

Intellectual Property

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I. INTRODUCTION

This Article surveys case law developments in the area of intellectual property, including patents, copyrights, and trademarks in Georgia during the period from January 1, 2002 to December 31, 2002. The Authors have not attempted to include all cases that touch upon intellectual property, but instead have selected some decisions that are of more significance or interest.

Intellectual property law comprises several discrete, yet overlapping, areas of law. The three primary areas are patent, trademark, and copyright law.¹ Patent and copyright law are provided for in the United States Constitution,² and thus, the cases regarding these two areas are based on federal law and are gleaned from the U.S. federal courts. While trademark law has both federal³ and state aspects and thus the

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1. Secondary areas, which will not be surveyed in this Article, include trade secret, trade dress, and know-how. Cases relating to these secondary areas have not been included due to space limitations.

2. Article I, section 8, clause 8 of the United States Constitution provides, "The Congress shall have power . . . (8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." Authors/Writings refers to copyright, and Inventors/Discoveries refers to patent.

3. Article I, section 8, clause 3 of the United States Constitution is the Commerce Clause, which forms the constitutional basis for federal trademark and unfair competition legislation and provides, "The Congress shall have power . . . (3) To regulate Commerce

cases regarding this area are based on federal or state law, the precedent-setting cases generally are from the U.S. federal courts, and as such, this Article will focus on the cases from the federal courts. Further, because the United States Court of Appeals for the Eleventh Circuit covers Georgia and its decisions are applicable to Georgia, some cases from Florida and Alabama (the other two states in the Eleventh Circuit) that have been appealed to the Eleventh Circuit are included. The United States Supreme Court decisions and some United States Federal Circuit Court of Appeals decisions (which decide appeals from the U.S. district courts based on patent law) that affect intellectual property law in Georgia also are included.

II. PATENT CASES

A. *Claim Construction*

The claims of a patent are the equivalent of the metes and bounds of the protection of the patent—the scope of coverage of the patent. As such, claim construction is one of the important concepts in patent law because the scope of a claim can often be determinative in a patent infringement action. As a result, many of the appellate cases in the field of patent law are focused on claim construction. While claim construction is determined from a number of factors, the more interesting cases this year have focused on the use of a patent’s specification, the main descriptive body of the patent, to interpret the claim elements.

A claimed element that has not been mentioned in the patent specification can be valid.⁴ In *All Dental Prodx, L.L.C. v. Advantage Dental Products, Inc.*,⁵ the Federal Circuit held that the failure of a specification to specifically mention a claim limitation that later appears in the claim is not fatal if a person skilled in art (patent law’s “reasonable person” standard) would recognize, upon reading the specification, that the new language reflects what the specification shows has been invented.⁶ Specifically, the patent claims, which concerned a method for making a custom dental impression tray and recited the step of “heating an original unidentified mass” of thermoplastic material, were not invalid for failure to satisfy the written description requirement, even though the original specification did not include the phrase “original

with foreign Nations, and among the several States, and with the Indian Tribes”

4. See *All Dental Prodx, L.L.C. v. Advantage Dental Prods., Inc.*, 309 F.3d 774, 779 (Fed. Cir. 2002).

5. 309 F.3d 774 (Fed. Cir. 2002).

6. *Id.* at 779.

unidentified mass.”⁷ Although there is no mention of the starting material’s shape or form in the specification, the Federal Circuit reasoned that the specification made it clear that the invention did not involve heating a mass having an identifiable form or shape.⁸

A patent claim should not be construed to cover only a single embodiment disclosed in a patent specification.⁹ In *Teleflex, Inc. v. Ficosa North America Corp.*,¹⁰ the Federal Circuit held that a claim is not limited to the single embodiment disclosed in the specification and is to be given its ordinary meaning unless the applicant expressly imparts a unique meaning or deviates from the ordinary meaning.¹¹ After distinguishing *Teleflex* from previous precedent,¹² the court noted that there was a “heavy presumption” that a claim term or limitation takes on its ordinary meaning (claim terms generally should be defined as in the dictionary, unless the applicant states otherwise) and that this presumption is not overcome by simply pointing to the preferred embodiment disclosed in the patent.¹³ Importantly, the court stated that the number of embodiments disclosed in the specification is not determinative of the meaning of disputed claim limitations.¹⁴

Further, a claim is not limited to the preferred embodiment that is required to be disclosed in the patent application.¹⁵ In *Beckson Marine, Inc. v. NFM, Inc.*,¹⁶ the Federal Circuit held that the term “sloping drain groove” claimed in the patent for a boat port light was not limited to a long, narrow drain groove depicted as a preferred embodiment in the specification because the ordinary meaning of “groove” is not necessarily limited to a long U-shaped channel.¹⁷ Even though the patent’s figures showed only a single embodiment of the “sloping drain groove,” the court reasoned that the specification’s use of the broad term “draining structures” suggests that the applicant did not mean to limit the term “groove” to a specific width or length, and because the specification did not require long and narrow grooves at any point, such

7. *Id.* at 780.

8. *Id.*

9. *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1326 (Fed. Cir. 2002).

10. 299 F.3d 1313 (Fed. Cir. 2002).

11. *Id.* at 1324.

12. *Id.* at 1323-25.

13. *Id.* at 1325.

14. *Id.* at 1326.

15. *Beckson Marine, Inc. v. NFM, Inc.*, 292 F.3d 718, 724 (Fed. Cir. 2002).

16. 292 F.3d 718 (Fed. Cir. 2002).

17. *Id.* at 723.

a limitation is properly construed to mean a more general sloping, artificial channel for flowing water.¹⁸

The patent specification, however, can be used to narrow claims.¹⁹ In *Bionx Implants, Inc. v. Linvatec Corp.*,²⁰ the Federal Circuit held that the term “rigid,” as used in claims for a surgical suturing device, was properly construed to mean that the device is “sufficiently rigid” to be pushed directly through certain human tissue because the written description made it clear that, to be rigid within the meaning of the claims, a suture must be sturdy enough to be “pushed” through the tissue to be repaired.²¹ Further, the inventor emphasized the definition for “rigid” during the prosecution of claims (the give and take between the applicant and the United States Patent and Trademark Office during the patent application stage), thus, distinguishing the claimed suture over the prior art by emphasizing that it was rigid enough to be pushed through uncut tissue without the use of a needle.²²

The patent specification controls the interpretation of the terms in the claim.²³ In *Pickholtz v. Rainbow Technologies, Inc.*,²⁴ the Federal Circuit reversed the district court’s holding that the term “computer,” as used in the claims of the patent, was directed to a software protection method and was not synonymous with the term “computer system” in the patent’s specification.²⁵ The appeals court found that there was nothing in the specification to indicate that these terms had different meanings and that the patentee did not distinguish his invention from prior art on the basis of any difference between “computer” and “computer system” because the claim term “computer” must include at least some peripherals.²⁶ The court noted that ordinarily it does not regard extra words as surplusage, but in this case the words were used as synonyms.²⁷

The claims of a design patent, which protect the ornamental features of a functional invention, are construed by assessing the entire patent, including all of the figures.²⁸ In *Contessa Food Products, Inc. v.*

18. *Id.* at 724.

19. *See Bionx Implants, Inc. v. Linvatec Corp.*, 299 F.3d 1378 (Fed. Cir. 2002).

20. 299 F.3d 1378 (Fed. Cir. 2002).

21. *Id.* at 1380.

22. *Id.*

23. *See Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365 (Fed. Cir. 2002).

24. 284 F.3d 1365 (Fed. Cir. 2002).

25. *Id.* at 1373.

26. *Id.* at 1370.

27. *Id.*

28. *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1378 (Fed. Cir. 2002).

Conagra, Inc.,²⁹ the Federal Circuit held that all of the ornamental features illustrated in the patent figures in a design patent must be considered in evaluating the infringement of a design patent.³⁰ In accordance with the “ordinary observer” test, the patented design must be viewed in its entirety and is defined by the patent drawings, not by a single feature of the claimed design.³¹ In *Contessa* the determination of whether a design patent for a serving tray holding frozen shrimp was infringed required a consideration of the patent figures showing the underside of the tray, as well as those patent figures showing the arrangement of the shrimp on the tray, because an ordinary observer analysis must encompass the ornamental features of all of the figures in the patent.³²

B. Doctrine of Equivalents

After claim construction, the scope of a patent and its claims is determined in part by the Doctrine of Equivalents. The Doctrine of Equivalents provides that a patent should not be limited strictly to the exact structures or steps in the patent, but that the inventor is entitled to a certain range of equivalents of these structures or steps. While the scope of equivalents is determined by a number of factors and principles, like in any area of law, the patent’s prosecution history can have a crucial role in the ultimate scope of equivalents. The prosecution history is the written record of the give and take between the applicant and the United States Patent and Trademark Office (“USPTO”) during the patent application stage. How the prosecution history defines the scope of a patent or the scope of equivalents under the Doctrine of Equivalents has been in constant flux. While it appears that the Supreme Court in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*³³ breathed life into the Doctrine of Equivalents, it also appears that the general trend is now towards limiting the role of the Doctrine of Equivalents.

In *Festo* the Supreme Court unanimously reversed the Federal Circuit’s holding that amending a claim during the prosecution of a patent application will eliminate the application of the Doctrine of Equivalents to the amended limitation.³⁴ More particularly, in *Festo*, the Supreme Court held that while a narrowing amendment that adds limitations to a claim made to satisfy any requirement of the United

29. 282 F.3d 1370 (Fed. Cir. 2002).

30. *Id.* at 1378.

31. *Id.*

32. *Id.* at 1381.

33. 535 U.S. 722 (2002).

34. *Id.* at 733-42.

States Patent Act³⁵ may give rise to prosecution history estoppel, such an amendment does not act as a complete bar to the assertion that the narrowed claim element is infringed under the Doctrine of Equivalents.³⁶ In reversing the Federal Circuit's holding³⁷ and affirming *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*,³⁸ the Supreme Court held that a narrowing amendment does not relinquish equivalents that were unforeseeable at the time of the amendment to the claim and beyond a fair interpretation of what was surrendered, nor does it foreclose a claim of equivalence for aspects of the invention that only have a peripheral relation to the reason for amendment.³⁹ However, the patentee bears the burden of proving that the amendment did not surrender a particular equivalent at issue and must show that, at the time of amendment, one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent.⁴⁰ Over the next several years, we undoubtedly will see how the lower courts will interpret what unforeseeable at the time of amendment means for patentees.

A disclosed but not claimed element cannot be an equivalent to another element in a patent claim.⁴¹ In *Johnson & Johnston Associates, Inc. v. R.E. Service Co.*,⁴² the Federal Circuit, en banc, held that subject matter disclosed but not claimed in a patent has been dedicated to the public and cannot be recaptured under the Doctrine of Equivalents.⁴³ In *Johnson* the patentee had a patent on the manufacture of printed circuit boards in which a key component was a thin layer of aluminum.⁴⁴ The patent disclosed in the specification that other substrates, such as stainless steel or nickel alloys, could be used, but the issued claims only claimed the use of copper foil.⁴⁵ Stressing that claims, not specifications, determine the scope of patent rights, the Federal Circuit stated that an applicant cannot narrowly claim an

35. 35 U.S.C. §§ 101-103, 112 (2000 & Supp. 2002).

36. 535 U.S. at 737.

37. In *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558, 569 (Fed. Cir. 2000), the Federal Circuit held that when an amendment narrows a claimed element, it is not entitled to any range of equivalents under the Doctrine of Equivalents.

38. 520 U.S. 17 (1997).

39. *Festo*, 535 U.S. at 740-41.

40. *Id.* at 740.

41. *Johnson & Johnston Assocs., Inc. v. R.E. Serv. Co.*, 285 F.3d 1046, 1052 (Fed. Cir. 2002).

42. 285 F.3d 1046 (Fed. Cir. 2002).

43. *Id.* at 1052.

44. *Id.* at 1048.

45. *Id.* at 1050.

invention to avoid scrutiny during prosecution and then, after the patent issues, use the Doctrine of Equivalents to establish infringement on the grounds that the specification discloses equivalents.⁴⁶ Further, the court pointed out that it is well established that unclaimed subject matter is dedicated to the public.⁴⁷

The Doctrine of Equivalents must not be applied so that claim limitations are vitiated by the application.⁴⁸ In *Cooper Cameron Corp. v. Kvaerner Oilfield Products, Inc.*,⁴⁹ the Federal Circuit held that the Doctrine of Equivalents must be applied to each individual element of a claim under the so-called All-Limitations Rule.⁵⁰ In *Cooper* the claim at issue required a “workover” port that extends laterally through a spool tree wall from “between the two plugs” in a wellhead assembly, whereas the workover port of the allegedly infringing device entered a wellhead “above” those two plugs.⁵¹ The court held that these could not be equivalent to each other; therefore, the allegedly infringing device did not meet the “all limitations” rule.⁵² In the application of the Doctrine of Equivalents, an equivalent must not be applied that essentially vitiates an element of the claim.⁵³

The Federal Circuit continues to apply the Doctrine of Equivalents. In *Leggett & Platt, Inc. v. Hickory Springs Manufacturing Co.*,⁵⁴ the Federal Circuit found that a genuine issue of fact existed about whether defendant’s device infringed on plaintiff’s patent rights under the Doctrine of Equivalents.⁵⁵ While the court agreed with the district court that the claims were not literally infringed, the court held that defendant’s device achieved the same result in substantially the same way and performed the same function as the patented device, which is a test under the Doctrine of Equivalents.⁵⁶ In *Leggett* the patent was for a stackable bedding foundation with “support wires” that only attached to borders of foundation (and thus the support wire did not consist of multiple wires with multiple ends welded together but rather

46. *Id.* at 1054.

47. *Id.* at 1053-54 n.1.

48. *Cooper Cameron Corp. v. Kvaerner Oilfield Prods., Inc.*, 291 F.3d 1317, 1321 (Fed. Cir. 2002).

49. 291 F.3d 1317 (Fed. Cir. 2002).

50. *Id.* at 1321-22.

51. *Id.* at 1318-19.

52. *Id.* at 1321.

53. *Id.*

54. 285 F.3d 1353 (Fed. Cir. 2002).

55. *Id.* at 1360.

56. *Id.* at 1359-60.

was a continuous strand with two ends).⁵⁷ The court held that this limitation could be infringed by a defendant's device that does not have support wires but instead uses "support cups," or wire baskets, welded to longitudinal wires that collectively have more than two ends.⁵⁸

Similarly, in *Vulcan Engineering Co. v. FATA Aluminium, Inc.*,⁵⁹ the Federal Circuit affirmed the district court's finding of infringement when all the differences between the patented process and the accused device were insubstantial.⁶⁰ In *Vulcan* the district court properly concluded that the allegedly infringing system met the "registration" means limitation in a claim directed to an on-line continuous system for metal casting using a "lost foam" process.⁶¹ The court was persuaded, in part, by plaintiff's presentation of evidence that one of ordinary skill would consider the registration means employed by the allegedly infringing system to be interchangeable with those claimed in the patent.⁶² Importantly, the court, applying the Doctrine of Equivalents, stated that known interchangeability is an important factor in determining equivalence and that defendants cannot avoid an infringement holding by asserting that the claimed means perform an additional function that the allegedly infringing system is not capable of performing.⁶³

In *CCS Fitness, Inc. v. Brunswick Corp.*,⁶⁴ the Federal Circuit held that a claimed term "reciprocating member," as used in a patent for an elliptical trainer exercise device, is properly construed to encompass a multicomponent, curved structure used in allegedly infringing machines, and is not limited to single-component, straight-bar structures shown in the patent drawings.⁶⁵ Because it was undisputed that "reciprocating" simply means to move back and forth, and because the ordinary meaning of "member" denotes a beam-like structure that is a single unit in larger whole, the Federal Circuit held that even though only one embodiment was disclosed in the specification, the claimed element was entitled to a range of equivalents.⁶⁶

57. *Id.* at 1355-56.

58. *Id.* at 1359-60.

59. 278 F.3d 1366 (Fed. Cir. 2002).

60. *Id.* at 1374.

61. *Id.* at 1370, 1374.

62. *Id.* at 1374.

63. *Id.*

64. 288 F.3d 1359 (Fed. Cir. 2002).

65. *Id.* at 1367.

66. *Id.* at 1369.

C. Patent Invalidity

Patent invalidity is a powerful defense to patent infringement. A patent can be invalid for numerous technical and substantive reasons. Over the last year, the Federal Circuit has decided several interesting cases in which the validity of patents were raised. The following cases are just a few of the most interesting examples.

Genetic-related patents must disclose gene sequences if they are necessary for an understanding of the patent. A deposit of an actual gene sequence in a recognized repository can suffice.⁶⁷ A patent is not invalid and meets the written description requirements of 35 U.S.C. § 112⁶⁸ by a deposit of a genetic sequence in a public repository for biological material.⁶⁹ In *Enzo Biochem, Inc. v. Gen-Probe, Inc.*,⁷⁰ the Federal Circuit held that a functional description of genetic material along with the deposit of such material may satisfy the written description requirement of 35 U.S.C. § 112.⁷¹ In *Enzo* patentee claimed a nucleic acid probe that selectively hybridizes with the nucleic acid sequence of *Neisseria gonorrhoeae*. While the specification contained information relating to how the probes were obtained, their approximate lengths were disclosed, but their actual sequences were not. However, the sequences were in a repository for biological material pursuant to biological patent practice and USPTO guidelines.⁷² In reversing its prior decision, the court held that “reference in the specification to a deposit [of biological material] in a public depository, which makes its contents accessible to the public when it is not otherwise available in written form, constitutes an adequate description of the deposited material sufficient to comply with the written description requirement of § 112.”⁷³ The court emphasized that the written description requirement is met when one skilled in the art can recognize what is claimed by comparing the claims to the deposit.⁷⁴

A patent that has been broadened during reissue to cover matter beyond the specification is not invalid.⁷⁵ “Re-examination” and “reissue” are USPTO processes used to confirm or modify, respectively,

67. *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 296 F.3d 1316, 1324 (Fed. Cir. 2002).

68. 35 U.S.C. § 112 (2000).

69. *Enzo Biochem*, 296 F.3d at 1326.

70. 296 F.3d 1316 (Fed. Cir. 2002).

71. *Id.* at 1324.

72. *Id.* at 1320-21.

73. *Id.* at 1325.

74. *Id.* at 1326.

75. *See* *Creo Prods., Inc. v. Presstek, Inc.*, 305 F.3d 1337, 1351 (Fed. Cir. 2002).

the coverage of an issued patent when newly found prior art exists or any other possible reason for invalidating the patent arises. In *Creo Products, Inc. v. Presstek, Inc.*,⁷⁶ the Federal Circuit held that the patentee did not impermissibly broaden its claims during re-examination for an apparatus and method for correcting errors in printing presses when it amended the original claims to require only two points of correction rather than the four points of correction originally claimed.⁷⁷ The court stressed that the written description's disclosure of four algorithms for correcting different types of errors did not limit the corresponding structure in the original claim to a single structural embodiment capable of performing all four algorithms, and that the prosecution history did not restrict the invention to a single structure capable of correcting all four types of imaging errors disclosed in specification.⁷⁸ Because the limitation of only two points of correction had support in the specification, the court held that the reissued patent was valid.⁷⁹

Omitting an inventor from an application for a patent can invalidate a patent.⁸⁰ In *Frank's Casing Crew & Rental Tools, Inc. v. PMR Technologies, Ltd.*,⁸¹ the Federal Circuit held that the two named inventors of the patent in the suit engaged in inequitable conduct by omitting the third person who participated in the development of the invention.⁸² In *Frank's* two inventors deliberately concealed a co-inventor's involvement in the conception of the invention, did not inform the co-inventor that a patent application had been filed on the invention, and engaged in a pattern of intentional conduct designed to deceive the USPTO about the identity of the true inventors.⁸³ Reasoning that the patent would not have issued without participation by wrongdoers and that the omission of an inventor was material, the appeals court affirmed the district court's holding that the patent was unenforceable by anyone, including the "innocent" co-inventor.⁸⁴

76. 305 F.3d 1337 (Fed. Cir. 2002).

77. *Id.* at 1346.

78. *Id.* at 1350.

79. *Id.* at 1351.

80. See *Frank's Casing Crew & Rental Tools, Inc. v. PMR Techs., Ltd.*, 292 F.3d 1363, 1376 (Fed. Cir. 2002).

81. 292 F.3d 1363 (Fed. Cir. 2002).

82. *Id.* at 1376.

83. *Id.*

84. *Id.*

D. Procedural Issues

Aside from substantive issues of patent law, the Supreme Court and the Federal Circuit also have resolved procedural issues that directly affect patent enforcement. The Federal Circuit has been the appeals court for all appeals relating to patents, whether the issue was raised in the complaint or in the counterclaim. However, the Supreme Court has held that the well-pleaded complaint rule does not allow the Federal Circuit to hear a cause of action in which there is only a patent infringement counterclaim.⁸⁵

In *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*,⁸⁶ the Supreme Court held that the Federal Circuit does not have jurisdiction over an action in which the complaint does not assert a claim under patent law, even though the answer asserts a counterclaim for patent infringement.⁸⁷ Because the Federal Circuit's jurisdiction is fixed with reference to that of the federal district court and is determined within the meaning of the "arises under" clause of 28 U.S.C. § 1338,⁸⁸ an action "arises under" patent law from the cause of action in the complaint alone.⁸⁹ In other words, the well-pleaded complaint rule does not allow a counterclaim to serve as a basis for Federal Circuit jurisdiction.⁹⁰ The Court reasoned that the statutory phrase "arising under" need not be interpreted differently in ascertaining the Federal Circuit's jurisdiction to effectuate the goal of promoting uniformity of patent law.⁹¹ This may have the effect of allowing patent law to be interpreted by the many federal circuits, rather than just the Federal Circuit.

The prevailing party in a patent infringement action may not file a conditional cross-appeal.⁹² In *Bailey v. Dart Container Corp.*,⁹³ the Federal Circuit held that a defendant who prevailed in a patent infringement action could not file a cross-appeal.⁹⁴ In *Bailey*, Dart Container prevailed on the merits of the case but filed a "conditional" cross-appeal so that it could raise arguments regarding noninfringement and claim construction in the event the court reversed the noninfringe-

85. *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831 (2002).

86. 535 U.S. 826 (2002).

87. *Id.* at 832-34.

88. 28 U.S.C. § 1338 (2000).

89. *Vornado*, 535 U.S. at 833-34.

90. *Id.*

91. *Id.*

92. *Bailey v. Dart Container Corp.*, 292 F.3d 1360, 1362 (Fed. Cir. 2002).

93. 292 F.3d 1360 (Fed. Cir. 2002).

94. *Id.* at 1362.

ment determination.⁹⁵ The court held that because defendant could, without cross-appeal, advance arguments on appeal that the judgment of noninfringement should be affirmed, a cross-appeal would be inappropriate unless defendant sought to have the judgment reversed or modified on appeal.⁹⁶ The court also noted that allowing a cross-appeal by defendant would unnecessarily expand briefing and oral argument.⁹⁷

In *BlackLight Power, Inc. v. Rogan*,⁹⁸ the Federal Circuit held that the USPTO may withdraw a patent application from issuance after the issue fee has been paid.⁹⁹ Although the second paragraph of 35 U.S.C. § 151¹⁰⁰ states that a patent “shall issue” upon payment of the issue fee, the opening clause of § 151 conditions the issuance of a patent on whether an applicant is “entitled to a patent under the law.”¹⁰¹ As such, there is nothing in § 151 to prohibit the USPTO from interrupting the sequence of procedures for a notice of allowance and issuance.¹⁰² The court also stressed that it is important policy to ensure that valid patents issue.¹⁰³

E. Genetic Patents

Patents covering transgenic animals are not inherently invalidated through anticipation by prior publications identifying the nature and location of the claimed gene.¹⁰⁴ In *Elan Pharmaceuticals, Inc. v. Mayo Foundation for Medical Education & Research*,¹⁰⁵ the Federal Circuit held that patents for transgenic animals harboring amyloid precursor protein (“APP”) having the “Swedish mutation” of Alzheimer disease were not inherently anticipated by a prior art patent that identifies the nature and location of the Swedish mutation in the gene and states that transgenic animals containing the mutated gene can be used in

95. *Id.* at 1361.

96. *Id.* at 1362.

97. *Id.*

98. 295 F.3d 1269 (Fed. Cir. 2002).

99. *Id.* at 1273.

100. 35 U.S.C. § 151.

If it appears that applicant is entitled to a patent under the law, a written notice of allowance of the application shall be given or mailed to the applicant. The notice shall specify a sum, constituting the issue fee or a portion thereof, which shall be paid within three months thereafter.

Id.

101. *Id.*

102. 295 F.3d at 1273-74.

103. *Id.* at 1273.

104. *See Elan Pharms., Inc. v. Mayo Found. for Med. Educ. and Research*, 304 F.3d 1221, 1228-30 (Fed. Cir. 2002).

105. 304 F.3d 1221 (Fed. Cir. 2002).

Alzheimer's disease research and therapy.¹⁰⁶ The patent claims at issue in *Elan* included an element that specified detection of a larger fragment of cleaved APP ("ATF-betaAPP")¹⁰⁷ as a proxy for detection of the smaller, more difficult to detect beta-amyloid peptide ("beta-AP") molecule associated with Alzheimer's disease.¹⁰⁸ Because (1) the prior patent describes known procedures for making a transgenic animal but did not describe every element of the claims at issue and (2) the prior patent did not teach the production of a transgenic rodent having detectable ATF-betaAPP in brain homogenate, the prior patent did not defeat the "novelty" of the specific mouse as claimed in the patent.¹⁰⁹

F. On Sale and Other Bars

An experimental use more than one year before the filing date of a patent application will not invalidate the patent.¹¹⁰ The United States Patent laws' "on-sale" bar generally provides that if the inventor makes, uses, offers to sell, or sells an invention more than one year prior to filing a patent application on the invention, the inventor is not entitled to obtain a patent.¹¹¹ In *EZ Dock, Inc. v. Schafer Systems, Inc.*,¹¹² the Federal Circuit held that if a patentee's sale was an experimental use, the sale would not invalidate a patent filed more than one year subsequent to the sale under the on-sale bar.¹¹³ In *EZ Dock* the Federal Circuit held that *Pfaff v. Wells Electronics, Inc.*¹¹⁴ requires that an invention subject to the on-sale bar must be (1) subject to a commercial offer and (2) must be ready for patenting.¹¹⁵ Using the *Pfaff* standard, which requires a "totality of the circumstances" test to enforce the on-sale bar, the Federal Circuit held that a finding of experimental use by the inventors would not satisfy the "ready for patenting" prong of the test for on-sale bar.¹¹⁶ In holding that the patentee's sale could be considered experimental use, the court noted that the buyer paid less than full market price, the buyer initiated the sale of the invention, the buyer received free equipment and installation,

106. *Id.* at 1229-30.

107. Humans who do not develop Alzheimer's disease are believed to break down APP in a manner that does not produce significant amounts of beta-AP. *Id.* at 1224.

108. *Id.* at 1228-29.

109. *Id.* at 1228.

110. *EZ Dock, Inc. v. Schafer Sys., Inc.*, 276 F.3d 1347, 1351 (Fed. Cir. 2002).

111. *Id.*

112. 276 F.3d 1347 (Fed. Cir. 2002).

113. *Id.* at 1351.

114. 525 U.S. 55 (1998).

115. *EZ Dock*, 276 F.3d at 1351.

116. *Id.* at 1351-52.

the inventors visited the device location on several occasions and made free repairs, and one inventor testified that he sold the device to determine whether it was capable of performing its intended purpose in its intended environment.¹¹⁷

An agreement to commercialize an invention between the applicant's licensee and a third party may not place the invention on "sale" for purposes of invalidating the patent right under 35 U.S.C. § 102(b).¹¹⁸ In *In re Kollar*,¹¹⁹ the Federal Circuit held that an agreement (or "a right to commercialize") between the patent applicant's assignee and a third-party corporation to sell products of a claimed process did not place the claimed process "on sale" within the meaning of § 102(b), even though the invention had been reduced to practice and was "ready for patenting."¹²⁰ In *Kollar* the Federal Circuit noted that a claim to a product of a claimed process is distinct from the claimed process itself and the right to commercialize in this situation did not include the right to commercialize the process.¹²¹ Importantly, the Federal Circuit noted that the mere transmission of a written description without more does not place the invention on sale and that such a holding is consistent with the fundamental on-sale doctrine.¹²² Further, the court noted that only licensing the invention, under which development of the claimed process would have to occur before the process is successfully commercialized, is not such a sale and that such a holding helps inventors bring their inventions to market when they could not otherwise have done so.¹²³

Generally, inventors are under a duty to try to obtain patent protection as quickly as possible for an invention. Undue delay in filing patent applications to protect inventions can bar the enforcement of later issued patents.¹²⁴ In *Symbol Technologies, Inc. v. Lemelson Medical, Education & Research Foundation, LP*,¹²⁵ the Federal Circuit held that the equitable doctrine of laches can apply, as a matter of law, to bar the enforcement of a patent that issued after an unreasonable and unexplainable delay in prosecution, even though the applicant complied with

117. *Id.* at 1352.

118. *In re Kollar*, 286 F.3d 1326, 1330 (Fed. Cir. 2002); see 35 U.S.C. § 102(b).

119. 286 F.3d 1326 (Fed. Cir. 2002).

120. *Id.* at 1330.

121. *Id.* at 1333.

122. *Id.*

123. *Id.*

124. *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1364-65 (Fed. Cir. 2002).

125. 277 F.3d 1361 (Fed. Cir. 2002).

pertinent statutes and rules.¹²⁶ Symbol Technologies brought a declaratory judgment action seeking a judgment that Lemelson's patents, which claimed priority on two patents filed in 1954 and 1956, were unenforceable and invalid.¹²⁷ The Federal Circuit, citing *Woodbridge v. United States*¹²⁸ and *Webster Electric Co. v. Splitdorf Electrical Co.*,¹²⁹ held that prosecution of laches prevents a patentee from enforcing a patent after an unexplained and unreasonable delay.¹³⁰ Lemelson is famous in the patent field for keeping patent applications pending for inordinate periods of time in the hope that a royalty or licensing opportunity may arise prior to the actual issuance or expiration of his patents.

Similarly, the USPTO has the authority to reject applications when the applicant has been dilatory. In *In re Bogese*,¹³¹ the Federal Circuit held that the USPTO may reject a patent application if the applicant fails to advance prosecution of a patent application for an unreasonably long period of time.¹³² In other words, laches may apply to bar enforcement of a patent that issues after an unreasonable and unexplained delay in prosecution. In *Bogese* the USPTO rejected an application from an applicant who filed twelve continuation applications over a period of eight years without substantively advancing prosecution of application.¹³³ The Federal Circuit affirmed the actions of the USPTO and emphasized that it was in the USPTO's inherent authority to govern its own procedures that allow it to set reasonable deadlines and requirements for the prosecution of applications.¹³⁴

G. Miscellaneous Issues

Finally, several side issues in patent law were clarified in some interesting decisions. In *University of West Virginia, Board of Trustees v. VanVoorhies*,¹³⁵ the Federal Circuit held a university's patent policy,

126. *Id.* at 1366.

127. *Id.* at 1363.

128. 263 U.S. 50 (1923) (holding that prosecution laches rendered a patent unenforceable when patentee did not explain a nine-year delay in requesting the Patent Office to issue the patent).

129. 264 U.S. 463 (1924) (holding that prosecution laches rendered a patent unenforceable when patentee could not explain an eight-year delay).

130. *Lemelson*, 277 F.3d at 1364-65.

131. 303 F.3d 1362 (Fed. Cir. 2002).

132. *Id.* at 1369.

133. *Id.* at 1364.

134. *Id.* at 1368.

135. 278 F.3d 1288 (Fed. Cir. 2002).

even if unwritten, could require that “all university personnel”¹³⁶ assign inventions and future related inventions to the university.¹³⁷ Defendant in *VanVoorhies* was a graduate of and professor at the university when he invented a wireless, helical antenna. After defendant left the university, the university filed a patent application designated as a continuation in part of a prior application filed and assigned by defendant, and defendant filed a patent application on the matter without a claim of priority.¹³⁸ Although the court recognized that there were clear differences between the inventions sought to be patented, it reasoned that the matter was within the definition of a continuation-in-part of the invention.¹³⁹ Specifically, the Federal Circuit held that defendant’s application was a continuation-in-part application because: (1) it was filed during the pendency of the prior application, (2) it had a common inventor with the prior application, and (3) defendant had made statements¹⁴⁰ that the university should file a continuation application on the matter.¹⁴¹ As such, defendant was obligated to assign the invention rights to the university.¹⁴²

In *Rhone-Poulenc Agro, SA v. DeKalb Genetics Corp.*,¹⁴³ the Federal Circuit held that the bona fide purchaser defense to patent infringement is a matter of federal law because it implicates an issue of patent law.¹⁴⁴ In *Rhone* the issue on appeal was whether a sublicensee (Monsanto) that acquired the sublicense from a licensee (DeKalb Genetics Corp.) that had acquired the original license by fraud may retain the sublicense by establishing that the sublicensee was a bona fide purchaser for value.¹⁴⁵ In holding that the bona fide purchaser defense does not apply to nonexclusive licensees and essentially limiting the holding of *Heidelberg Harris v. Loebach*,¹⁴⁶ the Federal Circuit reasoned that the common law does not extend protection of the bona fide purchaser rule to those who do not obtain title to such property and

136. The WVU policy applies to “University personnel,” who are defined as “all full-time and part-time members of the faculty and staff, and all other employees of the University including graduate and undergraduate students and fellows of the University.” *Id.* at 1292.

137. *Id.*

138. *Id.* at 1292-93.

139. *Id.* at 1297.

140. Defendant is a Registered Patent Agent. *Id.*

141. *Id.*

142. *Id.* at 1297-98.

143. 284 F.3d 1323 (Fed. Cir. 2002).

144. *Id.* at 1328.

145. *Id.* at 1326.

146. 145 F.3d 1454 (Fed. Cir. 1998) (holding that the bona fide purchaser defense was available to nonexclusive licensees).

that a transfer of less than “all substantial rights” in a patent does not result in an assignment.¹⁴⁷

In *In re Cruciferous Sprout Litigation*,¹⁴⁸ the Federal Circuit held that claims of a method patent directed to the production and consumption of cruciferous sprouts “rich in glucosinolates” that aid a body’s natural cancer-fighting defense mechanisms are inherently anticipated by prior art.¹⁴⁹ In *Cruciferous* patentee claimed that consuming vegetables high in glucosinolates reduces the risk of cancer rather than claiming a new kind of sprout or a new way of growing or harvesting sprouts.¹⁵⁰ The Federal Circuit reasoned that the glucosinolate content of sprouts was a well-known characteristic of sprouts and that the invention as claimed was anticipated by the art.¹⁵¹

The USPTO must explain the reasons why a patent is invalid in view of the prior art.¹⁵² In *In re Sang-Su Lee*,¹⁵³ the Federal Circuit held that the rejection of a patent application based on obviousness under 35 U.S.C. § 103¹⁵⁴ must be based on a thorough search for and analysis of the prior art, including evidence relevant to a finding of whether there is teaching, motivation, or suggestion to select and combine references relied on as evidence of obviousness.¹⁵⁵ In *Lee* the Board of Patent Appeals and Interferences and the patent examiner relied upon the “common knowledge and common sense” of a person of ordinary skill in the art to find an invention obvious over a combination of two prior art references.¹⁵⁶ In reversing the Board (and the patent examiner), the Federal Circuit held that the Board and the patent examiner must explain their reasons why one of ordinary skill in the art would have been motivated to select references and to combine them to render the claimed invention obvious.¹⁵⁷

In *Transclean Corp. v. Bridgewood Services, Inc.*,¹⁵⁸ the Federal Circuit held that the district court did not abuse its discretion¹⁵⁹ when

147. *DeKalb*, 284 F.3d at 1329.

148. 301 F.3d 1343 (Fed. Cir. 2002).

149. *Id.* at 1352.

150. *Id.* at 1345.

151. *Id.* at 1348-49.

152. *In re Sang-Su Lee*, 277 F.3d 1338, 1345 (Fed. Cir. 2002).

153. 277 F.3d 1338 (Fed. Cir. 2002).

154. 35 U.S.C. § 103.

155. 277 F.3d at 1342-43.

156. *Id.* at 1340-42.

157. *Id.* at 1345.

158. 290 F.3d 1364 (Fed. Cir. 2002).

159. The imposition of a discovery sanction is not a matter substantially related to patent law, and the applicable law is that of the regional circuit, in this case the Eighth Circuit. *Id.* at 1370-71.

ruling that defendant willfully infringed plaintiff's patent rights and that the infringement was not exceptional.¹⁶⁰ In *Transclean* defendant argued that its device, relating to an automatic transmission fluid changing apparatus, was an embodiment of its own patent, which is indicative of a good faith belief that it was not infringing plaintiff's right.¹⁶¹ The jury found that defendant willfully infringed one of plaintiff's patent claims, but the district court did not award enhanced damages or attorney fees for willful infringement.¹⁶² The court made it clear that a finding of willfulness does not always necessitate an award of enhanced damages and attorney fees, but such a finding does authorize such awards based on the defendant's conduct.¹⁶³

The owner of a patent on a seed may create an agreement with a licensee in which the licensee must purchase seeds every year from the owner.¹⁶⁴ In *Monsanto Co. v. McFarling*,¹⁶⁵ the Federal Circuit held that defendant did not misuse its patent on a soybean by establishing a "technological agreement" in which farmers would have to buy the patented soybean seed from the owner each year instead of allowing the farmers to produce their own patented seeds from the prior year's crop.¹⁶⁶ The technological agreement did not create an illegal tying arrangement because the agreement placed no obligation on the farmers to purchase next year's seed as a condition of buying this year's seed, and there was nothing to prevent farmers from buying other soybean seeds from other entities.¹⁶⁷ Further, the court noted that the agreement did not violate the doctrines of patent exhaustion and first sale because the patents in this case covered seeds as well as plants, the new seeds grown from the original batch have never been sold by the patentee, and the price paid by the purchaser reflects only value of "use" rights conferred by patentee.¹⁶⁸

III. TRADEMARK CASES

While it may appear that in 2002 the field of trademark law was less dynamic than patent law, it is important to emphasize that the case law controlling Georgia essentially comes from the Federal Court of Appeals

160. *Id.* at 1373.

161. *Id.* at 1371.

162. *Id.* at 1369.

163. *Id.* at 1377-78.

164. *See Monsanto Co. v. McFarling*, 302 F.3d 1291, 1297-98 (Fed. Cir. 2002).

165. 302 F.3d 1291 (Fed. Cir. 2002).

166. *Id.* at 1297-98.

167. *Id.* at 1298.

168. *Id.* at 1298-99.

for the Eleventh Circuit.¹⁶⁹ There were four interesting cases in the field of trademark decided by the Eleventh Circuit.

First, in *Citicasters Licenses, Inc. v. Cumulus Media, Inc.*,¹⁷⁰ the District Court for the Southern District of Georgia granted a preliminary injunction against defendant radio station on the finding that the use of “KISS 104” by defendant would create a likelihood of confusion with the registered marks, “KIIS” and “KISS FM.”¹⁷¹ In assessing whether there was a likelihood of confusion with plaintiff’s radio station, the court held that a seven-part test¹⁷² weighed towards such a finding because, inter alia, the registered mark “KIIS” was an incontestably strong mark, was intended to be pronounced very similarly to defendant’s mark, and that listeners would potentially hear the term “kiss” from both stations and assume that one party owned both radio stations.¹⁷³ Interestingly, the court refused to limit the registrant’s mark to a limited radio market, even though the prior owner of the KIIS registration had argued to the USPTO that its mark was confined to a specific geographic location.¹⁷⁴

Second, in *Harod v. Sage Products, Inc.*,¹⁷⁵ the District Court for the Southern District of Georgia held that plaintiff failed to establish that it had used the mark “COMFORT BATH” in commerce before defendant’s conceded date of first use of October 1996.¹⁷⁶ Plaintiff alleged that in May 1996 it sent samples of the goods bearing the mark to various people and distributors, including companies in South Carolina, Georgia, and Florida, and that in June 1996 it sent samples to co-plaintiff’s sister-in-law in California.¹⁷⁷ After reviewing these facts on a summary judgment motion, the court reasoned that plaintiff’s use of the mark did not establish use in commerce because: (1) none of plaintiff’s shipments of goods using the mark exposed the mark to the

169. While the Eleventh Circuit generally provides the case law controlling in Georgia, the Federal Circuit pronounces the controlling case law in connection with registration and cancellation of marks. Due to the space limitation of this Article, the trademark cases from the Federal Circuit have been omitted.

170. 189 F. Supp. 2d 1372 (S.D. Ga. 2002).

171. *Id.* at 1376-77.

172. The Eleventh Circuit test for the likelihood of confusion is comprised of the following components: “(1) type of mark, (2) similarity of mark, (3) similarity of the products the marks represent, (4) similarity of the parties’ retail outlets and customers, (5) similarity of advertising media used, (6) defendant’s intent and (7) actual confusion.” *Id.* at 1376.

173. *Id.* at 1377.

174. *Id.* at 1378.

175. 188 F. Supp. 2d 1369 (S.D. Ga. 2002).

176. *Id.* at 1378.

177. *Id.* at 1371-72.

relevant class of consumers, (2) plaintiff's registration application stated a date of first use that was later than defendant's priority date, and (3) plaintiff's use of the mark was too "transitory, spasmodic, and inconsiderable" to establish trademark rights.¹⁷⁸

Third, in *International Cosmetics Exchange, Inc. v. Gapardis Health & Beauty, Inc.*,¹⁷⁹ the Eleventh Circuit held that an agreement in which defendant foreign cosmetics manufacturer granted plaintiff importer all rights, title, and interest in the mark "FAIR & WHITE" in the United States was an enforceable contract rather than an invalid assignment in gross.¹⁸⁰ As a valid assignment must be accompanied by attendant goodwill, which does not require the transfer of tangible assets, and as an assignment of United States trademark rights by a foreign manufacturer to a United States distributor ordinarily will not be regarded as an assignment in gross, the agreement clearly recognized plaintiff's prior marketing efforts with respect to the mark "FAIR & WHITE" in the United States.¹⁸¹ Because of the continued association by consumers of the mark "FAIR & WHITE" with its same goods in the United States, plaintiff's mark was enforceable.¹⁸²

Finally, in *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*,¹⁸³ the Eleventh Circuit found that defendant did not overcome the burden of showing that plaintiff abandoned the mark and upheld a preliminary injunction issued by the district court that prohibited defendant from making any use of the mark "THE BREEZE" for a radio station.¹⁸⁴ Defendant in *Cumulus* took the position that plaintiff had abandoned use of its mark and, therefore, it was no longer the prior user.¹⁸⁵ The court found that even if it were assumed that defendant established a prima facie case of abandonment, which would shift the burden of going forward to plaintiff, plaintiff met that burden by introducing evidence of its continued use of the mark on business cards, billboards, and promotional materials.¹⁸⁶ A showing of abandonment shifts the burden of producing evidence of use of the trademark (or an intent to resume use) to the plaintiff, but the ultimate "strict" burden of persuasion on the issue of abandonment remains with the defen-

178. *Id.* at 1378.

179. 303 F.3d 1242 (11th Cir. 2002).

180. *Id.* at 1246.

181. *Id.*

182. *Id.*

183. 304 F.3d 1167 (11th Cir. 2002).

184. *Id.* at 1172.

185. *Id.* at 1173.

186. *Id.* at 1175 n.10.

dant.¹⁸⁷ As defendant could not show it was the prior user, the court affirmed the grant of an injunction against defendant.¹⁸⁸ Defendant in *Cumulus* also appealed the district court's injunction because it did not permit "curative uses" designed to dispel confusion stemming from its prior use.¹⁸⁹ The Eleventh Circuit reasoned that a federal district court is not obligated to permit curative steps to an infringer transgressing the protectable rights of a current user, and even if uses of "THE BREEZE" for which defendant seeks permission would not infringe plaintiff's rights in the mark, it was well within bounds of the court's discretion to deny defendant those uses.¹⁹⁰ As such, the preliminary injunction was upheld.¹⁹¹

IV. COPYRIGHT

During the year 2002, there were only a couple of copyright cases in the Eleventh Circuit. While other federal circuits throughout the United States appear to have been busy, the Eleventh Circuit decided only two interesting cases.

First, in *Palmer v. Braun*,¹⁹² the Eleventh Circuit affirmed the denial of a preliminary injunction against defendant based on the lack of substantial similarity between defendant's self-help course and plaintiff's self-help course.¹⁹³ To prove copyright infringement, one must show that the alleged infringer had access to the copyrighted work and that the allegedly infringing work is substantially similar to the copyrighted work.¹⁹⁴ In *Palmer* a former employee and instructor at plaintiff's educational and motivational course (called "Avatar") refused to return Avatar's program materials when he left and started a competing and similar course.¹⁹⁵ The Eleventh Circuit affirmed the denial of the preliminary injunction against defendant because the court found that the merger doctrine made it very likely that defendant was going to succeed on the merits.¹⁹⁶

More particularly, although defendant's material could be found to contain similarities to plaintiff's material, defendant's material

187. *Id.* at 1177.

188. *Id.* at 1175-77.

189. *Id.* at 1178.

190. *Id.* at 1179.

191. *Id.*

192. 287 F.3d 1325 (11th Cir. 2002).

193. *Id.* at 1334-35.

194. *Id.* at 1329-30.

195. *Id.*

196. *Id.* at 1334-35.

essentially copied only the ideas of plaintiff's materials.¹⁹⁷ Copyright covers expression, not ideas. In fact, out of the thirty-plus phrases chosen for each of the exercises, only fifteen of the phrases were identical or almost identical.¹⁹⁸ For example, plaintiff's material contained phrases such as "I am happy to be me;" "I am right here;" and "I am me." Defendant's material contained similar phrases such as "I'm happy being who I am;" "I am right here;" and "I am just me."¹⁹⁹ The court found that the similarities were in the ideas and processes for increasing consciousness, not in the expression.²⁰⁰ Because ideas are not protected by copyright law, defendant's materials did not infringe plaintiff's materials.²⁰¹

Second, in *Calhoun v. Lillenas Publishing*,²⁰² the Eleventh Circuit held that evidence of independent creation bars copyright claims against a defendant, even though short melodies in respective compositions are practically identical.²⁰³ In *Calhoun*, plaintiff, an author of a song titled "Before His Eyes," sued the author of a song entitled "Emmanuel" on the allegation that "Emmanuel" infringed the copyright on "Before His Eyes."²⁰⁴ In affirming the summary judgment ruling of the lower court, the Eleventh Circuit was persuaded by defendant composer's affidavit, corroborated by a witness, stating that he independently created the song during a church service without use of any pre-existing material.²⁰⁵ As plaintiff did not offer any evidence to contradict defendant's testimony, the court found for defendant.²⁰⁶

V. FINAL NOTES

January 1, 2002 through December 31, 2002 was another active period in the field of intellectual property. The post-2001 hangover from the

197. *Id.* at 1334.

198. *Id.*

199. *Id.* at 1331-32.

200. Other phrases of similarity include the following: "I am source" and "I'm the source of it all;" "I don't know where I am" and "I don't know where I am;" "I feel like a victim" and "I feel like a victim;" "I am not a victim" and "I am not a victim;" "The past doesn't exist" and "My past doesn't exist;" "Everything I see is illusion" and "Everything I see is illusion;" "What I see is real" and "Everything I see is real;" "I create what I experience" and "I own what I experience;" "I have everything I need" and "I have what I need;" "My mind is still" and "My mind is quiet;" and "I am relaxed" and "I am relaxed;" and "I create it all" and "I create everything." *Id.*

201. *Id.* at 1334.

202. 298 F.3d 1228 (11th Cir. 2002).

203. *Id.* at 1232-33.

204. *Id.* at 1231.

205. *Id.* at 1233.

206. *Id.*

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dotcom bust did affect, somewhat, the quantity of decisions related to intellectual property, but it did not affect the quality or importance of the decisions.