S.P.Q. 299 (Fed. Cir. 1985). See also Stratoflex, Specialty Composites and Panduit, discussed supra.

110. 774 F.2d at 465, 227 U.S.P.Q. at 302-03 (emphasis added).

111. 774 F.2d at 465, 227 U.S.P.Q. at 303. Cf. Power Lift, Inc. v. Lang Tools, Inc., 774 F.2d 478, 481, 227 U.S.P.Q. 435, 438 (Fed. Cir. 1985) (describes Lang's lift system being based upon Power Lift's blow out preventer of system already in use; Lang's son made measurements of Power Lift winches and drums, designed system without knowledge of Power Lift patent application; claim 15 of issued patent covers Lang Tool's lift system; implicitly, claims also covered Power Lift System).

112. 62 F.3d 1512, 35 U.S.P.Q.2d 1641 (Fed. Cir. 1995), rev'd 520 U.S. 17, 117 S.Ct. 1040 (1997).

113. 520 U.S. 17, 117 S.Ct. 1040 (1997).

serve as a precursor to or elements of willfulness. When the “copying” is of a product that is covered by the claims only under the doctrine of equivalents, the situation is unclear, but Union Carbide, if adopted or followed by the Federal Circuit on this point, holds such “copying” not to be a willfulness precursor. Such a view also conforms to McCarthy’s discussion of “copying” theory and the interface between intellectual property rights and the public domain.

Taken on its face, Read Corp. disturbs this seeming symmetry of result, because the ideas or design of another cannot be protected by the right to exclude afforded by the patent law if they are not embraced by at least one issued claim. The weight to be given footnote 7 is confused, too, because what was “copied” in Read Corp., Read’s commercial device, was found to be covered, it appears literally, by the patent’s claims. With Read Corp. extant, however, in the as-yet unsettled Seagate Technology world, a cautious accused infringer must look to his bona fides of conduct under the “totality of circumstances” test, as to the second part of the willfulness standard, if he jumps-off from what then or later turns out to be a product related to an issued U.S. patent. This plainly causes great uncertainty with great risk, and potentially little fault to vest the risk--another manifestation of the curse of “copying.”

#### **IV. “COPYING” AND OBVIOUSNESS**

A second area of law that has been significantly affected by the issue of “copying” is obviousness. Cases seemingly without number identify “copying” as a secondary consideration

tending to establish nonobviousness.<sup>114</sup> Indeed, evidence of “copying” is often considered “the most probative and cogent evidence of nonobviousness.”<sup>115</sup>

The U.S. Supreme Court’s decision in Diamond Rubber Co. v. Consolidated Rubber Tire Co.<sup>116</sup> is the progenitor of this line of authority. There, Consolidated Rubber Tire Co. “copied” the Grant tire, with what must have been the unintended result of affording Mr. Justice McKenna the opportunity to put an eloquently-turned sentence into the patent precedent:

The prior art was open to the rubber company. That “art was crowded,” it says, “with numerous prototypes and predecessors” of the Grant tire, and it if [sic] insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation as others have done.<sup>117</sup>

The Court continued its focus on “copying” in Graham v. John Deere Co. where the “secondary considerations” included objective evidence of nonobviousness of the claimed invention, such as commercial success, long felt but unsolved need, failure of others, unexpected results — and “copying.”<sup>118</sup>

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114. See, e.g., Iron Grip Barbell Company v. USA Sports, Inc., 392 F.3d 1317, 1325, 73 U.S.P.Q.2d 1225, 1230 (Fed. Cir. 2005); Akamai Technologies, Inc. v. Cable & Wireless Internet Services, Inc., 344 F.3d 1186, 1196, 68 U.S.P.Q.2d 1186, 1193 (Fed. Cir. 2003); Advanced Display Systems, Inc. v. Kent State University, 212 F.3d 1272, 1285, 54 U.S.P.Q.2d 1673, 1681 (Fed. Cir. 2000).

115. See, e.g., Advanced Display, 212 F.3d at 1285, 54 U.S.P.Q.2d at 1681 (“Objective considerations such as failure by others to solve the problem and copying, see Graham, 383 U.S. at 17-18, 86 S.Ct. 684, ‘may often be the most probative and cogent evidence of nonobviousness.’”).

116. 220 U.S. 428 (1911). See, generally 2 Chisum, Patents, 5.05[5].

117. 220 U.S. at 441 (emphasis added). The Fifth Circuit embellished on the phrase in Ingersoll-Rand Co. v. Brunner & Lay, Inc., 474 F.2d 491, 497, 177 U.S.P.Q. 112, 115-116 (5th Cir. 1973) (“imitation is the sincerest form of flattery”). See also Copease Manufacturing Co., Inc. v. American Photocopy Equipment Co., 298 F.2d 772, 781, 132 U.S.P.Q. 87, 95 (7th Cir. 1961) (“The prior art upon which defendant now lavishes its praise was apparently permitted to lie dormant until the exigency, created by a suit for infringement, required its resurrection. Defendant’s imitation of the patent structure is another indication of invention”); Kurtz v. Belle Hat Lining Co., Inc., 280 F. 277, 280, (2d Cir. 1922) (“the imitation of a thing patented by a defendant, who denies invention, has often been regarded . . . as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think.”)

118. 383 U.S. 1, 17, 148 U.S.P.Q. 459, 467 (1966).

The effect of “copying” on an accused infringer’s allegations of invalidity were aptly summarized by Chief Judge Markey in an early Federal Circuit decision, Stratoflex, Inc. v.

Aeroquip Corporation:

[A] finding that a claimed invention has or has not been appropriated by the alleged infringer may carry substantial weight in a court’s analysis of all the evidence bearing on the obvious-nonobvious issue. An alleged infringer’s lauding of all the available prior art may, for example, in some cases have a hollow ring when played against its disregard of that art and its copying of the invention.<sup>119</sup>

The Federal Circuit has carried this concept through in a number of its decisions.<sup>120</sup>

Advanced Display shows just how powerful evidence of “copying” can be.<sup>121</sup> In that case, the defendant requested a new trial based on newly-discovered evidence of “copying” and failure of

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119. 713 F.2d 1530, 1541, 218 U.S.P.Q. 871, 880 (Fed. Cir. 1983).

120. See, e.g., Iron Grip, 392 F.3d at 1325, 73 U.S.P.Q.2d at 1230 (“Our cases ... establish that copying by a competitor may be a relevant consideration in the secondary factor analysis” of nonobviousness); Akamai, 344 F.3d at 1196, 68 U.S.P.Q.2d at 1193 (“[T]he record contains substantial evidence relating to secondary considerations supporting the jury’s verdict. In particular, the record shows that C&W expended significant effort to determine how Akamai’s products worked. . . . The[ir] new Footprint 2.0 design incorporated Akamai’s placement of the load balancing mechanism at the DNS server. This evidence of copying is relevant to an obviousness determination”); Advanced Display, 212 F.3d at 1285, 54 U.S.P.Q.2d at 1681 (finding that “copying of the claimed invention” provided “compelling evidence of nonobviousness.”); Diversitech Corp. v. Century Steps, Inc., 850 F.2d 675, 679, 7 U.S.P.Q.2d 1315, 1319 (Fed. Cir. 1988) (finding the trial court erred in declining to include the objective evidence of admitted copying in its determination of the issue of obviousness.”); Avia Group International, Inc. v. L.A. Gear California, Inc., 853 F.2d 1557, 1564, 7 U.S.P.Q.2d 1548, 1554 (Fed. Cir. 1988) (“Copying is additional evidence of nonobviousness.”); Specialty Composites v. Cabot Corp., 845 F.2d 981, 991, 6 U.S.P.Q.2d 1601, 1608 (Fed. Cir. 1988) (“[C]opying the claimed invention, rather than one in the public domain, is indicative of unobviousness.”); Windsurfing International, Inc. v. AMF Inc., 782 F.2d 995, 1000, 228 U.S.P.Q. 562, 565 (Fed. Cir. 1986), further proceedings, 4 U.S.P.Q.2d 1429 (S.D.N.Y. 1987) (same); Custom Accessories, Inc. v. Jeffrey-Allan Industries, Inc. 807 F.2d 955, 960, 1 U.S.P.Q.2d 1196, 1199 (Fed. Cir. 1986) (“when present, such objective evidence [of copying] must be considered”); Water Technologies Corp. v. Calco Ltd., 658 F. Supp. 961, 970, 1 U.S.P.Q.2d 1178, 1184 (N.D. Ill. 1986), on motion to amend judgment, 1 U.S.P.Q.2d 1872 (N.D. Ill. 1987), aff’d in part, rev’d in part, 850 F.2d 660, 7 U.S.P.Q.2d 1097 (Fed. Cir. 1988) (“Copying of the patented inventions is strong evidence of non-obviousness of the patents in suit.”); Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082, 1099, 227 U.S.P.Q. 337, 349 (Fed. Cir. 1985), vacated & remanded sub nom., Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809, 229 U.S.P.Q. 478 (1986), on remand, 810 F.2d 1561, 1 U.S.P.Q.2d 1593 (Fed. Cir. 1987) (“That Dennison, a large corporation with many engineers on its staff, did not copy any prior art device, but found it necessary to copy the cable tie of the claims in suit, is equally strong evidence of nonobviousness.”); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc. 776 F.2d 281,290-91, 227 U.S.P.Q. 657, 662 (Fed. Cir. 1985) (secondary considerations, such as copying cannot be ignored in obviousness analysis); W. L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 1559, 220 U.S.P.Q. 303, 317 (Fed. Cir. 1983), appeal after remand, 842 F.2d 1275, 6 U.S.P.Q.2d 1277 (Fed. Cir. 1988).

121. 212 F.3d 1272, 54 U.S.P.Q.2d 1673 (Fed. Cir. 2000).

others.<sup>122</sup> The newly-discovered evidence was a deposition transcript from a different case that had not been produced during discovery, despite a document request that covered materials from that litigation. The Federal Circuit found that the new evidence of “wholesale copying” was “compelling,” “potentially outcome determinative,” and, therefore, warranted a new trial.<sup>123</sup>

Also evident from the decision in Advanced Display, is that incidents of “copying” after independent development was tried and failed are of particular help in establishing nonobviousness.<sup>124</sup>

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122. 212 F.3d at 1284-85, 54 U.S.P.Q.2d at 1680-82.

123. *Id.* (emphasis added). *Cf. Ecolochem, Inc. v. Southern California Edison Company*, 227 F.3d 1361, 1380, 56 U.S.P.Q.2d 1065, 1079 (Fed. Cir. 2000) (copying is “only equivocal evidence of non-obviousness in the absence of more compelling objective indicia of other secondary considerations”); *In re GPAC*, 57 F.3d 1573, 1580, 35 U.S.P.Q.2d 1116, 1121 (Fed. Cir. 1995) (stating that “more than the mere fact of copying by an accused infringer is needed to make that action significant to a determination of the obviousness issue.”).

124. 212 F.3d at 1285-86, 54 U.S.P.Q.2d at 1682 (“The import of such copying evidence merits even greater weight in view of ADS’s failure to develop independently the claimed invention.”); *see also Dow Chemical Co. v. American Cyanamid Co.*, 816 F.2d 617, 2 U.S.P.Q.2d 1350, 1355 (Fed. Cir. 1987) (nonobviousness supported by evidence of acts of the infringer in trying but failing to “develop the claimed invention and [then] copied it instead”; Cyanamid was unable to develop its own commercial process based on the prior art); *Heidelberger Druckmaschinen AG v. Hantscho Commercial Products, Inc.*, 21 F.3d 1068, 1072, 30 U.S.P.Q.2d 1377, 1379 (Fed. Cir. 1994) (finding that “the litigation argument that an innovation is really quite ordinary carries diminished weight when offered by those who had tried and failed to solve the same problem, and then promptly adopted the solution that they are now denigrating”); *Panduit Corp. v. Dennison Manufacturing Co.*, 810 F.2d 1561, 1571, 1 U.S.P.Q.2d 1593, 1600 (Fed. Cir. 1987) (“Dennison’s obviousness defense is clearly refuted in this case by the unrefuted record of its own long and frustrating experience and that of others”); *Vandenberg v. Dairy Equip. Co.*, 740 F.2d 1560, 1567, 224 U.S.P.Q. 195, 199 (Fed. Cir. 1984) (“The copying of an invention may constitute evidence that the invention is not an obvious one.... This would be particularly true where the copyist had itself attempted for a substantial length of time to design a similar device, and had failed.”); *Lam, Inc. v. Johns-Manville Corp.*, 668 F.2d 462, 467-68, 474-76, 213 U.S.P.Q. 1061, 1065, 1070-71 (10th Cir. 1982) (rejecting defendant’s obviousness contentions in part because the evidence showed that defendant copied plaintiff’s invention “after years” of trying unsuccessfully to develop its own product.)

*Cf. In re GPAC*, 57 F.3d 1573, 1580, 35 U.S.P.Q.2d 1116, 1122 (Fed. Cir. 1995) (giving “little weight” to “widespread failure of others to develop alternatives to the Natale patent as evidence of nonobviousness” because GPAC offered no evidence to tie the failure to the subject matter claimed in that patent.); *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 317, 227 U.S.P.Q. 766, 771 (Fed. Cir. 1985) (“In the present case, Pentec’s effort to develop their own solution was not shown to have been extensive, its product is not identical to the claimed invention, and it vigorously denied infringement. GC’s copying argument can, accordingly, be given little weight.”); *Vandenberg v. Dairy Equipment Co. Div. of DEC International, Inc.*, 740 F.2d 1560, 1567, 224 U.S.P.Q. 195, 199 (Fed. Cir. 1984) (noting that because the accused infringer had given the project low priority and had not totally failed in its independent efforts, the accusation of “slavish copying” overstated the case); *Deere & Co. v. Hesston Corp.*, 440 F.2d 904, 907, 169 U.S.P.Q. 132, 134 (5th Cir. 1971) (“It is a peculiarity of patent law that it avails Deere [the patent owner] nothing to point out that the combination was not obvious to defendant’s engineers who gave up and copied Deere’s machine.”)

A contention that it may be commonplace in the industry for manufacturers to copy each other's designs will not defeat the effects of "copying" as objective evidence of nonobviousness. In L.A. Gear Inc. v. Thom McAn Shoe Co., the infringer admitted "copying" the inventor's shoe designs.<sup>125</sup> The only justification offered for the admitted "copying" was "that copying is prevalent in the fashion industry."<sup>126</sup> This argument was rejected by the Federal Circuit, and the infringer's "copying" was deemed strong evidence of willful infringement.<sup>127</sup>

"Copying" is not, despite the tenor of these cases, dispositive of nonobviousness.<sup>128</sup> And, as with all secondary considerations or objective evidence, a nexus with the claimed invention must be proved.<sup>129</sup>

The theoretical underpinnings of the "copy = nonobvious" equation are in many respects ill-developed. If the claimed subject matter is or was obvious, "copying" was entirely proper and

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125. 988 F.2d 1117, 1126-27, 25 U.S.P.Q.2d 1913, 1919-20 (Fed. Cir. 1993).

126. Id.

127. Id. See also Benchcraft, Inc. v. Broyhill Furniture Industries, Inc., 681 F. Supp. 1190, 7 U.S.P.Q.2d 1257, 1259-60, 1261 n.5, 1263, 1278 (N.D. Miss. 1988).

128. Ecolochem, 227 F.3d at 1380, 56 U.S.P.Q.2d at 1079-80 (holding that the district court committed clear error in not considering the evidence of copying, but finding with regard to a particular claim in question that the evidence of copying was outweighed by other secondary considerations and the findings on the prior art. Despite the copying, the court affirmed the district court's finding of obviousness for that particular claim.); Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343, 1366, 57 U.S.P.Q.2d 1747, 1763 (Fed. Cir. 2001) (holding evidence of copying was not sufficient to demonstrate nonobviousness, in view of the substantial question of validity raised by the prior art references cited); In re GPAC Inc., 57 F.3d at 1580, 35 U.S.P.Q.2d at 1122 ("[M]ore than the mere fact of copying by an accused infringer is needed to make that action significant to a determination of the obviousness issue."); Newell Companies, Inc. v. Kenney Manuf. Co., 864 F.2d 757, 768, 9 U.S.P.Q.2d 1417, 1426-27 (Fed. Cir. 1988) (holding that nonobviousness cannot be inferred from evidence of copying, and although commercial success, copying and other secondary considerations must be considered, they do not control the obviousness conclusion."); Leinoff v. Louis Milona & Sons, Inc., 726 F.2d 734, 740, 220 U.S.P.Q. 845, 849 (Fed. Cir. 1984) ("Although this evidence often helps a tribunal determine an invention's nonobviousness, it is not necessarily conclusive").

129. Amazon.com, 239 F.3d at 1366, 57 U.S.P.Q.2d at 1763 (noting that "evidence of copying . . . is legally irrelevant unless the . . . [relevant] feature is shown to be an embodiment of the claims."); In re GPAC Inc., 57 F.3d at 1580, 35 U.S.P.Q.2d at 1121 (explaining that "[f]or objective evidence to be accorded substantial weight, its proponent must establish a nexus between the evidence and the merits of the claimed invention."); Cable Elec. Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 1026, 226 U.S.P.Q. 881, 889 (Fed. Cir. 1985).

Constitutionally guaranteed, as it were.<sup>130</sup> As obviousness is judged by the hypothetical man of ordinary skill in the art, the less-than-omniscient, real-life “copyist” may not be reflective of the Graham standard viewed through the proper eyes.<sup>131</sup> And “copying” may occur from bases that are hard to work into the Graham standards.<sup>132</sup> Chisum has argued that little weight should be given to “copying” in the determination of nonobviousness:

It would seem that copying and laudatory statements by an infringer should be given little if any weight in determining nonobviousness. First, it is not necessarily inconsistent for a person to see value in an innovation yet deny its patentability on technical grounds. Second, public policy favors challenges to the validity of patents, and no defendant in an infringement suit should be placed under a special handicap in raising the issue. As Judge Hand noted, “there is more at stake than the issues between the two parties.”<sup>133</sup>

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130. See e.g., Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231, 140 U.S.P.Q. 524, 528 (1964) (“An unpatentable article . . . is in the public domain and may be made or sold by whoever chooses to do so”); Rite-Hite Corp. v. Kelley Co., 629 F. Supp. 1042, 1051, 231 U.S.P.Q. 161, 166 (E.D. Wis. 1986), aff’d, 819 F.2d 1120, 2 U.S.P.Q.2d 1915 (Fed. Cir. 1987) (“The very foundation of the patent system contemplates that users of a basic patent will make improvements with time.”); Dollar Elec. Co. v. Syndevco, Inc., 205 U.S.P.Q. 949, 964 (E.D. Mich. 1979), aff’d, 669 F.2d 1370, 214 U.S.P.Q. 241 (6th Cir. 1982) (“nothing prevents copying an unpatentable device”); Janex Corp. v. Bradley Time, 460 F. Supp. 383, 389, 199 U.S.P.Q. 525, 530 (S.D.N.Y. 1978) (“While copying may be powerful evidence of nonobviousness . . . , it remains the case that nothing deters a competitor from borrowing from a product not covered by a valid patent.”).

131. Amazon.com, 239 F.3d at 1366, 57 U.S.P.Q.2d at 1762 (holding that the district court erred in substituting the testimony of an expert about his personal view for what a hypothetical ordinarily skilled artisan would have gleaned from the cited references at the time that the patent application was filed.); see also Manufacturers Sys., Inc. v. ADM Indus. Inc., 198 U.S.P.Q. 223, 250 (N.D. Ind. 1978), aff’d, 615 F.2d 741, 206 U.S.P.Q. 879 (7th Cir. 1979) (“MSI . . . contends that if asserted Claim 8 is so obvious, why did defendant ADM have to copy. This argument is, however, based on a faulty premise, namely, that the defendant ADM is in the same position as the ‘statutory’ man of ordinary skill under 35 USC 103.”)

132. See, e.g., Ecolochem, 227 F.3d at 1380, 56 U.S.P.Q.2d at 1080 (explaining that copying “could have occurred out of a general lack of concern for patent property”); Creative Pioneer Products Corp. v. K Mart Corp., 5 U.S.P.Q.2d 1841, 1844 (S.D. Tex. 1986) (“Copying . . . may result from indifference or even a lack of awareness of a patent owner’s rights or disregard for his ability to enforce them.”); United States Tel. Co. v. American Telecommunications Corp., 204 U.S.P.Q. 951, 957 (D. Conn. 1979) (noting that copying in the telephone industry was pervasive because the industry relied on AT&T approval in adopting new telephone models).

133. 2 Chisum, Patents, 5.05[5][d] at 5–721-22.

Echoing these views, the Federal Circuit in Cable Electric Products, Inc. v. Genmark, Inc. discussed the disparity of reasons that one might copy an invention.<sup>134</sup> There, the court noted that copying could occur out of a general lack of concern for patent property, in which case its effect would be neutral on the obviousness analysis. Or, it may occur out of contempt for the specific patent in question, thus, only arguably demonstrating obviousness. As still another alternative, copying might be more related to the ability or willingness of the patentee financially or otherwise to enforce the patent right, which would call for deeper inquiry to determine its applicability to the obviousness analysis. The court noted that even widespread copying could weigh toward opposite conclusions, depending on the attitudes existing toward patent property and the accepted practices in the industry in question. The court therefore concluded that the idea that copying per se should bolster the validity of a patent was a “simplistic” view.<sup>135</sup>

Be that as it may, the Federal Circuit continues to accept objective evidence as probative of nonobviousness, including “copying” of the claimed invention when proper nexus is shown. Such evidence is of particular significance now that the Supreme Court has unanimously rejected the long-standing obviousness test used by the Federal Circuit in favor of a broader and more flexible test for determining whether subject matter is obvious.<sup>136</sup> In view of KSR, a larger percentage of patents may be deemed prima facie obvious, making objective evidence, such as “copying,” more important than ever. In the post KSR-era, one should expect that litigant patent owners will conjure up evidence of “copying” whenever possible, and try to use it aggressively to maintain the validity of their patents.

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134. 770 F.2d 1015, 226 U.S.P.Q. 881 (Fed. Cir. 1985) (overruled on other grounds as recognized in Midwest Industries, Inc. v. Karavan Trailers, Inc., 175 F.3d 1356 (Fed. Cir. 1999) (en banc)).

135. Id. at 1028, 226 U.S.P.Q. at 889 (affirming the trial court’s grant of summary judgment of obviousness).

136. See KSR Int’l Co. v. Teleflex Inc., 127 S.Ct. 1727, 82 U.S.P.Q.2d 1385 (2007).

## V. “COPYING” AND OTHER ISSUES

“Copying” may also have an effect on a variety of other substantive issues.

### 1. “Copying” And Infringement

“Copying’s” relationship with infringement concepts other than willfulness was addressed by the Federal Circuit in Hilton-Davis Chemical Co. v. Warner-Jenkinson Co. Inc.<sup>137</sup> In that case, the Federal Circuit held that “copying” has nothing to do with literal infringement, but may have much to do with the issue of infringement under the doctrine of equivalents because copying suggests that the differences between the claimed and accused products or processes -- measured objectively -- are insubstantial.<sup>138</sup> The Federal Circuit further found that “designing around” the patent claims has relevance to the question of infringement under the doctrine of equivalents because the fact-finder may infer that the competitor, presumably one of skill in the art, has designed substantial changes into the new product to avoid infringement.<sup>139</sup>

The Supreme Court, however, did not find the Federal Circuit’s reasoning persuasive:

According to the Federal Circuit, a person aiming to copy or aiming to avoid a patent is imagined to be at least marginally skilled at copying or avoidance, and thus intentional copying raises an inference—rebuttable by proof of independent development—of having only insubstantial differences, and intentionally designing around a patent claim raises an inference of substantial differences. This explanation leaves much to be desired. At a minimum, one wonders how ever to distinguish between the intentional copyist making minor changes to lower the risk of legal action and the incremental innovator designing around the claims, yet seeking to capture as much as is permissible of the patented advance.<sup>140</sup>

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137. 62 F.3d 1512, 35 U.S.P.Q.2d 1641 (Fed. Cir. 1995), rev’d 520 U.S. 17, 117 S.Ct. 1040 (1997).

138. 62 F.3d at 1519, 35 U.S.P.Q.2d at 1653.

139. 62 F.3d at 1520, 35 U.S.P.Q.2d at 1646-47 (emphasis added).

140. Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co., 520 U.S. 17, 35-36, 117 S.Ct. 1040, 1052 (1997).

After rejecting the Federal Circuit’s explanation of how “copying” and “designing around” fit into a doctrine of equivalents analysis, the Supreme Court instead posited that the need for independent experimentation could reflect knowledge—or lack thereof—of interchangeability possessed by one presumably skilled in the art, which is one of the express objective factors bearing upon whether the accused device is substantially the same as the patented invention.<sup>141</sup>

The Supreme Court’s reasoning is arguably subject to the same criticism as the Federal Circuit’s reasoning. Specifically, how does one distinguish between the intentional copyist attempting to make minor changes to the claimed invention and the independent experimenter trying to legitimately design around the claimed invention?

Furthermore, even though the Supreme Court rejected the Federal Circuit’s explanation of the role of “copying” in a doctrine of equivalents analysis, it arguably did not eliminate “copying” altogether as relevant to the doctrine of equivalents. If the need for “independent experimentation” can support the notion that elements are not interchangeable, as the Supreme Court suggests, then a reasonable corollary is that “copying” the claimed invention and making minor changes to get around the claims might support the notion that elements are interchangeable. Thus, “copying” may still have a place in analyzing infringement under the doctrine of equivalents.

Notably, the Supreme Court’s and Federal Circuit’s analysis are consistent in one important respect: their focus of what was being “copied” was the claimed invention, although there is loose usage of the terms “product” and “someone else’s invention” in one or two places. Thus, without making it the focus of the opinion, the Federal Circuit and Supreme Court helped

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141. Warner-Jenkinson, 520 U.S. at 36, 117 S.Ct. at 1052.

resolve the uncertainty about what must be “copied” to be relevant, at least to the doctrine of equivalents analysis: the claimed invention.<sup>142</sup>

## 2. “Copying” And Burdens of Proof

The interplay between burdens of proof applicable to different issues and “copying” was highlighted in Alpex Computer Corp. v. Nintendo Co., Ltd.<sup>143</sup> There, the court allowed evidence of “copying” to be presented to the jury during the liability trial, as relevant to the presence of secondary considerations refuting obviousness, which the court noted was subject to the preponderance of the evidence standard of proof.<sup>144</sup> However, when the damages phase of the trial was at hand, the same jury was not presented with the same evidence of “copying” because of the higher clear and convincing burden of proof applicable under willfulness concepts.<sup>145</sup>

Further, the court itself considered the “copying” evidence in view of Alpex’s request for a 50% enhancement of the jury’s award, but refused enhancement because it was a “close case” and the evidence was insufficient to support a finding by clear and convincing evidence that Nintendo copied the patent.<sup>146</sup>

In view of the foregoing, whether evidence of “copying” will be considered may depend on the burden of proof associated with the issue under review.

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142. Courts’ views on this point will be discussed infra, discussion of “‘Copy’ what?”.

143. 34 U.S.P.Q.2d 1167 (S.D.N.Y. 1994), aff’d in part, rev’d in part, 102 F.3d 1214, 40 U.S.P.Q.2d 1667 (Fed. Cir. 1996).

144. 34 U.S.P.Q.2d at 1191-92 & n.18.

145. Id.

146. Id. at 1207.

3. “Copying” And Offshore Activities

Knowledge of the activities of a competitor abroad may be alleged to bear upon issues of “copying.”<sup>147</sup>

4. “Copying” And Utility/Enablement

Evidence of “copying” may defeat assertions of nonenablement or nonutility.<sup>148</sup>

5. Prior Litigation And “Copying”

Prior litigation may be evidence of the secondary considerations of commercial success or “copying.”<sup>149</sup>

6. “Copying” And Laches

A patentee may defeat a laches defense if the accused infringer has engaged in particularly egregious conduct which would change the equities significantly in plaintiff’s favor. Conscious “copying” may be such a factor weighing against the accused infringer, whereas ignorance or a good faith belief in the merits of a defense may tilt matters in its favor.<sup>150</sup>

7. “Copying” And Corporate Officer Liability

Personal liability on the part of a corporate officer for direct infringement resulting from “copying” may lie, in the appropriate situation. In Manville Sales Corp. v. Paramount Systems,

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147. Minnesota Mining & Manufacturing v. Smith & Nephew, PLC, 25 U.S.P.Q.2d 1587, 1592 (D. Minn. 1992) (“Insofar as [the accused infringer’s foreign marketing] information lends insight into a defendant’s actual beliefs about the relative uniqueness, superiority and marketability of a disputed patent, it has been recognized as valuable in evaluating a defendant’s public assertions that a patent was obvious and therefore invalid”).

148. Medtronic, Inc. v. Cardiac Pacemakers, Inc., 721 F.2d 1563, 1582-83, 220 U.S.P.Q. 97, 111 (Fed. Cir. 1983)

149. Mendenhall v. Cedarapids, Inc., 5 F.3d 1557, 1573-74, 28 U.S.P.Q.2d 1081, 1095 (Fed. Cir. 1993).

150. A. C. Aukerman Co. v. R. L. Chaides Construction Co., 960 F.2d 1020, 1033-34, 22 U.S.P.Q.2d 1321, 1329 (Fed. Cir. 1992). De Graffenried v. U.S., 7 U.S.P.Q.2d 1366, 1368 (Ct. Cl. Tr. Div. 1988) (“Deliberate copying of a patented invention is the type of egregious conduct that can tip the equities against a defendant asserting laches”); cf. Berger & Gorin, Inc. v. Gary Plastic Packaging Corp., 691 F.Supp. 740, 754, 8 U.S.P.Q.2d 1480, 1491 (S.D.N.Y. 1980) (even if accused infringer demonstrated unreasonable delay, prejudice and injury, conduct “as a willful infringer would deprive it of the equitable defenses of laches and estoppel”).

Inc.,<sup>151</sup> the trial court determined that Paramount’s officers were personally liable for direct infringement, based on the actions they had each taken in assisting the copying of Manville’s design. However, the Federal Circuit noted that the officers’ acts were within the scope of their employment and thus were protected by the corporate veil.<sup>152</sup> That being the case, the court concluded that reversal was required.<sup>153</sup>

Under a different set of circumstances regarding scope of employment, or removing the protection of the corporate veil, “copying” might give rise to officer direct infringement liability.

#### 8. “Copying” And Acceptable Non-Infringing Substitutes

The fact that an accused infringer “copied” the commercial version of the patented invention may be an indication of the absence of acceptable non-infringing substitutes, in a damages context.<sup>154</sup>

#### 9. “Copying” And Attorneys’ Fees

“Copying” may affect an award of attorney fees under 35 USC § 285.<sup>155</sup>

### **VI. LIFTING THE “CURSE” OF “COPYING”**

Not surprisingly, a number of rationales for “copying” activity have been tried out over the years. A very few “work”; most don’t, particularly in front of a jury, many of whom used “the dog ate my homework” to try to explain why what they handed in at school as theirs, looked so much like their friend’s/brother’s (sister)’s. For example, the respondent in In re Certain

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151. 917 F.2d 544, 16 U.S.P.Q.2d 1587 (Fed. Cir. 1990).

152. 917 F.2d at 553, 16 U.S.P.Q.2d at 1594.

153. Id.

154. TWM Manufacturing Co., Inc. v. Dura Corp. and Kidde, Inc., 789 F.2d 895, 900, 229 U.S.P.Q. 525, 527-528 (Fed. Cir. 1986).

155. nCube Corp., 436 F.3d at 1325, 77 U.S.P.Q.2d at 1487; Westnofa USA Inc. v. Whole Life Co., Inc., 3 U.S.P.Q.2d 1352, 1359 (D. Mass. 1987).

Crystalline Cefadroxil Monohydrate<sup>156</sup> contended that its “copying” activity was solely the result of its intention to facilitate the process of obtaining Food and Drug Administration Approval. It was noted, with tongue surely in cheek, that “other factors influenced that decision as well.”<sup>157</sup>

The effect of evidence of “copying” upon the patentee’s case is usually an excuse for celebration. As one commentator noted, “any evidence of copying is pure gold because of its relevance to infringement, obviousness, and willful infringement, not to mention the psychological effect on the trier-of-fact.”<sup>158</sup> Use of the “copying” evidence before the jury should be maximized, but care should be taken not to overplay the hand:

After telling the story of the invention, one should tell the story of the defendant’s conduct, typically how defendants came second to the market, how defendants upset the inventors’ plans and hard work, how they reaped the commercial reward without doing any of the original creative work or taking any of the risks plaintiff took to develop the market. If you can establish copying or derivation by defendants, by all means emphasize it at this point, although with a jury you have to be careful not to get too bogged down in factual disputes about copying to the point that the jury begins to think copying is part of your burden of proof.<sup>159</sup>

The accused infringer must present a credible response to charges of/evidence tending to show “copying”. Ignoring it, or denying it when a denial is not credible, is not the recommended way to approach the problem. Denying “copying,” when evidence to the contrary exists, can destroy credibility.<sup>160</sup> If you copied, it is better to admit it, but explain that there is nothing wrong with copying under the right circumstances:

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156. 15 U.S.P.Q.2d 1263 (U.S.I.T.C. 1990).

157. 15 U.S.P.Q.2d at 1271.

158. Slobodin, “What To do From Getting the Case to Trial: An Overview for the Patent Infringement Trial Lawyer,” 1 Patent Litigation 1993 (PLI) pp. 43, 84.

159. Badenoch, “Trial of Infringement Issues: How To Prove Infringement and Noninfringement,” 1 Patent Litigation 1993 (PLI), pp. 393, 413.

160. Sease, “Ten Commandments of a Defendant’s Patent Case,” 1 Patent Litigation 1993 (PLI), pp. 603, 617-18.

Jurors can be educated that copying and building upon the knowledge of others is the essence of our society. If we did not copy we would not learn. For example, we would not learn language if we did not copy. We would not learn to ride a bicycle or recite poetry if we did not copy. Educational advancement in our society is predicated upon building on the shoulders of others. Supreme Court decisions, like Sears, Compco, Bonito Boats, and others recognize the value in taking the knowledge of others as a starting point to build. Indeed the patent system recognizes this. So the argument goes. . . . The point is if you have copied, admit it and move on. Unreasonable denials dilute your effectiveness as an advocate.<sup>161</sup>

Another approach where “copying” is raised is to emphasize that it is the claims that must be focused upon to gauge the accused infringer’s alleged infringement: emphasize the defendant’s innocence, the limited scope of the invention, and, if there was a substantial and successful design around effort, emphasize that the design falls outside the claims.<sup>162</sup>

There are also explanations and excuses that may avoid “copying”-based willfulness. In Micro Motion Inc. v. Exac Corp., for example, Micro Motion introduced significant evidence indicating that Exac’s designers had access to Micro Motion’s technology while they were designing Exac’s infringing Coriolis flowmeter.<sup>163</sup> Drs. Young and Dahlin, Exac’s founders and designers, had gained experience with Micro Motion’s C meter and they had obtained copies of Exac patents, including the patent which was reissued into the patent-in-suit.<sup>164</sup> By the end of 1982, the court noted, they had gained experience with Micro Motion’s C meter.<sup>165</sup> In June 1983, Dr. Dahlin obtained information on and drawings of the Micro Motion D meter through a

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161. Id.

162. Badenoch, id. at 430-31 (“[I]t is particularly helpful to separate plaintiff’s own products from the claimed invention if you can, so that nobody’s success can be attributed to the patent. The patent then becomes an unimportant and irrelevant diversion in a commercial business story that has nothing to do with it.”).

163. 761 F. Supp. 1420, 1437-38, 19 U.S.P.Q.2d 1001, 1015-16 (N.D. Cal. 1991).

164. 761 F. Supp. at 1437, 19 U.S.P.Q.2d 1001 at 1016.

165. Id.

Mr. Bottom.<sup>166</sup> And Dr. Dahlin received a Micro Motion C meter in August 1983 and a D meter in December 1983 from a Mr. Tanner.<sup>167</sup>

This would not have been thought to look too good for Drs. Dahlin and Young, but a rational explanation was at hand:

Exac . . . introduced evidence that Drs. Dahlin and Young obtained information on Micro Motion’s patents so that they could ensure that the device they developed would not conflict with Micro Motion’s patents . . . . This assertion is reasonable given Drs. Young and Dahlin’s strong financial interest in developing a patentable product. At trial, Dr. Young testified to the design differences that he felt distinguished the Exac device from Micro Motion’s . . . . Based on the testimony of Dr. Young and Mr. Swanson [Exac’s CEO], the Court believes that Exac did not intentionally copy Micro Motion’s design.<sup>168</sup>

What seemed to be damning evidence of willful infringement was, instead, portrayed for the jury as the accused infringer’s conscientious efforts to avoid infringement.

## **VII. CONCLUSION**

The curse of “copying” is quite real and powerful, especially where a jury of one’s peers is sitting as the trier of fact in patent litigation. Patentees will try to take advantage of this curse much more often given the recent holdings in KSR and Seagate Technology. Lifting the curse requires care and some courage at trial, in view of a precedential framework that is less than favorable to the accused infringer and the pejorative impact the term “copy” or the cry of “copy cat” will likely have on the jury and the court, if supporting evidence can be adduced. In the context of willful infringement, the “objective recklessness” standard, the “totality of the circumstances” and the patentee’s clear and convincing evidence burden must always be kept in view, and an accused infringer’s good faith established, or vitiated, particularly regarding

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166. Id.

167. Id.

168. Id. (emphasis added).

appropriate opinions of counsel or the lack thereof. With enhanced damages and attorneys' fees, as well as bolstering the nonobviousness of the alleged invention in the balance, knowledge of the law and its uncertainties should help swing the scales in favor of one's client. But be warned that "copying" runs the razor's edge, and will continue to do so for the foreseeable future.

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