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Kirk M. Hartung

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HOW TO AVOID INCREASED DAMAGES AND ATTORNEYS' FEES: THE DUTIES OF THE ACCUSED INFRINGER AND THE PATENT OWNER

BY KIRK M. HARTUNG*

I. Introduction

Increased damages and attorneys fees are specifically provided for in the patent statutes. 35 U.S.C. section 284 provides, "When the damages are not found by a jury, the Court shall assess them. In either event, the court may increase the damages up to three times the amount found or assessed."¹ 35 U.S.C. section 285 states, "The court in exceptional cases may award reasonable attorney fees to the prevailing party."² Thus, in all patent infringement cases, the potential for increased damages and attorney fees exists. Since its inception in October 1982, the Court of Appeals for the Federal Circuit³ has had numerous opportunities to consider the standards for increased damages and attorney fees. Therefore, for the benefit of the bar and businesses alike, an overview of the standards as set forth by the Federal Circuit is provided.⁴

II. Standard for Increased Damages

Since 1793, the patent statutes have provided for trebling of damages in patent infringement actions.⁵ The purpose of an increased damage award is both exemplary, in punishing and deterring flagrant acts of patent infringement, and compensatory, in compensating the patent owner for immeasurable expenses and losses.⁶ In-

* Partner, Zarley, McKee, Thomte, Voorhees & Sease, Des Moines, Iowa. J.D. University of Iowa 1982, B.S. Iowa State University 1979.

1. 35 U.S.C.A. § 284 (1984).

2. 35 U.S.C.A. § 285 (1984).

3. The Court of Appeals for the Federal Circuit (C.A.F.C.) has exclusive jurisdiction of appeals from final decisions of United States District Courts if the jurisdiction of that court was based, in whole or in part on the patent statutes, including issues of patent infringement. 28 U.S.C.A. § 1295 (1966).

4. Relevant C.A.F.C. cases through September 10, 1986 have been reviewed for purposes of this article.

5. Patent Act of February 21, 1793, ch. 11, § 5, 1 Stat. 318; See CHISUM, PATENTS § 20.02[1][a] (1985).

6. CHISUM, PATENTS, § 20.03[4][b] (1985).

creased damages discourage alleged infringers from using the judicial system where there is no real expectation of success.⁷ An award of increased damages to the patent owner is generally conditioned upon a finding of willful infringement⁸ based on clear and convincing evidence.⁹ As provided by 35 U.S.C. section 284, the award of increased damages is in the discretion of the trial court.¹⁰

A. Willful Infringement

Willful infringement is a question of fact and thus reviewable under the clearly erroneous standard.¹¹ While willful infringement requires knowledge of an existing patent¹² such willful infringement does not take time to develop.¹³ The fact that infringing conduct commenced without knowledge of the patent, or even before the patent issued, will not save an infringer who continues such conduct after learning of the patent rights from increased damages for willful infringement.¹⁴

There are no hard and fast rules *per se* regarding willful infringement.¹⁵ Generally, in determining whether or not infringing conduct is willful, the district court must look at the totality of cir-

7. Kloster Speedstell AB v. Stora Kopparbergs Bergslags AB, 793 F.2d 1565, 1580 n.11 (Fed. Cir. 1982).

8. The C.A.F.C. has used the terms "willful," "wanton," "deliberate" and "knowing," in describing infringing conduct wherein increased damages may be appropriate. *E.g.*, Leinoff v. Louis Milona & Sons, Inc., 726 F.2d 734, 742 (Fed. Cir. 1984); Rosemount, Inc. v. Beckman Instruments, Inc., 727 F.2d 1540, 1547 (Fed. Cir. 1984). Since the court has not differentiated between such terms, they are believed to be used synonymously.

9. *E.g.*, Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 628 (Fed. Cir. 1985). Willful infringement is a question of fact and therefore subject to the clearly erroneous standard of review. Leinoff, 726 F.2d at 742-43. The discretionary award of increased damages based upon a finding of willful infringement is subject to the abuse of discretion standard of review on appeal. American Original Corp. v. Jenkins Food Corp., 774 F.2d 459, 465 (Fed. Cir. 1985).

10. Leinoff v. Louis Milona & Sons, Inc., 726 F.2d 734, 742 (Fed. Cir. 1984). See also S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198, 201-02 (Fed. Cir. 1986) (the trial court's refusal to increase damages despite a finding of willful infringement was remanded for clarification by the C.A.F.C.).

11. *E.g.*, Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc., 761 F.2d 649, 656 (Fed. Cir.), *cert. denied*, 106 S. Ct. 230 (1985).

12. *E.g.*, State Industries, Inc. v. A.O. Smith Corp., 751 F.2d 1226, 1236 (Fed. Cir. 1985). See also American Original Corp. v. Jenkins Food Corp., 774 F.2d 459, 465 (Fed. Cir. 1985) (knowledge of a pending patent application is insufficient); Power Lift, Inc. v. Lang Tools, Inc., 774 F.2d 478 (Fed. Cir. 1985) (infringement was held to be willful even though suit was commenced only nine days after the patent was issued).

13. Ralston Purina Co. v. Far-Mar-Co., Inc., 772 F.2d 1570, 1577 (Fed. Cir. 1985).

14. *E.g.*, Pacific Furniture Mfg. Co. v. Preview Furniture Corp., No. 86-787, slip op. (Fed. Cir. 1986).

15. Rolls Royce Ltd. v. GTE Valcron Corp., No. 86-761, slip op. (Fed. Cir. 1986).

cumstances related to the infringing conduct.¹⁶ Several factors to be considered have been enunciated by the Federal Circuit.

1. *Exercise of Due Care in Avoiding Infringement*

When a potential infringer has actual notice of an existing patent, there is an affirmative duty to exercise due care in determining whether or not there is infringement of the patent rights.¹⁷ The affirmative duty includes obtaining competent legal advice from counsel *before* the initiation or continuance of any potentially infringing activity.¹⁸ Failure to fulfill this duty is an adequate basis for assessment of treble damages.¹⁹

More particularly, advice from counsel must include a well-reasoned evaluation of patent validity explicitly predicated on an analysis of the file histories of the patent, and an infringement evaluation comparing and contrasting the potentially infringing conduct with the patented claims.²⁰ However, since patents are presumed valid,²¹ advice as to patent validity which is based solely on review of the prior art appearing in the file history of the patent application, does not rise to meet the affirmative duty.²²

Thus, an attorney's advice which contains only bald, conclusory and unsupported remarks regarding validity or infringement is insufficient for satisfying the affirmative duty.²³ Other factors which are to be considered in determining whether the accused infringer has complied with the affirmative duty is whether the attorney who

16. *E.g.*, *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1577 (Fed. Cir. 1983).

17. *E.g.*, *Ralston Purina Co. v. Far-Ma-Co, Inc.*, 772 F.2d 1570, 1577 (Fed. Cir. 1985); *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389 (Fed. Cir. 1983).

18. *E.g.*, *Ralston Purina Co. v. Far-Ma-Co, Inc.*, 772 F.2d 1570, 1577 (Fed. Cir. 1985); *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1390 (Fed. Cir. 1983). While the C.A.F.C. in *Ralston Purina* stated that the affirmative duty included seeking and obtaining competent legal advice before initiation of any possible infringing activity, citing *Underwater Ralston Purina*, the patent had not even been issued until after the infringing conduct had started.

19. *Great Northern Corp. v. Davis Core & Pad Co.*, No. 85-2485, slip op. (Fed. Cir. 1986).

20. *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1390 (Fed. Cir. 1983).

21. 35 U.S.C.A. § 282 (1984).

22. *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1576-77 (Fed. Cir. 1983). Thus, it is probably necessary that an attorney conduct a patent search before rendering an opinion as to patent validity.

23. *E.g.*, *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc.*, 761 F.2d 649, 656 (Fed. Cir.), *cert. denied*, 106 S. Ct. 230 (1985); *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1390 (Fed. Cir. 1983). *But cf.* *Radio Steel & Mfg. Co. v. MTD Products, Inc.*, 788 F.2d 1554, 1558-59 (Fed. Cir. 1986) (the C.A.F.C. affirmed a finding of no willful infringement despite an oral opinion by patent counsel which did not consider either the file history or the prior art for the patent-in-suit).

provided the advice is a patent attorney, and whether the attorney is in-house or outside counsel.²⁴

Infringement is likely to be found willful when a defendant ignores the patent owner's letters regarding patent rights, without studying the patent or consulting an attorney.²⁵ When competent legal advice is obtained, the accused infringer must reasonably and in good faith adhere to the advice to avoid a finding of willful infringement.²⁶ An infringer who ignores counsel's advice or delays acting in accordance with the advice is in the same position as one who fails to secure advice of counsel.²⁷

2. Reasonable Belief of Non-Infringement or Invalidity

While an attorney's opinion on patent validity and infringement is evidence of good faith conduct, such evidence is not dispositive in determining willful infringement.²⁸ Another factor which may contribute to a finding of willful infringement is that the infringer had no reasonable basis for believing it had a right to do the infringing acts.²⁹ In other words, to have willful infringement, the infringer must be acting in disregard of the patent,³⁰ or without an "honest doubt" as to validity and infringement of the patent.³¹ On the other

24. *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1390 (Fed. Cir. 1983).

25. *CPG Products v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1015 (Fed. Cir. 1985); *Leinoff v. Louis Milona & Sons*, 726 F.2d 734, 743 (Fed. Cir. 1984).

26. *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1577 (Fed. Cir. 1983). Judge Nichols of the C.A.F.C. has stated that advice by an attorney which is qualified and without unequivocal conclusions regarding validity and infringement does not provide guidance upon which a potential infringer may reasonably rely. *Central Soya*, 723 F.2d at 1581-82 (Nichols, J., concurring). Judge Nichols concludes that a legal opinion must draw a clear line as to what conduct of the client is right and wrong. The effect of Judge Nichols statement in *Central Soya* is not clear, in light of his subsequent statement in *Paper Converting Machine Co. v. Magna Graphics Corp.*, 745 F.2d 11, 19 (Fed. Cir. 1984), that an accused infringer rarely knows whether his product infringes a patent until a district court passes on the issue.

27. *Central Soya*, 723 F.2d at 1577.

28. *E.g.*, *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1577 (Fed. Cir. 1983); *But cf.* *Great Northern Corp. v. Davis Core & Pad Co.*, No. 85-2485, slip op. (Fed. Cir. 1986) (the C.A.F.C. held that failure to fulfill the affirmative duty to obtain a validity and infringement opinion is an adequate basis to assess treble damages).

29. *E.g.*, *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 867 (Fed. Cir. 1985); *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1565 (Fed. Cir. 1983). In *Stickle*, the C.A.F.C. stated that even if the infringing acts were not inadvertent, such acts would not necessarily constitute willful infringement. 716 F.2d at 1565. However, the Court did not define inadvertent infringing acts. Presumably inadvertent infringing acts are those done without knowledge of the patent. Accordingly, "not inadvertent" infringing acts would be acts done with knowledge of the patent, in which case, the potential infringer has the affirmative duty to obtain advice of counsel and follow that advice.

30. *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1565 (Fed. Cir. 1983).

31. *Rosemount, Inc. v. Beckman Industries, Inc.*, 727 F.2d 1549, 1548 (Fed. Cir. 1984).

hand, an accused infringer who has a bona fide belief that the patent is invalid is serving the patent system by challenging that patent in a lawsuit. Increased damages should not be imposed solely because the court later holds that belief to be unfounded.³²

Generally, the fact that a potential infringer owns a patent covering the infringing product or method is irrelevant to the issue of infringement.³³ This is true because a second patent may distinguish over a first patent for purposes of patentability, however, the conduct performed pursuant to the second patent may come within the scope of the claims of the first patent.³⁴ Even so, an infringer's belief that its conduct falls within its own patentably distinct claims while falling outside the patent claims in issue is a factor to be considered in determining willfulness of the infringement.³⁵

3. Other Factors

Even though a potential infringer having knowledge of a patent has an affirmative duty to obtain competent legal advice concerning validity and infringement of the patent, the absence of such advice may be overcome by other circumstances such that a finding of willful infringement is inappropriate.³⁶

One factor which has been considered in determining the willfulness of infringement is the manner in which the defendant's infringing conduct arose. For example, the fact that the defendant had employed a highly experienced and knowledgeable employee of the plaintiff shortly before the infringing conduct commenced, has contributed to a finding of willful infringement.³⁷

Another factor to be considered is the infringer's effort to avoid or design around the patent.³⁸ One of the positive benefits of the

32. *Kloster Speedsteel AB v. Stora Kopparbergs Bergslags AV*, 793 F.2d 1565, 1581 (Fed. Cir. 1986).

33. *State Industries, Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1235 (Fed. Cir. 1985).

34. *Rolls Royce, Ltd. v. GTE Valcron Corp.*, No. 86-761, slip op. (Fed. Cir. 1986). For example, a first patent on a chair may have claims calling for a seat supported by four legs. The second patent for a rocking chair may have claims calling for a seat supported by four legs and rockers on the ends of the legs for allowing the chair to rock back and forth. The second patent distinguishes over the first patent due to the rockers. However, a rocking chair infringes the first patent since there is a seat supported by four legs. Accordingly, the owner of the second patent cannot practice that invention without infringing the first patent.

35. *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 867 (Fed. Cir. 1985). In *King Instrument*, the plaintiff's patent was cited as prior art in the infringing defendant's patent.

36. *E.g.*, *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 867 (Fed. Cir. 1985).

37. *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1575-76 (Fed. Cir. 1985).

38. *Rolls-Royce, Ltd.*, No. 86-761, slip op. (Fed. Cir. 1986).

patent system is its "negative incentive" to "design around" patented products, thus bringing innovations to the marketplace.³⁹ Classic competitive gamesmanship is not willful infringement and should not be discouraged by increased damage awards.⁴⁰ In other words, the absence or presence of slavish copying of the patented invention is a factor to be considered in determining willfulness of infringement.⁴¹

The Federal Circuit has also considered the nature of the accused infringer's challenge to the existence of infringement. Generally, an increase in damages for willfulness is inappropriate when the defendant mounts a good faith challenge to the patent.⁴² An accused infringer is defending in good faith as long as the defenses on the issues of validity and infringement are not frivolous.⁴³

Events and circumstances surrounding license negotiations are another element for consideration on the issue of willfulness. The offering of a license is actual notice of the patent rights.⁴⁴ In *Ralston Purina Co. v. Far-Ma-Co*,⁴⁵ the court held the infringement of the patent to be willful since the defendant, without consulting patent counsel, refused to take a license offered by the patent owner.⁴⁶ In *King Instruments Corp. v. Otari Corp.*⁴⁷ wherein the defendant requested a license from the patent owner plaintiff, the Court stated that such license negotiations may support an infringer's good faith if the infringer desired the license agreement as an alternative to unaffordable or expensive litigation.⁴⁸

Continued production after notice of the patent rights is also a consideration in determining willful infringement.⁴⁹ In *Power Lift, Inc. v. Lang Tools, Inc.*,⁵⁰ the patent owner accused the defendant of infringing the patent claims on the day the patent issued and offered the defendant a license under the patent. The defendant refused the license offer and continued production of the infringing product. The action for patent infringement was filed nine days af-

39. *State Industries, Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985); *Yarway Corp. v. Eur-Control U.S.A., Inc.*, 775 F.2d 268, 277 (Fed. Cir. 1985).

40. *State Industries, Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1235-36 (Fed. Cir. 1985).

41. *Id.* at 1238.

42. *Paper Converting Machine v. Magna-Graphics*, 745 F.2d 11, 20 (Fed. Cir. 1984).

43. *State Industries v. A.O. Smith Corp.*, 751 F.2d 1226, 1237 (Fed. Cir. 1985).

44. *Ralston Purina Co. v. Far-Ma-Co*, 772 F.2d 1570, 1577 (Fed. Cir. 1985).

45. *Id.*

46. *Id.* at 1577.

47. *King Instrument Corp.*, 767 F.2d at 867.

48. *Id.* This seems to imply that an infringer who requests a license and is refused is infringing less willfully than another who infringes without requesting a license.

49. *Power Lift, Inc. v. Lang Tools, Inc.*, 774 F.2d 478, 482 (Fed. Cir. 1985).

50. *Id.*

ter the patent issued. The Court held that such continued production after notice of the patent rights was clear and convincing evidence of willfulness.⁵¹

B. *Bad Faith*

The Federal Circuit has recently broadened the application of increased damages beyond those cases involving willful infringement. In *Yarway Corporation v. Eur-Control U.S.A., Inc.*,⁵² a somewhat unusual case wherein the patent owner was being sued for infringing its own patent,⁵³ the court stated that increased damages under 35 U.S.C. § 284 may be premised on either willful infringement or bad faith.⁵⁴ Unfortunately, the court did not define "bad faith" infringement. Based upon the patent system goal of promoting innovation by designing around existing patents, the court concluded that infringement resulting from attempts to invent around the patent cannot constitute bad faith infringement for purposes of increased damages.⁵⁵ Such conduct is not sufficiently obnoxious to outweigh the innovation incentive of the patent laws so as to justify increased damages.⁵⁶

III. *Standards for Attorney Fees*

Pursuant to 35 U.S.C. § 285, the court may award reasonable attorney fees in exceptional cases to the prevailing party. This is a statutory exception to the "American Rule" of not assessing attorney fees against the losing party.⁵⁷ Thus, an award of attorney fees is within the discretion of the district court judge, once the prevailing party has established the exceptional nature of the case by clear and convincing evidence.⁵⁸

51. *Id.*

52. *Yarway Corp.*, 775 F.2d at 268.

53. Plaintiff Yarway had been granted an exclusive license from patent owner Kalle, to manufacture, use, sell and distribute the patented product throughout the United States. Subsequent to the licensing agreement Eur-Control began marketing a similar product in the United States in competition with Yarway. Kalle and Eur-Control were owned and controlled by a common parent such that Eur-Control was neither a wholly-owned subsidiary nor independent of Kalle. Therefore, Yarway charged Eur-Control with infringement and Kalle with inducement of that infringement. 775 F.2d at 270.

54. 775 F.2d at 277. The district court had concluded that infringement was not willful, but increased damages due to the bad faith efforts of the defendant to circumvent the patent license. 775 F.2d at 272-73. Thus, on appeal, the C.A.F.C. was concerned only with the bad faith issue. 775 F.2d at 277.

55. 775 F.2d at 277-78. Willful infringement was not an issue on appeal.

56. *Id.*

57. *Rohm and Haas Co. v. Crystal Chemical Co.*, 736 F.2d 688, 690 (Fed. Cir.), cert. denied, 105 S. Ct. 221 (1984).

58. *E.g.*, *Machinery Corp. of America v. Gullfiber AB*, 774 F.2d 467, 471 (Fed.

The purpose of section 285 is to enable courts to prevent gross injustice.⁵⁹ In awarding attorney fees, the district courts should attempt to strike a balance between the interest of the patent owner in protecting his statutory patent rights, and the interest of the public in confining such rights to their legal limits.⁶⁰ Accordingly, attorney fees are available in exceptional cases to both the patent owner and the accused infringer to compensate the prevailing party for its monetary outlays in the prosecution or defense of the suit.⁶¹

Attorney fees include those sums incurred in the preparations for and performance of legal services related to suit.⁶² Fees are also limited to those related to patent claims and other claims having issues so intertwined with the patent issues that the evidence would be material to both issues.⁶³ In determining the reasonableness of an award of attorney fees, there must be evidence of the number of hours expended and the billing rate charged.⁶⁴

A. Award to Patent Owner

Prevailing patent owners are often awarded attorney fees for an exceptional case based on willful infringement.⁶⁵ An award of attorney fees to a patent owner is not an abuse of the district court's discretion when a defendant has been found to be a willful infringer.⁶⁶

Attorney fees may also be granted to prevailing patent owners for an exceptional case based on frivolous or bad faith defenses⁶⁷ or

Cir. 1985). In awarding attorney fees, the district court must specifically articulate the facts which make the case exceptional. *E.g.*, *Reactive Metals and Alloys Corp. v. ESM, Inc.*, 769 F.2d 1578, 1582 (Fed. Cir. 1985). On appeal, the clearly erroneous standard of review applies to the finding of exceptionality, whereas the exercise of the trial court's discretion in awarding attorney fees is subject to reversal only if there is an abuse of discretion. *Reactive Metals and Alloys Corp. v. ESM, Inc.*, 769 F.2d 1578, 1583 (Fed. Cir. 1985).

59. *Rohm and Haas Co. v. Crystal Chemical Co.*, 736 F.2d 688, 690 (Fed. Cir.), *cert. denied*, 105 S. Ct. 172 (1984). The purpose of the "American Rule" of attorney fees is to avoid penalizing a party for merely defending a lawsuit. *Id.*

60. *S.C. Johnson & Son, Inc. v. Carter Wallace, Inc.*, 781 F.2d 198, 200 (Fed. Cir. 1986).

61. *Central Soya Co. v. Geo. A. Hormel and Co.*, 723 F.2d 1573, 1578 (Fed. Cir. 1983).

62. *Id.*

63. *E.g.*, *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1564 (Fed. Cir. 1983).

64. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983).

65. *E.g.*, *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc.*, 761 F.2d 649 (Fed. Cir. 1985). *See also* *S.C. Johnson and Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 202 (Fed. Cir. 1986) (the C.A.F.C. remanded the case for clarification when the district court did not award attorney fees after finding infringement to be willful).

66. *E.g.*, *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 200 (Fed. Cir. 1986).

67. *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1564 (Fed. Cir. 1983).

other litigation misconduct.⁶⁸ While standard boilerplate answers to an infringement complaint are not condoned, something more in the way of vexatious tactics is necessary to establish defenses asserted in bad faith.⁶⁹ For example, an unfounded defense which is not pressed at trial is an abuse of judicial process and may support an award of attorney fees.⁷⁰ Defenses which are brought only for purposes of harassment or delay may constitute an exceptional case for purposes of awarding attorney fees.⁷¹ However, a defense which is meritless, without being frivolous, has been found to be an insufficient basis for an award of attorney fees.⁷² Finally, merely losing on the defenses of invalidity and non-infringement is not sufficient to make a case exceptional.⁷³

The Federal Circuit has affirmed a trial court's award of attorney fees to the prevailing patentee in approximately 85% of the cases where the issue has been raised on appeal.⁷⁴

B. Award to Alleged Infringer

When the accused infringer is the prevailing party, attorney fees may be awarded if the patent owner has litigated in bad faith, or if fraud or other inequitable conduct was committed during prosecution of the patent application before the Patent Office.⁷⁵ In either event, such gross injustices to the alleged infringer must be supported by proof of actual wrongful intent or gross negligence.⁷⁶ Thus, attorney fees may be awarded to an accused infringer due to the misconduct of the patent owner with respect to the Patent Office or the alleged infringer. However, when an award of attorney fees to an alleged infringer has been challenged on appeal, the Federal Circuit has affirmed the award in only 25% of the cases.⁷⁷

1. Inequitable Conduct Before the Patent Office

A patentee and his patent attorney have an uncompromising duty of candor and good faith toward the Patent Office during the

68. *Rolls Royce, Ltd.*, No. 86-761, slip op. (Fed. Cir. 1986).

69. *Id.*

70. *Id. But cf. Stickle*, 716 F.2d at 1564-65 (a defense withdrawn shortly before trial will not necessarily support a finding of bad faith).

71. *CTS Corp. v. Piher International Corp.*, 724 F.2d 1550, 1558 (Fed. Cir.), cert. denied, 105 S. Ct. 221 (1984).

72. *Id.* The C.A.F.C. in *CTS* did not define "meritless" or "frivolous".

73. *State Industries, Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1238 (Fed. Cir. 1984).

74. See Appendix 2.

75. *Machinery Corp. of America v. Gullfiber AB*, 774 F.2d 467, 472 (Fed. Cir. 1985).

76. *Id.* at 473.

77. See Appendix 2.

prosecution of patent applications.⁷⁸ Pursuant to 37 C.F.R. section 1.56(a), such duty encompasses the disclosure to the Patent Office of information which may be material to the examination of the application.⁷⁹ Information is material where there is a substantial likelihood that a reasonable Patent Office Examiner would consider the information important in deciding whether to allow the application to issue as a patent.⁸⁰ Information can be material even though it would not result in the rejection of the application.⁸¹ A breach of the duty of candor owed to the Patent Office will cause a patent to be unenforceable.⁸² Such a breach of duty occurs when material information is withheld from the Patent Office, and such withholding was intentional or accompanied by gross negligence or bad faith.⁸³

Thus, inequitable conduct before the Patent Office is broader than common law fraud and requires proof by clear and convincing evidence of materiality and intent.⁸⁴ Inequitable conduct encompasses affirmative acts of commission as well as omission.⁸⁵ However, evidence of simple negligence, oversight, or erroneous good faith judgment not to disclose prior art is not sufficient to constitute inequitable conduct.⁸⁶

Direct evidence of acts as well as the natural consequences of acts may be used to prove intent.⁸⁷ Gross negligence, which is sufficient proof of intent, is present when the actor, judged as a reasonable person, in his position, should have known of the materiality of the withheld reference.⁸⁸ Thus, inference or direct evidence can be used to prove intent.⁸⁹ The existence of inequitable conduct is a factual issue.⁹⁰

Accordingly, when an alleged infringer succeeds in having a patent declared unenforceable on the basis of inequitable conduct before the Patent Office, an award of attorney fees is appropriate.⁹¹

78. *Kansas Jack, Inc. v. Kuhn*, 719 F.2d 1144, 1155 (Fed. Cir. 1983).

79. 37 C.F.R. 1.56(a) (1985).

80. *Id.*

81. *Driscoll v. Cebalo*, 731 F.2d 878, 884 (Fed. Cir. 1984).

82. *Hycor Corp. v. Schleuter Co.*, 740 F.2d 1529, 1538 (Fed. Cir. 1984).

83. *Id.* at 1538.

84. *J.P. Stevens and Co. v. Lextex, Ltd.*, 747 F.2d 1553, 1559-60 (Fed. Cir. 1984).

85. *Id.* at 1559.

86. *Orthopedic Equipment Co. v. All Orthopedic Appliances, Inc.*, 707 F.2d 1376, 1383 (Fed. Cir. 1983).

87. *J.P. Stevens and Co. v. Lextex, Ltd.*, 747 F.2d 1553, 1560 (Fed. Cir. 1984); *Kansas Jack, Inc. v. Kuhn*, 719 F.2d 1144, 1151 (Fed. Cir. 1983).

88. *J.P. Stevens*, 747 F.2d at 1560.

89. *American Hoist and Derrick Co. v. Sowa and Sons, Inc.*, 725 F.2d 1350, 1363 (Fed. Cir. 1984).

90. *J.P. Stevens*, 747 F.2d at 1562.

91. *See Interpart Corp. v. Italia*, 777 F.2d 678 (Fed. Cir. 1985); *Hughes v. Novi American, Inc.*, 724 F.2d 122 (Fed. Cir. 1985).

However, invalidation of a patent without a finding of inequitable conduct before the Patent Office will not support an award of attorney fees to the accused infringer.⁹²

2. *Misconduct Towards Alleged Infringer*

An alleged infringer who prevails on the issue of infringement may also recover attorney fees when the litigation is vexatious, unjustified or frivolous.⁹³ Attorney fees may also be awarded to the accused infringer when there is litigation misconduct by the patent owner.⁹⁴

In awarding attorney fees to an accused infringer, the district court must take into account the totality of circumstances surrounding the patent owner's conduct.⁹⁵ One factor to consider is the patent owner's reasonableness in concluding that infringement exists.⁹⁶ The patent owner has a duty to obtain competent legal advice as to the issues of validity and infringement of the patent, similar to that of the accused infringer with respect to willful infringement.⁹⁷ Thus, the presence or absence of advice of counsel is evidence as to the patent owner's state of mind, but does not conclusively establish the "exceptionality" of the case.⁹⁸

Another factor for consideration in awarding attorney fees is whether the patent-in-suit has been previously held invalid by another court.⁹⁹ Generally, once a patent has been declared invalid, the patent owner is collaterally estopped from asserting the validity of the patent in a subsequent action.¹⁰⁰ Even if the patent owner had a full and fair opportunity to litigate the validity of the patent in the

92. See *State Industries, Inc. v. Rheem*, 762 F.2d 762 (Fed. Cir. 1985); *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 762 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2676 (1985); *Hycor Corp. v. Schleuter Co.*, 740 F.2d 1529 (Fed. Cir. 1984); *Orthopedic Equipment Co. v. All Orthopedic Appliances, Inc.*, 707 F.2d 1376 (Fed. Cir. 1983).

93. *E.g.*, *Bayer Aktiengesellschaft v. Duphar International Research B.V.*, 738 F.2d 1237, 1242 (Fed. Cir. 1984).

94. *Bayer*, 738 F.2d at 1242 (Fed. Cir. 1984).

95. *Machinery Corp. of America v. Gullfiber AB*, 774 F.2d 467, 472-73 (Fed. Cir. 1985).

96. *Id.* at 473. See also *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 455 (Fed. Cir. 1985) (baseless litigation); *Bayer Aktiengesellschaft v. Duphar International Research B.V.*, 738 F.2d 1237, 1243 (Fed. Cir. 1984) (frivolous claim interpretation); *Hughes v. Novi American, Inc.*, 724 F.2d 122, 124-25 (Fed. Cir. 1984) (no good faith belief of infringement).

97. *Machinery Corp.*, 774 F.2d at 472-73.

98. *Id.* at 473. Presumably, the standards for reasonableness of the advice of counsel for the alleged infringer, see *supra* notes 14-31 and accompanying text, will apply equally to the reasonableness of the advice of counsel for the patent owner.

99. *Stevenson v. Sears-Roebuck & Co.*, 713 F.2d 705, 712-13 (Fed. Cir. 1983).

100. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

previous suit, a subsequent suit for patent infringement is not an exceptional case absent a finding of unfairness, bad faith, inequitable conduct, vexatious litigation or similar circumstances.¹⁰¹

Abuse of discovery is another factor to consider in awarding attorney fees.¹⁰² For example, falsely answered interrogatories may contribute to the finding of an exceptional case.¹⁰³

An alleged infringer, who commences a declaratory judgment action for a declaration of patent invalidity and/or non-infringement in response to charges of infringement, may also recover attorney fees upon proof of actual wrongful intent or gross negligence on the part of the patent owner in the infringement accusations.¹⁰⁴ In awarding attorney fees to the prevailing non-infringer in a declaratory judgment action, the district court should consider the relevant facts surrounding the commencement of the suit. These facts include the patent owner and the accused infringer's conduct, the accused infringer's reasonable belief that the best recourse against the patent owner was to file suit, unfair competition on the part of the patent owner against the accused infringer, and the bearing of these factors on the reasonable necessity to commence litigation.¹⁰⁵

C. Award of Attorney Fees For Appeal

Neither the language of section 285 nor its legislative history distinguishes between awarding attorney fees in the district court or the appellate court. Since the purpose of section 285 is to prevent injustice to a party involved in a patent suit, if the appeal itself is exceptional, attorney fees may be granted.¹⁰⁶

A frivolous appeal will justify an award of attorney fees. An appeal is frivolous if there is no plausible premise upon which reversal can be based.¹⁰⁷ If the arguments on appeal are reasonable and

101. *Stevenson*, 713 F.2d at 713.

102. *Hughes v. Novi American, Inc.*, 724 F.2d 122, 126 (Fed. Cir. 1984).

103. *Id.* See also *Reactive Metals and Alloys Corp. v. ESM, Inc.*, 769 F.2d 1578, 1583-85 (Fed. Cir. 1985) (award of attorney fees reversed since the falsity of interrogatory answers was not proven by clear and convincing evidence). *Western Marine Electronics, Inc. v. Furono Electric Co.*, 764 F.2d 840, 847 (Fed. Cir. 1985) (the C.A.F.C. affirmed the trial court's denial of attorney fees despite falsely answered interrogatories by the patent owner. The trial court had previously imposed monetary sanctions against the patent owner for discovery abuse).

104. *Machinery Corp. of America v. Gullfiber AB*, 774 F.2d 467, 473 (Fed. Cir. 1985).

105. *Id.*

106. *E.g.*, *Rohm and Haas Co. v. Crystal Chemical Co.*, 736 F.2d 688, 692 (Fed. Cir.), *cert. denied*, 105 S. Ct. 172 (1984).

107. *Porter v. Farmers Supply Service, Inc.*, 790 F.2d 882, 887 (Fed. Cir. 1986); *Chemical Engineering Corp. v. Marlo, Inc.*, 754 F.2d 331, 335 (Fed. Cir. 1985); *D.H. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1033 (Fed. Cir. 1985).

presented in good faith, the appeal is not frivolous.¹⁰⁸ The Federal Circuit has also indicated that misstatement of the record on appeal may justify an award of attorney fees.¹⁰⁹ However, when new standards of law are established on appeal, attorney fees are not appropriate.¹¹⁰ An award of attorney fees for appeal may be assessed against counsel, jointly and severally with the party represented.¹¹¹

D. Award of Double Costs

The Federal Circuit has awarded double costs on appeal for a frivolous appeal pursuant to F.R.A.P. 38.¹¹² While a definition of frivolous appeal is difficult, an appeal is frivolous if the record, briefs, or oral argument lack any basis for reversal of the district courts decision.¹¹³ An appeal that has a small chance of success is not frivolous for that reason alone.¹¹⁴

Double costs on appeal may also be awarded against a party who presents arguments lacking the candor mandated by the Model Rules of Professional Conduct.¹¹⁵ The Court has reasoned that conduct which imposed unnecessary costs on the parties and on the citizens whose taxes support the court, and also wastes the time of the court and of the opposing counsel, is punishable.¹¹⁶ For example, if

108. *Shelcore, Inc. v. Durham Industries, Inc.*, 745 F.2d 621, 630 (Fed. Cir. 1984).

109. *See Glaros v. H.H. Robertson Co.*, 230 U.S.P.Q. 393, 401 (Fed. Cir. 1986) (the court stated that misstatement of the record normally would justify an award of attorney fees incurred in the effort of opposing counsel to inform the court of the truth. However, since appellee's counsel, who presumably knew the truth, failed to contact appellant's counsel regarding the misstatements so that corrective documents may have been unnecessary, attorney fees and costs were denied).

110. *Rohm and Haas*, 736 F.2d at 693.

111. *Porter*, 790 F.2d at 887; *Chemical Engineering Corp.*, 754 F.2d at 335.

112. *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1553-55 (Fed. Cir. 1983). The court awarded double costs plus \$500 for the frivolous appeal. *Id.* at 1555. *FED R. APP. P.* 38 (Damage for delay). If a court of appeals determines that an appeal is frivolous, it may award just damages and single or double costs to an appellee. *Id.*

113. *Connell*, 722 F.2d at 1555.

114. *Id.* at 1554.

115. *Panduit Corp. v. Dennison Manufacturing Co.*, 774 F.2d 1082, 1102-02 (Fed. Cir. 1985); *Amstar Corp. v. Environtech Corp.*, 730 F.2d 1476, 1486 (Fed. Cir. 1984). *See also* *Connell*, 722 F.2d at 1554 (the C.A.F.C. awarded double costs plus \$500 to the alleged infringer for the frivolous appeal. No reason is given for the \$500 portion of the award). American Bar Association, *Model Rules of Professional Conduct and Code of Judicial Conduct* (1983); Rule 3.3., Candor Toward the Tribunal, provides, "(a) A lawyer shall not knowingly: (1) make a false statement of material fact to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

116. *See Amstar*, 730 F.2d at 1486.

an appeal argument distorts the record and misstates the law, increased costs may be awarded for the prevailing party on appeal.¹¹⁷ The party who prevailed at trial is not immune from an assessment of double costs.¹¹⁸

IV. Conclusion

Pursuant to 35 U.S.C. section 284, damages in patent infringement litigation may be trebled, in the discretion of the trial court. Damages are often increased when infringement is found to be willful. In determining willfulness, the court must look to the totality of circumstances surrounding the infringing conduct. A primary consideration is whether the infringer has satisfied the affirmative duty to obtain and follow the well-reasoned advice of legal counsel. Other factors to consider include a reasonable belief that the conduct occurred, efforts to avoid or design around the patent, the nature of the defenses asserted against the claim of infringement, license negotiations, and continued infringement after receiving notice of the patent rights.

In exceptional cases, the prevailing party may be awarded attorney fees, pursuant to 35 U.S.C. section 285. An exceptional case exists for a prevailing patent owner when infringement has been willful or when defenses have been asserted in bad faith or frivolously. For an accused infringer who prevails, an exceptional case exists when the patent has been procured through inequitable conduct in the Patent Office, or when the patent owner has acted in bad faith towards the alleged infringer. Attorney fees may also be awarded on appeal in exceptional cases.

Finally, a party who appeals frivolously or who lacks candor in its conduct before the court may be assessed increased costs.

Thus, the patent owner, the potential infringer, and their counsel, all have certain duties and responsibilities which arise both before and during litigation. Parties who fail to meet these duties and responsibilities potentially subject themselves to detrimental monetary repercussions. "Caution" should be the watch word of the day!

117. See *Panduit*, 774 F.2d at 1101-02; *Amstar*, 730 F.2d at 1486.

118. See *Panduit*, 774 F.2d at 1101-02; *Amstar*, 730 F.2d at 1486. In both *Panduit* and *Amstar*, the C.A.F.C., without citing any statutory basis, assessed double costs against the alleged infringer who had prevailed at trial. Federal Rule of Appellate Procedure 38 allows damages and single or double costs to the appellee for frivolous appeals.

APPENDIX 1

C.A.F.C. DECISIONS RE: INCREASED DAMAGES

<u>Case</u>	<u>District Court</u>		<u>C.A.F.C.</u>
	<u>Willful Infringe.</u>	<u>Increased Damages</u>	
Stickle v. Heublein, Inc. 716 F.2d 1550 (Fed. Cir. 1983)	Yes	No	Reversed (will- ful infringement)
Underwater Devices, Inc. v. Morrison-Knudsen Co., 717 F.2d 1380 (Fed. Cir. 1983)	Yes	Treble	Affirmed
Central Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573 (Fed. Cir. 1983)	Yes	Double	Affirmed
Leinoff v. Louis Milona & Sons, Inc., 726 F.2d 734 (Fed. Cir. 1984)	Yes	Treble	Affirmed
Rosemount, Inc. v. Beckman Industries, Inc., 727 F.2d 1540 (Fed. Cir. 1984)	Yes	Treble	Affirmed
Paper Converting Machine Co. v. Magna-Graphics Corp., 745 F.2d 11 (Fed. Cir. 1984)	Yes	Treble	Remanded
State Industries, Inc. v. A. O. Smith Corp., 751 F.2d 1226 (Fed. Cir. 1985)	Yes	Treble	Reversed
Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613 (Fed. Cir. 1985)	No	No	Affirmed
Kori Corp. v. Willco Marsh Buggies & Draglines, Inc., 761 F.2d 649 (Fed. Cir.), <i>cert. denied</i> 106 S.Ct. 230 (1985)	Yes	Double	Affirmed
King Instrument Corp. v. Otari Corp., 767 F.2d 853 (Fed. Cir. 1985)	No	No	Affirmed
Ralston Purina Co. v. Far-Mar-Co. 772 F.2d 1570 (Fed. Cir. 1985)	Yes	Ruling Reserved	Affirmed
American Original Corp. v. Jenkins Food Corp., 774 F.2d 459 (Fed. Cir. 1985)	No	No	Affirmed
Power Lift, Inc. v. Lang Tools, 774 F.2d 478 (Fed. Cir. 1985)	Yes	?	Affirmed

Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268 (Fed. Cir. 1985)	Bad faith	Increased by 50%	Reversed
CPG Products Corp. v. Pegasus Luggage, Inc., 776 F.2d 1007 (Fed. Cir. 1985)	No	No	Reversed
S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198 (Fed. Cir. 1986)	Yes	No	Affirmed (willful in- fringement) remanded (in- creased damages)
Great Northern Corp. v. Davis Core & Pad Co., No. 85-2485, slip op. (Fed. Cir. 1986)	Yes	Treble	Affirmed
Radio Steel & Mfg. Co. v. MTD Products, Inc., 788 F.2d 1554 (Fed. Cir. 1986)	No	No	Affirmed
Kloster Speedsteel AB v. Stora Kopparbergs Bergslags AB, 793 F.2d 1565 (Fed. Cir. 1986)	No	No	Remanded
Shiley, Inc. v. Bentley Laboratories, Inc., 794 F.2d 1561 (Fed. Cir. 1986)	Yes	Double	Affirmed
Rolls-Royce, Ltd. v. GTE Valeron Corp., No. 86-761, slip op. (Fed. Cir. 1986)	No	No	Affirmed
Pacific Furniture Mfg. Co. v. Preview Furniture Corp., No. 86-787, slip op. (Fed. Cir. 1986)	Yes	Treble	Affirmed

APPENDIX 2

C.A.F.C. DECISIONS RE: ATTORNEY FEES

<u>Case</u>	District Court Attorney Fee Award		<u>C.A.F.C.</u>
	<u>Granted To</u>	<u>Denied To</u>	
Orthopedic Equipment Co. v. All Orthopedic Appliances, Inc., 707 F.2d 1376 (Fed. Cir. 1983)		Alleged Infringer	Affirmed
Stevenson v. Sears, Roebuck & Co., 713 F.2d 705 (Fed. Cir. 1983)	Alleged Infringer		Reversed
White Consolidated Industries Inc. v. Vega Servo-Control, Inc. 713 F.2d 788 (Fed. Cir. 1983)		Alleged Infringer	Affirmed
Stickle v. Heublein, Inc., 716 F.2d 1550 (Fed. Cir. 1983)	Patent Owner		Reversed
Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056 (Fed. Cir. 1983)	Patent		Affirmed
Central Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573 (Fed. Cir. 1983)	Patent Owner		Affirmed
Hughes v. Novi American, Inc., 724 F.2d 122 (Fed. Cir. 1984)	Alleged		Affirmed
Rosemount, Inc. v. Beckman Industries, Inc., 727 F.2d 1540 (Fed. Cir. 1984)	Patent Owner		Affirmed
CTS Corp. v. Piher International Corp., 727 F.2d 1550 (Fed. Cir.), <i>cert. denied</i> 105 S.Ct. 221 (1984)		Patent Owner	Affirmed
Radio Steel & Mfg. Co. v. MTD Products, Inc., 731 F.2d 840 (Fed. Cir.), <i>cert. denied</i> 105 S.Ct. 119 (1984)		Patent Owner	Affirmed
Bayer Aktiengesellschaft v. Duphar International Research B.V., 738 F.2d 1237 (Fed. Cir. 1984)		Alleged Infringer	Remanded

Hycor Corp. v. Schleuter Co., 740 F.2d 1529 (Fed. Cir. 1984)	Alleged Infringer	Reversed
Peterson Mfg. Co. v. Central Purchasing, Inc., 740 F.2d 1541 (Fed. Cir. 1984)	Alleged Infringer	Reversed
Western Marine Electronics, Inc. v. Furuno Electric Co., 754 F.2d 840 (Fed. Cir. 1985)	Alleged Infringer	Affirmed
King Instruments Corp. v. Otari Corp., 767 F.2d 853 (Fed. Cir. 1985)	Patent Owner	Affirmed
State Industries, Inc. v. Rheem Mfg. Co., 769 F.2d 762 (Fed. Cir. 1985)	Alleged Infringer	Reversed
Reactive Metals and Alloys Corp., v. ESM, Inc., 769 F.2d 1578 (Fed. Cir. 1985)	Alleged Infringer	Reversed
Great Northern Corp. v. Davis Core & Pad Co., No. 85-2485, slip op. (Fed. Cir. 1986)	Patent Owner	Affirmed
Radio Steel & Mfg. Co. v. MTD Products, Inc. 788 F.2d 1554 (Fed. Cir. 1986)	Patent Owner	Affirmed
Kloster Speedsteel AB v. Stora Kopparbergs Bergslags AB, 793 F.2d 1565 (Fed. Cir. 1986)	Patent Owner	Affirmed
Shiley, Inc. v. Bentley Labora- tories, Inc., 794 F.2d 1561 (Fed. Cir. 1986)	Patent Owner	Affirmed
Rolls-Royce, Ltd. v. GTE Valeron Corp., No. 86-761 slip op. (Fed. Cir. 1986)	Patent Owner	Affirmed
Pacific Furniture Mfg. Co. v. Preview Furniture Corp., No. 86-787, slip op. (Fed. Cir. 1986)	Patent Owner	Affirmed

APPENDIX 3

C.A.F.C. DECISIONS RE: ATTORNEY FEES FOR APPEAL

<u>Case</u>	<u>Granted to</u>	<u>Denied to</u>
Rohm & Haas Co. v. Crystal Chemical Co., 736 F.2d 688 (Fed. Cir.), <i>cert. denied</i> 105 S.Ct. 172 (1984)		Alleged infringer
Shelcore, Inc. v. Durham Industries, Inc., 745 F.2d 621 (Fed. Cir. 1984)		Alleged Infringer
D. H. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985)	Alleged infringer	
Chemical Engineering Corp. v. Marlo, Inc., 754 F.2d 331 (Fed. Cir. 1985)	Alleged infringer	
Porter v. Farmers Supply Service, Inc., 790 F.2d 882 (Fed. Cir. 1986)	Alleged infringer	
Glaros v. H. H. Robertson Co. 230 U.S.P.Q. 393 (Fed. Cir. 1986)		Patent Owner

APPENDIX 4

C.A.F.C. DECISIONS RE: DOUBLE COSTS ON APPEAL

<u>Case</u>	<u>Granted to</u>
Amstar Corp. v. Environtech Corp., 730 F.2d 1476 (Fed. Cir. 1984)	Appellant/patent owner
Connell v. Sears, Roebuck & Co., 722 F.2d 1542 (Fed. Cir. 1983)	Appellee/alleged infringer
Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082 (Fed. Cir. 1985)	Appellant/patent owner