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§ 196:163. Executive summary for clients regarding US patent law and practice

Client Executive Summary on U.S. Patent Law and Practice

§ 1. Introduction

There are sometimes significant variations among the patent laws of various nations. Generally, however, the holder of a patent has the right, for a fixed period of time, to prevent others from making, using, or selling the invention without the consent of the holder of the patent, even if the other party independently discovers the invention. In contrast to other forms of intellectual property—copyrights, trademarks and trade secrets—there is no common law patent right and a patent can only be granted by formal action of the designated governmental authority. In the United States, patents are issued and administered at the federal level by the United States Patent and Trademark Office (“PTO”), which is an agency within the United States Department of Commerce. The individual states do not have any power or authority to issue patents.

The PTO is responsible for granting patents and registering trademarks. The PTO also acts as an advisor to the Executive Branch, particularly the Department of Commerce, and other government agencies on various matters relating to domestic and global aspects of “intellectual property.” In discharging its patent-related duties, the PTO examines applications and grants patents on inventions when applicants are entitled to them; publishes and disseminates patent information; records assignments of patents; maintains search files of domestic and foreign patents; maintains a search room for public use in examining issued patents and records; and supplies copies of patents and official records to the public. In addition, the PTO provides training regarding the requirements of United States patent statutes and regulations and publishes the Manual of Patent Examining Procedure to make the patent review process more transparent. Finally, the PTO maintains a Web site that includes an extensive amount of forms and other information including, for example, an online guide to General Information Concerning Patents, which is an excellent first resource for understanding the United States patent system.

The basis for patents in the United States can be traced directly to the Constitution of the United States, which gives Congress the power to enact laws relating to patents in Article I, section 8 (“Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”). Congress enacted the very first patent law in 1790 and the United States patent laws are currently codified in Title 35, United States Code (referred to herein as the “Patent Act”). In addition to establishing the PTO, these laws serve as the foundation for identifying the subject matter of patent protection in the United States and the conditions that owners of inventions must satisfy in order to obtain and maintain a valid United States patent.

The patent right is an exclusionary right and is usually not dependent upon the patent owner's affirmative use of the invention. In order to obtain these rights, however, the inventor or his or her assignee must file an application with the appropriate governmental authority (e.g., the PTO in the United States) that contains a description of the invention and other items of information designed to demonstrate that the invention meets the legal requirements for patentability. The contents of this application will eventually be published and will be available to enhance the public knowledge during the term of the patent-based exclusivity, even though the public cannot lawfully practice the invention until the patent expires.

Before a company goes to the trouble of adopting proper patent procedures, it is important to evaluate the company's patent risk to determine if the time and resources required for patent procedures should be expended. As a general matter, the companies that will likely be concerned about patent problems are companies that manufacture and sell any type of products or use any sort of industrial processes; any company that does engineering, scientific, or design work or renders any sort of technical services relating to engineering, research, industrial processes, or manufacture of products; and any company that supplies components which are to be utilized by others in products or industrial processes. Obviously, this excludes a large number of businesses. Some companies or individuals, such as those who sell products, fall into a gray area where they might have serious concerns about patents depending upon whether the products they handle are particularly vulnerable to infringement claims. In any event, as companies begin to develop their patent strategies they should carefully consider industry climate, technical sophistication and development difficulties, competition, and the availability of alternative forms of protection.

A patent right is a form of property. The owner can use a patent for a variety of strategic purposes in the course of its business activities. Like any other property right, a patent can be assigned in whole as part of a transfer of assets. A portion of the patentee's rights may also be licensed to others for limited uses. The patent owner may protect the exclusive rights embodied therein by legal actions against infringers who attempt to exploit the invention without the consent of the owner. Patent protection extends only to the borders of the country in which the patent right has been granted. Accordingly, patent owners in the United States generally have no right to prevent persons outside the United States and its possessions from making, using, or selling the invention in a foreign country, unless they have also obtained a patent in the foreign country. If additional protection in other countries is required, consideration must be given to applying for a patent in each of the other countries or regional patent offices. Almost every other country has its own patent laws and regulations and United States patent owners wishing to obtain protection in a particular country must prepare and file an application relating to that country in accordance with the specific local requirements. With respect to inventions made in the United States, the owner of the invention must obtain a license from the Director of the PTO before an application for a patent covering the invention can be filed in a foreign country.

§ 2. Requirements for patentability

In order for an invention to be eligible for patentability under the Patent Act several statutory requirements must be satisfied: the invention must fall within a statutory class of patentable subject matter; the invention must be useful; the invention must be novel and nonobvious; and the application must be made by persons that satisfy the inventorship requirements in the Patent Act. Patents are issued with respect to an "invention," which is defined by the claims initially included in the patent application and eventually allowed if and when the patent is actually issued. Following implementation of the America Invents Act, the Patent Act now follows the common practice among the other industrialized nations of the world of granting a patent to the person who is the "first-to-file" a patent application covering the invention, even if such person was not the first inventor of the subject matter. The requirements for patentability are quite complex and technical and the discussion herein is intended to be a simplified overview of the entire process and the issues associated therewith.

The Patent Act defines the type of subject matter which can be patented; however, it is important to understand that specific interpretation of this section of the statute is left to the courts and that the scope of the subject matter upon which a patent can be granted will change based on the development and evolution of technology and business methods. The most well-known type of patent recognized under the Patent Act is the "utility patent," which is based on the statutory language in the Patent Act that provides for protection of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." In addition, the visual characteristics of an object, such as its configuration, shape or surface ornamentation, may be eligible for design patent protection provided that the design is also new and original. The protection provided by these design patents is for the appearance of the object rather than any functional characteristics. A plant patent may be available for distinct and new varieties of plants that have been asexually reproduced by the inventor, including cultivated sports, mutants, hybrids and newly found seedlings, but not "tuber propagated" plants or plants found in

an uncultivated state.

As mentioned above, the courts play a significant role in the scope of patent rights recognized under the Patent Act. For example, a United States Supreme Court case can be broadly interpreted to hold that anything man made in contrast to things that already exist in nature is eligible for patent protection. Consequently, micro-organisms produced by genetic engineering qualify as patentable subject matter. The Court has also held that software, under certain circumstances, can be afforded patent protection, and the Federal Circuit has held that software inventions embodying business models are protectable by patents, a ruling that had a profound effect for e-commerce. The Supreme Court has not categorically denied the possibility of patent protection for “business methods”; however, business methods that are merely abstract ideas are not patentable and it appears that there must be a demonstration of an inventive use of the algorithm/idea associated with the business method, rather than just a statutory use (e.g., use in an industrial process) in order for patent protection to be granted.

The subject matter of a utility patent must be useful. This requirement is generally easily met by establishing that the invention can be operated in a manner that accomplishes at least one of its intended purposes. It is not necessary that the invention provide any improvement over prior practice. However, it is necessary that the invention be operative, and where a person of ordinary skill would question that an invention operates as asserted by the patent applicant, or as claimed, the applicant may be required to prove operability. In addition, the invention must be capable of being put to present practical use; which means that the utility claimed for the invention cannot be hypothetical or dependent on further research. Finally, patent protection is not available when the intended purpose is immoral, frivolous or mischievous or when the intended purpose is not in some way beneficial to the progress of mankind.

The novelty requirements of the Patent Act are met by applying Section 102, which sets out the various types of disclosures by, or activities of, the inventor or others, occurring before the making of the invention by an applicant or before the filing of a patent application for the invention, which may result in the denial of patent protection for an invention. In some cases, the inventor actually has some degree of control over the occurrence of a particular event, such as the decision to publish information regarding the invention in a domestic or foreign journal or the choice of filing a patent application outside of the United States without making a concurrent filing in the United States. Nonetheless, even in cases where a disqualifying event is caused by the inventor, the statutory bars will operate to deny protection in the United States.

In addition to the concepts of utility and novelty, inventions will only receive patent protection if they are not “obvious ... to a person having ordinary skill in the art to which said subject matter pertains.” The inquiry that will be made in satisfying the nonobviousness requirement will take into account some of the same factors that determine if the invention is sufficiently novel. Specifically, an examination must be made of various types of disclosures regarding the subject matter that may have been made prior to the filing of the patent application in order to determine the “state-of-the-art” at that time. These disclosures are sometimes referred to as the “prior art” and the person of ordinary skill will be presumed to know all of the prior art and be able to skillfully implement all that it teaches or suggests. Any such implementation of the prior art will be considered to be legally “obvious” and thus cannot be the subject of patent protection.

Finally, the general rule is that patent applications can only be filed by, and the initial ownership of an issued patent may only vest in, the person(s) who has/have actually invented the subject matter claimed in the patent application. In those cases where the invention resulted from the work of two or more persons, the application must be jointly made by all of the co-inventors. However, assignees may file and prosecute a patent application, and there are special provisions for circumstances in which an inventor is incapacitated, refuses to cooperate, or cannot be reached. Many inventions that qualify for patent protection are conceived by employees during the course of their employment by a corporation or other business entity. In the U.S., an employer usually has the legal right to have the patent on an employee’s invention assigned to it if the employee was hired to invent, provided that the parties have previously entered into a valid, written assignment-of-inventions agreement satisfying the requirements of applicable state statutes. In the event such an agreement has not been executed by the employee, the employer has only a “shop right,” or royalty-free license, to use the invention, but does not own the patent or has the right to grant licenses with respect thereto.

§ 3. Preparation and filing of patent applications

A fundamental condition to the limited monopoly rights provided to an inventor is the need for the inventor to publicly

disclose the subject matter of the patent with particularity in the patent application. The patent application, which must be filed with and examined by the PTO in the U.S., must contain a full description of the invention and the specific inventive “claims” that one is seeking to patent. The level of detail that must be disclosed in the application must be sufficient to allow one skilled in the art to make and use the invention. The information set out in the application will eventually become available to the public, thereby contributing to the advance of knowledge, even though practice of the invention remains subject to the rights of the patentee. A patent application may be filed and prosecuted by the applicant, a registered attorney, registered agent or other individual authorized to practice before the PTO in patent cases, or the assignee of record of the entire interest in the application.

A patent application in the United States will contain an oath or declaration in which the inventor makes certain allegations that fulfill specific statutory requirements with respect to the invention and acknowledges the inventor’s duty of candor to disclose information material to the examination of the application; a specification including one or more claims defining the scope of the invention, a full written description of the invention and of the manner and process of making and using the invention, a detailed description of the preferred embodiment or embodiments of the invention in sufficient detail to enable any person of ordinary skill in that art to make and use the invention and disclosure of the best mode that is contemplated by the inventor of carrying out the invention; drawings, if necessary to illustrate important features of the invention otherwise discussed in the specification; and the prescribed filing fee. The application must also be signed by the applicant and may also include a power of attorney unless the power is filed separately. A filing date for a patent application is obtained when the specification and drawing (if necessary) are filed in the PTO. The 20 year patent term begins when the complete patent application is filed in the PTO.

Additionally, a provisional application procedure is available for purposes of establishing priority without incurring the immediate expense of preparing a full-blown application. A provisional application will not be examined by the PTO and cannot result in the issuance of a patent; however, it does reserve a place in line for the applicant for up to one year from the date it is filed so that the applicant can decide whether it is worth the expense of filing a nonprovisional application that would have a priority date that is the same as the date that the provisional application was filed. While it is not necessary for a provisional application to include claims as with a complete patent application the applicant must provide disclosures in the provisional application that are sufficiently complete to support the claims that will eventually be asserted in the nonprovisional application. Although filing of a provisional application is a relatively straightforward and inexpensive procedure, it can contain hidden dangers and it is strongly advised that an attorney be consulted prior to the filing of a provisional application.

§ 4. Review and examination of patent applications

After filing, a patent application is classified by the PTO in a specific class and subclass according to the most comprehensive claim and is assigned to an examining group within the PTO having particular knowledge regarding the subject matter covered by the application. The rules for the examination of a patent application are prescribed in the PTO’s Manual of Patent Examining Procedure (“MPEP”), which is available on the PTO Web site. The general rule followed by the PTO is that patent applications will be examined in the order determined by reference to their effective U.S. filing date and, in general, the application will remain in limbo for a substantial period of time before being acted upon by a patent examiner. In some instances, patent applications may be acted upon more quickly by the PTO pursuant to “Priority Examination” or other “accelerated examination” procedures. During the entire pendency period of the patent application the inventor may place the words “patent pending” on the invention. Legal protection for the invention, however, is obtained only when the patent actually issues.

Unless a statutory exclusion applies, a patent application will be electronically published on the PTO’s Internet site 18 months after the effective filing date of the application. Since publication of applications provides notice of the claimed rights to potential infringers, an inventor may now be entitled to a reasonable royalty for infringing uses that occur between the application date and the date the patent is actually issued. After an application is published, members of the public—most likely, a competitor or someone else familiar with the patented invention’s field—may realize they have information relevant to a pending application. The relevant information may include prior art that would prohibit the pending application from issuing as a patent. The Patent Act allows third parties to make statements concerning the relevance of the patents, patent applications, and other printed publications that they bring to the PTO’s attention.

When the patent application is ready for examination, the examiner carefully reads the entire patent application and determines whether the application meets the appropriate statutory requirements concerning the description, best mode, and disclosure. In addition, the examiner conducts a “thorough investigation of the available prior art relating to the subject matter of the claimed invention.” The patent examiner also determines whether the invention is patentable by comparing the claims with the prior art located in the search and disclosed by the applicant and makes a determination regarding the sufficiency of the specification in light of the formal statutory requirements as to disclosure. While the examiner may allow the application immediately to become a patent, the more likely result of the initial examination is that the some or all of the claims will be rejected and the examiner will raise objections to the specification and drawings. An objection deals with problems relating to form, while a rejection deals with substantive issues. For example, in the event that the examiner makes a determination that the invention is not sufficiently distinct from the prior art to qualify for patent protection, the applicant will be advised that the application has been “rejected.” On the other hand, if the examiner finds fault with the application itself, the examiner will “object” to the application and will advise the applicant of the perceived deficiencies which may have been noted in the application. An explanation of any problems will be set out in an Office Action which, like all correspondence between the PTO and the inventor (applicant), is directed to the applicant, agent or attorney as designated in the oath or declaration.

It should be of solace to the inventor to know that most patent applications will receive some form of rejection in the first Office Action. This rejection should not be considered by the inventor as a complete rejection of the invention. In many instances, sufficient persistence together with good reasons supported by adequate persuasion may remove the initial rejection. In the patent system, removal of the rejection or objection leads to an allowance of the claims. If any doubt as to patentability exists, the examiner will surely render a rejection in the first Office Action in order to receive from the inventor a response which specifically points out where the examiner has either misconstrued or misapplied the references in the rejection of the claims.

Upon receipt of the initial Office Action, the applicant may amend the claims to further distinguish them from the prior art references and to overcome any formal rejections. The response to the first Office Action includes not only a detailed rebuttal of the rejection but, in some instances, if the examiner is correct in the rejection of the claims, a modification or amendment of the claims in order to overcome the rejection. These amendments to the claims will be considered by the examiner and must be entered into the application as long as they do not contain new matter (that is, material which does not have a basis within the original specification). Ordinarily, the applicant is given three months for responding to an Office Action.

Upon receipt of the response from the applicant, the examiner will reconsider the initial rejections and objections, and in some instances, conduct a further search of the prior art based upon the amendments to the claims. After taking into account the applicant’s arguments and amendments in response to the initial rejections and objections the examiner may be convinced that amended application is either ready for allowance or sufficiently close to allowance that any remaining issues can be resolved through discussions with the applicant that will result in the issuance of an Examiner’s Amendment on behalf of the applicant that incorporates the mutual agreement of the parties. Either way the examiner can move forward with issuing a Notice of Allowance that memorializes the intent of the PTO to grant a patent based on the information in the amended application after payment of a final fee. If, however, the changes made by the applicant in response to the first Office Action are insufficient in the eyes of the examiner a second Office Action will be issued that will include all or most of the initial rejections and objections and may even include additional grounds for rejection that make it even more problematic that the applicant will be successful in obtaining allowance. A second Office Action on the merits is generally the final word from the examiner and the PTO unless a new ground of rejection is introduced that is neither necessitated by the applicant’s amendment of the claims nor based on information that was submitted in an information disclosure statement.

If the correspondence between the applicant and the examiner does not resolve all the stated objections, the examiner will issue a final rejection of the claims. This final rejection still does not mean that the invention is unpatentable. It may mean that there are still further arguments to be made by the inventor or it may require some change to the claims, which will render the claims allowable. The inventor, through his or her attorney or agent, has an opportunity to submit to the PTO a further response including an amendment to the claims. The amendment to the claims after a final rejection will only be entered into the application if it places the application in condition for allowance or places the rejected claims in better form for consideration on appeal. The examiner is not required to enter the amendment in response to a final rejection. If claims still remain rejected, the inventor’s recourse consists of filing a continuing patent application in order to continue prosecution before the PTO or filing an appeal of the rejected claims to the Patent Trial and Appeal Board (the “Board”).

In most instances, examiners are extremely reasonable and, if sufficient persuasive arguments are presented by the applicant through his or her attorney, the examiner will make a just and appropriate determination as to the patentability of the invention based upon the prior art before the examiner. It is preferable to receive an allowance of claims defining the invention in broad terms. However, in cases where these broad claims are truly unpatentable, more specific claims may be found allowable and, thereby, result in the issuance of a patent. Although a patent containing more specific claims (sometimes referred to as picture claims) does not provide the legal protection afforded by claims broader in scope, the inventor does obtain a U.S. patent for the invention.

If all attempts to persuade the examiner are unsuccessful and the claims have been twice or finally rejected, an applicant has the right to appeal the decision made by the examiner to the Board. In fact, if a final rejection is not withdrawn an appeal must be filed to the Board or the application will become abandoned. In order to appeal, an applicant must file an appeal brief, including arguments and citations to legal authority. The examiner then must file an “examiner’s answer” responding to the arguments presented. Finally, the applicant may file a reply brief to any new arguments raised in the examiner’s answer. If an oral hearing is requested in the appeal brief, the hearing will be conducted before the Board. At the hearing the applicant and the patent examiner may present oral arguments. The applicant may also present a demonstration of the improvement achieved by the invention. This is sometimes quite helpful in convincing the Board to reverse the examiner’s final rejection. If the applicant is dissatisfied with the Board’s decision, the applicant may appeal the decision to the U.S. Court of Appeals for the Federal Circuit or seek a remedy by a civil action against the Director of the Patent Office in the U.S. District Court for the District of Columbia. If the applicant wishes to present new evidence, an appeal to the district court is necessary because this enables a trial *de novo* of the case.

§ 5. Reexamination of issued patents

After a patent has been issued, any person, including the patentee, may request reexamination of the patent by the PTO in order to verify its validity. The PTO has several types of procedures to reexamine issued patents. For example, “ex parte reexamination” occurs upon a request from a third party to cancel an issued patent based on newly discovered prior art that invalidates the claims in an issued patent. A substantial new question of patentability must be raised and no interaction between the requester and the examiner is allowed after the request for reexamination has been filed. Inter partes review is available when a requester establishes that their challenge has a “reasonable likelihood of success” with respect to at least one claim in the issued patent. While the threshold for review is higher than for an ex parte reexamination, the requester will be allowed to participate in the reexamination process. This process is supposed to be completed within 12 months from a decision to grant a petition to review a patent. In addition, there is a post-grant opposition procedure that can be utilized during the first nine months after the grant of a patent or issue of a reissue patent and which permits a challenge on any ground related to invalidity. The intent of the post-grant review process is to enable early challenges to patents, while still protecting the rights of inventors and patent owners against new patent challenges unbounded in time and scope.

§ 6. Term and maintenance of patent rights

In general, the term of a utility patent begins on the date of grant or issuance and ends, if all maintenance fees are paid, 20 years from the filing date for the application for the patent; however, for patents that were in force on June 8, 1995, or that issued on an application that had been filed prior to that date, the term is the greater of 20 years from such filing or 17 years from grant of the patent. If a provisional patent application has been filed to establish a priority date, the 20-year term will still nonetheless commence on the filing date of the completed application. As a rule, the protection period cannot be extended; however, patents on human drug products, medical devices, food additives, and color additives, which may be subject to regulatory review before marketing, may be extended for up to five years beyond the initial statutory period, if certain conditions are met, to compensate the inventor for that period of review. The term may also be extended for a maximum of five years for delays in the issuance of the patent such as those due to interferences, secrecy orders, and/or successful appeals to the Board or the federal courts and regulatory delays. Patent protection is conditioned on payment of the required maintenance fees; and, if the appropriate maintenance fees are not paid, United States patents expire at the end of either four, eight or 12 years from the issuance date. In any case, at the end of the patent term, the exclusionary right of the owner expires and rights to use the invention pass into the public domain.

§ 7. Strategic uses of patent rights

The most obvious strategic use of an issued patent is proactive and offensive commercialization of the invention covered by the patent through direct sales activities; however, patent owners may also take advantage of a variety of other possible strategic uses of their patent rights:

- In those cases where the holder does not have the financing and production skills to use the invention itself, the patent can be used to induce investors to contribute the capital required for the commercial exploitation of the invention. Investors can derive some comfort that commercialization of the invention can proceed, at least for some limited period of time, without legal competition in the country where a patent has been issued.
- Obviously, in those cases where the holder does have sufficient functional capabilities (e.g., production, financing, and distribution) to commercialize the invention, an aggressive program of patent enforcement can be used to discourage competitors and increase and maintain market share. While this is particularly important for smaller companies with niche markets that they wish to protect against larger companies, larger companies are also well positioned to expend the time and cash resources necessary to aggressively defend a patent position.
- Companies may decide to accumulate large patent portfolios to protect themselves from patent lawsuits filed by competitors. Owning a large number of patents allows the company to enter into cross-licensing arrangements, rather than becoming involved in fierce litigation in industries where there are a number of potentially overlapping claims.
- If the holder is unwilling or unable to use, make, or sell the underlying invention itself, it can license the right to use the invention to others. A license is a form of “exception to the monopoly rights inherent in the patent grant, in return for a stream of royalty income based in some way on the licensee’s use of the patent rights. Both individuals and large companies license their patents for revenue, sometimes to recoup some of the expenses associated with research and development.
- Patent licenses can be used as a contribution by the holder to a new business enterprise, such as a domestic or foreign joint venture. The ability of the owner to contribute patent rights in such situations and, in some cases, to receive royalties from the use of the patent, will depend upon local laws relating to permissible forms of investment and transfers of technology.

§ 8. Infringement

In general, the owner of a patent has the right within the United States, its territories, and its possessions to prevent others from making, using, offering for sale, selling, or importing the protected invention or, in the case where the patent covers a process, to prevent others from using the process. Further, the patent owner can prevent others from using, offering for sale, selling, or importing the product obtained directly from the patented process. A patent owner has the right to commence legal proceedings against persons who infringe upon the owner’s exclusive right to make, use, or sell the invention claimed in the patent. The patent owner may also have a cause of action against anyone who induces another to infringe the rights of the patent owner or contributes to that infringement. Patent owners may also have rights under their patents to obtain reasonable royalties from others who made, used, offered to sell, sold or imported the invention claimed in the application on which the patent was granted prior to the grant.

Suits for patent infringement may be commenced by following the rules of procedure of the federal courts and currently may be brought in the judicial district where the defendant resides or where the defendant infringes and has a regular and established place of business. The United States Court of Appeals for the Federal Circuit (“Federal Circuit”), which was established by the Congress in 1982, has authority to hear all appeals from any district court with respect to cases in which the original action involved a claim arising under the United States patent laws. While patent-related claims can also be heard by other appellate courts, the Federal Circuit has become the venue of preference due to the expertise and experience that has been developed by the panel in the patent area.

A defendant may defend a patent infringement action by denying that the acts in question constituted infringement and by attempting to demonstrate noninfringement. Alternatively, the defendant may raise several affirmative defenses based either upon the underlying invalidity of the patent in suit or specified conduct by the patentee that, under the law, mitigates against enforcement of the patent monopoly. For example, a patentee may be prevented from enforcing its patent rights if it is found that the patentee engaged in inequitable conduct while applying for the patent, such as by affirmative misrepresentation of a material fact or failure to disclose material information (e.g., failing to disclose all known prior art to the examiner). Inequitable conduct requires proof of materiality as well as intent to deceive by clear and convincing evidence. In addition, a

patentee who uses the patent in an improper manner may lose the ability to enforce the patent under the doctrine of “patent misuse.” Examples of misuse include using the patent in a manner intended to extend the permitted monopoly beyond the scope of the original claims; using patent license provisions to violate antitrust law; and inequitable conduct in licensing or threatening suit for patent infringement. In appropriate instances a defendant may assert the so-called “prior use rights” defense.

A patentee may obtain preliminary and permanent injunctive relief with respect to an act of infringement. If a patentee prevails in a suit for infringement, he or she will be entitled to damages in an amount that is deemed adequate to compensate him or her for the infringement but in no event less than a reasonable royalty for the use of the invention by the infringer, together with interest and costs as fixed by the court. Additionally, an infringer who is shown, by “clear and convincing” evidence, to have intentionally, or “willfully,” infringed an issued patent may be liable for treble damages to the patentee. It should be noted, however, that monetary damages for infringement cannot be recovered unless and until the infringer has been put on notice about the infringement and notice may be provided by actually notifying the infringer, filing an action for infringement, or marking the product (or its packaging where marking the product is impractical) with the word “patent” or the abbreviation “pat.,” together with the patent number. The measure of damages in an infringement action will be determined with reference to the lost profits of the patentee, which may take three different forms: (1) lost profits from potential sales that were lost to actual sales made by the infringer; (2) lost profits from price reductions which the patentee was forced to make in response to competition from the infringer; and (3) lost profits from any projected lost sales, including the inability of the patentee to raise its prices due to competition from the infringer and a reduction in the rate of the patentee’s sales growth after the initial infringement.