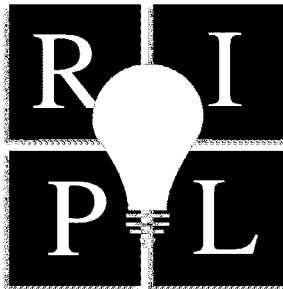


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## THE CURSE OF “COPYING”

KENNETH R. ADAMO, RYAN B. MCCRUM, AND SUSAN M. GERBER

### ABSTRACT

The concept of “copying” has long been involved with various aspects of intellectual property law, particularly in regard to patents and trademarks. In the absence of legally determined exclusive rights, “copying” is permitted, and is in fact, encouraged. However, because the term “copying” carries an undercurrent of disapproval and unfavorable practices, it is a favorite of patentees looking to portray an accused infringer in the most negative light, especially before a jury. Hence, the curse of “copying.” This article will review the current state of “copying” by addressing the substantive precedent in areas where “copying” has traditionally had a substantive effect—willfulness of any accused infringing conduct and obviousness of the patented invention. With respect to “copying” and willful infringement, this article outlines two important considerations that the precedent is weak upon—“copying’ what?” and “copying’ when?” Lifting the curse requires care and some courage at trial, in view of a precedential framework that is less than favorable to the accused infringer and the pejorative impact the term “copying” will likely have on the jury and the court. These issues will be discussed and suggestions are advanced throughout as to how one might lift the curse once it is pronounced.

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## THE CURSE OF “COPYING”

KENNETH R. ADAMO, RYAN B. MCCRUM AND SUSAN M. GERBER\*

### INTRODUCTION

The concept of a “copy” or “copying” has long been involved with various aspects of intellectual property law, particularly in regard to patents and trademarks.<sup>1</sup> In patent precedent, “copying” may affect issues of willfulness and obviousness, among others.<sup>2</sup> In view of recent Supreme Court and Federal Circuit decisions, “copying” may take on a more significant role in connection with such issues.<sup>3</sup> For example, in view of the Federal Circuit’s recent en banc decision in *In re Seagate Technology, LLC*,<sup>4</sup> which heightened the standard for proving willfulness to “objective recklessness,”<sup>5</sup> patentees are likely to turn more than ever to evidence of “copying” to establish willfulness. Whether evidence of “copying” rises to the level of “objective recklessness” remains to be seen, but patentees will certainly try to establish that it does.<sup>6</sup> Moreover, now that the Supreme Court has adopted a more lenient test for establishing obviousness,<sup>7</sup> evidence of “copying” has never been more important, as it may be a powerful tool in rebutting a prima facie showing of obviousness. Indeed, in the wake of the Supreme Court’s *KSR International Co. v. Teleflex Inc.*<sup>8</sup> decision, the lower courts are giving increased attention to secondary considerations, including copying.<sup>9</sup>

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<sup>1</sup> “Copying” is unquestionably an integral part of the copyright law. *E.g.*, 17 U.S.C. § 101 (2006). This article leaves to the expertise of Professor Goldstein and others the intricacies of that jurisprudence.

<sup>2</sup> *See* *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1225 (Fed. Cir. 2006) (noting that copying is a relevant consideration in determining willfulness); *Glaverbel Societe Anonyme v. N. Lake Mktg. & Supply, Inc.*, 45 F.3d 1550, 1555 (Fed. Cir. 1995) (noting that copying is a relevant consideration in determining obviousness).

<sup>3</sup> *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (heightening the standard for proving willfulness); *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007) (adopting a more lenient test for establishing obviousness).

<sup>4</sup> 497 F.3d 1360.

<sup>5</sup> *Id.* at 1371.

<sup>6</sup> *See, e.g.*, *VNUS Med. Techs., Inc. v. Diomed Holdings, Inc.*, No. 05-2972, 2007 WL 3165548, at \*1 (N.D. Cal. Oct. 24, 2007) (describing that plaintiff relied almost exclusively on allegations of “copying” to satisfy the willfulness standard articulated in *In re Seagate*).

<sup>7</sup> *See KSR Int’l Co.*, 127 S. Ct. at 1739.

<sup>8</sup> 127 S.Ct. 1727.

<sup>9</sup> *See, e.g.*, *Muniauction, Inc. v. Thomson Corp.*, 502 F. Supp. 2d 477, 490 (W.D. Pa. 2007) (finding patent not obvious). There, the plaintiff introduced evidence that the defendant

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

This article will review the current state of “copying” by addressing the substantive precedent in areas where “copying” has traditionally had a substantive effect—willfulness of any accused infringing conduct and obviousness of the patented invention. With respect to “copying” and willful infringement, this article outlines two important considerations that the precedent is weak upon—“copying’ what?” and “copying’ when?” These issues will be discussed and suggestions are advanced throughout as to how one might lift the curse once it is pronounced.

#### I. “COPYING” AND THE THEORY OF ITS IMPROPRIETY

The theory of “copying” is addressed at length by Professor McCarthy, his discussion touching upon not only trademark and unfair competition law but also patent law.<sup>10</sup> A corollary to the policy of free economic competition, he states, is the principle of free “copying” of things that are in the public domain: “Free copying and imitation are the rule, and exclusive rights such as patents, trademarks and copyrights are the exception.”<sup>11</sup> “A thing is in the public domain only if no

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deliberately copied the patented invention. *Id.* at 491. This evidence supported both the jury’s conclusion of willful infringement as well as nonobviousness of the patent:

We further note that plaintiff presented sufficient evidence of secondary considerations to shed light on the circumstances surrounding the origin of the patented subject matter. Plaintiff presented evidence of skepticism, legally appropriate praise, copying, and commercial success. This evidence supports the jury’s conclusion that the claims of the ’099 Patent were not obvious.

*Id.* See also *Friskit, Inc. v. RealNetworks, Inc.*, 499 F. Supp. 2d 1145, 1154 (N.D. Cal. 2007) (acknowledging that “[c]opying by a competitor may be a relevant factor in the secondary factor analysis[.]” but concluding that the patentee failed to introduce evidence to support its copying claim). *Cl. Asyst Techs., Inc. v. Empak, Inc.*, No. C 98-20451 JF (EAD), 2007 WL 2255220, at \*8 (N.D. Cal. 2007) (recognizing the significance of secondary considerations but noting that a “strong showing of obviousness cannot be overcome based upon secondary considerations” (citing *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (holding that the patent was invalid for obviousness, despite strong showing of secondary considerations))).

<sup>10</sup> 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 1.2 (4th ed. 2003).

<sup>11</sup> 1 *Id.* § 1:27.

intellectual property right protects it.”<sup>12</sup> In the context of a patent, anything disclosed but not within the literal coverage of the claims of that patent (or another patent) is in the public domain, save for the question of the doctrine of equivalents.<sup>13</sup>

In 1989, the United States Supreme Court in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*<sup>14</sup> restated the basic precept that the principle of free competition and free “copying” is the rule, while exclusive rights in intellectual property are the exception.<sup>15</sup> There, the Court continually emphasized the importance of maintaining an informed balance between *free* competition and *fair* competition, that is, between the policy of the public domain and the policy of intellectual property.<sup>16</sup> *Bonito Boats*, in McCarthy’s view,<sup>17</sup> qualified Judge Rich’s earlier statement in *Mine Safety Appliances Co. v. Electric Storage Battery Co.*<sup>18</sup> where, in rejecting a party’s contention that the patent laws put things into the public domain when a patent expires, he wrote that:

Patent laws function only to keep things out of the public [sic] domain temporarily. They have nothing to do with putting things into it. . . . “Public domain” moreover, is a question-begging legal concept. *Whether or not things are in or out of the public domain and free or not free to be copied may depend on all sorts of legal concepts including patent law, antimonopoly policy and statutes, the law of unfair competition, copyright law, and the law of trademarks and trademark registration.* What we really do is to determine these legal rights; then we may express the ultimate conclusion by saying something is in the “public domain”—or not in it.<sup>19</sup>

Indeed, McCarthy notes that in *Bonito Boats*, Justice O’Connor took issue with Judge Rich’s generalization in this quotation to the effect that “the patent laws say nothing about the right to copy or use.”<sup>20</sup> Instead, Justice O’Connor commented that federal patent law “must determine not only what is protected, but also what is free for all to use.”<sup>21</sup>

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<sup>12</sup> 1 *Id.* § 1:31.

<sup>13</sup> Joshua D. Sarnoff, *Abolishing the Doctrine of Equivalents and Claiming the Future After Festo*, 19 BERKELEY TECH. L.J. 1157, 1176 (2004) (noting that the doctrine of equivalents operates as a restriction on the public domain). The doctrine of equivalents extends patent protection beyond the literal coverage of a patent’s claims to possibly patentable subject matter considered to be factually equivalent to the embodiments within those claims. *Id.* at 1165.

<sup>14</sup> 489 U.S. 141 (1989).

<sup>15</sup> *Id.* at 151. Justice O’Connor notes:

[F]ree exploitation of ideas will be the rule, to which the protection of a federal patent is the exception. Moreover, the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure. . . . To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use.

*Id.*

<sup>16</sup> *Id.* at 146–57.

<sup>17</sup> 1 MCCARTHY, *supra* note 10, § 1:30.

<sup>18</sup> 405 F.2d 901 (C.C.P.A. 1969).

<sup>19</sup> *Id.* at 902 n.2 (emphasis added).

<sup>20</sup> 1 MCCARTHY, *supra* note 10, § 1:30.

<sup>21</sup> *Bonito Boats*, 489 U.S. at 151.

“In the absence of legally defined exclusive rights,” McCarthy states, “imitation and ‘copying’ is permitted, and in fact, encouraged, as an essential element of free competition. . . . The public interest in competition outweighs any interest in granting a reward for ingenuity . . . unless a competitor who copies these [new] features transgresses the law . . . .”<sup>22</sup> McCarthy concludes: “[I]t is permissible in a competitive economy for the second comer to try to capture as much of the innovator’s market as it can. The limitation is that such competition must not be accomplished by infringing on exclusive rights . . . .”<sup>23</sup> In the patent context, it is the claims that demarcate the exclusive rights, in the sense of a right to exclude competitors.<sup>24</sup> Theory currently appears to favor, then, the second comer as long as he or she stays outside at least the literal coverage of the patent claims.<sup>25</sup>

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

*“Copying” is sometimes denigrated as being somehow inherently immoral, unfair and illegal. The popular folklore is that a “copycat” is a pirate and that all commercial copying and imitation must be an illegal form of competition. That is not so. In fact, legitimate copying is a large part of what makes a free market economy work.*

. . . .

The successful competitor offers an identical or equivalent product at a lower price or with greater quality. *It is important to emphasize that there is absolutely nothing legally or morally reprehensible about exact copying of things in the public domain.* It is fallacious to reason that because some exclusive rights of intellectual property are needed as an incentive to innovation and quality, then even more and broader rights of exclusion would be even better for the economy. Like salt in the soup, there can be too much of a good thing.<sup>26</sup>

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

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<sup>22</sup> 1 MCCARTHY, *supra* note 10, § 1:28.

<sup>23</sup> *Id.*

<sup>24</sup> Bell Commc’ns Research, Inc. v. Vitalink Commc’ns Corp., 55 F.3d 615, 619–20 (Fed. Cir. 1995).

<sup>25</sup> See 1 MCCARTHY, *supra* note 10, § 1:28 (noting that beyond the scope of the exclusive intellectual property rights granted by law, imitation and copying is encouraged); Matthew D. Powers & Steven C. Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 SYRACUSE L. REV. 53, 95–97 (2001) (discussing how copying or designing around patents is encouraged).

<sup>26</sup> 1 MCCARTHY, *supra* note 10, § 1:28 (emphasis added).

## II. "COPYING" AND WILLFULNESS

A. *The Role of "Copying" in the Spectrum of Willful Infringement*

"Copying" has had an effect on a number of areas of patent law, not the least of which has been in helping to establish a prima facie showing of willful infringement.<sup>27</sup> In the wake of the Federal Circuit's recently issued en banc decision in *In re Seagate*, the role of "copying" as it relates to willful infringement may become even more pronounced.<sup>28</sup> Future cases may include a contention that the first part of the *In re Seagate* standard is prima facie satisfied by the presence of copying.

In *In re Seagate*, the Federal Circuit overruled the Court's previous standard for finding willful infringement, and replaced it with a heightened standard of "objective recklessness."<sup>29</sup> Relying on a number of non-patent decisions from the United States Supreme Court, the Federal Circuit provided some guidance as to the meaning of "objective recklessness":

*[T]he civil law generally calls a person reckless who acts in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. Accordingly, to establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. The state of mind of the accused infringer is not relevant to this objective inquiry. If this threshold objective standard is satisfied, the patentee must also demonstrate that this objectively-defined risk . . . was either known or so obvious that it should have been known to the accused infringer. We leave it to future cases to further develop the application of this standard.<sup>30</sup>*

While the Federal Circuit left it "to future cases to further develop the application of this standard," there is little doubt that patentees will argue that evidence of "copying," especially if blatant, will help satisfy this heightened standard, particularly the first, "objectively high likelihood that its actions constituted infringement of a [presumptively] valid patent" part of the standard.<sup>31</sup>

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<sup>27</sup> See, e.g., *nCube Corp. v. SeaChange Int'l, Inc.*, 436 F.3d 1317, 1325 (Fed. Cir. 2006) (holding that evidence of deliberate copying supported an award of enhanced damages); *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1571 (Fed. Cir. 1996) (affirming a jury finding of willful infringement based in part on evidence of blatant copying of a commercial embodiment of a patent); *BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 1 F.3d 1214, 1223 (Fed. Cir. 1993) ("Windsurfing produced no evidence of direct copying. The district court's determination that Windsurfing did not show willfulness was not clearly erroneous.")

<sup>28</sup> See, e.g., *VNUS Med. Techs., Inc. v. Diomed Holdings, Inc.*, No. 05-2972, 2007 WL 3165548, at \*3 (N.D. Cal. Oct. 24, 2007) (relying almost exclusively on allegations of "copying," the plaintiff attempted to satisfy the willfulness standard articulated in *In re Seagate*).

<sup>29</sup> *In re Seagate Tech., L.L.C.*, 497 F.3d 1360, 1371 (Fed. Cir. 2007).

<sup>30</sup> *Id.* (emphasis added) (citations omitted).

<sup>31</sup> See, e.g., *VNUS Med. Techs., Inc.*, 2007 WL 3165548, at \*3 (relying almost exclusively on allegations of "copying," the plaintiff attempted to satisfy the willfulness standard articulated in *In re Seagate*).

“Copying’s” place in the spectrum of willfulness and enhancement of damages was earlier explained in *Read Corp. v. Portec, Inc.*,<sup>32</sup> where the Federal Circuit reviewed its prior precedent on this issue, including *Bott v. Four Star Corp.*<sup>33</sup> Speaking generally, at first, Chief Judge Nies explained that a damages award “may be enhanced up to three times the compensatory award,” and that enhancement “is committed to the discretion of the trial court.”<sup>34</sup> The statutory scheme does not, however, provide a framework for determining when such enhancement would be appropriate.<sup>35</sup> While the Federal Circuit historically approved enhanced damages awards when the infringement is found to be willful, such enhancements are not mandatory.<sup>36</sup>

To gauge the egregiousness of the accused infringer’s conduct, based on all the facts and circumstances, consideration must be given to factors that render that conduct more culpable, as well as factors that are mitigating or ameliorating.<sup>37</sup> The *Read* court provided a list of nine (9) factors, beginning with the *Bott* factors and adding others:

- (1) whether the infringer deliberately *copied* the ideas or design of another;
- (2) whether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; and
- (3) the infringer’s behavior as a party to the litigation;
- (4) defendant’s size and financial condition;
- (5) closeness of the case;
- (6) duration of defendant’s misconduct;
- (7) remedial action by the defendant;
- (8) defendant’s motivation for harm; and
- (9) whether defendant attempted to conceal its misconduct.<sup>38</sup>

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<sup>32</sup> 970 F.2d 816 (Fed. Cir. 1992) (superseded on other grounds as recognized in *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1368–69 (Fed. Cir. 2006)).

<sup>33</sup> 807 F.2d 1567 (Fed. Cir. 1986).

<sup>34</sup> *Read Corp.*, 970 F.2d at 826.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 827 (emphasis added). While *In re Seagate* heightens the standard for establishing willfulness, these considerations will likely still be useful in analyzing the issue of willfulness. See *Informica Corp. v. Bus. Objects Data Integration, Inc.*, No. C 02-03378 EDL, 2007 WL 3203062, at \*6 (N.D. Cal. Oct. 29, 2007) (considering the totality of the circumstances in light of *In re Seagate* and determining that the plaintiff was not entitled to enhanced damages).



As to the first factor, “copying,” the court dropped footnote seven to explain that “‘ideas’ and ‘design’ would encompass, for example, copying the commercial embodiment, not merely the elements of a patent claim.”<sup>39</sup>

“Inasmuch as a finding of willful infringement does not mandate enhancement of damages, the above factors taken together assist the trial court [and jury] in evaluating the degree of the infringer’s culpability and in determining whether . . . to award enhanced damages and how much, the damages should be increased.”<sup>40</sup> To enable appellate review, a trial court must explain the basis for the award, particularly where the maximum amount is imposed.<sup>41</sup> “For the latter, the court’s assessment of the level of culpability must be high.”<sup>42</sup>

### *B. Analysis of Case Law Involving Allegations of “Copying”*

#### *1. Numerous Cases Have Relied on “Copying” as a Basis for Finding Willful Infringement and/or Enhanced Damages*

Historically, “copying” allegations have been the basis for a finding of willful infringement and enhanced damages.<sup>43</sup> “Copying” was a key factor in the finding of willful infringement in *Stryker Corp. v. Intermedics Orthopedics, Inc.*,<sup>44</sup> where the district court based its determination in part on the fact that the accused infringer *deliberately copied* the ideas or design of the patent.<sup>45</sup> Significantly, the Federal Circuit in *Stryker* rejected the idea that a showing of “slavish copying” is needed to support a finding of willful infringement.<sup>46</sup> Thus, evidence showing that the accused

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<sup>39</sup> *Read Corp.*, 970 F.2d at 827 n.7. See also *Lam, Inc. v. Johns-Manville Corp.*, 668 F.2d 462, 475 n.6 (10th Cir. 1982) (“[W]hen a party intentionally takes the ideas of another and puts them in its own ‘very similar’ design with only nonmeaningful deviations, the party has ‘copied’ the other’s design.”). This footnote may have brought *Read Corp.* into conflict with certain of the court’s earlier decisions that held that whatever was “copied” had to fall literally within the claims. *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 989 (Fed. Cir. 1988); *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1576 (Fed. Cir. 1987); *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1541 (Fed. Cir. 1983). There can be no “copying” in the air, because the public is free to use whatever is not covered by an intellectual property right, which, in the case of a patent, is only that which the claims specify and (possibly) equivalents. See discussion *infra* Section III.C.2.

<sup>40</sup> *Read Corp.*, 970 F.2d at 828 (citing 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.03(4)(b)(vi) (1991)).

<sup>41</sup> *Id.* (citing 7 CHISUM, *supra* note 40, § 20.03(4)(b)(vi)).

<sup>42</sup> *Id.* (citing 7 CHISUM, *supra* note 40, § 20.03(4)(b)(vi)).

<sup>43</sup> See generally Stephanie Pall, *Willful Patent Infringement: Theoretically Sound? A Proposal to Restore Willful Infringement to its Proper Place Within Patent Law*, 2006 U. ILL. L. REV. 659, 659 (2006) (describing the evolution of willful infringement and the importance of the copying requirement for punitive damages).

<sup>44</sup> 96 F.3d 1409 (Fed. Cir. 1996), *aff’d* 891 F. Supp. 751 (N.D.N.Y. 1995).

<sup>45</sup> *Id.* at 1413–14 (emphasis added); see also *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 811 (Fed. Cir. 2007).

<sup>46</sup> *Stryker*, 96 F.3d at 1414 (“We have found no authority in our precedent for the proposition that the fact finder must find ‘slavish copying’ in order to conclude that the infringer copied the patentee’s invention.”).

infringer exactly copied the claimed invention is not necessary to establish “copying” for the purpose of showing willfulness.

Like *Stryker*, “copying” was a key factor in the trial court’s finding of willful infringement in *Kaufman Co. v. Lantech, Inc.*,<sup>47</sup> the court finding that Kaufman faithfully “copied” the claimed invention.<sup>48</sup> On appeal, Kaufman argued that an award of increased damages was improper since its “copying” activities took place before the patent issued, and its infringement ceased four months after issuance.<sup>49</sup> The court rejected Kaufman’s argument because the evidence demonstrated Kaufman’s intentional “copying” activities constituted willful infringement.<sup>50</sup>

Similarly, in *nCube Corp. v. SeaChange International, Inc.*,<sup>51</sup> “copying” was an important factor in the trial court’s decision to award enhanced damages.<sup>52</sup> In *nCube*, the evidence established that “SeaChange deliberately copied the invention in its products without investigating the scope of the patent” and, thus, “had not formed a good faith belief excusing its conduct.”<sup>53</sup> As a result, the court awarded enhanced damages.<sup>54</sup>

In *Pacific Furniture Manufacturing Co. v. Preview Furniture Corp.*,<sup>55</sup> evidence of “copying” also led to an award of increased damages in a design patent infringement case.<sup>56</sup> The infringer had direct access to the patented chairs; its chairs were virtually identical to those of patentee, and it admitted “copying” the chair designs.<sup>57</sup> Finding the infringer’s opinion of counsel evidence insufficient, the court held that the infringement was willful.<sup>58</sup>

In some cases, a finding of willful infringement was based, at least in part, on activity that occurred before the asserted patent issued.<sup>59</sup> For example, in *Stryker Corp. v. Davol Inc.*,<sup>60</sup> the Federal Circuit affirmed a finding of willful infringement despite the fact that the copying predated the issuance of the asserted patent.<sup>61</sup>

Similarly, in *Avia Group International Inc. v. L.A. Gear California, Inc.*,<sup>62</sup> L.A. Gear (“LAG”) tried to overturn the district court’s enhanced damages award, arguing that much of its accused conduct occurred before the patents issued.<sup>63</sup> The Federal Circuit rejected this argument:

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<sup>47</sup> 807 F.2d 970 (Fed. Cir. 1986).

<sup>48</sup> *Id.* at 978.

<sup>49</sup> *Id.* at 977–78.

<sup>50</sup> *Id.* at 979.

<sup>51</sup> 436 F.3d 1317 (Fed. Cir. 2006).

<sup>52</sup> *Id.* at 1325.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 626 F. Supp. 667 (M.D.N.C. 1985), *aff’d*, 800 F.2d 1111 (Fed. Cir. 1986).

<sup>56</sup> *Id.* at 676.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 677–78.

<sup>59</sup> See discussion *infra* Section III.C.1 (discussing how the Federal Circuit’s views on this point have varied).

<sup>60</sup> 234 F.3d 1252 (Fed. Cir. 2000).

<sup>61</sup> *Id.* at 1259–60.

<sup>62</sup> 853 F.2d 1557 (Fed. Cir. 1988).

<sup>63</sup> *Id.* at 1566.

LAG's contention that infringement could not be willful because the patents issued after LAG placed its last order is unavailing. "The fact that [an infringer] may have started its infringement before the patents issued (or before [it was] aware of the patents) does not bar an award of increased damages or attorney fees." LAG continued to sell the infringing shoes after the patent issued, well after it had notice the patent was pending for a *particular* design, and even after this suit for infringement was filed. By such conduct, LAG intentionally accepted the risk of infringement.<sup>64</sup>

In contrast to these authorities, the Federal Circuit in *State Industries, Inc. v. A.O. Smith Corp.*<sup>65</sup> focused the issue of willful infringement on activity that occurred *after* the asserted patent issued and found that the accused infringement had *not* been willful.<sup>66</sup> In *State Industries*, the Federal Circuit found that "[t]o willfully infringe a patent, the patent must exist and one must have knowledge of it."<sup>67</sup> The Federal Circuit concluded that because State did not have the patent-in-suit until "22 days before suit, Smith had a perfect right to make and sell its LIME TAMER, without question, because State had no 'patent rights' which covered it."<sup>68</sup> The Federal Circuit distinguished *Milgo Electronic Corp. v. United Business Communications, Inc.*<sup>69</sup> because there the defendant had engaged in "a most elaborate and detailed copying ('slavish copying' according to the trial judge) of complex electronic circuitry in a 'modem' by a corps of engineers working in secrecy over a period of a couple of years to pry loose the secret of Milgo's inventions," in contrast to the *State Industries* defendant who copied a device before it had been patented.<sup>70</sup>

*State Industries*, then, suggests that punishable "copying" could *not* take place before issuance of the patent, because one willfully infringes a patent, more precisely, the issued claims of a patent, not a product or a product which later turns out to be covered by the claims of the later-issued patent.<sup>71</sup> Under *State Industries*, issuance of the patent did *not*, retroactively—*nunc pro tunc*, as it were (or *ex post facto*, insofar as impact is concerned)—convert Smith into a willful infringer.<sup>72</sup> The *State Industries* court did not view the pre-issuance "copying" as an inchoate basis for a later finding of willfulness, which might mature into a problem for the accused infringer at a later date.<sup>73</sup>

The varying views expressed in the foregoing cases (e.g., *Stryker, Avia, Milgo*, and *State Industries*) highlight the uncertainty in the law regarding when "copying"

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<sup>64</sup> *Id.* at 1566 (citations omitted); see also *Milgo Elec. Corp. v. United Bus. Comm'ns, Inc.*, 623 F.2d 645, 666 (10th Cir. 1980) (finding that "copying" activities that took place before the asserted patent issued were relevant to the issue of willful infringement).

<sup>65</sup> 751 F.2d 1226 (Fed. Cir. 1985).

<sup>66</sup> *Id.* at 1236.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1237.

<sup>69</sup> 623 F.2d 645.

<sup>70</sup> *State Industries*, 751 F.2d at 1238; see also *Deere & Co. v. Int'l Harvester Co.*, 658 F.2d 1137, 1147 (7th Cir. 1981) (distinguishing *Milgo* on the fact that the *Milgo* defendant made no effort to secure an opinion of counsel).

<sup>71</sup> *State Industries*, 751 F.2d at 1236.

<sup>72</sup> *Id.* at 1237.

<sup>73</sup> *Id.*

can result in willfulness. This issue is discussed *infra* in the discussion of “Copy When?”<sup>74</sup>

## 2. *Opinions of Counsel Do Not Necessarily Insulate an Accused Infringer From a Finding of Willful Infringement*

Even when an accused infringer has obtained opinions of counsel, evidence of “copying” can result in a finding of willful infringement and enhanced damages.<sup>75</sup> For example, evidence of “copying” was critical in the trial court’s finding of willful infringement in *Liquid Dynamics Corp. v. Vaughan Co.*<sup>76</sup> despite the fact that the accused infringer had obtained and relied on opinions of counsel.<sup>77</sup> On appeal, Vaughan argued that there was no basis for the jury to disregard its reliance on an opinion of counsel and that there was insufficient evidence to conclude Vaughn copied the claimed invention.<sup>78</sup> Relying mostly on circumstantial evidence and inferences, the court affirmed the finding that Vaughan’s “copying” activities nonetheless constituted willful infringement.<sup>79</sup> The court concluded that Vaughan’s opinions of counsel were unreliable because they were based on erroneous facts.<sup>80</sup>

A number of other cases track the analysis in *Liquid Dynamics*. For example, in *Jurgens v. CBK, Ltd.*,<sup>81</sup> the accused infringer presented evidence that it immediately contacted an experienced attorney and obtained an opinion that either it was not infringing or that the patent was invalid when it learned of its potential infringement.<sup>82</sup> The jury found that the accused infringer’s conduct was willful, but the trial judge declined to award enhanced damages because the defendants immediately sought the advice of counsel.<sup>83</sup> The Federal Circuit affirmed the finding of willfulness, but *reversed* the trial judge’s decision *not* to award enhanced damages.<sup>84</sup> The Federal Circuit also *reversed* the trial court’s decision *not* to award attorney’s fees.<sup>85</sup>

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<sup>74</sup> See *infra* Section C.1.

<sup>75</sup> *Liquid Dynamics Corp. v. Vaughan Co.*, No. 01C 6934, 2005 WL 711993, at \*2 (N.D. Ill. March 22, 2005), *aff’d*, 449 F.3d 1209 (Fed. Cir. 2006). Where an opinion of counsel will fit into a post-*In re Seagate* analysis remains to be worked out by the Federal Circuit, but it may well have effect in regard to the second part of the new willfulness standard, if the “copying” prima facie satisfies the first part of the standard. *In re Seagate Tech., L.L.C.*, 497 F.3d 1360, 1371 (Fed. Cir. 2007).

<sup>76</sup> 2005 WL 711993, at \*2.

<sup>77</sup> *Id.*

<sup>78</sup> *Liquid Dynamics*, 449 F.3d at 1225.

<sup>79</sup> *Id.* at 1225–26.

<sup>80</sup> *Id.* at 1226.

<sup>81</sup> 80 F.3d 1566 (Fed. Cir. 1996).

<sup>82</sup> *Id.* at 1571.

<sup>83</sup> *Id.* at 1571–72.

<sup>84</sup> *Id.* at 1573. Similarly, in *Stryker Corp. v. Davol Inc.*, the Federal Circuit affirmed the jury’s verdict of willful infringement despite the accused infringer’s reliance on opinions of counsel. 234 F.3d 1252, 1260 (Fed. Cir. 2000). The court in *Stryker* noted that “the jury reasonably could have credited the testimony that [the accused infringer’s] reliance on the opinions of counsel was not reasonable, that it did not in fact follow those opinions, and that the designs for the accused devices were finalized before obtaining an opinion of counsel.” *Id.* at 1259. See also *VNUS Med. Techs., Inc. v. Diomed Holdings, Inc.*, No. C-05-2972 MMC, 2007 WL 3165548, at \*3–4 (N.D. Cal. Oct 24, 2007)

In a jury trial, a finding of willfulness when the accused infringer relied on opinions of counsel, might be expected to fall before a Federal Rules of Civil Procedure, Rule 50, judgment as a matter of law (“JMOL”), motion. This is not necessarily true. In *Amsted Industries, Inc. v. Buckeye Steel Castings Co.*,<sup>86</sup> Buckeye moved for JMOL or a new trial on the issues of willful infringement and damages, while Amsted moved for enhanced damages and attorneys’ fees.<sup>87</sup> The trial court refused to set aside the jury’s verdict of willful infringement and granted Amsted’s motion for enhanced damages and attorneys’ fees.<sup>88</sup> On appeal, Buckeye argued that no reasonable jury could have found that infringement was willful.<sup>89</sup> In support of this argument, Buckeye relied on written opinions and the testimony of its engineering director that the decision to copy was made only after forming a good faith belief that the patent was invalid.<sup>90</sup>

In setting the legal standard applicable to Buckeye’s position, the court stated that just because “an opinion of counsel was obtained does not ‘always and alone’ dictate a finding that the infringement was not willful.”<sup>91</sup> “What matters is the nature of that opinion and what effect it had on an infringer’s actions.”<sup>92</sup> Close scrutiny of both the outside counsel opinions and the engineering director’s “good faith belief” showed that the validity opinions relied upon were not final, requests for review and further information to opining counsel had not been answered, and, in fact, the opinions may have been provided, even in preliminary form, on the basis of less than all existing information supportive of the patent’s validity.<sup>93</sup> Enhancement of damages, therefore, was affirmed, *inter alia*, on the basis of Buckeye’s deliberate “copying,” in view of *Read Corp. v. Portec, Inc.*<sup>94</sup>

*Transmatic, Inc. v. Gulton Industries, Inc.*,<sup>95</sup> however, had a different outcome, despite Gulton’s alleged effort to make a “clone” of the patented invention.<sup>96</sup> At least six opinions had been received from Gulton’s patent counsel on whether or not its efforts to develop a device to compete with Transmatic would infringe the patent.<sup>97</sup> In reviewing the *Bott* factors as to increased damages, the court disarmed the “hot-button” term, “clone,” quite adroitly, stating that the “Defendant experimented with a number of possibilities in an effort to design around the patent,” and that “the product that Gulton ultimately went to market with was not an exact clone of the Domas patent.”<sup>98</sup> Moreover, the court noted in a footnote that even if the accused

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(denying motion for summary judgment of no willful infringement even though the accused infringer was relying on opinions of counsel; alleged “copying” was the basis for asserting willfulness).

<sup>85</sup> *Jurgens*, 80 F.3d at 1572.

<sup>86</sup> 24 F.3d 178 (Fed. Cir. 1994).

<sup>87</sup> *Id.* at 181.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 182.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 183–84.

<sup>95</sup> 849 F. Supp. 526 (E.D. Mich. 1994), *aff’d in part, rev’d in part*, 53 F.3d 1270 (Fed. Cir. 1995).

<sup>96</sup> *Id.* at 532. In an internal Gulton memorandum, Gulton’s president, David Turney, urged the use of a “clone” of Transmatic’s patented product. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 536.

device were a direct copy, that fact would not be dispositive proof of willfulness if the defendant had a good faith, well-informed belief that the patent was invalid.<sup>99</sup>

Thus, an opinion and a good faith belief of invalidity *may* fend off a “copying”-based willfulness charge where the “copying” is contended to prima facie satisfy the first part of the *In re Seagate* willfulness standard, and a perceptive court, on post-trial, Federal Rules of Civil Procedure Rule 50 motion and enhancement motion practice,<sup>100</sup> may itself prevent any untoward or undeserved damage done by use of a prejudicial term such as “clone” before a jury.

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

### 3. The Importance of Designing Around

The Federal Circuit has noted in a number of rulings that any “copying” that results from an unsuccessful effort to “design around” the claimed invention will most likely *not* result in an inference or finding of willfulness, and hence exposure to multiple damages and attorneys fees on that basis.<sup>101</sup> There should be no different result under *In re Seagate*.

The importance of “designing around” towards ameliorating the effects of a charge of “copying” was pointed out by Judge Rich in *State Industries*.<sup>102</sup> In that case, the court reversed the trial court’s holding of willfulness, finding State’s case “to be fatally flawed as based on a mixture of fact with non-fact and erroneous legal presumptions.”<sup>103</sup> The court discussed at length the evidence supporting the defendant’s efforts to design around:

*Conduct such as Smith’s, involving keeping track of a competitor’s products and designing new and possibly better or cheaper functional equivalents is the stuff of which competition is made and is supposed to*

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<sup>99</sup> *Id.* at 536 n.12. The court stated: “It is simply not a willful infringement if there is a good faith, well-informed belief that the patent itself is invalid.” *Id.* “Copying may be probative of a ‘willful infringement,’ but it is not dispositive.” *Id.*

<sup>100</sup> FED. R. CIV. P. 50; 35 U.S.C. §§ 284, 285 (2006) (granting the court discretion to award treble damages and attorneys’ fees in patent infringement cases). In *Transmatic*, the court had earlier ruled that infringement under the doctrine of equivalents and willful equivalent infringement were matters for the court, not the jury. *Transmatic*, 849 F. Supp. at 529 n.4. The jury rendered an advisory verdict on equivalents infringement, but not on willfulness. *Id.* at 529. That ruling explains the procedural status of the willfulness/enhancement issues in *Transmatic* as to how willfulness was an issue for the court and not the jury. *Id.* It also may indicate lack of the usual, expected impact of a term such as “copy” or “clone” upon a jury, because willfulness was not decided by them. *Id.*

<sup>101</sup> *See, e.g.*, *Westvaco Corp. v. Int’l Paper Co.*, 991 F.2d 735, 745 (Fed. Cir. 1993) (noting that although Westvaco unsuccessfully attempted to design around Int’l Paper Co.’s product, “[it] should not be found to have willfully infringed based on its attempt”).

<sup>102</sup> *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226 (Fed. Cir. 1985).

<sup>103</sup> *Id.* at 1234.

*benefit the consumer.* One of the benefits of a patent system is its so-called “negative incentive” to “*design around*” a competitor’s products, even when they are patented, thus bringing a steady flow of innovations to the marketplace. It should not be discouraged by punitive damage awards except in cases where conduct is so obnoxious as clearly to call for them. The world of competition is full of “fair fights,” of which this suit seems to be one.<sup>104</sup>

Applying the same analysis as it did in *State Industries*, the Federal Circuit in *Amstar Corp. v. Envirotech Corp.*,<sup>105</sup> found there was no error in refusing to find willfulness.<sup>106</sup> There, the accused infringer tried to work its way clear of the patent-in-suit. “After being advised of Amstar’s claim of infringement, [Envirotech] engaged in a good faith colloquy with Amstar and modified its . . . design in an attempt, albeit unsuccessful, to avoid infringement.”<sup>107</sup> While the evidence was susceptible to multiple interpretations, the Federal Circuit deferred to the jury’s determination that Envirotech attempted to design around the patent, and its infringement was not willful.<sup>108</sup>

The benefits of “designing around” are also evident from the Federal Circuit’s decision in *Read Corp. v. Portec, Inc.*<sup>109</sup> In that case, Read had pressed Portec’s “copying” as the key to its enhancement case.<sup>110</sup> The Federal Circuit considered those allegations. It recognized that determining when a patented device has been “designed around” enough to avoid infringement is a difficult determination to make, and that Portec was properly found liable for damages caused by its miscalculation respecting infringement of the patent.<sup>111</sup> However, the court concluded that Portec’s conduct was not sufficiently egregious to justify finding it had willfully infringed, because there was no evidence contradicting Portec’s claim that it had tried to design around the ’194 patent.<sup>112</sup>

*Westvaco Corp. v. International Paper Co.*<sup>113</sup> exemplifies just how important evidence of designing around can be, even when minimal. At the trial court level, the court found that Westvaco’s infringement was willful, based upon its conclusion that Westvaco had copied International Paper’s (“IPC”) product, a carton for holding

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<sup>104</sup> *Id.* at 1235–36 (emphasis added); see also *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1109–10 (Fed. Cir. 1986) (affirming the trial court’s holding that the infringer did not willfully infringe the patent-in-suit because it designed around the patent claims instead of intentionally copying them); *Yarway Corp. v. Eur-Control USA, Inc.*, 775 F.2d 268, 277–78 (Fed. Cir. 1985) (holding licensor-infringer’s attempt to “design around” licensed patent, which attempted to avoid exclusive license granted to plaintiff, coupled with a non-frivolous attempt to avoid infringement by changed design, was not sufficiently obnoxious to premise the enhancement of damages, because it advanced one of the purposes of the patent law, to encourage “design around” activities).

<sup>105</sup> 823 F.2d 1538 (Fed. Cir. 1987).

<sup>106</sup> *Id.* at 1546–47.

<sup>107</sup> *Id.* at 1547.

<sup>108</sup> *Id.* at 1546–47.

<sup>109</sup> 970 F.2d 816 (Fed. Cir. 1992), *abrogated on other grounds by* *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995), *aff’d*, 517 U.S. 370 (1996).

<sup>110</sup> *Id.* at 828.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 830 (holding that the factors of willful infringement and copying were not present where Portec had “successfully ‘designed around’ [Read’s] patent”).

<sup>113</sup> 991 F.2d 735 (Fed. Cir. 1993).

orange juice.<sup>114</sup> The Westvaco employee that had developed the accused product, Dr. Debora Massouda, kept a lab notebook that included the notation “trying to duplicate IP[C] structure.”<sup>115</sup> Westvaco obtained an opinion of counsel that concluded that the accused product did not infringe any valid claims of the patent-at-issue.<sup>116</sup>

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

A finding of willfulness is not precluded by the fact that Westvaco sought validity and infringement opinions from competent outside counsel. Here, Westvaco engaged in deliberate and obvious attempts to copy successful IP[C] products after IP[C] patented the structures embodied by the products. Westvaco should not be insulated from increased damages and an attorney’s fee award by its after-the-fact efforts to justify these actions by encouraging positive opinions from an initially uncertain outside counsel.<sup>117</sup>

Despite a starting point that certainly had all of the trappings of improper “copying,” the Federal Circuit reversed the lower court, recharacterizing Westvaco’s conduct as appropriate attempts to “design around” as opposed to wrongful “copying.”<sup>118</sup> Even though Dr. Massouda stated that Westvaco was trying to “duplicate” the structure of IPC’s product, the Federal Circuit determined that “Westvaco made specific structural changes to its product so that its product was not a copy of IPC’s product” and evidenced an attempt to design around IPC’s product.<sup>119</sup>

Based on the foregoing, evidence of designing around the asserted patent can weigh heavily against a finding of willful infringement.<sup>120</sup> However, care must be given not to abandon one’s own independent design efforts and “copy” a patented invention, because a willfulness finding may result.<sup>121</sup>

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<sup>114</sup> *Id.* at 740.

<sup>115</sup> *Id.* at 738.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 740 (citations omitted).

<sup>118</sup> *Id.* at 745.

<sup>119</sup> *Id.*

<sup>120</sup> See *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, 924 F. Supp. 994, 1020 (C.D. Cal. 1996) (noting that attempts to design around the patent may also negate a finding of willfulness); *Mobil Oil Corp. v. Amoco Chems. Corp.*, 779 F. Supp. 1429, 1484–85 (D. Del. 1991), *aff’d*, 980 F.2d 742 (Fed. Cir. 1992) (finding that Amoco scientists used Mobil patents to develop the infringing catalyst, but that the activity did not amount to copying, because Amoco legitimately attempted to “design around” the Mobil patents); *Schering Corp. v. Precision-Cosmet Co.*, 614 F. Supp. 1368, 1383 (D. Del. 1985) (doubling damages rather than tripling them, where defendant did not simply copy patent owner’s product, but had been independently developing own product); *Atlas Powder Co. v. E.I. duPont de Nemours & Co.*, 588 F. Supp. 1455, 1472–73 (N.D. Tex. 1983), *aff’d*, 750 F.2d 1569 (Fed. Cir. 1984) (finding that infringer did not simply copy patent owner’s product but rather in good faith did basic research to develop an improved product); 7 CHISUM, *supra* note 40, § 20.03(4)(b)(v)(G) (noting that “designing around” patented technology is a positive benefit of the patent system, not to be punished by multiple damage awards”); *cf.* *Chaparral Indus. Inc. v. Boman Indus.*, 697 F. Supp. 1113, 1125 (C.D. Cal. 1988) (finding willfulness where Boman, in copying the patented invention, attempted to “design around” it but merely created a “functional equivalent”).

<sup>121</sup> See *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1260 (Fed. Cir. 1997) (finding that the district clearly erred in finding no willful infringement because it “overlooked



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

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

*1. “Copy” When?*

That an accused infringer begins conduct later challenged as infringement *before* a United States patent has issued, or *before* he or she became aware of an issued United States patent, apparently does not *per se* bar a finding of willfulness on that basis, according to the Federal Circuit’s current view.<sup>122</sup> Infringement, and any basis for increasing thereafter-incurred damages, however, cannot begin until the issuance of a U.S. patent and notice of the existence of the U.S. patent.<sup>123</sup> Whether willfulness thereafter exists in that infringement should be judged by the “totality of the circumstances,” including the presence of opinions of counsel and other evidence of good faith conduct.<sup>124</sup>

The Federal Circuit’s governing precedent in these “jump the gun” infringement situations is represented by *Gustafson, Inc. v. Intersystems Industrial Products Inc.*<sup>125</sup> Prior to *Gustafson*, Donald S. Chisum notes that “Federal Circuit decisions have oscillated on the question of willfulness when the infringer allegedly copied the

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overwhelming evidence in the record that Becton Dickinson’s efforts to develop a safety catheter were a failure” as “it must be more than coincidence that Becton Dickinson managed to commercialize its design by adopting features disclosed in the [asserted patents] soon after it became aware of their existence”); *W.R. Grace & Co.-Conn. v. Intercat, Inc.*, 7 F. Supp. 2d 425, 475 (D. Del. 1997), *aff’d*, 155 F.3d 572 (Fed. Cir. 1998) (finding willful infringement because although there was evidence that the defendant attempted to design around, the plain fact was that the new product was practically identical to the patented product); *Padco Inc. v. Newell Cos.*, 13 U.S.P.Q.2d 1607, 1610 (E.D. Wis. 1988), *aff’d*, 878 F.2d 1445 (Fed. Cir. 1989) (finding willful infringement where Newell abandoned independent design efforts and intentionally copied Padco’s patented paint roller to prevent loss of sales of other products).

<sup>122</sup> *See, e.g.*, *Shiley Inc. v. Bentley Labs., Inc.*, 794 F.2d 1561, 1568 (Fed. Cir. 1986) (disagreeing with Bentley’s assertion that “since it began to market its infringing device a month before any of Shiley’s patents issued, its infringement cannot be willful as a matter of law”).

<sup>123</sup> *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985).

<sup>124</sup> *Graco, Inc. v. Binks Mfg. Co.*, 60 F.3d 785, 792 (Fed. Cir. 1995) (holding that “[t]here are no hard and fast rules regarding a finding of willfulness and that “a number of factors enter into a willfulness determination and, as such, the issue is properly resolved by evaluating the totality of the surrounding circumstances” (citations omitted)). While the standard for establishing willfulness may have changed under *In re Seagate*, there is no reason to believe that the proper analysis for determining whether that standard has been met is anything other than an analysis of the totality of the circumstances. *See Trading Techs. Int’l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 WL 63233, at \*1 (N.D. Ill. 2008) (finding that “[*In re Seagate*] did not alter the requirement that the totality of the circumstances must be taken into account when determining whether infringement was willful”).

<sup>125</sup> 897 F.2d 508 (Fed. Cir. 1990).

patentee’s technology before the patent issued.”<sup>126</sup> One line of authority provided that pre-issuance “copying” could not evidence willfulness,<sup>127</sup> while another line of authority found to the contrary.<sup>128</sup>

According to Chisum, *Gustafson* effectively reconciled the two lines of cases.<sup>129</sup> In that decision, the court notes that, in a sequence of cases involving claims of willful infringement, the Federal Circuit “has evolved a jurisprudence applicable to situations in which a product found an [sic] infringement at trial had been

<sup>126</sup> 7 CHISUM, *supra* note 40, § 20.03(4)(b)(v)(H).

<sup>127</sup> See *State Indus. Inc. v. Mor-Flo Indus., Inc.*, 17 U.S.P.Q.2d 1706, 1709 (E.D. Tenn. 1990), *aff’d*, 948 F.2d 1573 (Fed. Cir. 1991) (noting that “copying . . . [does not constitute] evidence of willful infringement of a patent, inasmuch, as there was no patent at that time, and no indication that there was even a patent pending” (citation omitted)); *State Indus. v. A.O. Smith Corp.*, 751 F.2d 1226, 1235 (Fed. Cir. 1985) (finding that there was no willfulness and that the case merely involved “the familiar picture of competitors competing, one trying to match a new product of the other with a new product of its own, *not copied* but doing the same job, and the other manipulating its secret pending patent application to cover the functionally competitive structure”); *Am. Original Corp. v. Jenkins Food Corp.*, 774 F.2d 459, 465–66 (Fed. Cir. 1985) (noting that the trial court did not err in declining to increase damages when defendant began developing its process before issuance of the patent; the infringer did not obtain an opinion letter of counsel after issuance of the patent; accused infringer did alter its system in the hope of avoiding infringement; and the patent owner never notified the infringer of the charge of infringement until filing suit); *John O. Butler Co. v. Block Drug Co.*, 620 F. Supp. 771, 779 (N.D. Ill. 1985) (finding no willful infringement when the defendant did not know of the plaintiff’s design patents when it began production and learned of those patents only after suit was filed against it).

<sup>128</sup> See *Stryker Corp. v. Davol Inc.*, 234 F.3d 1252, 1259 (Fed. Cir. 2000) (rejecting Davol’s argument that willfulness should not be found where copying involved predated the issuance of the patent); *Shiley Inc. v. Bentley Labs., Inc.*, 794 F.2d 1561, 1568 (Fed. Cir. 1986) (disagreeing with Bentley’s assertion that “since it began to market its infringing device a month before any of Shiley’s patents issued, its infringement cannot be willful as a matter of law”); see also *Avia Group Intl, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1566 (Fed. Cir. 1988) (noting that “LAG’s contention that infringement could not be willful because the patents issued after LAG placed its last order [was] unavailing”); *Milgro Elec. Corp. v. United Bus. Commc’ns, Inc.*, 623 F.2d 645, 665–66 (10th Cir. 1980) (copying prior to issuance of patent: “there can be no liability for infringement before a patent issues . . . [but] the issue here is not infringement, but rather willfulness, that is UBC’s state of mind”); *GTE Prods. Corp. v. Kennametal Inc.*, 772 F. Supp. 907, 918 (W.D. Va. 1991) (noting that although the accused infringer copied the product of the patent applicant before the patent issued and that after issuance, it re-designed away from the patent, there was still willful infringement for the period before re-design); *Joy Mfg. Co. v. CGM Valve & Gauge Co.*, 730 F. Supp. 1387, 1393, 1398 (S.D. Tex. 1989) (finding willfulness where the accused valves were designed based on patentee’s product, were substantially identical, and defendant did not get a written opinion of counsel nor did it modify the design of the accused valves); *Afros S.p.A. v. Krauss-Maffei Corp.*, 671 F. Supp. 1402, 1438 (D. Del. 1987) (noting that “[t]he issue of willfulness does not rest solely on the timing or knowledge of the patent, but on the totality of the circumstances”) (citations omitted), *aff’d mem.*, 848 F.2d 1244 (Fed. Cir. 1988); *Indecor Inc. v. Fox-Wells & Co.*, 642 F. Supp. 1473, 1491–92 (S.D.N.Y. 1986) (noting that “[a]n infringer’s decision to continue production after notice of a patent is evidence of willfulness” and that Fox-Well’s failure to conduct a patent search or to receive an opinion of counsel as to the validity of the ’195 Patent serve [sic] to aggravate the circumstances”). The court in *Indecor* went on to note that “[While] Fox-Well’s copying of the Indecor fabric before the patent was issued does not constitute infringement . . . [such] copying activities provide evidence that its conduct in manufacturing and selling [the infringing product after issuance of the patent] was ‘intentional and deliberate, in willful disregard of [Indecor’s] rights, rather than merely accidental or negligent.’” *Id.* (citations omitted).

<sup>129</sup> 7 CHISUM, *supra* note 40, § 20.03(4)(b)(v)(H).

manufactured before the patent issued.”<sup>130</sup> When one learns of the U.S. patent coincident with filing of suit, such as being sued on the day the patent issues, *Gustafson* says, as Chisum reads it, no pre-issuance “copying” may be used as evidence of willfulness if one continues the pre-suit challenged course of conduct; the accused infringer is relieved of the inchoate risk.<sup>131</sup> However, when one has knowledge of the U.S. patent before suit is filed, even if the delay between knowledge and suit is a matter of days, the inchoate risk may vest and then must be dealt with. A showing of the propriety of continuing the pre-issuance conduct may need to be made, and/or the alleged “copying” disproved, to avoid “copying” acting as proof of satisfaction of the *In re Seagate* willfulness standard.

Under *Gustafson*, then, the true nature of the curse of “copying” shows through: pre-issuance “copying,” which is entirely legal and proper, and in fact favored by theory and Constitutional rights and benefits, presents an inchoate risk of a finding of willfulness and all of the horrors that that may bring.<sup>132</sup> This inchoate risk may vest, as it were, if what was “copied” later turns out to fall literally within the claims of a subsequently issued United States patent, as properly construed under the Federal Circuit’s well-defined rules of claim construction. And if *Read Corp.*’s footnote seven is broadly read, that risk may arise from “copying” the patentee’s product or portions of disclosure, even if that product or that disclosure does not literally encroach upon the claims that later issue.<sup>133</sup>

In one post-*Gustafson* decision, *Conopco, Inc. v. May Department Stores Co.*,<sup>134</sup> the Federal Circuit vacated and remanded the trial court’s findings as to willfulness, but affirmed the findings of infringement as to two of the defendant’s products. On remand, the trial court was cautioned to avoid finding willfulness based upon the defendant’s conduct before the patent issued:

In resolving the willfulness, enhanced damages, exceptional case, and attorney fees issues, *the court is cautioned not to place undue weight on defendants’ activities prior to the issuance of the patent.* Although these activities may have been undertaken with knowledge that a patent application covering the relaunched lotion formulation was pending (in view of the “patent pending” notice affixed to the relaunched product), that is insufficient to support a finding of willfulness.<sup>135</sup>

The patent-in-suit in *Conopco* issued, and the lawsuit was filed one month later.<sup>136</sup> The defendants did not have actual knowledge of the patent until the

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<sup>130</sup> *Gustafson*, 897 F.2d at 510.

<sup>131</sup> 7 CHISUM, *supra* note 40, § 20.03(4)(b)(v)(H).

<sup>132</sup> *Gustafson*, 897 F.2d at 510–11.

<sup>133</sup> *Read Corp., v. Portec, Inc.*, 970 F.2d 816, 827 n.7 (Fed. Cir. 1992). Note that in *Read Corp.*, the copied commercial device *did* literally fall within claims of the ’194 patent found to be infringed. *Id.* at 825.

<sup>134</sup> 46 F.3d 1556 (Fed. Cir. 1994).

<sup>135</sup> *Id.* at 1562 (emphasis added).

<sup>136</sup> *Id.* at 1560.

lawsuit was filed.<sup>137</sup> The court’s cautionary instruction on remand is consistent with *Gustafson*, as interpreted by *Chisum*.<sup>138</sup>

## 2. “Copy” What?

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

The Seventh Circuit had earlier wrestled with the “copy’ what?” issue in *Union Carbide Corp. v. Graver Tank & Manufacturing Co.*,<sup>139</sup> where the Master’s report on damages was before the court.<sup>140</sup> The Master had found that Lincoln’s 660 flux, which was found to infringe *only* under the doctrine of equivalents, “was copied from the teachings of the patent.”<sup>141</sup> Based upon that finding, the trial court “characterized Lincoln as a conscious and willful infringer, notwithstanding that the Master had refused” to do so.<sup>142</sup> The Seventh Circuit reversed that finding, both as a matter of fact and law.<sup>143</sup>

In coming to this conclusion, the court considered the issue of exactly what Lincoln had copied. It did not appear that the product claimed by the patent had been copied, but rather it appeared that what was disclosed by the specification, rather than that specified in the claims, had been copied.<sup>144</sup> More to the point, the court stated that “[i]t strikes us as an anomaly to find that Lincoln copied from the patent but that infringement was found only by application of the doctrine of equivalents.”<sup>145</sup> Hence, “[i]n our view, the word ‘copied’ as used [to] describe Lincoln’s conduct is a misnomer. It is a conclusion arrived at by process of reasoning with which we do not agree.”<sup>146</sup> For this reason, and because Lincoln had obtained an opinion of invalidity or non-infringement, the court concluded the infringement was not willful.<sup>147</sup> As *Union Carbide* plainly points to the issued claims of the patent as

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<sup>137</sup> *Conopco, Inc. v. May Dept. Stores Co.*, 784 F. Supp. 648, 662 (E.D. Mo. 1992), *aff’d in part, rev’d in part*, 46 F.3d 1556.

<sup>138</sup> 7 CHISUM, *supra* note 40 § 20.03(4)(b)(v)(H) (discussing the Federal Circuit’s holding in *Gustafson* and noting that a defendant “could not be a willful infringer when the trial court had found that the defendant was aware of the two patents in question ‘as of the filing of suit on the two, the second patent having issued after the filing of suit on the first’”).

<sup>139</sup> 282 F.2d 653 (7th Cir. 1960).

<sup>140</sup> *Id.* at 656.

<sup>141</sup> *Id.* at 657.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 663, 678.

<sup>144</sup> *Id.* at 657–58.

<sup>145</sup> *Id.* at 658.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 658–59. Significantly, *Union Carbide* argued that Lincoln had failed to inform its counsel that its flux was “copied” from the teachings of the patent. *Id.* at 659. The trial court seemed to embrace that theory, going so far as to state that Lincoln’s failure to advise counsel that it had “copied” showed that it was aware of possible infringement, because otherwise it would not have sought patent counsel’s advice. *Id.* at 660. The Seventh Circuit disagreed, finding good faith reliance on opinion of counsel and noting that obtaining a competitor’s product for analysis could

what “copying” must be judged against, if the doctrine of equivalents is the only grounds for infringement liability, “copying” is apparently not put in play as a basis for finding willfulness.<sup>148</sup>

As noted, some courts clearly have focused on whether the claimed invention is what has been “copied.” In *VNUS Medical Technologies, Inc. v. Diomed Holdings, Inc.*,<sup>149</sup> the three defendants jointly moved for summary judgment of no willful infringement.<sup>150</sup> VNUS opposed the motion, arguing that there was evidence in the form of deposition testimony and statements made in 501(k) statements that supported a finding of willful infringement under the standard set forth in *In re Seagate*.<sup>151</sup> The court granted the motion with respect to two of the defendants because the evidence pertaining to those two defendants, even if true, did not establish “copying” of the *claims* of the asserted patent.<sup>152</sup> For example, with regard to the evidence against one of the defendants, the court stated:

The above-referenced statements on which VNUS relies cannot be reasonably interpreted by a trier of fact as an admission that AngioDynamics “copied” the *patented claims* . . . . The statement by biolitec in its Form 501(k) cannot be understood as a representation pertaining to the *patented claims*. Additionally, the above-referenced testimony by AngioDynamic's expert does not make reference to AngioDynamics, let alone suggest AngioDynamics copied the *claimed methods* . . . .<sup>153</sup>

The court denied the motion with respect to one of the three defendants because the proffered evidence did relate to “copying” of the claims.<sup>154</sup> Hence, the court was clearly focused on whether the claims were copied, not the plaintiff's products or the specification of the asserted patent.

A similar analysis was performed in *Amsted Industries, Inc. v. Buckeye Steel Castings Co.*<sup>155</sup> The trial court discussed Buckeye's admitted “copying” of Amsted's patent in deciding whether to award, and ultimately awarding, enhanced damages through application of the *Read Corp.* factors.<sup>156</sup> The court noted that Buckeye's deviations from the invention did not avoid the fact that it deliberately copied the patented invention.<sup>157</sup> This, coupled with the fact that Buckeye did not have a good

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have been done for the purpose of copying as much as for the purpose of designing a product around the scope of the patent's claims. *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> No. C-05-2972 MMC, 2007 WL 3165548 (N.D. Cal. Oct 24, 2007).

<sup>150</sup> *Id.* at \*1.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at \*1–2.

<sup>153</sup> *Id.* at \*1 (emphasis added).

<sup>154</sup> *Id.* at \*3–4. The court stated, “a trier of fact could reasonably find that the defendant had obtained actual knowledge of plaintiff's *patented methods*.” *Id.* at \*3 (emphasis added).

<sup>155</sup> 28 U.S.P.Q.2d 1352 (N.D. Ill. 1993).

<sup>156</sup> *Id.* at 1354. The patent related to the under-frame of a railway car, and had five elements. *Id.* at 1353. Buckeye sold only one of those elements—the center plate—to customers who assembled that element, along with the remaining elements, into a combination that infringed the patent. *Id.*

<sup>157</sup> *Id.* at 1354–55.

faith belief that the patent was invalid, supported the finding that Buckeye’s infringement was willful.<sup>158</sup>

Based on these cases, it would seem that mere “copying” a competitive *product* cannot *per se* lead to enhanced liability and the other punishments of willful infringement. Or can it, under *Read Corp.*’s footnote seven, if broadly read? Such a broad reading of *Read Corp.*’s footnote seven seems inconsistent with other Federal Circuit precedent finding that the deciding factor is where the “copy” falls with respect to the claims of the patent in issue. Consider *Rawlplug Co. v. Illinois Tool Works, Inc.*<sup>159</sup> There, an Illinois Tool Works (“ITW”) employee obtained a copy of the Rawl Spike, Rawlplug’s commercial product made under exclusive license to the ’445 patent-in-suit, and a copy of the ’445 patent, “with the intent of developing a competing product that would not infringe on Rawlplug’s pending patents.”<sup>160</sup> The court found nothing improper about such activities:

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

The essential question before the court, then, is did ITW successfully “design around” and avoid the claims of the Rawlplug patents?<sup>161</sup>

In *State Industries*, the accused infringer designed its “copied” product in response to the introduction of the patentee’s product onto the market.<sup>162</sup> The infringer introduced its product before issuance of the patent, and in fact the patentee added claims in a continuation-in-part application for the specific purpose of covering the accused infringer’s product.<sup>163</sup> After issuance of the patent, the patentee almost immediately filed suit, which was the accused infringer’s first notice of the patent.<sup>164</sup> The Federal Circuit reasoned that the “patent pending” notice on the initial product gave no notice of what the patentee might *claim* in its patent.<sup>165</sup> Also, while the accused infringer knew of a prior patent that had issued on a parent

<sup>158</sup> *Id.* *But cf.* *Vandenberg v. Dairy Equip. Co.*, 740 F.2d 1560, 1567 (Fed. Cir. 1984). The record established that DEC had used the exact dimensions from the patent in designing the infringing system, but because the dimensions were not claimed, the court found that the “copying” of the patent was not strong evidence of nonobviousness. *Id.*

<sup>159</sup> 23 U.S.P.Q.2d 1054 (S.D.N.Y. 1992), *rev’d on other grounds*, 11 F.3d 1036 (Fed. Cir. 1993).

<sup>160</sup> *Id.* at 1056.

<sup>161</sup> *Id.* at 1057 (citations omitted) (emphasis added).

<sup>162</sup> *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1230 (Fed. Cir. 1985).

<sup>163</sup> *Id.* at 1235–36.

<sup>164</sup> *Id.* at 1236.

<sup>165</sup> *Id.*

application to that of the patent-in-suit, the latter did *not* have *claims* covering the infringer's product.<sup>166</sup> Willfulness was not found, because the patent contained *claims* which the "copy" infringed had not been known to the accused infringer until suit was filed.<sup>167</sup>

Similarly, in *American Original Corp. v. Jenkins Food Corp.*,<sup>168</sup> the court affirmed the trial court's refusal to find willfulness because the facts established that Jenkins could not have "copied" the Marvin *patent* because the patent had not yet issued when Jenkins installed its original eviscerator.<sup>169</sup> Lack of willfulness was also supported by evidence that once the Marvin patent was brought to Jenkins' attention, it responded by altering its system in the hope of avoiding infringement.<sup>170</sup>

That the claimed invention is what must be copied is supported by the Federal Circuit's decision in *Hilton-Davis Chemical Co. v. Warner-Jenkinson Co.*,<sup>171</sup> as well as the Supreme Court's review of that decision.<sup>172</sup> These cases are consistent in that the focus of what is being "copied" is the claimed invention, although there are a few loose references to the terms "product" and "someone else's invention."<sup>173</sup> While the decisions in *Hilton Davis* dealt with "copying" as it relates to the doctrine of equivalents, it would seem unlikely that the requirements for what is being "copied" would be different for considerations of willfulness. Without making it the focus of the opinion, then, the Court helped resolve the uncertainty about *what* must be "copied" to be relevant.

Thus, with the exception of the *Read Corp.* footnote seven comment that prohibited "copying" that extends to the ideas or design of another outside the elements of a patent claim, such as the "copying" of the patentee's commercial embodiment, the Federal Circuit precedent appears to establish that prohibited "copying" must be of the literally claimed invention for it to serve as a precursor to or elements of willfulness. When the "copying" is of a product that is covered by the claims only under the doctrine of equivalents, the situation is unclear, but *Union Carbide*, if adopted or followed by the Federal Circuit on this point, holds such "copying" not to be a willfulness precursor. Such a view also conforms to McCarthy's discussion of "copying" theory and the interface between intellectual property rights and the public domain.

Taken on its face, *Read Corp.* disturbs this seeming symmetry of result, because the ideas or design of another cannot be protected by the right to exclude afforded by the patent law if they are not embraced by at least one issued claim. The weight to

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<sup>166</sup> *Id.* at 1234.

<sup>167</sup> *Id.* at 1236.

<sup>168</sup> 774 F.2d 459 (Fed. Cir. 1985).

<sup>169</sup> *Id.* at 465; *see also* Specialty Composites v. Cabot Corp., 845 F.2d 981, 989 (Fed. Cir. 1988); Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1576 (Fed. Cir. 1987); Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1541 (Fed. Cir. 1983).

<sup>170</sup> *Am. Original*, 774 F.3d at 465; *cf.* Power Lift, Inc. v. Lang Tools, Inc., 774 F.2d 478, 481 (Fed. Cir. 1985) (describing Lang's lift system being based upon Power Lift's blow out preventer system already in use). Lang's son made measurements of Power Lift winches and drums and designed a system without knowledge of Power Lift's patent application. *Id.* Claim 15 of the issued patent covers Lang Tool's lift system, and therefore, implicitly, the claims also cover the Power Lift System. *Id.*

<sup>171</sup> 62 F.3d 1512 (Fed. Cir. 1995), *rev'd*, 520 U.S. 17 (1997).

<sup>172</sup> *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997).

<sup>173</sup> *See, e.g., Warner-Jenkinson*, 62 F.3d at 1548.

be given footnote seven is confused, too, because what was “copied” in *Read Corp.*, Read’s commercial device, was found to be covered, it appears literally, by the patent’s claims. With *Read Corp.* extant, however, in the as-yet unsettled *In re Seagate* world, a cautious accused infringer must look to *his bona fides* of conduct under the “totality of circumstances” test, as to the second part of the willfulness standard, if he jumps off from what then or later turns out to be a product related to an issued U.S. patent. This plainly causes great uncertainty with great risk, and potentially little fault to vest the risk—another manifestation of the curse of “copying.”

#### D. “COPYING” AND OBVIOUSNESS

A second area of law that has been significantly affected by the issue of “copying” is obviousness. Cases seemingly without exception identify “copying” as a secondary consideration tending to establish nonobviousness.<sup>174</sup> Indeed, evidence of “copying” is often considered “the most probative and cogent evidence of nonobviousness.”<sup>175</sup>

The U.S. Supreme Court’s decision in *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*<sup>176</sup> is the progenitor of this line of authority.<sup>177</sup> There, Consolidated Rubber Tire “copied” the Grant tire,<sup>178</sup> with what must have been the unintended result of affording Mr. Justice McKenna the opportunity to put an eloquently-turned sentence into the patent precedent:

The prior art was open to the rubber company. That “art was crowded,” it says, “with numerous prototypes and predecessors” of the Grant tire, and they, it if [sic] insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. *It gives the tribute of its praise to the prior art: it gives the Grant tire the tribute of its imitation, as others have done.*<sup>179</sup>

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<sup>174</sup> See, e.g., *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2005); *Akamai Techs., Inc. v. Cable & Wireless Internet Servs., Inc.*, 344 F.3d 1186, 1196 (Fed. Cir. 2003); *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1285 (Fed. Cir. 2000).

<sup>175</sup> *Advanced Display*, 212 F.3d at 1285 (“Objective considerations such as failure by others to solve the problem and copying, may often be the most probative and cogent evidence of nonobviousness.”) (citations omitted).

<sup>176</sup> 220 U.S. 428 (1911).

<sup>177</sup> See 2 CHISUM, *supra* note 40, § 5.05[5].

<sup>178</sup> *Diamond Rubber*, 220 U.S. at 429. “Grant tire” refers to the patent at suit which was issued to Arthur W. Grant on February 18, 1896 for an improvement in rubber tires. *Id.*

<sup>179</sup> *Id.* at 441 (emphasis added). The Fifth Circuit embellished on the phrase, “imitation is the sincerest form of flattery,” in *Ingersoll-Rand Co. v. Brunner & Lay, Inc.*, 474 F.2d 491, 497 (5th Cir. 1973). See also *Copease Mfg. Co. v. Am. Photocopy Equip. Co.*, 298 F.2d 772, 781 (7th Cir. 1961) (finding that “[t]he prior art upon which defendant now lavishes its praise was apparently permitted to lie dormant until the exigency, created by a suit for infringement, required its resurrection,” and “[d]efendant’s imitation of the patent structure is another indication of invention”); *Kurtz v. Belle Hat Lining Co.*, 280 F. 277, 281 (2d Cir. 1922) (“The imitation of a thing patented by a defendant, who denies invention, has often been regarded . . . as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think.”).



The Court continued its focus on “copying” in *Graham v. John Deere Co.*<sup>180</sup> where the “secondary considerations” included objective evidence of nonobviousness of the claimed invention, such as commercial success, long felt but unsolved need, failure of others, unexpected results—and “copying.”<sup>181</sup>

The effect of “copying” on an accused infringer’s allegations of invalidity were aptly summarized by Chief Judge Markey in an early Federal Circuit decision, *Stratoflex, Inc. v. Aeroquip Corp.*<sup>182</sup>:

[A] finding that a claimed invention has or has not been appropriated by the alleged infringer may carry substantial weight in a court’s analysis of *all* the evidence bearing on the obvious-nonobvious issue. An alleged infringer’s lauding of all the available prior art may, for example, in some cases have a hollow ring when played against its disregard of that art and its copying of the invention.<sup>183</sup>

The Federal Circuit has carried this concept through in a number of its decisions.<sup>184</sup> *Advanced Display Systems, Inc. v. Kent State University*,<sup>185</sup> shows just

<sup>180</sup> 383 U.S. 1 (1966).

<sup>181</sup> *Id.* at 18.

<sup>182</sup> 713 F.2d 1530 (Fed. Cir. 1983).

<sup>183</sup> *Id.* at 1541.

<sup>184</sup> *See, e.g.*, *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2005) (“[O]ur cases . . . establish that copying by a competitor may be a relevant consideration in the secondary factor analysis” of nonobviousness); *Akamai Techs., Inc. v. Cable & Wireless Internet Servs., Inc.*, 344 F.3d 1186, 1193, 1196 (Fed. Cir. 2003).

[T]he record contains substantial evidence relating to secondary considerations supporting the jury’s verdict. In particular, the record shows that C&W expended significant effort to determine how Akamai’s products worked . . . The[ir] new Footprint 2.0 design incorporated Akamai’s placement of the load balancing mechanism at the DNS server. This evidence of copying is relevant to an obviousness determination.

*Id.* at 1196; *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1285 (Fed. Cir. 2000) (finding that “copying of the claimed invention” provided “compelling evidence of nonobviousness”); *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 679 (Fed. Cir. 1988) (finding the trial court erred in declining to include the objective evidence of admitted copying in its determination of the issue of obviousness); *Avia Group Intl, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1564 (Fed. Cir. 1988) (“Copying is additional evidence of nonobviousness.”); *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 991 (Fed. Cir. 1988) (“Copying the claimed invention, rather than one in the public domain, is indicative of unobviousness.”); *Windsurfing Int’l, Inc. v. AMF Inc.*, 782 F.2d 995, 1000 (Fed. Cir. 1986), *further proceedings at* 668 F. Supp. 812 (S.D.N.Y. 1987); *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 960 (Fed. Cir. 1986) (“When present, such objective evidence [of copying] must be considered.”); *Water Techs. Corp. v. Calco Ltd.*, 658 F. Supp. 961, 970 (N.D. Ill. 1986) (“Copying of the patented inventions is strong evidence of non-obviousness of the patents in suit.”), *on motion to amend judgment*, 658 F. Supp. 980 (N.D. Ill. 1987), *aff’d in part, rev’d in part*, 850 F.2d 660 (Fed. Cir. 1988); *Panduit Corp. v. Dennison Mfg. Co.*, 774 F.2d 1082, 1099 (Fed. Cir. 1985) (“That Dennison, a large corporation with many engineers on its staff, did not copy any prior art device, but found it necessary to copy the cable tie of the claims in suit, is equally strong evidence of nonobviousness.”), *vacated sub nom.*, *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986), *remanded to* 810 F.2d 1561 (Fed. Cir. 1987); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 290–91 (Fed. Cir. 1985) (holding that secondary considerations, such as copying cannot be ignored in obviousness analysis); *W.L. Gore & Assocs., Inc. v. Garlock*,

how powerful evidence of “copying” can be.<sup>186</sup> In that case, the defendant requested a new trial based on newly-discovered evidence of “copying” and failure of others.<sup>187</sup> The newly-discovered evidence was a deposition transcript from a *different* case that had not been produced during discovery, despite a document request that covered materials from that litigation.<sup>188</sup> The Federal Circuit found that the new evidence of “wholesale copying” was “compelling,” “potentially outcome determinative,” and, therefore, warranted a new trial.<sup>189</sup> Also evident from the decision in *Advanced Display*, is that incidents of “copying” after independent development was tried and failed are of particular help in establishing nonobviousness.<sup>190</sup>

A contention that it may be commonplace in the industry for manufacturers to copy each other’s designs will not defeat the effects of “copying” as objective evidence of nonobviousness. In *L.A. Gear, Inc. v. Thom McAn Shoe Co.*,<sup>191</sup> the infringer

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Inc., 721 F.2d 1540, 1559 (Fed. Cir. 1983), *remanded to* 670 F. Supp. 760, *aff’d in part, rev’d in part*, 842 F.2d 1275 (Fed. Cir. 1988).

<sup>185</sup> 212 F.3d 1272.

<sup>186</sup> *Id.* at 1272.

<sup>187</sup> *Id.* at 1284–85.

<sup>188</sup> *Id.* at 1280.

<sup>189</sup> *Id.* at 1285 (emphasis added); *cf.* *Ecolochem, Inc. v. S. Cal. Edison Co.*, 227 F.3d 1361, 1380 (Fed. Cir. 2000) (stating that copying is “only equivocal evidence of non-obviousness in the absence of more compelling objective indicia of other secondary considerations”); *In re GPAC*, 57 F.3d 1573, 1580 (Fed. Cir. 1995) (stating that “more than the mere fact of copying by an accused infringer is needed to make that action significant to a determination of the obviousness issue”).

<sup>190</sup> *Advanced Display*, 212 F.3d at 1285–86 (“The import of such copying evidence merits even greater weight in view of ADS’s failure to develop independently the claimed invention.”); *see also* *Dow Chem. Co. v. Am. Cyanamid Co.*, 816 F.2d 617 (Fed. Cir. 1987) (holding nonobviousness was supported by evidence of acts of the infringer in trying but failing to “develop the claimed invention and [then] copied it instead”; Cyanamid was unable to develop its own commercial process based on the prior art); *Heidelberger Druckmaschinen AG v. Hantscho Commercial Prods., Inc.*, 21 F.3d 1068, 1072 (Fed. Cir. 1994) (finding that “the litigation argument that an innovation is really quite ordinary carries diminished weight when offered by those who had tried and failed to solve the same problem, and then promptly adopted the solution that they are now denigrating”); *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1571 (Fed. Cir. 1987) (“Dennison’s obviousness defense is clearly refuted in this case by the unrefuted record of its own long and frustrating experience and that of others.”); *Vandenberg v. Dairy Equip. Co.*, 740 F.2d 1560, 1567 (Fed. Cir. 1984) (“The copying of an invention may constitute evidence that the invention is not an obvious one. . . . This would be particularly true where the copyist had itself attempted for a substantial length of time to design a similar device, and had failed.”); *Lam, Inc. v. Johns-Manville Corp.*, 668 F.2d 462, 467–68, 474–76 (10th Cir. 1982) (rejecting defendant’s obviousness contentions in part because the evidence showed that defendant copied plaintiff’s invention “after years” of trying unsuccessfully to develop its own product); *cf.* *In re GPAC*, 57 F.3d at 1580 (giving “little weight” to “widespread failure of others to develop alternatives to the Natale patent as evidence of nonobviousness” because GPAC offered no evidence to tie the failure to the subject matter claimed in that patent); *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 317 (Fed. Cir. 1985) (“In the present case, Pentec’s effort to develop their own solution was not shown to have been extensive, its product is not identical to the claimed invention, and it vigorously denied infringement. GC’s copying argument can, accordingly, be given little weight.”); *Vandenberg*, 740 F.2d at 1567 (noting that because the accused infringer had given the project low priority and had not totally failed in its independent efforts, the accusation of “slavish copying” overstated the case); *Deere & Co. v. Hesston Corp.*, 440 F.2d 904, 907 (“It is a peculiarity of patent law that it avails Deere [the patent owner] nothing to point out that the combination was not obvious to defendant’s engineers who gave up and copied Deere’s machine.”).

<sup>191</sup> 988 F.2d 1117 (Fed. Cir. 1993).

admitted “copying” the inventor’s shoe designs.<sup>192</sup> The only justification offered for the admitted “copying” was “that copying is prevalent in the fashion industry.”<sup>193</sup> This argument was rejected by the Federal Circuit, and the infringer’s “copying” was deemed strong evidence of willful infringement.<sup>194</sup>

“Copying” is not, despite the tenor of these cases, dispositive of nonobviousness.<sup>195</sup> Additionally, as with all secondary considerations or objective evidence, a nexus with the claimed invention must be proved.<sup>196</sup>

The theoretical underpinnings of the “copy = nonobvious” equation are in many respects ill-developed. If the claimed subject matter is or was obvious, “copying” was entirely proper and Constitutionally guaranteed, as it were.<sup>197</sup> As obviousness is judged by the hypothetical man of ordinary skill in the art, the less-than-omniscient, real-life “copyist” may not be reflective of the *Graham* standard viewed through the proper eyes.<sup>198</sup> Additionally, “copying” may occur from bases that are hard to work

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<sup>192</sup> *Id.* at 1126–27.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1127; see also *Benchcraft, Inc. v. Broyhill Furniture Indus., Inc.*, 681 F. Supp. 1190, 1206 (N.D. Miss. 1988).

<sup>195</sup> *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1366 (Fed. Cir. 2001) (holding evidence of copying was not sufficient to demonstrate nonobviousness, in view of the substantial question of validity raised by the prior art references cited); *Ecolochem, Inc. v. S. Cal. Edison Co.*, 227 F.3d 1361, 1380–81, (Fed. Cir. 2000) (holding that the district court committed clear error in not considering the evidence of copying, but finding evidence of copying of a particular claim was outweighed by other secondary considerations and findings on the prior art; nonetheless, affirming the district court’s finding of obviousness for that particular claim); *In re GPAC, Inc.*, 57 F.3d at 1580 (“[M]ore than the mere fact of copying by an accused infringer is needed to make that action significant to a determination of the obviousness issue.” (quoting *Cable Elec. Prods. Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1028 (Fed. Cir. 1985))); *Newell Cos., v. Kenney Mfg. Co.*, 864 F.2d 757, 768 (Fed. Cir. 1988) (holding that nonobviousness cannot be inferred from evidence of copying, and although commercial success, copying and other secondary considerations must be considered, “they do not control the obviousness conclusion”); *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 740 (Fed. Cir. 1984) (“Although this evidence often helps a tribunal determine an invention’s nonobviousness, it is not necessarily conclusive.”).

<sup>196</sup> *Amazon.com*, 239 F.3d at 1366 (noting that “evidence of copying . . . is legally irrelevant unless the . . . [relevant] feature is shown to be an embodiment of the claims”); *In re GPAC*, 57 F.3d at 1580 (explaining that “[f]or objective evidence to be accorded substantial weight, its proponent must establish a nexus between the evidence and the merits of the claimed invention” (citing *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1539 (Fed. Cir. 1983))); *Cable Elec. Prods.*, 770 F.2d at 1026.

<sup>197</sup> See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964) (“An unpatentable article . . . is in the public domain and may be made or sold by whoever chooses to do so.”); *Rite-Hite Corp. v. Kelley Co.*, 629 F. Supp. 1042, 1051 (E.D. Wis. 1986) (“The very foundation of the patent system contemplates that users of a basic patent will make improvements with time.”), *aff’d*, 819 F.2d 1120 (Fed. Cir. 1987); *Dollar Elec. Co. v. Syndeveco, Inc.*, 205 U.S.P.Q. 949, 964 (E.D. Mich. 1979) (“[N]othing prevents copying an unpatentable device.”), *aff’d*, 669 F.2d 1370 (6th Cir. 1982); *Janex Corp. v. Bradley Time*, 460 F. Supp. 383, 389 n.10 (S.D.N.Y. 1978) (“While copying may be powerful evidence of nonobviousness, it remains the case that nothing deters a competitor from borrowing from a product not covered by a valid patent.” (citing *Kurtz v. Belle Hat Lining Co.*, 280 F. 277, 281 (2d Cir. 1922))).

<sup>198</sup> *Amazon.com*, 239 F.3d at 1364 (holding that the district court erred in substituting the testimony of an expert about his personal view for what a hypothetical ordinarily skilled artisan would have gleaned from the cited references at the time that the patent application was filed); see also *Mfrs. Sys., Inc. v. ADM Indus., Inc.*, 198 U.S.P.Q. 223, 250 (N.D. Ind. 1978) (“MSI . . . contends that if asserted Claim 8 is so obvious, why did defendant ADM have to copy. This argument is,

into the *Graham* standards.<sup>199</sup> Chisum has argued that little weight should be given to “copying” in the determination of nonobviousness:

It would seem that copying and laudatory statements by an infringer should be given little if any weight in determining nonobviousness. First, it is not necessarily inconsistent for a person to see value in an innovation yet deny its patentability on technical grounds. Second, public policy favors challenges to the validity of patents, and no defendant in an infringement suit should be placed under a special handicap in raising the issue. As Judge Hand noted, “there is more at stake than the issues between the two parties.”<sup>200</sup>

Echoing these views, the Federal Circuit in *Cable Electric Products, Inc. v. Genmark, Inc.*<sup>201</sup> discussed the disparity of reasons that one might copy an invention.<sup>202</sup> There, the court noted that copying could occur out of a general lack of concern for patent property, in which case its effect would be neutral on the obviousness analysis.<sup>203</sup> Or, it may occur out of contempt for the specific patent in question, thus, only arguably demonstrating obviousness.<sup>204</sup> As still another alternative, copying might be more related to the ability or willingness of the patentee financially or otherwise to enforce the patent right, which would call for deeper inquiry to determine its applicability to the obviousness analysis.<sup>205</sup> The court noted that even widespread copying could weigh toward opposite conclusions, depending on the attitudes existing toward patent property and the accepted practices in the industry in question.<sup>206</sup> The court therefore concluded that the idea that copying per se should bolster the validity of a patent was a “simplistic” view.<sup>207</sup>

Be that as it may, the Federal Circuit continues to accept objective evidence as probative of nonobviousness, including “copying” of the claimed invention when proper nexus is shown. Such evidence is of particular significance now that the Supreme Court has unanimously rejected the long-standing obviousness test used by the Federal Circuit in favor of a broader and more flexible test for determining

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however, based on a faulty premise, namely, that the defendant ADM is in the same position as the ‘statutory’ man of ordinary skill under 35 USC [§] 103.”), *aff’d*, 615 F.2d 741 (7th Cir. 1979).

<sup>199</sup> See, e.g., *Ecolochem*, 227 F.3d at 1380 (explaining “copying ‘could have occurred out of a general lack of concern for patent property’” (quoting *Cable Elec. Prods.*, 720 F.2d at 1028)); *Creative Pioneer Prods. Corp. v. K Mart Corp.*, 5 U.S.P.Q.2d 1841, 1844 (S.D. Tex. 1986) (“Copying . . . may result from indifference or even a lack of awareness of a patent owner’s rights or disregard for his ability to enforce them.” (citing *Cable Elec. Prods.*, 720 F.2d at 1026–28)); *U.S. Tel. Co. v. Am. Telecomms. Corp.*, 204 U.S.P.Q. 951, 957 (D. Conn. 1979) (noting that copying in the telephone industry was pervasive because the industry relied on AT&T approval in adopting new telephone models).

<sup>200</sup> 2 CHISUM, *supra* note 40, § 5.05(5)(d).

<sup>201</sup> 770 F.2d 1015 (Fed. Cir. 1985), *overruled on other grounds as recognized in* *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) (en banc).

<sup>202</sup> *Id.* at 1027–28.

<sup>203</sup> *Id.* at 1028.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (affirming the trial court’s grant of summary judgment of obviousness).

whether subject matter is obvious.<sup>208</sup> In view of *KSR International Co. v. Teleflex Inc.*,<sup>209</sup> a larger percentage of patents may be deemed prima facie obvious, making objective evidence, such as “copying,” more important than ever. In the post *KSR*-era, one should expect that litigant patent owners will conjure up evidence of “copying” whenever possible, and try to use it aggressively to maintain the validity of their patents.

#### E. LIFTING THE “CURSE” OF “COPYING”

Not surprisingly, a number of rationales for “copying” activity have been tried out over the years. A very few “work”; most don’t; particularly in front of a jury, many of whom used “the dog ate my homework” to try to explain why what they handed in at school as theirs, looked so much like their friend’s/brother’s (sister)’s. For example, the respondent in *In re Certain Crystalline Cefadroxil Monohydrate*<sup>210</sup> contended that its “copying” activity was solely the result of its intention to facilitate the process of obtaining Food and Drug Administration approval.<sup>211</sup> It was noted, with tongue surely in cheek, that “other factors influenced that decision as well.”<sup>212</sup>

The effect of evidence of “copying” upon the patentee’s case is usually an excuse for celebration. As one commentator noted, “any evidence of copying is pure gold because of its relevance to infringement, obviousness, and willful infringement, not to mention the psychological effect on the trier-of-fact.”<sup>213</sup> Use of the “copying” evidence before the jury should be maximized, but care should be taken not to overplay the hand:

After telling the story of the invention, one should tell the story of the defendant’s conduct, typically how defendants came second to the market, how defendants upset the inventors’ plans and hard work, how they reaped the commercial reward without doing any of the original creative work or taking any of the risks plaintiff took to develop the market. If you can establish copying or derivation by defendants, by all means emphasize it at this point, although with a jury you have to be careful not to get too bogged down in factual disputes about copying to the point that the jury begins to think copying is part of your burden of proof.<sup>214</sup>

The accused infringer must present a credible response to charges of and evidence tending to show “copying.” Ignoring it, or denying it when a denial is not credible, is not the recommended way to approach the problem. Denying “copying,”

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<sup>208</sup> See *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007).

<sup>209</sup> *Id.*

<sup>210</sup> 15 U.S.P.Q.2d 1263 (U.S. Int’l. Trade Comm’n 1990).

<sup>211</sup> *Id.* at 1271.

<sup>212</sup> *Id.*

<sup>213</sup> Jack L. Slobodin, *What To do From Getting the Case to Trial: An Overview for the Patent Infringement Trial Lawyer*, 375 PAT. LITIG. 43, 84 (1993).

<sup>214</sup> George R. Badenoch, *Trial of Infringement Issues: How to Prove Infringement and Noninfringement*, in PATENT LITIGATION 1993 at 393, 413 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course, Handbook Ser. No. 375, 1993), available at WL, 375 PLI/Pat 393.

when evidence to the contrary exists, can destroy credibility.<sup>215</sup> If you copied, it is better to admit it, but explain that there is nothing wrong with copying under the right circumstances:

Jurors can be educated that copying and building upon the knowledge of others is the essence of our society. If we did not copy we would not learn. For example, we would not learn language if we did not copy. We would not learn to ride a bicycle or recite poetry if we did not copy. Educational advancement in our society is predicated upon building on the shoulders of others. Supreme Court decisions, like *Sears, Compco, Bonito Boats*, and others recognize the value in taking the knowledge of others as a starting point to build. Indeed the patent system recognizes this. So the argument goes. . . . The point is if you have copied, admit it and move on. Unreasonable denials dilute your effectiveness as an advocate.<sup>216</sup>

Another approach where “copying” is raised is to emphasize that it is the *claims* that must be focused upon to gauge the accused infringer’s alleged infringement: emphasize the defendant’s innocence, the limited scope of the invention, and, if there was a substantial and successful design around effort, emphasize that the design falls outside the claims.<sup>217</sup>

There are also explanations and excuses that may avoid “copying”-based willfulness. In *Micro Motion Inc. v. Exac Corp.*,<sup>218</sup> for example, Micro Motion introduced significant evidence indicating that Exac’s designers had access to Micro Motion’s technology while they were designing Exac’s infringing Coriolis flowmeter.<sup>219</sup> Drs. Young and Dahlin, Exac’s founders and designers, had gained experience with Micro Motion’s C meter and they had obtained copies of Exac patents, including the patent which was reissued into the patent-in-suit.<sup>220</sup> By the end of 1982, the court noted, the doctors had gained experience with Micro Motion’s C meter.<sup>221</sup> In June 1983, Dr. Dahlin obtained information on and drawings of the Micro Motion D meter through a Mr. Bottom.<sup>222</sup> Additionally, Dr. Dahlin received a Micro Motion C meter in August 1983 and a D meter in December 1983 from a Mr. Tanner.<sup>223</sup>

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

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<sup>215</sup> Edmund J. Sease, *Ten Commandments of a Defendant’s Patent Case*, in PATENT LITIGATION 1993 at 603, 618 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course, Handbook Ser. No. 375, 1993), available at WL, 375 PLI/Pat 603.

<sup>216</sup> *Id.*

<sup>217</sup> Badenoch, *supra* note 214, at 430–31 (“[I]t is particularly helpful to separate plaintiff’s own products from the claimed invention if you can, so that nobody’s success can be attributed to the patent. The patent then becomes an unimportant and irrelevant diversion in a commercial business story that has nothing to do with it.”).

<sup>218</sup> 761 F. Supp. 1420 (N.D. Cal. 1991).

<sup>219</sup> *Id.* at 1437.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

Exac . . . introduced evidence that *Drs. Dahlin and Young obtained information on Micro Motion's patents so that they could ensure that the device they developed would not conflict with Micro Motion's patents. This assertion is reasonable given Drs. Young and Dahlin's strong financial interest in developing a patentable product.* At trial, Dr. Young testified to the design differences that he felt distinguished the Exac device from Micro Motion's. Based on the testimony of Dr. Young and Mr. Swanson [Exac's CEO], the Court believes that Exac did not intentionally copy Micro Motion's design.<sup>224</sup>

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

#### CONCLUSION

The curse of "copying" is quite real and powerful, especially where a jury of one's peers is sitting as the trier of fact in patent litigation. Patentees will try to take advantage of this curse much more often given the recent holdings in *KSR* and *In re Seagate*. Lifting the curse requires care and some courage at trial, in view of a precedential framework that is less than favorable to the accused infringer and the pejorative impact the term "copy" or the cry of "copy cat" will likely have on the jury and the court, if supporting evidence can be adduced. In the context of willful infringement, the "objective recklessness" standard, the "totality of the circumstances," and the patentee's clear and convincing evidence burden must always be kept in view, and an accused infringer's good faith established, or vitiated, particularly regarding appropriate opinions of counsel or the lack thereof. With enhanced damages and attorneys' fees, as well as bolstering the nonobviousness of the alleged invention in the balance, knowledge of the law and its uncertainties should help swing the scales in favor of one's client. But be warned that "copying" runs the razor's edge, and will continue to do so for the foreseeable future.

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<sup>224</sup> *Id.* (emphasis added) (citations omitted).