

PRELIMINARY INJUNCTIVE RELIEF IN PATENT LITIGATION

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I. INTRODUCTION

Although injunctive relief is by all accounts an extraordinary remedy, [n.2] it is uniquely suited to address the injuries resulting from the infringement of intellectual and industrial property rights. As a general rule, courts have thus granted petitioners injunctive relief in most intellectual and industrial property actions upon a clear showing of validity and infringement. Their protection of patents, however, has traditionally been less enthusiastic. Rather, the history of injunctive relief in patent infringement cases has followed a circular road from being granted as a matter of course in the nineteenth century to being denied with regularity during most of the twentieth century and then, in recent years, to being granted again with some frequency. [n.3] The impact of the judiciary's changing attitude towards equitable relief in patent infringement litigation is no where more pronounced than in the area of preliminary injunctions.

Many practitioners and commentators have suggested that, since the Court of Appeals for the Federal Circuit was established on October 1, 1982, there has been a dramatic increase in the number of preliminary injunctions *214 granted in patent cases. [n.4] This Article confirms the accuracy of their claim by presenting the results of a case study that surveyed all reported district court and appellate decisions, involving preliminary injunctions in patent litigation, which were issued between the establishment of the Federal Circuit and December 31, 1993. Substantive discussion begins in Part II with a general overview of preliminary injunctions and the various standards applied by the courts in determining whether preliminary injunctive relief is available in a given set of circumstances. Further background material is presented in Part III, where a general history of preliminary injunctive relief in patent cases is presented. In Part IV, discussion about the availability of preliminary injunctive relief in patent litigation continues with an examination of the prevailing preliminary injunction standard as defined by the Federal Circuit. The results and accompanying analysis of the case study considering preliminary injunctions in the patent context are presented in Part V. The Article concludes in Part VI with a brief summation of the author's observations and conclusions.

II. PRELIMINARY INJUNCTIONS

The basic function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits. [n.5] As with other equitable remedies, the issuance of a preliminary injunction is justified only when a legal remedy will not adequately compensate the movant's injuries suffered as a consequence of the conduct he is trying to enjoin. [n.6] Although the standard is often overlooked or ignored, it is well established *215 that a legal remedy is "adequate" only when it is as complete, practical, and efficient as one which could be granted in equity. [n.7]

In determining whether or not to grant a preliminary injunction, courts traditionally consider four factors:

1. whether the movant has established a substantial likelihood of success on the merits;
2. whether the movant will suffer irreparable harm if a preliminary injunction is denied;
3. whether the injuries suffered by the movant in the absence of a preliminary injunction outweigh the harm that an injunction would cause to the non-moving party; and
4. whether and, if so, how the public interest will be affected by the grant or denial of a preliminary injunction.

Judicial unanimity on the relevance of these factors has not, however, led to a uniform standard on how best to apply each consideration to a particular set of circumstances. [n.8] Some courts approach the factors sequentially and, thus, hold that a movant's failure to carry his burden with respect to any one factor, including a likelihood of success on the merits, precludes the court from granting preliminary injunctive relief. [n.9] This approach is commonly referred to as the sequential test. Other courts treat no one factor, taken individually, as dispositive. Instead, these courts weigh the four factors against one another in a balancing test, also taking into consideration the form and magnitude of the relief requested. [n.10] Finally, an increasing number of courts have adopted the so-called alternatives test, which holds that a moving party may meet its burden by demonstrating either (1) a *216 combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions about the non-moving party's conduct have been raised and the balance of hardships tips sharply in the moving party's favor. [n.11]

For its part, the Supreme Court has provided little guidance on the appropriate standard to be applied in judging the merits of a motion for preliminary injunction. In one case, *Ohio Oil Co. v. Conway*, [n.12] the Court appeared to endorse a balancing test when it overruled a trial court's refusal to issue a preliminary injunction against a state's collection of a new oil severance tax. In making its ruling, the Court held that a "real dispute" existed over the constitutionality of the tax, any taxes paid pending trial could not be recovered because of the state's sovereign immunity, and the state's interest in collecting the taxes could be protected by requiring the oil company to post a sufficient bond. [n.13] The opinions expressed in more recent decisions have been, at best, ambivalent. In *Atchison, Topeka & Santa Fe R. Y. v. Wichita Board of Trade*, [n.14] for example, a plurality of the justices again seemingly endorsed a balancing test. In *Doran v. Salem Inn* [n.15] and *Sampson v. Murray*, [n.16] on the other hand, the Court appeared to adopt the sequential test by concluding that to prevail on a motion for preliminary

injunction, the moving party must separately prove likelihood of success on the merits and irreparable injury. The lower courts, however, have not viewed the Supreme Court's decisions as controlling precedent, since the Court did not focus on the issue of the proper preliminary injunction standard and the standard applied did not affect the outcome.

The absence of a definitive statement from the Supreme Court on an appropriate preliminary injunction standard has led to conflicting decisions, not only among the circuit courts, but also within the circuits themselves. In the Ninth Circuit, for example, all three preliminary injunction tests are now commonly employed after different panel decisions applied different standards without specifying why it had selected the chosen test. [n.17] Many *217 commentators argue that, by having the option to select between the balancing and alternatives test - considered by some to be overly liberal - and the stricter standard imposed by the sequential test, courts are able to engage in result-oriented decision making. [n.18] Others, however, argue that although the tests may be flawed, the divergence among the judiciary's treatment of similar cases results mainly from the inconsistent application and definition accorded the individual factors. [n.19] Until the Federal Circuit was established in 1982, the group of practitioners maybe most affected by these complaints were patent attorneys.

III. PRELIMINARY INJUNCTIVE RELIEF IN PATENT INFRINGEMENT ACTIONS: PRIOR TO OCTOBER 1, 1982

Preliminary injunctive relief against patent infringers has been authorized by statute since the United States patent system was established by Congress in 1819. [n.20] Although it has historically been difficult to obtain preliminary injunctions, the federal courts readily granted injunctive relief in patent infringement actions until early in the twentieth century in the belief that the injury caused by infringement was presumptively irreparable. [n.21] By the 1920s, however, many circuit courts (as well as commentators) became disillusioned with what they viewed as the anticompetitive impact of patents on the marketplace. [n.22] Not surprisingly, this anti-patent sentiment led many courts to invalidate patents during the course of litigation. Judicial skepticism towards patents was also especially visible in the interpretation that some circuit courts accorded the four factors used in ruling upon a motion for preliminary injunction.

One of the more stringent standards imposed on patentees in preliminary injunction suits was the showing necessary to establish a likelihood of *218 success on the merits. As is true today, a patent owner, in this era, bore the burden of proving the validity and infringement of his patent. Unlike today, however, most courts held that in order to show a likelihood of success on the merits, a patentee had to prove the validity of his patent "beyond question," which was another way of saying proof beyond a reasonable doubt. [n.23] Further hindering the patent owner was that the presumption of validity commonly accorded patents in present-day litigation was either ignored or accorded little weight by most courts. [n.24] Unless the patent had been judged valid in prior litigation or was sufficiently far into its term and successful to indicate that industry had acquiesced to the patentee's right to a monopoly, coming forward with sufficient evidence of validity to

establish proof beyond a reasonable doubt was difficult, if not, impossible. [n.25] And, even if successful on that score, the patent owner then faced an identical burden with respect to infringement. [n.26] Thus, if disputed issues of fact existed as to whether a patent had been infringed, a motion for preliminary injunctive relief would likely fail irrespective of other considerations. [n.27]

When a patent owner managed to establish a likelihood of success on the merits, the courts typically went on to consider whether he would suffer irreparable injury if a preliminary injunction was not granted. Unsatisfied with the ability of the likelihood of success factor to reduce the number of improvidently granted injunctions, the courts used the irreparable injury requirement as another hurdle by which to limit the availability of *219 preliminary injunctions in patent infringement actions. [n.28] Under the prevailing standard, a patentee could not successfully prove irreparable injury by relying on the notion that patent rights are inchoate and that injury to those rights is not translatable into damages. Instead, the courts typically looked at the competitive positions of the patent owner and infringer. [n.29] Unless the patent owner could prove a permanent loss of market position or sales, that the infringer was insolvent or near insolvency, or that other infringers were likely to enter the market, the injury resulting from infringement was generally thought to be remediable through money damages. [n.30] Not surprisingly, the absence of irreparable injury was a leading reason for why preliminary injunctions were denied to patent owners during this period. [n.31]

A twenty-five year survey conducted by two practitioners revealed that by 1978, the anti-patent sentiment within the judiciary had led courts to grant equitable relief in only a small minority of cases. In the Second Circuit, for example, preliminary injunction motions filed in an effort to enjoin conduct allegedly constituting patent infringement were denied ninety-two percent of the time. [n.32] While other circuits treated preliminary injunction motions in patent cases less harshly (sometimes granting a vast majority of the motions for preliminary injunction sought in their circuit), [n.33] the overall success rate of preliminary injunction motions was limited to thirty-two percent. [n.34] In light of their research, the practitioners concluded that "a patent owner should consider forum the most important factor in deciding whether or not to seek preliminary relief." [n.35] Findings such as these led shortly thereafter to the establishment of the Court of Appeals for the Federal *220 Circuit, which was granted exclusive jurisdiction over patent appeals, in the hope that patent doctrines could be unified. [n.36]

IV. THE FEDERAL CIRCUIT'S FORMULATION OF THE PRELIMINARY INJUNCTION STANDARD

Under 28 U.S.C. § 1295(a) (1988), the Court of Appeals for the Federal Circuit has exclusive jurisdiction over all matters relating to patents. [n.37] United States district courts must therefore follow the substantive law of that circuit when they are confronted with cases involving alleged patent infringement. [n.38] Part of that substantive law is the Federal Circuit's conclusions regarding the availability of preliminary injunctive relief against patent infringers, though the circuit has recognized "that purely procedural

questions involving the grant of a preliminary injunction are controlled by the law of the appropriate regional circuit." [n.39]

In its first case considering the relationship between patents and preliminary injunctions, the Federal Circuit departed from prior case law and adopted a single method, the balancing test, for applying the four factors traditionally considered in assessing a motion for preliminary injunction. [n.40] The Federal Circuit interprets the balancing test to require the moving party to demonstrate: (1) a reasonable likelihood of success on the merits; (2) irreparable injury if the preliminary relief is not granted; (3) that the balance of hardships tips in his favor; and (4) the issuance of a preliminary *221 injunction favors the public interest. [n.41] According to the Federal Circuit, in deciding whether to grant or deny a motion for preliminary injunction, a trial court must weigh each of the factors against one another and against the form and magnitude of the relief requested. [n.42] Moreover, the court may not view one factor, taken alone, as dispositive. [n.43] While not necessarily requiring denial of the motion, the absence of an adequate showing on any one factor may be sufficient to serve as the basis for denial if the movant's showing on the remaining factors does not implicate the equitable concerns of the court. [n.44] In no case, however, can a preliminary injunction issue where the alleged infringer proves by clear and convincing evidence that the patent is invalid or not infringed. [n.45]

The Federal Circuit departed from prior preliminary injunction standards on a more fundamental count by also rejecting the "beyond question" burden of proof standard formerly applied in most regional circuit courts. [n.46] In its place, the Federal Circuit adopted a standard under which the movant need only prove a reasonable likelihood that it would prevail at a trial on the merits under a preponderance of evidence standard. [n.47] In so doing, the Federal Circuit sought to place patents on par with other forms of intellectual and industrial property.

Despite its divergence with prior case law on these points, the Federal Circuit has not ignored the basic rationale - to preserve the status quo - behind preliminary injunctive relief. [n.48] In *Atlas Powder Co. v. Ireco* *222 *Chemicals*, [n.49] for example, the defendant appealed the district court's grant of a preliminary injunction arguing, in part, that the district court had altered the status quo by issuing the injunction. Rather than hold that the relevant status quo was the competitive situation facing the parties at the time the injunction was issued, the court recognized that the status quo preserved by preliminary injunctive relief is the "last peaceable status quo" between the parties. [n.50] For the court to have held otherwise would have made the right to effective preliminary injunctive relief dependent upon whether the patent infringement was discovered in the contemplative or preparatory stages.

To be sure, the Federal Circuit's changes to the preliminary injunction standard applied in patent cases has had a far reaching impact. Yet, by reviewing the standards that were applied in the regional circuits prior to the Federal Circuit's establishment, it becomes clear that the choice of standard is far from controlling and should not be viewed in solitude. For example, between 1953 and 1978, the Second Circuit Court of Appeals applied what is generally regarded as the most lenient standard for preliminary

injunctions, the alternatives test. [n.51] Thus, under this test, it would be expected that many, if not most, motions for preliminary injunctions would be granted. However, as noted previously, the Second Circuit granted only eight percent of the preliminary injunctions involving patent infringement claims over this time period. [n.52]

Accordingly, a full understanding of the present availability of preliminary injunctions in patent cases requires consideration of, not only the preliminary injunction standard itself, but also of how the Federal Circuit has defined likelihood of success on the merits, irreparable injury, a balancing of the hardships, and the public interest when the infringement of a patent is at issue.

A. Reasonable Likelihood of Success

Proving a reasonable likelihood of success on the merits of a claim for patent infringement requires the movant to come forward with evidence demonstrating that he has title to the patent, the patent is valid, and that the patent has been infringed. The initial requirement, proof of title, is rarely contested as a certified copy of the patent or recorded assignment is generally sufficient to satisfy the movant's burden. In fact, since the establishment of the Federal Circuit, proof of title was a contested issue in only two cases in *223 which a preliminary injunction was being sought. [n.53] The remaining matters of proof, on the other hand, typically involve issues at the heart of the dispute between the parties.

One of the more difficult burdens faced by a patentee in a preliminary injunction hearing prior to the establishment of the Federal Circuit was to come forward with sufficient evidence to support a finding of validity. [n.54] As previously noted, the courts either ignored or granted little weight to the statutory presumption of validity during this period. [n.55] For its part, the Federal Circuit has resurrected the statutory presumption by requiring anyone challenging the validity of a patent to bear the burden of going forward with evidence and the ultimate burden of persuasion on that issue. [n.56] Thus, unless the alleged infringer challenges the validity of a patent with evidence, the patentee need do nothing to establish his rights under the patent. [n.57] On the other hand, when an infringer does come forward with evidence of invalidity at the preliminary injunction stage, the presumption will not relieve the patentee "from carrying the normal burden of demonstrating that it will likely succeed on all disputed liability issues at trial." [n.58] By the same token, however, nor will the patentee be required to prove that the patent has previously been held to be valid in a full-scale trial in order to receive a preliminary injunction. [n.59] Rather, the trial court must "make an assessment of the persuasiveness of the challenger's evidence, recognizing that it is doing so without all evidence that may come out at *224 trial." [n.60] If, when viewed in the light of the patentee's rebuttal evidence, a substantial question about the patent's validity is not raised by the infringer's evidence, the Federal Circuit holds that the patentee has carried his burden with respect to validity. [n.61]

Unlike validity, an alleged infringer is not required to go forward with evidence to suggest that his conduct does not infringe the rights of the patent owner. To the contrary,

the burden rests squarely on the shoulders of the patentee. [n.62] But, as with the other required elements of proof, the patentee need only show a reasonable likelihood that, at trial, he will prove infringement by a preponderance of the evidence. [n.63] This standard is considerably less burdensome than the standard applied in many pre-Federal Circuit cases, where the moving party had to prove "beyond all question" that there had been an infringement, which for practical purposes meant proof that no evidence existed to support the non-moving party's arguments against infringement. [n.64] To prove infringement, the patentee may, of course, rely on either evidence of literal infringement [n.65] or infringement by equivalents as they are defined by the precedent. [n.66] Accordingly, under the Federal Circuit's preliminary injunction standard, district courts apply a revised burden of proof with respect to infringement, but application of the substantive law remains the same.

*225 B. Irreparable Injury

"It is sometimes said that equity will not act if there is an adequate legal remedy; and alternatively, that equity will act only to prevent an injury that is irreparable, i.e., irreparable at law." [n.67] The traditional method of establishing irreparable injury in patent suits has been to show that the accused infringer is financially unable to pay a judgment in legal damages. [n.68] Though this road to proving irreparable injury remains open, the Federal Circuit also recognizes that a patentee who has made a clear showing of a likelihood of success on the merits - a clear showing that his patent is valid and has been infringed - is entitled to a presumption that he will suffer immediate irreparable harm if a preliminary injunction is not granted. [n.69] In creating this presumption, the Federal Circuit predicated it upon the public policy of the patent laws, which according to the court, is the right it confers on the patent holder to exclude others from infringing the invention. [n.70]

Since it was adopted, the presumption of irreparable injury has been employed and treated by the district courts with varying degrees of vigor. [n.71] The inconsistency is due, in large measure, to the failure of the Federal Circuit to provide the lower courts with guidance both on what type of factual showing is required to raise the presumption and, under what circumstances, can the presumption be rebutted. As to the former issue, the Federal Circuit has said only that the kind of strong showing required to raise the presumption is, for example, proof that the patent has been held valid in prior litigation or the failure of the alleged infringer to present evidence contesting the patent's validity. [n.72] Some courts have taken the absence of further elaboration as an indication that the presumption should be liberally applied, though recent decisions from the Federal Circuit indicate otherwise. [n.73]

*226 As to the factual proof necessary to rebut the presumption of irreparable injury, the Federal Circuit has provided greater, although still limited, direction. In *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, [n.74] for example, the court upheld the denial of a preliminary injunction where a district court had considered the alleged infringer's ability to pay monetary damages for any infringement during the course of litigation. Although

the patentee in that case had apparently shown adequate proof of a likelihood of success on the merits to raise the presumption of irreparable injury, the trial court held that the alleged infringer's ability to pay monetary damages for any infringement that occurred during the course of the litigation was sufficient to rebut the presumption. [n.75] The Federal Circuit ruled that, like all generalities, neither the concept that every patentee is always irreparably harmed by an alleged infringer's pre-trial sales nor the traditional concept that a patentee cannot show irreparable harm when an alleged infringer is capable of responding to monetary damages is universally applicable. [n.76] Rather, the ability to compensate must be weighed against other relevant considerations in determining whether the presumption of irreparable injury has been rebutted. [n.77]

The facts relevant to whether the presumption of irreparable injury has been rebutted are presumably the same considerations taken into account in determining whether irreparable injury is likely to follow from the denial of injunctive relief when the patentee has failed to raise the presumption of irreparable injury by not making a clear showing of validity and infringement. Among the facts endorsed thus far by the Federal Circuit as suggesting that irreparable injury is unlikely are that the infringement is not occurring or would not be reasonably likely to occur in the future; [n.78] delay in seeking a preliminary injunction; [n.79] as well as the existence of licensing agreements. [n.80] On the other hand, the Federal Circuit has found financial *227 insolvency and responsibility [n.81] and a small number of years remaining in the monopoly right [n.82] as facts tending to show that irreparable injury is likely to follow from the denial of a preliminary injunction. Moreover, although traditionally relevant, the Federal Circuit has recently indicated that difficulty in calculating damages or market shares and the potential loss of market shares are irrelevant to the determination of irreparable injury. [n.83]

C. Balance of Hardships

Until recently, the Federal Circuit had written little on the balance of hardships factor. Consequently, in considering this factor, district courts referred to other decisions by analogy. [n.84] One case popularly cited was the federal circuit's decision in *Windsurfing International, Inc. v. AMF, Inc.* [n.85] In that case, the district court refused to issue a permanent injunction after finding that it would be harmful to the infringer's business and that the infringer was too small to be of competitive significance to the patentee. [n.86] The Federal Circuit reversed the denial of the injunction as an abuse of discretion. In so doing, it stated that "one who built a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." [n.87] The Federal Circuit has since rejected this dictum's application in the context of preliminary injunctions. [n.88] Rather, in *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, [n.89] the Federal Circuit indicated that due to the extraordinary nature of the *228 relief and that it is given prior to trial, a district court has broader discretion in the context of preliminary injunctions to consider the business ramifications of equitable relief than it does after a trial on the merits. The court wrote:

The hardship on a preliminarily enjoined manufacturer who must withdraw its product from the market before trial can be devastating. On the other hand, the hardship on a

patentee denied an injunction after showing a strong likelihood of success on validity and infringement consists in a frequently and equally serious delay in the exercise of his limited-in-time property right to exclude. Neither hardship can be controlling in all cases. Because the court must balance the hardships, at least in part in light of its estimate of what is likely to happen at trial, it must consider the movant's showing of likelihood of success. Yet, a court must remain free to deny a preliminary injunction, when equity in light of all the factors so requires. [n.90]

By preserving the discretionary role of the district court in considering the balance of hardships, the Federal Circuit avoided reducing the preliminary injunction standard in patent cases to a two-factor inquiry involving likelihood of success on the merits and irreparable injury. Moreover, the court has preserved the one factual inquiry in which the patentee does not enjoy a presumption favoring issuance of the injunction, though it has ruled that where the balance of interests favors neither party, a preliminary injunction may still issue. [n.91]

D. Public Interest

Although rarely stated as such, the public interest factor in patent preliminary injunction proceedings involves a two-step inquiry. The initial focus under the public interest factor is a determination of "whether there exists some critical public interest that would be injured by the grant of preliminary injunctive relief." [n.92] Thus, in *Hybritech, Inc. v. Abbott Laboratories*, [n.93] the Federal Circuit upheld a district court's partial denial of a preliminary injunction because it found that the public's interest in having medical supplies, which were important to cancer and hepatitis patients, readily available outweighed the patentee's interests. [n.94] A similar conclusion was reached in *Scripps Clinic & Research Foundation v. Genentech, Inc.*, [n.95] *229 where the district court found that only the infringer was in a position to bring a patented drug for hemophiliacs to market. [n.96]

Either because a product's availability is not threatened by the issuance of an injunction or because its availability does not directly affect the health or livelihood of the public, most controversies involving patents will not implicate the public interest in the same way as it was implicated in *Hybritech* and *Scripps Research Foundation*. [n.97] In these instances, the Federal Circuit has mandated that district courts balance the public interest in protecting patent rights with its corollary interest in assuring that preliminary injunctions are not improvidently granted where they are not deserved. [n.98] As is the case with balancing hardships, [n.99] consideration of the public interest in the patent context requires the court to make its determination in light of what it expects will happen at trial. Thus, where a reasonable likelihood of success on the merits has been shown, the public interest generally weighs in favor of granting the preliminary injunctive relief. [n.100]

V. APPLICATION OF THE FEDERAL CIRCUIT STANDARD

In light of the Federal Circuit's liberal stance - relative to prior case law - towards preliminary injunctions involving patent infringement suits, one would expect the decisions ultimately rendered to reflect the shift in approach. To test this hypothesis, the results of all district court and Federal Circuit decisions involving preliminary injunctions in the patent context, which issued between October 1, 1982 and December 31, 1993 and published in a reporter or installed on the WESTLAW database, [n.101] were compiled. [n.102] The results of the survey appear in Tables A and B of the *230 Appendix. From this collection of data, various comparisons can be made with Dorr's & Duft's survey of published decisions appearing between January 1953 and September 1978. [n.103] These comparisons will provide, at least, a glimpse into the differences between results under prevailing standards and those reached under the standards employed prior to the establishment of the Federal Circuit.

The word "glimpse" is used because the data in both studies is flawed in certain respects. First, Dorr & Duft conducted their survey prior to the introduction of legal databases and thus only incorporated published decisions in their set of data. [n.104] Whether consideration of a larger number of decisions would have affected the results of their study cannot be gauged. Second, Dorr's and Duft's survey ended with decisions issued before September 1978, four years prior to the creation of the Federal Circuit. Accordingly, decisions issued after August 1978 and through September 1982 are not part of the data set and may also have affected the results of the Dorr and Duft survey. [n.105] Similarly, the data collected for this Article is incomplete because the popular legal databases only began incorporating unpublished decisions in large numbers after 1986. Thus, for example, a comparison of the studies cannot provide a reliable indication of whether the filing of preliminary injunctions in patent infringement actions has increased since the creation of the Federal Circuit. [n.106] Putting aside these inadequacies, the comparative data results are sufficiently comprehensive to provide a helpful indicator of how the application of the Federal Circuit's preliminary injunction standard has altered the availability preliminary injunctions in the patent context.

To begin, the data pertaining to district court decisions reveals that since the establishment of the Federal Circuit, district courts have been granting preliminary injunctions in patent infringement actions in a not *231 insubstantially higher percentage of cases. Specifically, between October 1, 1982 and December 31, 1993, district courts granted preliminary injunctions in slightly over sixty-one percent of the cases involving patent infringement. [n.107] This compares with approximately forty-one percent prior to the establishment of the Federal Circuit. [n.108] Such a significant increase cannot likely be attributed to random variations in the number of preliminary injunctions granted from year to year regardless of changes in the patent system. The percentage of preliminary injunctions granted by district courts in each year is reflected below in Table 1.

Table 1

Percentage of District Court Decisions Granting Preliminary Injunctive Relief

YEAR	# FILED	% GRANTED
After September 1982	1	0 (0)
1983	3	66 (2)
1984	5	0 (0)
1985	3	66 (2)
1986	12	75 (9)
1987	16	50 (8)
1988	20	75 (15)
1989	16	43 (7)
1990	20	75 (15)
1991	16	56 (9)
1992	16	68 (11)
1993	14	64 (9)
Total	142	61 (87)

(numbers appearing in parenthesis in third column represent the actual number of injunctions granted)

A comparative increase in the number of injunctions approved can also be seen at the appellate level.

*232 Prior to the establishment of the Federal Circuit, preliminary injunctions that had been granted at the district court level were affirmed by appellate courts forty-four percent of the time. [n.109] The Federal Circuit, on the other hand, has affirmed grants of preliminary injunctive relief at a rate of fifty-eight percent; a rate slightly less than its overall affirmance rate in this context of sixty-three percent when reviewing preliminary injunction decisions generally. [n.110] The breakdown by year is shown below in Table 2.

Table 2

Percentage of Federal Circuit Decisions Affirming Preliminary Injunctive Relief

YEAR	#APPEALED	.FIRMED
1982	0	0 (0)
1983	0	0 (0)
1984	0	0 (0)
1985	2	50 (1)
1986	2	0 (0)
1987	3	66 (2)
1988	5	100 (5)
1989	10	80 (8)
1990	3	100 (3)

1991	10	30 (3)
1992	5	40 (2)
1993	8	50 (4)
Total	48	58 (28)

(numbers appearing in parenthesis in third column represent the actual number of injunctions affirmed)

Of note in Table 2 is the increased rate at which the Federal Circuit has been vacating preliminary injunctions since 1991. The majority of the district court orders vacated during this period were criticized for what the Federal Circuit viewed as the trial court's failure to issue sufficient findings of fact and conclusions of law in support of its decision. [n.111] If nothing more, these*233 decisions suggest that the Federal Circuit is making a conscious effort to force district courts to substantiate their decisions. Along with an increased emphasis on reasoned analysis, however, the Federal Circuit's recent tendency to affirm less grants of preliminary injunctions may also reflect an effort on the part of the court to reestablish that, despite the tone of many of its early opinions, preliminary injunctions remain an extraordinary form of relief and should not be granted freely without adequate cause. [n.112] This effort has also been evidenced in the language employed in many of these decisions, which emphasize the need for district courts to adequately and more fully consider the irreparable injury factor. [n.113]

The reasons given at the district court level for the denial of preliminary injunctive relief tend to support the Federal Circuit's concerns. Prior to the establishment of the Federal Circuit, failure to show that a patent was clearly valid or that the patentee would suffer irreparable harm if an injunction was not issued were the primary reasons given for denying preliminary injunctive relief. [n.114] Decisions made under the prevailing standard reveal that the Federal Circuit's approach toward the validity presumption provides neither patent owners nor alleged infringers with an undue advantage in prevailing on a preliminary injunction, as illustrated by the fact that validity remains the leading reason for denying preliminary injunctive relief. [n.115] On the other hand, the newly developed presumption of irreparable injury, which is accorded patentees who make a strong showing of validity and infringement, [n.116] has apparently had the general effect of reducing the burden associated with that factor for all litigants, even if the presumption has not arisen. This is illustrated by the fact that irreparable injury is

cited as the basis for denying preliminary injunctive relief in only twenty-six percent of the cases. The data regarding the reasons for denying injunctive relief are shown below in Table 3.

Table 3

Reasons for Denial of Injunctive Relief [n.117]
 YEAR #DENIED VALIDITY INFRING. IRREP. INJURY BAL. OF HARMS
 PUBLIC

INTEREST

1982	1	0	1	0	0	0
1983	0	0	0	0	0	0
1984	4	2	1	2	0	0
1985	1	0	0	0	1	0
1986	3	1	2	0	0	0
1987	8	0	2	4	2	1
1988	5	1	4	1	0	0
1989	9	6	2	3	0	0
1990	5	3	1	0	1	0
1991	7	3	5	2	1	1
1992	5	3	2	0	0	0

1993	5	3	1	2	0	0
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Total	53	22	21	14	6	2
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*234 VI. CONCLUSION

During the short history in which the Federal Circuit has existed, it has struggled to redefine the circumstances under which preliminary injunctive relief is available for purposes of patent litigation. The court's earliest opinions suggested that it would define the boundaries broadly, by creating what it viewed as equitable presumptions in favor of granting the requested relief whenever the patentee was likely to prevail at a trial on the merits. The difficulty with this approach was that it tilted the balance between protecting the exclusive rights of patents and ensuring that invention and competition are not hindered too far in favor of the interests of the patentee. It also undermined the concept of equity by promoting judicial reliance on *235 generalizations rather than consideration of the unique circumstances present in individual controversies. Although it has yet to say so, the language, tone and alternative results found in recent decisions of the Federal Circuit indicate that the Court has recognized these criticisms and found them valid. Accordingly, the Federal Circuit can be expected to continue to refine the preliminary injunction standard applied in patent infringement actions in an effort to reflect more accurately the competing interests of litigants, while at the same time endeavoring to promote the public interest.

[n.1]. Law clerk for the Honorable Sarah S. Vance, United States District Court, Eastern District of Louisiana; B.A., Pitzer College, 1989; J.D., Tulane University School of Law, 1992; LL.M., New York University, 1994.

[n.2]. See, e.g., *Pardee v. Camden Lumber Co.*, 73 S.E. 82 (W. Va. 1911); Owen M. Fiss, *The Civil Rights Injunction*, 39-43 (1978); Frederick Maitland, *Equity* 1-7 (2d ed. 1936).

[n.3]. The low-water mark for the availability of equitable relief may have come when the Second Circuit Court of Appeals approved what was in effect a compulsory license between a patentee, who was not using his patent, and an infringer, who had exploited the patent in commerce. See *Foster v. American Mach. & Foundry Co.*, 492 F.2d 1317, 182 U.S.P.Q. 1 (2d Cir.), cert. denied, 419 U.S. 833 (1974); see also *Royal-McBee Corp. v. Smith-Corona Marchant, Inc.*, 295 F.2d 1, 6, 130 U.S.P.Q. 377, 381 (2d Cir. 1961); *Nerney v. New York, N.H. & H.R. Co.*, 83 F.2d 409 (2d Cir. 1936); *Curtis Aerocar Co. v. Springer*, 81 F.2d 668, 674 (5th Cir. 1936).

[n.4]. For earlier discussions on the impact of the creation of the Federal Circuit on the availability of preliminary injunctions in patent cases, see James J. Foster, *The Preliminary Injunction - A "New" and Potent Weapon in Patent Litigation*, 68 *J. Pat. & Trademark Off. Soc'y* 281 (1986); L. Craig Metcalf, *Preliminary Injunctions and Their Availability: How to Defend Against the Early Injunction*, 15 *AIPLA Q.J.* 105 (1987); William A. Morrison, *Comment, The Impact of the Creation of the Court of Appeals for the Federal Circuit on the Availability of Preliminary Injunctive Relief Against Patent Infringement*, 23 *Ind. L. Rev.* 169 (1990); Herbert F. Schwartz, *Injunctive Relief in Patent Cases*, 50 *Alb. L. Rev.* 565 (1986).

[n.5]. See, e.g., *Los Angeles Memorial Coliseum Comm. v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

[n.6]. See, e.g., *Banercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 356 n.9 (2d Cir. 1972) ("The very thing which makes an injury irreparable is the fact that no remedy exists to repair it."), *rev'd on other grounds*, 415 U.S. 1 (1974).

[n.7]. See *Terrace v. Thompson*, 263 U.S. 197, 214 (1923); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 *Tex. L. Rev.* 1065, 1071-72 (1979).

[n.8]. Though all courts consider the four-factor test in one form or another, some courts combine the irreparable injury factor and balance of hardships factor, see Lee B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 *Or. L. Rev.* 839, 839 n.2 (1989), while other courts have created a fifth factor which looks at "all other relevant considerations." See *Florida Medical Ass'n v. United States*, 601 F.2d 199, 203 n.2 (5th Cir. 1984).

[n.9]. See, e.g., *Sierra Club v. Hathaway*, 579 F.2d 1162, 1167 (9th Cir. 1978); *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970), *aff'd sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972); *Virginia Petroleum Jobbers Ass'n v. FPC* 259 F.2d 921 (D.C. Cir. 1958) (*per curiam*).

[n.10]. See, e.g., *Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380 (7th Cir. 1984) (*en banc*); *Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167, 1177 (3d Cir. 1984); *Warner v. Central Trust Co.*, 715 F.2d 1121, 1123-24 (6th Cir. 1982); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194-95 (4th Cir. 1977).

[n.11]. See, e.g., *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam); *Sonesta Int'l Hotels v. Wellington Ass'n*, 483 F.2d 247, 250 (2d Cir. 1973).

[n.12]. 279 U.S. 813 (1929).

[n.13]. *Id.* at 815.

[n.14]. 412 U.S. 800, 822 n.15 (1973).

[n.15]. 422 U.S. 922, 931 (1975).

[n.16]. 415 U.S. 61, 90 n.63 (1974).

[n.17]. Compare, e.g., *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197 (9th Cir. 1980) (applying the alternatives test) with *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) (applying a sequential test); see also Linz Audain, Of Posner, and Newton and *Twenty First Century Law: An Economic and Statistical Analysis of the Posner Rule for Granting Preliminary Injunctions*, 23 *Loy. L. Rev.* 1153, 1233-44 (1990) (comparing the various preliminary injunction standards employed among the circuit courts).

[n.18]. Vaughn, *supra* note 7, at 840-41 n.11.

[n.19]. Audain, *supra* note 16, at 1231; Vaughn, *supra* note 7, at 841.

[n.20]. See Act of Feb. 15, 1819, ch. 19, 3 Stat. 481-82. Preliminary injunctive relief in patent infringement actions is presently made available pursuant to 35 U.S.C. § 283 (1988), and Fed. R. Civ. P. 65(a).

[n.21]. Schwartz, *supra* note 3, at 565-67; Note, *Injunctive Relief in Patent Infringement Suits*, 112 *U. Pa. L. Rev.* 1025, 1041-43 (1964); see also *Bliss v. Brooklyn*, 3 F. Cass. 706 (C.C.E.D.N.Y. 1871) (No. 1,544).

[n.22]. Robert P. Merges, *Patent Law and Policy: Cases and Materials*, 8-9 (1992).

[n.23]. See, e.g., *Mayview Corp. v. Rodstein*, 480 F.2d 714, 717, 178 U.S.P.Q. 449, 451 (9th Cir. 1973); *Bose Corp. v. Linear Design Labs., Inc.*, 467 F.2d 304, 307 (2d Cir. 1972); *Coleco Industries, Inc. v. Empire Plastic Corp.*, 169 U.S.P.Q. 94 (S.D.N.Y. 1971); *Knoll Int'l, Inc. v. Continental Imports, Inc.*, 192 U.S.P.Q. 502 (E.D. Pa. 1976).

[n.24]. The Ninth Circuit, for example, held that "[t]he presumption of validity is too slim a reed to support a preliminary injunction in a patent case. Moreover, the presumption of validity afforded to patents is not conclusive, but exists simply to give the grant substance and value." *Mayview Corp.*, 480 F.2d at 718, 178 U.S.P.Q. at 452.

[n.25]. See Robert C. Dorr & Bradford J. Duft, *Patent Preliminary Injunctive Relief*, 60 J. Pat. Off. Soc'y 597, 607-10 (1978); James J. Foster, *The Preliminary Injunction - A "New" and Potent Weapon in Patent Litigation*, 68 J. Pat. & Trademark Office Soc'y 281, 283 (1986); Schwartz, *supra* note 3, at 567.

[n.26]. See, e.g., *Simpson Bros. v. Blancard & Co.*, 22 F.2d 498, 499 (2d Cir. 1927) (Hand, J.). In their article, Dorr & Duft, *supra* note 24, survey the various standards applied by the circuit courts in patent infringement actions involving preliminary injunction motions prior to the establishment of the Court of Appeals for the Federal Circuit. See *Id.* at 632 (Table 3).

[n.27]. See, e.g., *Superior Elec. Co. v. General Radio Corp.*, 194 F. Supp. 339, 343, 129 U.S.P.Q. 248, 250 (D.N.J. 1961) (equating the standard for infringement on a motion for preliminary injunction with standard used to determine a motion for summary judgment); see also Schwartz, *supra* note 3, at 567.

[n.28]. See Schwartz, *supra* note 3, at 567.

[n.29]. See *Id.*

[n.30]. See, e.g., *Nuclear-Chicago Corp. v. Nuclear Data, Inc.*, 465 F.2d 428, 174 U.S.P.Q. 381 (7th Cir. 1972); *Rohm & Haas Co. v. Mobil Oil Corp.*, 525 F. Supp. 1298, 1307, 212 U.S.P.Q. 354, 363 (D. Del. 1981); *Jenn-Air Corp. v. Modern Maid Co.*, 499 F. Supp. 320, 332, 209 U.S.P.Q. 295, 306 (D. Del. 1980), *aff'd*, 659 F.2d 1068 (3d Cir. 1981); Dorr & Duft, *supra* note 24, at 615-16 (citing cases).

[n.31]. Dorr & Duft, *supra* note 24, at 615.

[n.32]. *Id.* at 602. According to the statistics compiled by Dorr and Duft, most patent infringement actions were filed in the Court of Appeals for the Second Circuit. It was also by far the most conservative court in terms of granting preliminary injunctions.

[n.33]. *Id.* The Fifth and Ninth Circuits were found by Dorr and Duft to grant up to eighty percent of the motions for preliminary injunction involving patents. These circuits, however, heard far fewer cases than, for example, the Second Circuit. The Fifth Circuit, for instance, published only five opinions on the issue over the twenty-five year period examined by Dorr and Duft.

[n.34]. *Id.*

[n.35]. *Id.*

[n.36]. See Rochelle Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 *N.Y.U. L. Rev.* 1, 25-26 (1989); Merges, *supra* note 21, at 9.

[n.37]. The Federal Circuit set out the standard by which it reviews preliminary injunction appeals involving patents in *Chrysler Motors v. Auto Body Panels, Inc.*, 908 F.2d 951, 15 U.S.P.Q.2d 1469 (Fed. Cir. 1990). In that case, the court stated that the grant of a preliminary injunction "lies largely in the sound discretion of the trial judge We review the trial judge's determination to ascertain if there was an abuse of discretion, an error of law, or a serious misjudgment of the evidence." *Id.* at 953, 15 U.S.P.Q.2d at 1471.

[n.38]. See, e.g., *Chrysler Motors Corp. v. Auto Body Panel of Ohio, Inc.*, 908 F.2d 951, 952-53, 15 U.S.P.Q. 2d 1469, 1470 (Fed. Cir. 1990); *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 n.12, 7 U.S.P.Q.2d 1191, 1195 (Fed. Cir. 1988); *Upjohn Co. v. Medtron Labs., Inc.*, 751 F. Supp. 416, 17 U.S.P.Q.2d 1268 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 622 (Fed. Cir. 1991); *Tennant Co. v. Hako Minuteman, Inc.*, 651 F. Supp. 945, 1 U.S.P.Q.2d 2042 (N.D. Ill. 1987).

[n.39]. *Hybritech*, 849 F.2d at 1451 n.12, 7 U.S.P.Q. 2d at 1195, citing *Chemlawn Servs. Corp. v. GNC Pumps, Inc.*, 823 F.2d 515, 517, 3 U.S.P.Q.2d 1313, 1315 (Fed. Cir. 1987); *Digital Equipment Corp. v. Emulex Corp.* 805 F.2d 380, 382 n.3, 231 U.S.P.Q. 779, 781 (Fed. Cir. 1986).

[n.40]. See *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 n.7, 219 U.S.P.Q. 686, 692 (Fed. Cir.), cert. denied, 464 U.S. 996 (1983).

[n.41]. See *Id.*; see also *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 882, 23 U.S.P.Q.2d 1622, 1625 (Fed. Cir. 1992); *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390, 2 U.S.P.Q.2d 1926, 1927 (Fed. Cir. 1987); *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1270-73, 225 U.S.P.Q. 345, 347-50 (Fed. Cir. 1985); *Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1231-34, 227 U.S.P.Q. 289, 290-93 (Fed. Cir. 1985).

[n.42]. See, e.g., *Chrysler Motors*, 908 F.2d at 953, 15 U.S.P.Q.2d at 1471.

[n.43]. See, e.g., *Hybritech*, 849 F.2d at 1451, 7 U.S.P.Q.2d at 1195.

[n.44]. See, e.g., *Chrysler Motors*, 908 F.2d at 953, 15 U.S.P.Q.2d at 1471; *Calmar, Inc. v. Emson Research, Inc.*, 838 F. Supp. 453, 455 (C.D. Ca. 1993).

[n.45]. See *New England Braiding*, 970 F.2d at 882-83, 23 U.S.P.Q. at 1625; *Tennant Co.*, 651 F. Supp. at 954, 1 U.S.P.Q.2d at 2046.

[n.46]. See *Atlas Power Co. v. Ireco Chems.*, 773 F.2d 1230, 1233, 227 U.S.P.Q. 289, 292 (Fed. Cir. 1985) ("The burden upon the movant should be no different in a patent case than for other kinds of intellectual property, where, generally, only a clear showing is required."); see also *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1270, 2235 U.S.P.Q. 345, 347 (Fed. Cir. 1985) (casting doubt on the "beyond question" standard); *Smith Int'l, Inc. v. Hughes Tool*, 718 F.2d 1573, 1578, 219 U.S.P.Q. 686, 690 (Fed. Cir. 1983) (same).

[n.47]. See *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1535, 19 U.S.P.Q.2d 1367, 1369 (Fed. Cir. 1991); *B.F. Goodrich Flight Systems, Inc. v. Insight Instruments Corp.*, 22 U.S.P.Q.2d 1832, 1833 (S.D. Ohio 1992); *Lubrizol Corp. v. Exxon Corp.*, 696 F. Supp. 302, 319, 7 U.S.P.Q.2d 1513, 1524 (N.D. Ohio 1988).

[n.48]. See *supra* note 4, and accompanying text.

[n.49]. 773 F.2d 1230, 227 U.S.P.Q. 289 (Fed. Cir. 1985).

[n.50]. *Id.* at 1232, 227 U.S.P.Q. at 291; see *Merges*, *supra* note 21, at 757. On the concept of the last peaceable status quo, see, e.g., *Rees v. Panhandle E. Pipe Line Co.*, 377 N.E. 2d 640, 646 (Ind. App. 1978).

[n.51]. See *supra* note 31-34, and accompanying text.

[n.52]. See *supra* note 31-34, and accompanying text.

[n.53]. See *Filmtec Corp. v. Allied Signal, Inc.*, 988 F.2d 129; *New England Braiding Co. v. A.W. Chesterton Co.*, 746 F. Supp. 1200 (D. Ma. 1990), *aff'd*, 970 F.2d 878, 23 U.S.P.Q.2d 1622 (Fed. Cir. 1992). For pre-Federal Circuit decisions in which title was contested as part of a preliminary injunction proceeding, see *Norwich Pharmacal Co. v. International Brokers, Inc.*, 296 F. Supp. 937, 159 U.S.P.Q. 758 (N.D. Ga. 1968); *Singer Mfg. Co. v. Better Serv. Sewing Mach. Co.*, 131 F. Supp. 146, 105 U.S.P.Q. 190 (S.D.N.Y. 1955).

[n.54]. See *supra* notes 22-26, and accompanying text.

[n.55]. See *supra* notes 22-26, and accompanying text.

[n.56]. See, e.g., *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 23 U.S.P.Q.2d 1622 (Fed. Cir. 1992); *Nutrition 21 v. United States*, 930 F.2d 867, 869, 18 U.S.P.Q.2d 1347, 1349 (Fed. Cir. 1991).

[n.57]. *New England Braiding*, 970 F.2d at 882-83, 23 U.S.P.Q.2d at 1625.

[n.58]. *Id.*; see also *Nutrition 21*, 930 F.2d at 869, 18 U.S.P.Q.2d at 1349, ("[A]t the preliminary injunction stage, because of the extraordinary nature of the relief, the patentee carries the burden of showing likelihood of success on the merits with respect to the patent's validity, enforceability, and infringement."). The language used in *Nutrition 21* is reminiscent of that used in pre-Federal Circuit cases. Rather than marking a return to an older standard, however, its precedential impact has been minimized by the balanced explanation of the presumption of validity appearing in the more recent decision of *New England Braiding*

[n.59]. See, e.g., *Datascope Corp. v. Kontron, Inc.*, 786 F.2d 398, 400, 229 U.S.P.Q. 41, 42-43 (Fed. Cir. 1986); *Unique Concepts, Inc. v. Manuel*, 231 U.S.P.Q.2d 268 (N.D. Ill. 1986).

[n.60]. *New England Braiding*, 970 F.2d at 883, 23 U.S.P.Q.2d at 1625.

[n.61]. *Id.*

[n.62]. See *Nutrition 21*, 930 F.2d at 869-70, 18 U.S.P.Q.2d at 1349.

[n.63]. *Id.*; see *supra* note 45-46, and accompanying text.

[n.64]. See *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390, 2 U.S.P.Q.2d 1926, 1930 (Fed. Cir. 1987); *California Medical Prods., Inc. v. Emergency Prods., Inc.*, 796 F. Supp. 640, 642, 24 U.S.P.Q.2d 1205, 1207 (D.R.I. 1992), *aff'd*, 991 F.2d 808 (Fed. Cir. 1993).

[n.65]. An inquiry into literal infringement involves a two step process. The Court first must determine the scope of the patent claims and then whether the properly constructed claims encompass the accused product. See *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1455, 7 U.S.P.Q.2d 1191, 1199 (Fed. Cir. 1988); *Autogiro Co. v. United States*, 384 F.2d 391, 155 U.S.P.Q. 697 (Ct. Cl. 1967).

[n.66]. Under the doctrine of equivalents, a device is deemed to infringe a patent when it performs substantially the same function in substantially the same way to obtain the same result. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950); see also *Wilson Sporting Goods v. David Geoffrey & Assoc.*, 904 F.2d 677, 14 U.S.P.Q.2d 1942 (Fed. Cir. 1990); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931, 4 U.S.P.Q.2d 1737 (Fed. Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 961 (1988); *Thomas & Betts Corp. v. Litton Sys., Inc.*, 720 F.2d 1572, 1579, 220 U.S.P.Q. 1, 6 (Fed. Cir. 1983).

[n.67]. *Douglas Laycock, Modern American Remedies* 335 (1985).

[n.68]. See *Cordis Corp. v. Medtronic, Inc.*, 780 F.2d 991, 996, 228 U.S.P.Q. 189, 192 (Fed. Cir. 1985), *cert. denied*, 476 U.S. 154 (1986); see also *supra* notes 27-30, and accompanying text.

[n.69]. See, e.g., *Nutrition 21 v. Thorne Research, Inc.*, 930 F.2d 867, 872, 18 U.S.P.Q.2d 1347, 1351 (Fed. Cir. 1991); *Datascope Corp. v. Kontron, Inc.*, 786 F.2d 398, 400, 229 U.S.P.Q. 41, 42-43 (Fed. Cir. 1986); *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1271, 225 U.S.P.Q. 345, 348 (Fed. Cir. 1985); *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581, 219 U.S.P.Q. 686, 692 (Fed. Cir. 1983).

[n.70]. *Smith Int'l*, 718 F.2d at 1581, 219 U.S.P.Q. at 692.

[n.71]. Compare e.g., *California Medical Prods.*, 796 F. Supp. at 642, 24 U.S.P.Q.2d at 1206, with *Calmar, Inc. v. Emson Research, Inc.*, 838 F. Supp. 453, 455 (C.D. Cal. 1993).

[n.72]. See *Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1233, 227 U.S.P.Q. 289, 292 (Fed. Cir. 1985); *Roper*, 757 F.2d at 1272, 225 U.S.P.Q. at 349.

[n.73]. See *Nutrition 21*, 930 F.2d at 875, 18 U.S.P.Q.2d at 1351.

[n.74]. 906 F.2d 679, 15 U.S.P.Q.2d 1307 (Fed. Cir. 1990).

[n.75]. *Id.* at 683, 15 U.S.P.Q.2d at 1310.

[n.76]. *Id.*

[n.77]. See *Nutrition 21*, 930 F.2d at 872, 18 U.S.P.Q.2d at 1351; *Pretty Punch Shoppettes, Inc. v. Hauk*, 844 F.2d 782, 784, 6 U.S.P.Q.2d 1563, 1565 (Fed. Cir. 1988). But see *Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1233, 227 U.S.P.Q. 289, 292 (Fed. Cir. 1985).

[n.78]. See *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1272, 225 U.S.P.Q. 345, 349 (Fed. Cir. 1985).

[n.79]. See *T.J. Smith & Nephew Ltd. v. Consolidated Medical Equip., Inc.*, 821 F.2d 646, 647-48, 3 U.S.P.Q.2d 1316, 1317-18 (Fed. Cir. 1987); *Crucible Materials Corp. v.*

Sumitomo Special Metals Co., 719 F. Supp. 14, 17, 13 U.S.P.Q.2d 1477, 1479-80 (D.D.C. 1989).

[n.80]. See T.J. Smith, 821 F.2d at 648, 3 U.S.P.Q.2d at 1318; Crucible Materials, 719 F. Supp. at 17, 13 U.S.P.Q.2d at 1480.

[n.81]. See, e.g., Cordis Corp. v. Medtronic, Inc., 780 F.2d 991, 996, 228 U.S.P.Q. 189, 192 (Fed. Cir. 1985), cert. denied, 476 U.S. 1115 (1986).

[n.82]. See Nutrition 21, 930 F.2d at 872, 18 U.S.P.Q.2d at 1351; H.H. Robertson Co. v. United Steel Deck, Inc., 820 F.2d 384, 390, 2 U.S.P.Q.2d 1926, 1930 (Fed. Cir. 1987); see also Polaroid Corp. v. Eastman Kodak Co., Civ. No. 76-1634-z, Slip Op., at 6 (D. Mass. Oct. 11, 1985).

[n.83]. Nutrition 21, 930 F.2d at 872, 18 U.S.P.Q.2d at 1351. But see Hybritech, Inc. v. Abbott Labs., 849 F.2d 1446, 1456, 7 U.S.P.Q.2d 1191, 1200 (Fed. Cir. 1988) (upholding consideration of market share impact and unpredictability of future damages in assessing the presence of irreparable injury). The Hybritech court further upheld consideration of the state of the technology, the level of competition, the infringer's large presence in the market, the growth rate of the technology, and the likely entry of other infringers into the market.

[n.84]. See, e.g., Upjohn Co. v. Medtron Lab., Inc., 751 F. Supp. 416, 430-31, 17 U.S.P.Q.2d 1268 (S.D.N.Y. 1990), aff'd, 937 F.2d 622 (Fed. Cir. 1991).

[n.85]. 782 F.2d 995, 228 U.S.P.Q. 562 (Fed. Cir.), cert. denied sub nom., Bic Leisure Prods. Inc. v. Windsurfing Int'l, Inc., 477 U.S. 905 (1986).

[n.86]. Id. at 1003, 228 U.S.P.Q. at 568.

[n.87]. Id. at 1003 n.12, 228 U.S.P.Q. at 568.

[n.88]. Illinois Tool Works, Inc. v. Grip-Pak, Inc., 906 F.2d 679, 683, 15 U.S.P.Q.2d 1307, 1310 (Fed. Cir. 1990).

[n.89]. Id.

[n.90]. Id.

[n.91]. See *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1457-58, 7 U.S.P.Q.2d 1191, 1201 (Fed. Cir. 1988).

[n.92]. Id. at 1458, 7 U.S.P.Q.2d at 1201.

[n.93]. 849 F.2d 1146, 7 U.S.P.Q.2d 1191 (Fed. Cir. 1988).

[n.94]. Id. at 1458, 7 U.S.P.Q.2d at 1201.

[n.95]. 666 F. Supp. 1379, 3 U.S.P.Q.2d 1481 (N.D. Ca. 1987).

[n.96]. Id. at 1384, 3 U.S.P.Q.2d at 1484.

[n.97]. See, e.g., *California Medical Prods., Inc. v. Emergency Medical Prods., Inc.*, 796 F. Supp. 640, 648, 24 U.S.P.Q.2d 1205, 1211 (D.R.I. 1992) (finding that injunction would not diminish supply of medical device); see also Note, *Patents for Pharmaceuticals: The AZT Case*, 17 *Am. J.L. & Med.* 145 (1991).

[n.98]. Compare *Hybritech*, 849 F.2d at 1458, 7 U.S.P.Q.2d at 1201, with *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 391, 2 U.S.P.Q.2d 1926, 1930 (Fed. Cir. 1987).

[n.99]. See *supra* notes 83-90, and accompanying text.

[n.100]. *H.H. Robertson*, 820 F.2d at 391, 2 U.S.P.Q.2d at 1930.

[n.101]. The WESTLAW database was chosen over LEXIS because the former reports more unpublished dispositions.

[n.102]. The data was collected through several computerized searches on both WESTLAW and LEXIS. Unpublished district court opinions that were appealed to the Federal Circuit are also incorporated in the data set. Although the search seems to have been thorough, some decisions were undoubtedly missed inadvertently.

[n.103]. Dorr & Duft, *supra* note 24.

[n.104]. *Id.* at 599 n.4.

[n.105]. Dorr's & Duft's data set was completed in 1990 by a law student who published his results as part of a comment in the *Indiana Law Review*. Morrison, *supra* note 3, at 186. Morrison found only a one percent increase in the overall rate (42%) at which preliminary injunctions were granted when the two periods were combined. Not recognizing the limitation of comparing a data set based on published opinions and one incorporating published and unpublished opinions, Morrison used chi-square statistical analysis to determine whether the increased number of preliminary injunctions granted was due to random variables or the Federal Circuit's revised preliminary injunction standard. His results were inconclusive. *Id.* at 184-88.

[n.106]. The collected data for the years 1987-1993 indicates that, at least for this period, the rate at which motions for preliminary injunction are filed has remained fairly constant.

[n.107]. The current success rate for preliminary injunctions appears to hold about equally for different classes of patents. See, e.g., Perry J. Saidman, *Design Patents-The Whipping Boy Bites Back*, 73 *J. Pat. & Trademark Off. Soc'y* 859, 866 (1991) (finding a success rate of 70% for design patents).

[n.108]. Dorr & Duft, *supra* note 24, at 602.

[n.109]. *Id.* at 631 n**.

[n.110]. Interestingly, the Federal Circuit affirms denials of preliminary injunctions at a rate of seventy-five percent.

[n.111]. See Appendix Table B, *infra*.

[n.112]. See, e.g., Nutrition 21 v. United States, 930 F.2d 867, 18 U.S.P.Q.2d 1347 (Fed. Cir. 1991).

[n.113]. The importance of doctrinal changes in the substantive law of patents, as opposed to the law relating to preliminary injunctions, in determining the availability of preliminary injunctive relief in patent litigation is further evidenced by the increased citation of the failure to prove infringement as the basis for denying such relief. Since the Federal Circuit's ruling in *Wilson Sporting Goods Co. v. David Geoffrey & Ass'n.*, 904 F.2d 677, 14 U.S.P.Q.2d 1942 (Fed. Cir. 1990), failure to prove infringement by equivalents has been a leading basis for reversing grants of preliminary injunctive relief.

[n.114]. Failure to prove validity or irreparable injury were the basis for denial in sixty-seven percent of the cases, with validity representing forty-one percent and irreparable injury twenty-six percent.

[n.115]. See Appendix Table B, *infra*.

[n.116]. See *supra* notes 66-82 and accompanying text.

[n.117]. Two decisions in which preliminary injunctions were denied in 1983 and 1984 were omitted from Table 3 because they were denied for procedural reasons. Table 3 also reflects the use of the balancing test in that some motions were denied for a number of reasons. It therefore contains some overlap and the total number of reasons for denial does not equal the number of cases where preliminary injunctions were denied.

*237 APPENDIX

TABLE A

SURVEY OF UNITED STATES DISTRICT COURT DECISIONS PERTAINING TO MOTIONS FOR

PRELIMINARY INJUNCTIVE RELIEF IN PATENT INFRINGEMENT ACTIONS -- OCTOBER 1,

1982 -- jaNUARY 1, 1994

NO.	CAPTION/CITATION	COURT	YEAR	RELIEF	RAT'L
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1 Minnesota Mining & Mfg. v. D. 1993 granted

Carapace, Inc., 1993 WL 528166 Minn.

2 Calmar, Inc. v. Emson Research, C.D. 1993 denied no irr-

Inc., 838 F. Supp. 453 Cal. ep.

inju-

ry

3 Rubbermaid Commercial Prods., Inc. W.D. 1993 granted

v. Contico Int'l, Inc., 836 F. Va.

Supp. 1247, 29 U.S.P.Q.2d 1574

4 SRI Int'l v. Acoustic Imaging N.D. 1993 denied failure

Tech. Corp., 1993 WL 356896 Cal. to

prove

vali-

dity

and

no i-

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inju-

ry

5 Critikon, Inc. v. Becton Dickinson D. Del. 1993 granted

6 A & E Products Group v. California C.D. 1993 granted

Supply, Inc., 28 U.S.P.Q.2d 1041 Cal.

7 Roto-Mix Enter., Ltd. v. Heyco, D. Kan. 1993 denied failure

Inc., 1993 WL 257132 to

prove

infr-

inge

ment

8 Alternative Pioneering Sys., Inc. D. 1993 denied failure

v. Direct Innovative Prods., Minn. to

Inc., 822 F.Supp. 1437 prove

vali-

dity

9 Flo-Con Sys., Inc. v. Leco Corp., S.D. 1993 granted large

845 F. Supp. 1576, 29 U.S.P.Q.2d Ga. limited mark-

1443 relief of et

deposit of share

% gross of and

sales as comp-

if etit

licensee ors

10 Juno Lighting, Inc. v. Cooper N.D. 1993 denied failure

Indus., 1993 WL 131481

Ill.

to

prove

vali-

dity

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11 Construction Technology v. S.D.N.- 1993 granted

Cybermation, Inc., 1993 WL 87926 Y.

12 Lambton Mfg. Ltd. v. Young, 833 W.D. 1993 granted

F.Supp. 610, 27 U.S.P.Q.2d 1775 Ky.

13 United States Surgical Corp. v. N.D.Ca- 1993 granted,

Origin Medsystems, Inc., 27

l.

aff'd 16

U.S.P.Q.2d 1526

F.3d 420,

1993 WL

50322

14 Speed Shore Corp. v. Allied Steel S.D. July granted,

& Tractor Prods., Inc. Civ. No. Tex. 19, rev'd, 16
H-91-3704 1993 F.3d 421,
1993 WL
514359

15 Chiuminatta Concrete Concepts, C.D.Ca- 1992 granted,
Inc. v. Target Prods., Inc. 1992 l. aff'd,
WL 465720 1994 WL
48574

16 American Cyanamid Co. v. United D. 1992 denied failure
States Surgical Corp., 833 Conn. to
F.Supp. 92, 30 U.S.P.Q.2d 1561 prove
vali-
dity
or i-
nfri-
nge
ment

17 Voice Sys. & Serv., Inc. v. VMX, N.D. 1992 granted
Inc., 26 U.S.P.Q.2d 1106 Okla.

18 Payless Shoesource, Inc. v. Reebok D. Kan. 1992 denied, no inf-
Int'l., 804 F. Supp. 206, 25 vacated, ring-

U.S.P.Q. 1130 998 F.2d e ment

985

(1993).

19 Multi-Tech Sys., Inc. v. Hayes D. 1992 denied no inf-
Microcomputer Prods., 800 F. Minn. ring-
Supp. 825 e ment

20 California Medical Prods., Inc. v. D.R.I. 1992 granted,
Emergency Medical Prods., Inc., aff'd, 991
796 F. Supp. 640, 24 U.S.P.Q.2d F.2d 808
1205 (1993)

21 Saes Getters S.p.A. v. Ergenics, D.N.J. 1992 granted,
Inc. 816 F. Supp. 979 aff'd 989
F.2d 1201
(1993)

22 American Dental Ass'n. v. Bisco, N.D. 1992 granted
Inc. 24 U.S.P.Q.2d 1524 Ill.

23 Omega, S.A. v. S & N Jewelry, S.D.N.- 1992 denied insuff-
Inc., 1992 WL 142746 Y. icie
nt e-
vide-

nce
of v-
alid-
ity
(uno-
ppos-
ed)
gran-
ted
for
trad-
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24 Total Concept, Inc. v. Environ E.D.Pa. 1992 granted
Prods., 23 U.S.P.Q.2d 1305

25 B.F. Goodrich Flightsystems v. S.D. 1992 granted,
Insight Instruments Inc., 22 Ohio aff'd, 991
U.S.P.Q.2d 1832 F.2d 810

(1993)

26 Telebrands Direct Response Corp. D.N.J. 1992 granted
v. Ovation Communications, Inc.,

27 Larami Corp. v. Lanard Toys, Ltd., E.D. 1992 granted
22 U.S.P.Q.2d 1440 Pa.

28 Ovation Communications, Inc. v. C.D. 1992 granted,
RBM, Ltd., unpublished Cal. rev'd, 979
F.2d 215
(1992)

29 Wang Lab., Inc. v. Clearpoint D. Nov. granted,
Research Corp., Civ. No. Mass. 12, rev'd, 5
92-11482-MA 1992 F.3d 1504
(1993)

30 Strathyr Instant Lawn Paryt, Ltd., D. Vt. Sept. denied, failure
v. Gunn Civ. No. 92-127 23, aff'd, 991 to
1992 F.2d 811 prove
(1993) vali-
dity

31 Jenmar Corp. v. Pattin Mfg. Corp., S.D. 1991 denied, no inf-
1991 WL 288825 Ohio aff'd 985 ring-
F.2d 583 ement
(1982)

32 Intel Corp. v. ULSI System Tech., D. Or. 1991 granted,
Inc., 782 F. Supp. 1467 rev'd 995
F.2d 1566

33 American Home Prods., Inc. v. E.D. 1991 granted,
Johnson & Johnson Corp., 22 Pa. rev'd 979
U.S.P.Q.2d 1561 F.2d 216
(1992)

34 Rawplug Co. v. Hilti S.D.N.- 1991 denied failure
Artiengesellschaft, 777 F.Supp. Y. on
240 all
four
coun-
ts w-
itho-
ut d-
iscu-
ssion

35 Motorola, Inc. v. Alexander Mfg. N.D. 1991 granted
Co., 786 F. Supp. 808, 21 Iowa
U.S.P.Q.2d 1573

36 Yenser v. Agrotors, Inc., 764 F. M.D. 1991 granted

Supp. 974, 20 U.S.P.Q.2d 1198 Pa.

37 Ethicon, Inc. v. United States D. 1991 denied, no inf-
Surgical Corp., 762 F. Supp. Conn. aff'd, 965 ring-
480, 19 U.S.P.Q.2d 1721 F.2d 1065 ement
(1992)

38 Michaels v. Art Betterfly Enter., W.D.NY 1991 granted,
Inc., 18 U.S.P.Q.2d 2035 rev'd, 972
F.2d 1353
(1992)

39 Black & Decker, Inc. v. Hoover D. 1991 denied failure
Serv. Ctr., 765 F. Supp. 1129, Conn. to
20 U.S.P.Q.2d 1612 prove
vali-
dity

40 McNeil-PPC, Inc. v. Proctor & D. 1991 denied failure
Gamble Co., 759 F. Supp. 1505, Colo. to
19 U.S.P.Q.2d 1658 prove
vali-
dity
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inge-

ment

41 Dolly, Inc. v. Spalding & Evenflo S.D. 1991 granted,
Cos., 18 U.S.P.Q.2d 1737 Ohio rev'd, 954
F.2d 734
(1992)

42 XYTEC Plastics, Inc. v. Ropak E.D. Feb. granted,
Corp., Civ. No. 90-CV-72707 Mich. 15, aff'd, 954
1991 F.2d 733,
(1992)

43 Filmtec Corp. v. Allied-Signal, S.D. Aug. granted,
Inc. Civ. No. 89 Cal. 30, aff'd, 988
1991 F.2d 129
(1993)

44 Ciba Corning Diagnostics Corp. v. D. Apr. denied, no irr-
Alko Diagnostic Corp., Civ. No. Mass. 29, rev'd, 950 ep.
91-CV-10239 1991 F.2d 732 harm
(1991)

45 Jacobson v. Cox Paving Co., Civ. D. May granted,
No. 89-1786 Ariz. 16, aff'd, 949

1991 F.2d 404

(1991)

46 Wahpeton Canvas Co. v. Gebhart E.D. Apr. denied, no inf-
Enter., Inc., Civ. No. Ark. 15, rev'd, 996 ring-
PB-C-90-418 1991 F.2d 318 ement

(1993)

47 Henkel Corp. v. Coral, Inc., 754 N.D. 1990 granted,
F.Supp. 1280, 21 U.S.P.Q.2d 1081 Ill. aff'd 945

F.2d 416

(1991).

48 National Presto Indus., Inc. v. N.D.II- 1990 granted,
Dazey Corp., 18 U.S.P.Q. 1113 I. aff'd, 949

F.2d 402

(1991)

49 Conair Group, Inc. v. Automatik 19 W.D. 1990 granted,
U.S.P.Q.2d 1535 Pa. rev'd, 944

F.2d 862

(1991)

50 Upjohn Co. v. Medtron Lab., Inc., S.D.N.- 1990 granted
751 F. Supp. 416, 17 U.S.P.Q.2d Y.

1268

51 Saes Getters, S.p.A. v. Ergenics, D.N.J. 1990 granted,
17 U.S.P.Q.2d 1581 aff'd, 914
F.2d 270
(1990)

52 Oscar Mayer Foods Corp. v. Sara Lee Corp., 743 F. Supp. 1326, 16 U.S.P.Q.2d 1369 Wisc. 1990 denied balance of harm

53 Allied-Signal, Inc. v. Filmtec Corp., 17 U.S.P.Q.2d 1692 S.D. Cal. 1990 granted

54 Oscar Mayer Foods Corp. v. Sara Lee Corp., 15 U.S.P.Q.2d 1204 Wisc. 1990 granted

55 Nutrition 21 v. Thorne Research, Inc., 1990 WL 300282 W.D. Wash. 1990 granted, rev'd 930
F.2d 867
(1991)

56 Tecnol, Inc. v. Charles Greiner & Co., 1990 WL 294260 N.D.Te- x. 1990 denied no inf- ring-
ement

57 Ortho Pharmaceutical Corp. v. E.D. 1990 granted

Smith, 15 U.S.P.Q.2d 1856 Pa.

58 Ampex Corp. v. Abekas Video Sys., N.D. 1990 denied failure

Inc., 15 U.S.P.Q.2d 1219 Cal. to

prove

vali-

dity

59 Allegheny Ludlum Corp. v. Nifton E.D. 1990 denied failure

Steel Corp., 1990 WL 898 Pa. to

prove

vali-

dity

60 New England Braiding Co. v. A.W. D. 1990 denied, abando-

Chesterton Co., 746 F. Supp. Mass. aff'd, 970 nment

1200 F.2d 878 and

(1992) pate-

ntee

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ntor

61 Oakley, Inc. v. Int'l Tropic-Cal, C.D. Feb. granted,

Inc., Civ. No. 90-89 Cal. 1, rev'd, 923

1990 F.2d 167

(1991)

62 FilmTec Corp. v. Allied Signal, S.D. Mar. granted,

Inc., Civ. No. 89-0919 Cal. 1, rev'd, 939

1990 F.2d 1568

(1991).

63 Lund Indus., Inc. v. Go Indus., N.D. Aug. granted,

Inc., unknown Tex. 20, rev'd, 938

1990 F.2d 1272

(1991)

64 Rubbermaid Tamor Plastics v. Tamor D. 1990 granted

Plastics, 1990 WL 122396 Mass.

65 McAulay v. United States Bank N.D. 1990 granted,

Corp., Civ. No. 87-20736 Cal. aff'd, 918

F.2d 185

(1990)

66 National Presto Indus. v. Dazey, N.D. 1990 granted

18 U.S.P.Q.2d 1113 Ill.

67 Moore Business Forms, Inc. v. N.D. 1989 granted

Wallace Computer Servs., Inc., Ind.

14 U.S.P.Q.2d 1849

68 We Care, Inc. v. Ultra-Mark Int'l D. 1989 granted,
Corp., 741 F. Supp. 743, 14 Minn. rev'd 930
U.S.P.Q.2d 1804 F.2d 1567
(1991)

69 Illinois Tool Works, Inc. v. N.D.- 1989 denied, failure
Grip-Pak, Inc., 725 F. Supp. l. aff'd, 906 to
951, 13 U.S.P.Q.2d 1463 F.2d 679 prove
(1990) vali-
dity

70 Upjohn Co. v. Medtron Lab., Inc., S.D.N.- 1989 granted
16 U.S.P.Q.2d 1362 Y.

71 Drexelbrook Controls, Inc. v. D. Del. 1989 granted,
Magnetrol Int'l, Inc., 720 F. aff'd, 904
Supp. 397, 12 U.S.P.Q.2d 1608 F.2d 45
(1990)

72 J-Star Indus. v. Oakley, 720 F. W.D. 1989 denied failure
Supp. 1291, 13 U.S.P.Q.2d 1993 Mich. to
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inge
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73 Crucible Materials Corp. v. D.D.C. 1989 denied no irr-
Sumitomo SpecialMetals Co., 719 ep.
F. Supp. 14, 13 U.S.P.Q.2d 1477 harm

74 Chrysler Motors Corp. v. Auto Body S.D. 1989 denied, failure
Panels 719 F. Supp. 622, 12 Ohio aff'd, 908 to
U.S.P.Q.2d 1493 F.2d 951 prove

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75 Amsted Indus. Inc. v. National N.D.Ill- 1989 denied failure
Castings, Inc. 1989 WL 39832 l. to
prove

vali-
dity

76 Russell Williams, Ltd. v. ABC E.D.N.- 1989 denied no irr-
Display & Supply, Inc. 11 Y. epar-
U.S.P.Q.2d 1812 ab le

harm

77 Kalipharma, Inc. v. Bristol-Meyers S.D.N.- 1989 denied failure
Co., 707 F. Supp. 741, 11 Y. to
U.S.P.Q.2d 1737 prove

vali-
dity

78 E.I. duPont de Nemours & Co. v. D. Del. 1989 granted,
Polaroid Graphics Imaging, Inc., aff'd, 887
706 F. Supp. 1135, 10 U.S.P.Q.2d F.2d 1095
1579 (1989)

79 Whistler Corp. v. Dynscan Corp., N.D. 1989 denied failure
1989 WL 13299 Ill. to

prove
vali-
dity

80 Automotive Prods. v. Federal-Mogul E.D. 1989 granted

Corp., 1989 WL 109739 Mich.

81 Kim v. Yeu, unknown D. Haw. Sept. granted,
22, aff'd, 904
1989 F.2d 44,
(1990).

82 Black & Decker v. Hoover Serv. D. Jan. denied, no inf-
Ctr., Civ. No. H-87-851 Conn. 27, rev'd, 886 ring-
1989 F.2d 1285 ement
(1989)

83 Everpure, Inc. v. Cuno, Inc., 705 D. 1988 denied, no inf-
F.Supp. 725 Conn. aff'd, 875 ring-
F.2d 300 ement
(1989)

84 Archive Corp. v. Cipher Data C.D. 1988 denied no inf-
Prods., Inc., 1988 WL 168533 Cal. ring-
ement

85 Southwest Aerospace Corp. v. N.D. 1988 granted,
Teledyne Indus., Inc., 702 F. Ala. aff'd, 884
Supp. 870, 9 U.S.P.Q.2d 1949 F.2d 1398
(1989)

86 Zeller Plastik v. Joyce Molding Co., 698 F. Supp. 1204, 10 U.S.P.Q.2d 1081 D.N.J. 1988 granted

87 Johnson & Johnson v. Ormco Corp., 1988 WL 155634 D. Del. 1988 granted

88 American Antenna Corp. v. Wilson Antenna, Inc., 690 F. Supp. 924 D. Nev. 1988 granted

89 Lubrizol Corp. v. Exxon Corp., 696 F. Supp. 302, 7 U.S.P.Q.2d 1513 N.D. Ohio 1988 granted

90 Dreamlite Holdings, Ltd. v. Kraser, 705 F. Supp. 98, 9 U.S.P.Q.2d 1401 E.D.N.-Y. 1988 granted, aff'd, 878 F.2d 1446

91 Garel Skatebike Int'l, Inc. v. Lerun Indus., Inc., unknown (1989) E.D. Mich. 1988 denied, aff'd, 871 F.2d 1097 (1989) no injury

92 C.R. Bard, Inc. v. Kendall Co., Civ. No. 88-3236 1988 C.D. Cal. 19, rev'd, 878 F.2d 1446 (1989) granted,

93 P.W. Wood & Sons v. Antelope C.D. Aug. granted,
Enter. Co., Civ. No. 87-6848 Cal. 15, aff'd, 871
1988 F.2d 1096
(1989)

94 L'Nard Ass'n., Inc. v. Interstate M.D. Oct. granted,
Medical Mktg., Inc., unknown Fla. 7, aff'd, 892
1988 F.2d 1049
(1989)

95 McAulay v. United States Banknote N.D. 1988 granted,
Corp., Civ. No. 87-20736 Cal. rev'd, 891
F.2d 298
(1989)

96 Neiss v. A.L.C. Co., Civ. No. N.D. Nov. granted,
C88-3997A Ohio 30, rev'd, 889
1988 F.2d 1100
(1989)

97 Chemlawn Serv. Corp. v. GNC Pumps, S.D. 1988 granted,
Inc., 690 F. Supp. 1560, 6 Tex. aff'd, 856
U.S.P.Q.2d 1349 F.2d 202
(1988)

98 Astro-Med, Inc. v. Western C.D. Oct. denied, no inf-
Graphetic, Inc., Civ. No. Cal. 20, aff'd, 878 ring-
88-3348 RSWL 1988 F.2d 1447 ement
(1989)

99 Designs For Leisure v. Murry & C.D.Ca- 1988 granted
Sons, 9 U.S.P.Q.2d 1159 l.

100 T.J. Smith & Nephew Ltd. v. Acme D. unkno- granted,
United Corp., unknown Conn. wn aff'd, 846
F.2d 78
(1988)

101 Epic Metals Corp. v. H.H. W.D. Apr. denied, failure
Robertson Co., Civ. No. 86-1714 Pa. 21, aff'd, 870 to
1988 F.2d 1574 prove
(1989) vali-
dity

102 Am. Parking Meter Adv., Inc. v. D. 1988 granted,
Visual Media (Meter Hat II), Mass. aff'd,
Civ. No. 87-2010 1988 WL
112770
(1988)

103 Medtronic Inc. v. Teletronics, D. 1987 denied balance
Inc., 686 F. Supp. 838, 5 Colo. of
U.S.P.Q.2d 1649 harm

104 Toro Co. v. Textron, Inc., 703 F. W.D.N.- 1987 granted
Supp. 417, 5 U.S.P. Q.2d 1616 C.

105 Amicus, Inc. v. Post-Tension, 686 S.D. 1987 granted
F. Supp. 583, 5 U.S.P.Q.2d 1731 Tex.

106 Turbo Tex Enter. v. F.P. Feature N.D. 1987 granted
Prods., Inc., 1987 WL 19558 Ill.

107 Am. Parking Meter Advertising, D. 1987 granted,
Inc. v. Visual Media, Inc., 693 Mass. aff'd, 848
F. Supp. 1253, 6 U.S.P.Q. 2d1813 F.2d 1244
(1988)

108 John Fluke Mfg. Co. v. N. Am. Soar D.N.J. 1987 granted
Corp., 5 U.S.P.Q.2d 1657

109 Astronics Corp. v. Patecell, 1987 W.D.N.- 1987 denied, no irr-
WL 14586 Y. aff'd, 848 ep.
F.2d 1245 inju-
ry

110 Pittway v. Black & Decker, 667 F. N.D. 1987 granted

Supp. 585, 5 U.S.P.Q.2d 1052 Ill.

111 Scripps Clinic & Research Found. N.D.Ca- 1987 denied public
v. Genentech, Inc., 666 F. Supp. 1. inte-
1379, 3 U.S.P.Q.2d 1481 rest

112 Tenneco Oil Co. v. Vector N.D.N.- 1987 denied no irr-
Magnetics, Inc., 1987 WL 11620 Y. ep.
inju-
ry
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nce
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harm

113 Macdonald v. Crownmark, 2 D.R.I. 1987 denied no inf-
U.S.P.Q.2d 1235 ring-
ement

114 Tennant Co. v. Hako Minuteman, N.D. 1987 denied no irr-
Inc., 651 F. Supp. 945, 1 Ill. ep.
U.S.P.Q.2d 1042 inju-
ry

115 Chemlawn Servs. Corp. v. GNC S.D. 1987 granted,
Pumps, Inc., 652 F. Supp. 1382, Tex. rev'd, 823
2 U.S.P.Q.2d 1416 F.2d 515
(1987)

116 Hybritech, Inc. v. Abbott Lab., 4 C.D. 1987 granted,
U.S.P.Q.2d 1001 Cal. aff'd, 849
F.2d 1446
(1988)

117 Asgrow Seed Co. v. Kunkle Seed W. D. Apr. denied, balance
Co., Civ. No. 86-3138 La. 1, aff'd, of
1987 1988 WL harms
12106

118 Pretty Punch Shoppettes Inc. v. M.D. May denied, no inf-
Hauk, Civ. No. 87-667 Fla. 29. rev'd, 844 ringe
1987 F.2d 782 ment
(1988)

119 Cordis Corp. v. Medtronic, Inc., 2 D. 1986 granted,
U.S.P.Q.2d 1845 Minn. aff'd, 835
F.2d 859
(1987)

120 T.J. Smith & Nephew Ltd. v. N.D.N.- 1986 denied, failure

Consolidated Medical Equip., 645 Y. aff'd, 821 to
F. Supp. 206, 3 U.S.P.Q.2d 1129 F.2d 646 prove

(1987) vali-
dity,
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121 Upjohn Co. v. Riahom Corp., 641 F. D. Del. 1986 denied no inf-
Supp. 1209, 1 U.S.P.Q.2d 1433 ring-
ement

122 Rexnord, Inc. v. Laitram Corp., 1 E.D. 1986 granted
U.S.P.Q.2d 1923 Wis.

123 Unique Concepts, Inc. v. Manuel, N.D. 1986 denied no inf-
231 U.S.P.Q. 268 Ill. ring-
ement

124 Augat, Inc. v. John Mezzalingua N.D.II- 1986 granted
Ass'n., 642 F. Supp. 1912, 1 l.
U.S.P.Q.2d 1912

125 IMI-Tech Corp. v. Gagliana, 691 S.D. 1986 granted

F.Supp. 214, 6 U.S.P.Q.2d 1241 Cal.

126 Whittar Indus., Ltd. v. Superior C.D. 1986 granted

Indus. Int'l., 230 U.S.P.Q. 68 Cal.

127 Glasstech, Inc. v. AB Kyro OY, 635 N.D. 1986 granted

F.Supp. 465, 229 U.S.P.Q. 145 Ohio

128 Digital Equip. Corp. v. Emulex D.N.H. Apr. granted,

Corp., unknown 1, rev'd, 805

1986 F.2d 380

(1986)

129 H.H. Robertson Co. v. United Steel D.N.J. Mar. granted,

Deck, Inc., Civ. No. 84-5357 31, aff'd, 820

1986 F.2d 384

(1987)

130 Power Controls Corp. v. N.D. Mar. granted,

Hyberinectics, unknown Cal. 16, rev'd, 806

1986 F.2d 234

131 Medeco Security Locks v. Cinquini, D. 1985 granted

229 U.S.P.Q. 398 Mass.

132 Datascope Corp. v. Kontron, Inc., D. 1985 denied, balance

611 F. Supp. 889, 227 U.S.P.Q. Mass. aff'd, 786 of

(1985)

 133 Atlas Powder Co. v. Ireco Chems., D. Kan. Feb. granted,

unknown 1, aff'd, 773

1985 F.2d 1230

(1986)

 134 Tiegel Mfg. Co. v. Globe Union, D. Del. 1984 denied proced-

Inc., 224 U.S.P.Q. 1077 ural

tran-

sfer

 135 Roper Corp. v. Litton Sys., Inc., N.D. 1984 denied, no irr-

589 F. Supp. 823, 224 U.S.P.Q. Ill. aff'd, 757 ep.

200 F.2d 1266 inju-

(1985) ry

 136 SMI Indus. Canada, Ltd. v. Caelter N.D.N.- 1984 denied failure

Indus., Inc., 586 F. Supp. 808, Y. to

223 U.S.P.Q. 742 prove

vali-

dity

 137 CBS, Inc. v. Enco Indus., Inc., S.D.N.- 1984 denied failure

585 F.Supp. 1291

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138 Glasstech, Inc. v. AB Kyro OY, E.D. Dec. denied, no irr-

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139 Sanofi, S.A. v. Med-Tech D. Kan. 1983 granted

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140 Textron, Inc. v. Teleoperator Sys. E.D.N.- 1983 granted

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141 Stein Ass'n., Inc. v. Heat & N.D. Mar. denied, Attemp-

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142 Smith Int'l, Inc. v. Hughes Tool Co., unknown
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1 Payless Shoesource, Inc. v. Reebok Int'l, 998 F.2d 985, 27 U.S.P.Q. 1516
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2 Intel Corp. v. ULSI Sys. Tech., 995 F.2d 1566, 27 U.S.P.Q. 1136
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3 Speed Shore Corp. v. Allied 1993 vacated grant of failure to
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4 United States Surgical Corp. v. 1993 affirmed grant of
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5 California Medical Prods. v. 1993 affirmed grant of
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6 B.F. Goodrich FlightSystems, 1993 affirmed grant of
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991 F.2d 810 injunction

7 Saes Getters, S.p.A. v. 1993 affirmed grant of
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8 Wang Labs., Inc. v. Clearpoint 1993 vacated grant of failure to
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9 Wahpeton Canvas Co. v. Genhart 1993 vacated denial of
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11 Filmtec Corp. v. Allied Signal, 1993 vacated grant of no title to
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12 New England Braiding Co. v. A.W. 1992 affirmed denial of
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23 U.S.P.Q.2d 1622 injunction

13 Am. Home Prods. v. Johnson & 1992 vacated grant of failure to
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14 Ovation Communications v. RBM, 1992 vacated grant of failure to
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15 Michaels v. Art Betterley 1992 vacated grant of failure to
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16 Ethicon, Inc. v. United States 1992 affirmed denial of
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17 Dolly, Inc. v. Spalding & 1992 vacated grant of erroneous
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18 XYTEC Plastics, Inc. v. Ropak 1992 affirmed grant of
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19 Jenmar Corp. v. Pattin Mfg. 1992 affirmed denial of
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21 Filmtec Corp. v. Allied Signal, 1991 vacated grant of insufficie-
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22 Lund Indus., Inc. v. Go Indus., 1991 vacated grant of insufficie-
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23 We Care, Inc. v. Ultra-Mark 1991 vacated grant of failure to

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25 Oakley, Inc. v. Int'l 1991 vacated grant of insufficie-
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26 Ciba Corning Diagnostics Corp. 1991 vacated grant of insufficie-
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27 Jacobson v. Cox Paving Co., 949 1991 affirmed grant of
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28 Henkel Corp. v. Coral, Inc., 945 1991 affirmed grant of
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29 National Presto Indus., Inc. v. 1991 affirmed grant of
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- 30 Chrysler Motors, Corp. v. Auto 1990 affirmed denial of
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- 31 Illinois Tool Works, Inc. v. 1990 affirmed denial of
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- 32 McAulay v. United States 1990 affirmed grant of
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- 33 Drexelbrook Controls, Inc. v. 1990 affirmed denial of
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- 34 Yeu v. Kim, 904 F.2d 44 1990 affirmed grant of
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- 35 Saes Getters, S.p.A. v. 1990 affirmed grant of
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- 36 Black & Decker, Inc. v. Hoover 1989 vacated denial of erroneous
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43 L'Nard Ass'n, Inc. v. Interstate 1989 affirmed grant of

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44 McAulay v. United States 1989 vacated grant of insufficie-

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45 Neis v. A.L.C. Co., 889 F.2d 1989 vacated grant of insufficie-

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46 E.I. Du Pont de Nemours & Co. v. 1989 affirmed grant of

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47 Southwest Aerospace Corp. v. 1989 affirmed grant of
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48 Astro-Med, Inc. v. Western 1989 affirmed denial of
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49 Hybertech Inc. v. Abbott Labs., 1988 affirmed grant of
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50 Am. Parking Meter Adv., Inc. v. 1988 affirmed grant of
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51 Asgrow Seed Co. v. Kunkle Seed 1988 affirmed denial of
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52 Am. Parking Meter Adv., Inc. v. 1988 affirmed grant of
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53 Chemlawn Servs. Corp. v. GNC 1988 affirmed grant of
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54 Astronics Corp. v. Patecell, 848 F.2d 1245 1988 affirmed denial of preliminary

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55 Pretty Punch Shoppettes, Inc. v. Hauk, 844 F.2d 782, 6 1988 vacated denial of preliminary nt insufficie-

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56 T.J. Smith & Nephew, Ltd. v. Acme United Corp., 846 F.2d 78 1988 affirmed grant of preliminary

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57 Chemlawn Servs. Corp. v. GNC Pumps, Inc., 823 F.2d 515, 3 1987 vacated grant of failure to preliminary issue

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58 Cordis Corp. v. Medtronic, Inc., 1987 affirmed grant of
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59 T.J. Smith & Nephew Ltd. v. 1987 affirmed denial of
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60 H.H. Roberson, Co. v. United 1987 affirmed grant of
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61 Power Controls Corp. v. 1986 vacated grant of invalidity-
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62 Digital Equip. Corp. v. Emulex 1986 vacated grant of failure to
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63 Datascope Corp. v. Kontron, 1986 affirmed denial of
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64 Atlas Powder Co. v. Ireco 1985 affirmed grant of
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65 Glasstech, Inc. v. AB Kyro OY, 1985 vacated grant of no jurisd-
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66 Roper Corp. v. Litton Sys. 757 1985 affirmed denial of
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67 Stein Ass'n, Inc. v. Heat & 1984 affirmed denial of
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68 Smith Int'l, Inc. v. Hughes Tool 1983 vacated denial of court found
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