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### Patents

## Prosecution Laches: A New Depth Charge Against Submarine Patents?

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The defense of prosecution laches has garnered attention in recent case law, most notably *Symbol Tech's, Inc., et al., v. Lemelson Medical, Education & Research Foundation*, 69 USPQ2d 1738 (E.D. Nev. 2004) (67 PTCJ 258, 1/20/04).<sup>1</sup> Although dating back to early twentieth century cases such as *Woodbridge v. U.S.*, 263 U.S. 50 (1923) and *Webster Electric Co. v. Splitdorf Electrical Co.*, 264 U.S. 463 (1924), this defense had not been used by patent infringement defendants for several decades.

<sup>1</sup> This is a decision after reversal and remand by the Federal Circuit in *Symbol Tech.'s v. Lemelson Med. and Educ. Research Found.*, 277 F.3d 1361, 61 USPQ2d 1515 (Fed. Cir. 2002) (63 PTCJ 282, 2/1/02).

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Even in the past several years, this defense has not appeared with any frequency or regularity, though that is now likely to change. This is true particularly in view of its potential applicability to a multitude of patents in which "continuation practice" has been employed to extract new claims from a patent's original disclosure as a basis for filing continuing patent applications while retaining the benefit of the earlier filing date of the parent patent.

In the past, patentees have reviewed competitors' products to identify features within their patent disclosures that are not adequately addressed in their patent claims. Using this continuation practice, new claims can be presented to cover such products and thereby provide an effective tool for policing the patentee's space and keeping competitors at bay. However, the revived defense of prosecution laches has called aspects of this continuation practice into question.

In 1994, Congress adopted changes in patent law which pin the term of a given patent filed on or after June 8, 1995 to twenty years from its earliest effective filing date. Before that change, a patent's term was measured from its issue date, and because patent applicants could influence prosecution and hence the actual

issue date, the applicant also had the power to influence the operative term of the patent.<sup>2</sup>

This change addressed one facet of submarine patenting that Lemelson had used to his advantage in having the patents in-suit in the *Symbol* case issue in the 1990s based on filings from the 1950s. However, Congress has only partially addressed the effect of submarine patents and has left the remainder for the courts. For example, the subject matter being claimed in a child application can still be obscured from public view.

Despite other changes in the law which call for publication of pending patent applications and public access to continuity data on U.S. patent families, amendments made in a continuing application are rarely published with the application. To publish such amendments, they must be submitted electronically and further must be submitted together with the continuation application, as the present regulations only permit the submission of amendments in an electronic file format at that one moment in time.

As a result, patentees can hide the true-scope of claims being pursued as they position their “submarines” to cover the activities of an emerging industry or a competitor company. With the claims hidden from sight (under water, so to speak), newly introduced products are potential targets as infringing articles of patent claims that were only presented to the Patent Office *after* such products appeared on the market.<sup>3</sup>

Below we discuss in more detail the impact of recent judicial precedent on the use of continuation practice to cover a competitor’s product.

### The Revived Defense of Prosecution Laches.

The doctrine of prosecution laches that emerged in the early 20th century recognized that, through equity, an unexcused and unreasonable delay in securing patent protection can render a patent unenforceable.<sup>4</sup> Rulings from the Federal Circuit have modified this defense to hold this outcome even though an applicant for a patent has fully complied with the pertinent statutes and rules for continuation practice, namely 35 U.S.C. §§ 120, 121.<sup>5</sup> The facts in the two precedential decisions that the Federal Circuit has issued on this topic represent extreme conduct and are not informative of more typical situations such as where an applicant models claims after a competitor’s product in a continuing application. For example, in *Symbol* Lemelson kept his

<sup>2</sup> Prosecution laches is said to be applicable to post GATT filings. *Cummins-Allison Corp. v. Glory Ltd.*, 2003 U.S. Dist. LEXIS 16812 (N.D. Ill. Sept. 23, 2003). *But see Digital Control Inc. v. McLaughlin Mfg. Co.*, 248 F. Supp.2d 1015, 1018, 64 USPQ2d 1786 (W.D. Wash. 2003) (65 PTCJ 32, 11/8/02) (“patents subject to GATT or terminal disclaimers limiting patent protection to twenty years will tend to be reasonable,” hence it will be harder to conclude that prosecution laches applies in those cases).

<sup>3</sup> Such continuation and divisional practice are authorized under 35 U.S.C. §§ 120, 121 and permit applications to receive the filing date of the earliest application in a series of related patent applications so long as the new claims are directed to inventions that are supported in the earlier patent applications.

<sup>4</sup> See *Woodbridge v. U.S.*, 263 U.S. 50 (1923) and *Webster Electric Co. v. Splittorf Electrical Co.*, 264 U.S. 463 (1924).

<sup>5</sup> *Symbol Tech.’s v. Lemelson Med. and Educ. Research Found.*, 277 F.3d 1361, 61 USPQ2d 1515 (Fed. Cir. 2002) (63 PTCJ 282, 2/1/02); *In re Bogese*, 303 F.3d 1362, 64 USPQ2d 1448 (Fed. Cir. 2002) (64 PTCJ 434, 9/20/02).

patents pending for decades, waited for independent inventors to develop the technology in the industry, and then surfaced his “submarine” patents. Egregious conduct also occurred in *In re Bogese* where the applicant did not even make an attempt to advance the claims or arguments during prosecution but instead chose to consistently file continuation applications, for almost nine years, on the last possible day that a response to the outstanding office actions was due.

It is noteworthy that both of these cases had split-panel decisions, with Judge Pauline Newman weighing in decisively against the revival of this doctrine, principally for the reason, in her view, that there should be no equitable penalty for an applicant following a statutory framework such as provided under Sections 120 and 121. Her view is one of judicial restraint, reserving the issue for Congress to address rather than in piecemeal decisions prompted by atypical factual situations.

Although it revived the defense of prosecution laches, the Federal Circuit has yet to answer fundamental questions concerning this defense including the applicable burden of proof, the elements of the defense, and the definition and significance of adverse intervening rights. The district courts have provided answers without further guidance from the Federal Circuit. Critically, however, the answers vary with the selected forum.

While it is rather clear that the merits of the defense must be determined on a case by case basis, the burden of proof appears to be relatively low as compared to other defenses, requiring only a “preponderance of the evidence.”<sup>6</sup> There is general uniformity in this regard among the cases that have addressed the burden of proof for prosecution laches.<sup>7</sup>

The relatively low burden of proof is an invitation to patent-challengers to introduce the prosecution laches defense even in cases in which the evidence in support is minimal. Accordingly, the defense of prosecution laches could become as common as inequitable conduct claims have unfortunately become.<sup>8</sup>

<sup>6</sup> Several cases have applied the preponderance of evidence standard: *Verizon California v. Katz Tech. Licensing*, 2003 U.S. Dist. LEXIS at \*62 (C.D. Cal. Dec. 2, 2003) (prosecution laches raises considerations analogous to estoppel arising out of delay in enforcing a patent.); *Cummins-Allison, supra*; *Reiffin v. Microsoft Corp.*, 281 F. Supp. 2d 1149 (N.D. Cal. 2003). See also *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1044-45, 22 USPQ2d 1321 (Fed. Cir. 1992) (43 PTCJ 480, 4/2/92) (cited with approval in *Verizon*).

<sup>7</sup> One district court had held that “since the application of this doctrine would render a patent unenforceable, the moving party must provide clear and convincing evidence.” *Gen-Probe Inc. v. Vysis Inc.*, 2002 U.S. Dist. LEXIS 25020 at \*119 (S.D. Cal. Aug. 5, 2002), *vacated on other grounds, Gen-Probe Inc. v. Vysis Inc.*, No. 02-1617 (Fed. Cir. Mar. 5, 2004) (see report on this case elsewhere in this issue) (citing *Li Second Family Ltd. Partnership v. Toshiba Corp.*, 231 F.3d 1373, 1378, 56 USPQ 1681 (Fed. Cir. 2000) (61 PTCJ 62, 11/17/00)). All others that the authors have surveyed have used the preponderance of the evidence standard. The plaintiff in *A&E Products Group v. Mainetti USA Inc.*, 2004 U.S. Dist. LEXIS 2904 (S.D.N.Y. Feb. 25, 2004), cites to *Gen-Probe* for the clear and convincing standard, but the court did not reach that issue; instead the court noted that other courts have used a lower standard, as discussed in n.6 above.

<sup>8</sup> Judge Nichols once remarked on the unfortunate frequency of assertion of the inequitable conduct defense. *Burlington Industries Inc. v. Dayco Corp.*, 849 F.2d 1418 (Fed. Cir.

At this time, the elements of the defense and the significance of prejudice or "adverse intervening rights" among the reported cases are not uniform.

### Unreasonable and Unexplained Delay.

The principal inquiry in determining whether prosecution laches will hold as a defense is whether any delay in securing patent claims was "unreasonable." Resolution of this question concerns an investigation as to whether the prosecution history shows an explanation for the delay.

Prosecution laches has traditionally been used sparingly in only the most egregious of cases and many of the cases addressing this topic have concluded that the questioned activity was *reasonable*. Thus, the court in *Stambler v. RSA Security Inc.*, found that the fact that continuation and divisional applications did not issue until after seven years from the date of the originally filed application did not warrant a holding of prosecution laches in view of the complicated nature of the technology at issue.<sup>9</sup>

Also, in *Digital Control Inc.*, the court rejected expert testimony from a patent attorney in support of the challenger's argument that the plaintiff unreasonably delayed the issuance of claims. The claims at issue had been subject to restriction from a parent application. The alleged delay advanced by the expert was that the patentee proceeded with continuation applications rather than filing multiple, independent patent applications.<sup>10</sup>

Although just vacated by the Federal Circuit for lack of subject matter jurisdiction,<sup>11</sup> *Gen-Probe v. Vysis Inc.* is informative as to how the District Court for the Southern District of California had perceived the issue of prosecution laches. The court had held that eleven years was not sufficient to warrant a finding of prosecution laches because, among other reasons, there was no evidence that the delay was deliberate, as in *In re Bogese*, or without excuse. Specifically, the court in *Gen-Probe* had referenced the applicant's attorney's testimony that he never intended to delay the prosecution of

the patent, that numerous continuation applications were filed as a result of the extraordinary volume of work assigned to him at the time, and that there were personnel changes within the client company.

Quite appropriately, given the equitable nature of the defense, the *Gen-Probe* court pointed to the *defendant's* own patents that had been the subject of other litigation as having an equal or greater time period for prosecution as did the plaintiff's patents at issue. Interestingly, this was the only case holding that the burden of proof was under the clear and convincing evidence standard.

*Reiffin v. Microsoft Corp.* identifies the defense of prosecution laches as having one element: whether the applicant unduly delayed the prosecution of the patent in a manner that cannot be explained.<sup>12</sup> In *Reiffin*, the court pronounced this standard as being an objective one, i.e. whether the applicant in the particular case behaved as the reasonable applicant would have behaved. The court listed several objective factors that can be considered in determining the reasonableness of delay:

(a) the prosecution history of the applicant's patents was typical of patents in that field (or patents generally);

(b) any unexplained gaps exist in the prosecution history;

(c) the applicant took any unusual steps to speed or delay the application process;

(d) the PTO or other reviewing body took any unusual steps to speed or delay the application process;

(e) the applicant took any steps to limit (or expand) public awareness of his pending application(s) or the inventions he sought to patent during the course of the prosecution;

(f) any changes in the applicant's prosecution of the application(s) coincide with or directly follow evolutions in the field that relate to the claimed invention; and

(g) legitimate grounds can be identified for the abandonment of prior applications.<sup>13</sup>

The *Reiffin* court applied these factors to the situation presented and found that the conduct in question there was not sufficiently egregious to warrant a finding of laches, even though the prosecution period was almost fifteen years.

Specifically, regarding the prosecution period, the plaintiff in *Reiffin* filed the initial patent application on Sept. 28, 1982 and a continuation application in 1985. In March 1990, the plaintiff filed a second patent family which included a continuation application filed in 1994. Two patents issued, from the 1990 and 1994 applications respectively, on Dec. 2, 1997.

The evidence demonstrated that plaintiff's prosecution was atypical, both in its length and in the aggressiveness of the prosecution. Also, the court found that the evidence did not establish that the plaintiff was principally responsible for the delays in prosecution, spe-

1988) ("The habit of charging inequitable conduct in almost every major patent case has become an absolute plague. Reputable lawyers seem to feel compelled to make the charge against other reputable lawyers on the slenderest grounds . . ."). Compare *Symbol Tech.'s v. Lemelson*, 277 F.3d 1361, 61 USPQ2d 1515 (Fed. Cir. 2002)(63 PTCJ 282, 2/1/02) (J. Newman, dissenting) (the consequences of a new cause of action of prosecution laches will open legally granted patents to "a new source of satellite litigation of unforeseen scope").

<sup>9</sup> *Stambler v. RSA Sec. Inc.*, 243 F. Supp.2d 74 (D. Del. 2003). In *Stambler*, a three year delay in filing a divisional patent application was held to not be unreasonable where the applicant had been prosecuting two other applications in that family.

<sup>10</sup> *Gen-Probe Inc. v. Vysis*, *supra*, at 119-120.

<sup>11</sup> The issue presented on appeal to the Federal Circuit is in itself a fascinating inquiry into cases or controversies under the Declaratory Judgment Act (see report on this case elsewhere in this issue). *Gen-Probe* was a licensee in good-standing and not in breach of its license with *Vysis*. *Gen-Probe* contended that it paid license fees under protest, and that it had an actual apprehension of suit, but the court held that there was no actual controversy, reasoning that patentees would be discouraged from granting licenses as their licensees would not be able to cap possible damages via the license agreement in the event that they are unsuccessful in challenging the validity of the licensed patent.

<sup>12</sup> *Reiffin*, *supra*. See also *Digital Control Inc.*, *supra* at 1019 ("the Court does not consider that an examination of intervening adverse rights is a useful concept in prosecution laches when addressing continuation applications") in which the same test as *Reiffin* was applied.

<sup>13</sup> *Reiffin*, *supra*, at 1152 (emphasis added).

cifically noting that the applications were reviewed by three different examiners, each of whom cited new prior art, which added to the prosecution period significantly.

Moreover, the fact that the plaintiff had “aggressively and repeatedly challenged adverse determinations of the three examiners” and had prevailed, weighed against a finding of unreasonable delay. Therefore, under the reasonable patent applicant standard, aggressive prosecution tactics (including drafting claims to cover a competitor’s product) can explain away any alleged unreasonable delay.

*A&E Products Group* presents an interesting fact pattern in which the patentee filed a number of continuation and divisional applications on the last day before issuance of respective parent patents. Declarations were submitted in which the patentee explained that it would survey the market to determine whether competitors were copying the patentee’s product, and whenever claims were indicated as allowable, the lawyers were instructed to file additional continuation or divisional applications to cover competitor’s products.

However, the testimony in evidence from the patent attorneys who worked on those cases was found to be inconsistent with the sworn declarations made by the client; the sworn testimony suggested that the attorney invented the claimed subject matter himself and the applications were filed without contact with or instructions from the client to capture the technology of competitors.

In sum, the evidence presented led the court to note that the continuation applications “may have been deliberately held in abeyance and filed seriatim to affect competition adversely.”<sup>14</sup> The court held that genuine issues of material fact concerning whether the delay was unreasonable and unexplained precluded summary judgment on the issue of prosecution laches.

The *Reiffin* court pegged the standard to a reasonable patent applicant and gauged the question of reasonableness solely upon the applicant’s actions and without regard to third party concerns. *Reiffin* (from the Northern District of California) and *Digital Controls* (from the Western District of Washington) did not consider harm to third parties as pertinent to the defense, and one can question whether a defense proven solely upon a reasonable actor standard should be subject to the higher standard of proof of clear and convincing evidence, given that the result of a successful defense is a loss of patent rights.

In the cases discussed below, the elements of the defense include a consideration of evidence of adverse intervening rights *in addition to* unreasonable and unexplained delay, with the burden of proof again being a showing by a preponderance of the evidence. Consequently, as the law now stands, litigants will experience different treatment and potentially different outcomes based on the forum of their action.

### Adverse Intervening Rights.

Of questionable significance in determining whether prosecution laches should be applied is whether a court is to consider the existence of adverse intervening rights. As noted above, some courts have affirmatively rejected the notion that intervening rights are an appro-

priate consideration at all.<sup>15</sup> This view has merit insofar as the traditional notion of intervening rights is codified in the reissue provisions of the patent statute,<sup>16</sup> whereas there are no corresponding protections among the provisions that authorize continuation practice—the context in which the prosecution laches would be raised.

On the other hand, traditional use of a laches defense requires proof of prejudice or injury to the defendant as a proximate result of the delay.<sup>17</sup> At least one court has noted the Federal Circuit’s citation to the Supreme Court decision in *Crown Cork & Seal v. Ferdinand Gutman Co.*, 304 U.S. 159 (1938) as providing guidance for concluding that the elements of the defense should include proof of “intervening adverse public rights.”<sup>18</sup>

However, *Crown Cork* was decided at a time when divisional applications were not authorized by statute, but rather were a procedural technique that permitted claims to “separate and distinct inventions” to be divided out of an original filing so that the original patent would be limited to a single invention, as required by statute.

The Court in *Crown Cork* eliminated the need for any explanation for delays in filing a divisional application in which the delay was more than two years from the original patent’s grant date and in which there was no evidence of adverse intervening rights. The divisional application at issue was filed after the grant of the parent patent and there was no co-pendency between the two filings, nor was there a requirement for co-pendency, and so the notion that divisional applications had to be filed within a two year window or else a sufficient excuse had to be provided, in the absence of intervening rights, had meaning at that time.

Congress has since legislated in this area and has codified the requirement that a valid divisional application must have co-pendency with a parent case. Consequently, the premise of the *Verizon* court that *Crown Cork* supports the inclusion of the element of adverse intervening rights is tenuous.

We do not consider this logic to be compelling; under *Crown Cork* the lack of adverse intervening rights eliminated the need for an excuse under the then-prevailing law, but regardless of whether there are adverse interests at stake, unreasonable delays in prosecution should be a basis for prosecution laches, unless there is a meaningful explanation.

Thus, if intervening rights are to be considered at all, for example, in the context of whether to permit the equitable defense to be raised by a particular defendant, we think that decision should be premised on other grounds.

In those jurisdictions that have considered intervening rights, a distinction has been made between adverse impact on public verses private intervening rights. For instance, in *Verizon*, the court considered whether the publication of a parent application, which injects the disclosed but unclaimed subject matter into the public

<sup>15</sup> Neither intervening rights nor prejudice were at issue in *In re Bogese*, which was an appeal of a Patent Office determination holding an application barred for prosecution laches.

<sup>16</sup> See 35 U.C.C. § 252.

<sup>17</sup> *A&E Products Group L.P.*, *supra*, at \*5.

<sup>18</sup> *Verizon California Inc.*, 2003 U.S. Dist. LEXIS 23553, at \*62-63 (C.D. Cal. Dec. 2, 2003). *Accord Gen-Probe Inc.*, *supra* n.7, 10.

<sup>14</sup> *Id.* at \*17.



domain, can give rise to a “public” adverse intervening right.

That court considered this argument as having initial appeal, but reasoned that the requirement of a “public” adverse intervening right could not be established in that manner. Rather, a public intervening right was said to require conduct of a party that is *adverse* to the patentee, as evidenced by a public use, sale, intervening publication, or intervening patent.<sup>19</sup>

More interesting, perhaps, are the arguments concerning the private, actual prejudice that were advanced in *Verizon* and in *Chiron Corp. v. Genentech Inc.*, 268 F. Supp.2d 1139, 1145-47 (E.D. Ca. 2002), resulting from the allegedly delayed presentation of the claims in-suit. In *Verizon*, the defendant argued that it was prejudiced by the substantial economic investment it had made before the allegedly delayed claims were filed, and also by the loss or destruction of evidence during that intervening time. The defendant relied upon *Aukerman* to support its claim that economic prejudice establishes an adverse intervening right, but that court held that the economic prejudice of *Aukerman* concerned delay in bringing suit, not prosecution laches.

The court, therefore, refused to consider that evidence further.<sup>20</sup> The court also refused to consider, in a perfunctory comment, the question of evidentiary prejudice since there was no controlling authority on that point.

In contrast, *Chiron* treated the same arguments dissimilarly. The defendant in *Chiron* also relied upon *Aukerman* in advancing arguments of economic and evidentiary prejudice, and these arguments were considered on the merits. Specifically, in addressing the issue of economic prejudice, the court viewed *Aukerman* as requiring that the defendant have changed its economic position because of the *delay* rather than as a result of seizing a market opportunity. Thus, the *Chiron* court requires that there be a nexus between the alleged prejudice and the delay in prosecuting the claims in-suit. To hold otherwise would empower all defendants with the argument of economic prejudice. Further, the *Chiron* court explained that evidence that an infringer could have switched to a non-infringing product if it had notice, can support a finding of economic prejudice.

Thus, there remains a split in authority as to whether intervening rights are an appropriate consideration at all in asserting a prosecution laches defense. Defendants will have a more difficult burden and will be unlikely to prevail on a motion for summary judgment, in jurisdictions requiring that a nexus between the alleged prejudice and the delay must be proven.

<sup>19</sup> *Id.* at 66. This begs the question of whether a defendant can improve its position viz. an issued patent by publishing a white paper on its proposed system. Seemingly, under this court’s rationale, that publication might erect an adverse intervening right.

<sup>20</sup> *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1044-1045, 22 USPQ2d 1321 (Fed. Cir. 1992) (43 PTCJ 480, 4/2/92). Interestingly, however, the court suggested that use of defendant’s accused system might establish an adverse public intervening right based on its public use or disclosure.

## Prosecution Laches And Submarine Patents Will Coexist.

The prosecution laches defense will likely arise with increased frequency in future cases. Recent judicial decisions have clarified the factors that bear on the successful assertion of this defense, and the relatively low burden of proof makes it attractive to defendants, even in cases in which the circumstances that could support a finding of prosecution laches are questionable.

Because the defense relies upon factual findings, the question can be posed to a jury, which in and of itself will be of interest to many patent litigators in formulating their pleadings. However, the decisions so far that have barred the enforcement of a patent only in egregious situations such as those found in *Symbol* and *In re Bogese*.

According to at least one court, although the timing of the patentee’s changes in claim scope to closely track external developments in the field was “highly suspicious and suggestive of opportunism,” the court declined to bar enforcement of the patent absent evidence of unreasonable and unexplained delay in prosecution.<sup>21</sup> The Federal Circuit has seemingly embraced this view, in distinguishing the actions of patent applicant *Bogese* from its prior holdings.

Specifically, the Federal Circuit considered it permissible to maintain pendency in an effort to later draft and obtain allowance of claims that read on a competitor’s products in *State Indus. v. A.O. Smith Corp.*, 751 F.2d 1226 (Fed. Cir. 1985), but *In re Bogese* held that “an applicant’s attempt to obtain new claims directed to inventions that he or she believes are fully disclosed and supported in an earlier application, however, is easily distinguishable from appellant’s failure to further the prosecution of his application toward the issuance of any claims.”<sup>22</sup>

In the emerging line of cases concerning prosecution laches, the Federal Circuit has not abrogated the practice of amending claims of a pending application to cover competitor’s products that have arisen during prosecution in the PTO. In cases in which such amendments have been made, that practice has been recognized as a factor in considering whether prosecution laches should be applied against the patentee.

Indeed, the *A&E Products* case suggests that serial continuation filings made at the behest of the attorney rather than the client might be a basis for concluding that a prolonged delay in filing a continuation application is unreasonable. The question remains, however, what combination of factors will satisfy the burden of proof necessary to establish unreasonable and unexplained delay in presenting claims that have been drafted to cover a competitor’s product.

Unfortunately, the answer varies with the venue of the action, but the case law today seems to require egregious conduct by the patentee beyond mere opportunism in covering a competitor’s products.

<sup>21</sup> *Reiffin*, 281 F. Supp.2d at 1153.

<sup>22</sup> *Id.*