

# SHOULD A PATENT INFRINGEMENT ACTION BE STAYED PENDING RESOLUTION OF AN INTERFERENCE INVOLVING THE PATENT ASSERTED IN THE INFRINGEMENT ACTION?<sup>1</sup>

By

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## Introduction

There are now a great many opinions dealing with the subject of when a patent infringement action should be stayed pending resolution of a reexamination (ex parte or inter partes) involving the patent asserted in the infringement action.<sup>3</sup> There are (surprisingly, I think) many fewer opinions dealing with the subject of when a patent infringement action should be stayed pending resolution of an interference involving the patent asserted in the infringement action.<sup>4</sup>

In this article I will summarize (and criticize) a number of opinions involving the latter issue in the context of a patent infringement action or a patent-patent interference between two companies that are the real parties in interest in the interference (i.e., the owners of the two cases in interference).<sup>5</sup> After that, I will suggest various lessons to be learned from those opinions.

## **Research Corp. v. Radio Corp. of America**

Research Corp. v. Radio Corp. of America, 181 F. Supp. 709, 124 USPQ 401 (D. Del. 1960)(Wright, Ch. J.), is an early opinion granting a motion to stay, and it was authored by a judge who was extremely well regarded by the patent bar. Moreover, I find its logic very persuasive.

Of course, the facts were very favorable for the movant. The patent-application interference had been declared three years prior to commencement of the infringement action. Moreover, the infringement action had not proceeded past the pleading stages.<sup>6</sup> Nevertheless, I

believe that Judge Wright's logic should carry the day in far closer cases:

Predominating in this determination [i.e., the determination whether or not to grant the motion to stay] are policy considerations. There is no sound reason why litigation between the same parties and embracing common issues [should] be prosecuted simultaneously. Not only is an economic hardship imposed upon the parties, but litigation in two tribunals at the same time is a luxury not compatible with the efficient administration of justice. Different circumstances might warrant the invocation of policy considerations other than those indicated, compelling a different determination. No such case has been presented here.

The fact that the Patent Office is an administrative body is not barrier to a stay. [Discussion omitted.] \*\*\*

Similarly, no merit is found in plaintiff's assertion [this was a declaratory judgment action, so the plaintiff was the alleged infringer] that the Federal Rules of Civil Procedure are more accommodating to the trial of the cause than are the rules obtaining in the Patent Office. The unsuccessful litigant in a Patent Office action is afforded sufficient appellate safeguards to discount any purported claim that the procedures in the Patent Office are not conducive to a searching and complete probe. [Of course, the procedures in interferences are now much more court-like than they were in Judge Wright's day.]

Plaintiff's contention, that "the decision of the Patent Office even on this issue [priority] would not be res judicata in this court", completely ignores the fact that an adverse decision to plaintiff in the Patent Office would result in cancellation of its patent, with respect to the contested claims, if neither an appeal be prosecuted nor appropriate review be sought [i.e., in a 35 USC 146 action]. Under these circumstances, the determination of the Patent Office in the interference may very well be crucial. Moreover, decisions of the Patent Office, pertaining to priority of invention, are not without significance in subsequent litigation of the issue. The mere fact that an administrative determination is not accorded absolute effect does not require that administrative action be bypassed.<sup>7</sup>

**Childers Foods, Inc. v. Rockingham Poultry Marketing Co-Op, Inc.**

In Childers Foods, Inc. v. Rockingham Poultry Marketing Co-Op, Inc., 203 F. Supp. 794, 133 USPQ 648 (W.D. Va. 1962), the board had declared the interference (Churchill v. Childress)

on June 12, 1961, and the patent infringement action was filed on June 21, 1961. The Churchill patent application involved in the interference was actually owned by the manufacturer of the accused device (a company that was not formally a party to the patent infringement action), but the manufacturer had “assumed the complete defense of...[the] infringement action...,”<sup>8</sup> and the court treated the matter as if the same two parties were involved in the infringement action and in the interference.

On October 25, 1961, Childers (the patentee) filed a motion to stay the interference pending a determination of the infringement action. That motion was denied by an interference examiner on the ground that 35 USC 135 “imposed upon the Board of Patent Interferences ‘the duty of determining priority of invention where an application for patent is involved’.”<sup>9</sup> The interference examiner’s decision was affirmed by the Commissioner on the grounds “that the issue in the Interference Proceeding and in this action was not necessarily the same, and that neither Churchill nor his assignee were parties to...[the infringement action].”<sup>10</sup> The interference thereafter went forward through the taking of testimony and the filing of briefs.

Then on March 26, 1962, the defendants (including the owner of the application in interference) filed a motion to stay the infringement action pending a determination of the interference. That motion was granted in the opinion under consideration.

According to the court, “it now definitely appears that[,] whatever may transpire in this action, the Interference Proceeding will be prosecuted to its conclusion in the Patent Office.”<sup>11</sup> It then stated that “It is true that the issues and parties in this action and in the Interference Proceeding are not identical.”<sup>12</sup> However, the court clearly did not understand what “the issues...in the Interference Proceeding” were, for it continued: “As I understand it, the sole question in the Interference Proceeding is priority of invention, that is, who was the first inventor..., Churchill or Childers?”<sup>13</sup> That understanding was just plain wrong because, even

back then, interferences could determine issues other than priority under the doctrine of “ancillarity to priority.”

Moreover, the court clearly did not understand either that the decision of the board would be entitled to what we now call claim preclusion effect or that a decision of the board in favor of Churchill would have resulted in cancellation of all of the claims in the Childers patent. Instead, it wrote that:

Unless Childers was the first inventor..., he cannot prevail in this action. If in the Interference Proceedings, Childers should be held to be the first inventor, his contentions in this action are greatly strengthened; if Churchill should be held to be the first inventor, Childers’ contentions would be correspondingly weakened.<sup>14</sup>

Despite these infelicities in its opinion, I believe that the court’s ultimate rationale, based largely on Judge Wright’s opinion in Research Corp., is very nearly sound:

the proper action to be taken on this motion seems to me to depend upon good judgment or sound discretion, rather than a rule of law. Certainly, it seems wasteful and extravagant for litigants to be required to proceed simultaneously in two different forums, where the issues, while not identical, are so similar. This court has no control over the Interference Proceeding, and it is apparent that this proceeding will be prosecuted to its conclusion. It is conceded by counsel that, if this action proceed to its conclusion, before a final decision in the Interference Proceeding, the finding of this court on the question of who was the first inventor, will have little, if any, influence upon the conclusion to be reached in the Interference Proceeding.<sup>[15]</sup>

The determination of priority of invention, would seem to be a matter peculiarly within the expertise of the Patent Office. The conclusion reached on this question in the Interference Proceeding, while not binding on this court, would certainly be most helpful.<sup>16</sup>

**General Foods Corp. v. Struthers Scientific & International Corp.**

In General Foods Corp. v. Struthers Scientific & International Corp., 309 F. Supp. 161, 164 USPQ 609 (D. Del. 1970), in denying a motion for a stay of an infringement action pending the outcome of a related interference, the court first acknowledged and considered “the well-

reasoned opinion of Chief Judge Wright in Research Corporation...”<sup>17</sup> granting a stay.

However, it then distinguished that opinion on the following grounds:

First, unlike the *RCA* case, the interferences here were declared long after Struthers instituted the Texas action on the ‘007 patent and long after General Foods was permitted to amend its complaint in the Delaware action to incorporate the claims relating to patent ‘007, and after extensive and expensive discovery proceedings have been conducted. Rather than reduce economic hardship, the stay would tend to intensify such hardship.

Second, the motion for a stay here relates only to a portion of the pending litigation [i.e., to fewer than all of the patents involved in the infringement litigation] rather than to the full range of the dispute between the parties as in *RCA*. The factual background relating to the other two patents and the several claims of unfair competition are so intertwined that a stay of only a part of the litigation would not materially reduce the discovery and expenses of the other phases of the litigation not affected by the stay.<sup>[18]</sup>

Third, the interference proceedings will not dispose of all the issues in the pending litigation[,] <sup>19</sup> so that two tribunals would be involved at the same time with related matters in any event.<sup>20</sup>

**American Telephone & Telegraph Co. v. Milgo Electronic Corp.**

American Telephone & Telegraph Co. v. Milgo Electronic Corp., 416 F. Supp. 951, 193 USPQ 242 (S.D.N.Y. 1976), involved a motion to stay a 35 USC 291 patent-patent interference in a district court in favor of a patent-reissue application interference in the Patent Office. The patent-patent interference involved the ‘977 patent, and the patent-reissue application interference involved an application to reissue the ‘977 patent. The patent-reissue application interference had been declared on February 18, 1975. According to the opinion, the patent-patent interference was filed “[a]pproximately one month”<sup>21</sup> after another action was filed on January 23, 1976—which means that the patent-reissue application had been going on for approximately a year when the patent-patent interference was commenced.

The court granted the motion for a stay, reasoning as follows:

It is undisputed that the primary issue before the court in this § 291 action – that of priority of invention – is also before the Patent Office in the interference proceeding. Plaintiffs had a choice of two forums in which to adjudicate this issue, and they – over two years ago [that is, when one of them filed the reissue application and a request for an interference between the reissue application and the ‘977 patent] – elected the Patent Office. Whereas the proceeding before that agency has progressed to the testimony stage,<sup>[22]</sup> this judicial § 291 action has just been commenced. The parties are in agreement that the Patent Office interference will be completed within a year, whereas the instant action cannot reasonably be expected to be resolved in such a short time. More importantly, however, the simultaneous maintenance of two proceedings is an unnecessary duplication of judicial and agency effort, not to mention expensive and time-consuming for the litigants. \* \* \*

In light of the peculiar expertise of the Patent Office, we anticipate that that agency’s adjudication of the priority issue can only aid the court in its ultimate determination of this lawsuit. Since plaintiffs have demonstrated no prejudice that may befall them as a result of a stay [footnote citing General Foods and a 1925 district court opinion omitted], the § 291 claim is stayed pending termination of the Patent Office proceeding.<sup>23</sup>

### **Amersham International v. Corning Glass Works**

In Amersham International v. Corning Glass Works, 168 FRD 71, 228 USPQ 782 (D. Mass. 1985), the court also denied a motion for a stay pending the outcome of an interference. Again, the timing of the commencement of the infringement litigation and the declaration of the interference (and how far along the infringement action had gotten before the interference was declared) were critical. Although the defendant in the infringement action had requested the interference promptly after commencement of the infringement litigation, the interference wasn’t declared until long after commencement of the infringement litigation. Moreover, the court relied on the fact that the recently declared interference had been declared at the ex parte behest of the defendant in the infringement action:

In the case *sub judice*, plaintiff [i.e., the patentee] is in the clear danger of being damaged by untoward delay. Although the U.S.

Patent Office has granted an interference, the interference was approved on the basis of defendant's *ex parte* petition. Now the interference is first subject to plaintiff's challenges. Even if the interference survives the initial challenge, the process is likely to cover a protracted period.<sup>3</sup> Plaintiff might therefore be delayed many years before it is allowed to resume its cause of action.<sup>24</sup>

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<sup>3</sup> The Patent Office took over 1 ½ years on defendant's petition before declaring it would grant an interference proceeding. It is unclear how long the remaining process will take, notwithstanding new rules promulgated by the Patent Office.

**NL Chemicals, Inc. v. Southern Clay Products, Inc.**

NL Chemicals, Inc. v. Southern Clay Products, Inc., 14 USPQ2d 1561 (D.C.D.C. 1989), involved, not a simultaneous infringement action and an interference, but a simultaneous 35 USC 291 patent-patent interference in a district court and a patent-application interference before the BPAI between the same two real parties in interest. On September 9, 1988, ECCA (Southern Clay Products was a wholly owned subsidiary of ECCA's) filed two suggestions of interferences (referred to by the court as "petitions...for declarations of interferences"<sup>25</sup>) asking for interferences between NL's '402 patent and two CIP applications owned by ECCA. The patent-patent interference, filed on September 16, 1988, was between NL's '402 patent and ECCA's '842 patent. A key fact was that the two CIP applications that were the subject of ECCA's suggestions of interference claimed the benefit of the same priority date as was claimed in ECCA's '842 patent.

On January 27, 1989, the court stayed the patent-patent interference until March 27, 1989 "to await the PTO's action on ECCA's two petitions for declaration of interference."<sup>26</sup> On March 9, 1989, the PTO declared one of the two requested patent-application interferences and stayed prosecution of ECCA's other CIP application pending resolution of the interference.<sup>27</sup>

ECCA then moved to stay the patent-patent interference pending the outcome of the patent-application interference. The court granted that motion, saying:

the PTO interference proceeding encompasses all issues presented in this suit. \* \* \* Rather than duplicate the efforts of the PTO, the most prudent course to follow is to permit the PTO, which possesses substantially more technical expertise than this Court in these areas, to proceed to a final decision in...[the patent-application interference]. Should NL be dissatisfied with the result of that interference proceeding, nothing would preclude it from seeking de novo review before this Court under 35 U.S.C. § 146.<sup>28</sup>

Of course, one is left to wonder what the court thought that the impact of the decision of the board (if no review was sought under 35 USC 141 or 35 USC 146) or the decision of the Federal Circuit or the district court (if court review was sought—and it must be borne in mind that a 35 USC 146 action would not necessarily be filed in the same district court that was handling the patent-patent interference!) would have had on the stayed patent-patent interference.

**Bayer AG v. Novartis Crop Protection, Inc.**

In Bayer AG v. Novartis Crop Protection, Inc., 55 USPQ2d 1509 (M.D. La. 2000), Bayer had sued Novartis for infringement of the '146 patent in 1998.<sup>29</sup> On April 7, 2000, the board declared an interference between the '146 patent and an application owned by Novartis. Novartis then promptly moved for a stay of the infringement action pending the outcome of the interference.

The court's opinion starts off with a classic misunderstanding of just what most interferences (including this one) are all about.<sup>30</sup> According to the court, "The purpose of the interference is to determine whether Novartis or Bayer was the first to invent...[the subject matter at issue in the interference], and whether Novartis, rather than Bayer, rightfully should own the patent on...[the subject matter at issue in the interference]."<sup>31</sup> However, things got much better after that:

A motion to stay is addressed to the sound discretion of the court, and the denial or grant of a stay is predicated upon the inherent power of a court to control its Docket. \*\*\* The determination of

whether to grant a stay calls for the exercise of judgment which must weigh competing interests and maintain an even balance. \*\*\* The court should consider the possible damage, hardship and inequities to the parties to the lawsuit and the relationship of the stay to the fulfillment of judicial objectives of simplification of the issues in question and trial of the case. \* \* \*

The situation presented in this case is analogous to the situation present in *Childers Foods, Inc. v. Rockingham Poultry Marketing Co-Op, Inc.*, 203 F. Supp. 794, 133 U.S.P.Q. 648[,] 650 (W.D. Va. 1962). In *Childers*, defendant moved to stay an action for patent infringement pending the outcome of an interference proceeding between the parties. The issue to be addressed in the Interference was the priority of invention, namely who was the first inventor of the...[subject matter in dispute]. The Court stated, “it seems wasteful and extravagant for litigants to be required to proceed simultaneously in two different forums, where the issues, while not identical, are so similar.” *Id.* The Court further reasoned that the determination of priority of invention, would be a matter peculiarly within the expertise of the Patent Office. Thus, the conclusion reached by the Patent Office[,] while not being binding on the Court[,] would certainly be helpful. As such, the Court stayed the court proceeding pending the outcome of the Interference. *Id.* The same rationale can be applied to the case at hand.

This Court finds that there is no reason why litigation between the same parties, embracing common issues, should be prosecuted simultaneously. To do so would create an economic hardship on the parties and also result in the ineffective [sic; inefficient?] administration of justice. It seems more efficient to allow the administrative study of the patent to conclude before this matter moves toward trial. Additionally, this Court agrees with the Court in *Childers* that a ruling by the Patent Office, with the expertise possessed in the sorts of issues to be addressed in this case, would be helpful in making a determination of this cause on the merits. Moreover, if the patent held by Bayer is held to be invalid in the Interference proceeding, this case may be disposed of in its entirety.

This Court does not believe that a stay would create any tactical advantage or undue hardship on any of the parties to this litigation. This lawsuit was filed in 1998 and sat dormant for months, it was only once this Court required the parties to select a trial date in the year 2000 that the parties began to move the proceedings. The APJ has decided to “fast track” the Interference proceeding and has estimated a conclusion of the matter in March 2001.<sup>[32]</sup> This Court does not believe that a delay of five months is unreasonable

weighed against the benefit of staying this action pending the conclusion of the Interference proceeding. \*\*\*<sup>33</sup>

**Wireless Spectrum Technologies, Inc. v. Motorola Corp.**

In Wireless Spectrum Technologies, Inc. v. Motorola Corp., 57 USPQ2d 1662 (N.D. Ill. 2001), the patent infringement action was filed on February 14, 2000. After the lawsuit was filed,<sup>34</sup> Motorola asked the PTO “to declare an interference and adjudicate the priority of invention between...[Wireless’s] ‘453 patent and a pending Motorola application...”<sup>35</sup> According to the opinion, “Both parties agreed to delay the progress of this action until the PTO decided whether to institute an interference.”<sup>36</sup> The interference was declared on August 11, 2000—only some six months after Motorola asked for it.<sup>37</sup> Motorola then asked the Court to stay the infringement action pending the outcome of the interference.

The court granted the stay, reasoning as follows:

The Court finds that the equities favor a stay. The Court agrees with Motorola that a stay will further the interest of judicial economy and the conservation of the parties’ resources. The Interference involves the validity of the ‘453 Patent,<sup>[38]</sup> the same issue currently before this Court. If the PTO with its unique expertise determines that all or some of the ‘453 Patent’s claims are invalid, that determination will either dispose of this case entirely or at least aid the Court in adjudicating this case. \*\*\* Under these circumstances, there is no need for either party to spend time and money litigating both here and in front of the PTO at the same time. \*\*\*<sup>39</sup>

Perhaps Wireless’s best argument was that its patent might expire before the PTO had decided the interference, depriving it of the ability to obtain an injunction against Motorola. Its problem was that its patent would expire in April 2005, and Motorola’s motion was decided in June 2001. However, the court dealt with that argument as follows:

Although the Court is sensitive to Wireless’s concern that the Interference may impact its ability to obtain a permanent injunction, Wireless has failed to show either that the Interference is likely to outlast the ‘453 Patent<sup>[40]</sup> or that damages will not

adequately remedy Motorola's alleged infringement in the event an injunction is unavailable. Further, Wireless agreed to suspend the onset of discovery in this action until the PTO determined whether it would declare an Interference. Accordingly, this case has not progressed beyond the initial pleadings stage, and there is no indication that a stay would create any tactical advantage or undue hardship for the parties. \*\*\*<sup>41</sup>

## **Comments**

In many respects, motions for stays of infringement actions pending the outcome of reexamination proceedings and motions for stays of infringement actions pending the outcome of interferences are directly comparable. Accordingly a movant for a stay of an infringement action pending the outcome of an interference should always consult (and, where appropriate, rely on or distinguish) precedent involving motions for stays of infringement action pending the outcome of reexamination proceedings. However, in some respects (discussed below), they are fundamentally different.

(1) The key difference between motions for stays of infringement actions pending the outcome of either ex parte or inter partes reexaminations and motions for stays of infringement actions pending the outcome of interferences is that reexaminations are slow, slow, slow and interferences are fast—at least during the administrative phase, and court review is sought of only a small percentage of board decisions. That point should be hammered home by any movant for a stay of infringement litigation pending the outcome of an interference.

(2) Another important difference is that both ex parte and inter partes reexaminations are handled at least initially by line examiners, whereas interferences are handled by administrative patent judges in a special section of the BPAI devoted to handling interferences. (The decisions of the line examiners are, of course, subject to appellate review by the BPAI, but that appellate review is not conducted by the same APJs who handle interferences.)

(3) The notion that interferences are “priority contests” is pervasive among the

Federal judiciary. That notion cuts against granting stays of infringement litigation pending the outcome of interferences, since it suggests that the decisions in the interferences will have far less effect in the infringement litigation than it will actually have. Accordingly, any movant for a stay of an infringement action pending the outcome of an interference should offer proof (by the testimony of a member of the interference bar, the testimony of a retired APJ from the Interference Division of the BPAI, or a statistical summary of the bases for the BPAI's judgments in, say, its last 100 cases) that the overwhelming majority of interferences are decided on bases other than priority.

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<sup>3</sup> See generally the blog entitled "Patents Post Grant" maintained by my partners Stephen Kunin, Scott McKeown, and Todd Baker. That blog has discussed a host of opinions involving this issue.

<sup>4</sup> However, there are such opinions going way, way back. In the interests of keeping this article to the length preferred by the editors of this journal, I have rather arbitrarily limited my discussion to the more recent opinions.

<sup>5</sup> There is a variant on this situation: Where the patent infringement action is between two companies and the real parties in interest in the interference are one of those two companies and a third company. I represent the third company (i.e., the company not involved in the patent

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infringement action) in Allvoice Developments US, LLC v. Microsoft Corp., No. 6:09-cv-366 in the Eastern District of Texas. Since both the patent infringement action and the interference are on-going, I will not comment on that situation—except to invite the reader’s attention to the opinion of Magistrate Judge Love which is Document 79.

<sup>6</sup> One fact that cut against the movant was that the interference involved only 12 of the 29 claims in the patent. See General Foods, discussed infra.

<sup>7</sup> 181 F. Supp. at 711-12, 124 USPQ at 403, interpolation of “priority” by the court; all other interpolations by the author; footnotes omitted.

<sup>8</sup> 203 F. Supp. at 795, 133 USPQ at 649.

<sup>9</sup> 203 F. Supp. at 796, 133 USPQ at 649.

<sup>10</sup> 203 F. Supp. at 796, 133 USPQ at 649. The procedure recounted in the court’s opinion is, of course, totally different than the procedure today.

<sup>11</sup> 203 F. Supp. at 796, 133 USPQ at 649.

<sup>12</sup> 203 F. Supp. at 796, 133 USPQ at 649.

<sup>13</sup> 203 F. Supp. at 796, 133 USPQ at 649.

<sup>14</sup> 203 F. Supp. at 796, 133 USPQ at 649.

<sup>15</sup> On this point, I disagree with the counsel referred to by the court. Just as the court is “bound” by the results of the interference in the sense that the parties before it are bound by the results of the interference, so too the BPAI is bound by the results of a district court litigation in the sense that the parties before it are bound by the results of the district court litigation. The decisions of each of those entities are entitled to issue preclusion effect during subsequent litigation in the other. The only real issue is the impact of the fact that the burdens of proof in the two proceedings are different.

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<sup>16</sup> 203 F. Supp. at 796, 133 USPQ at 649-50. I also disagree with the court that the board's decision would not have been binding on the court—or, rather, binding on the parties before the court. See Coakwell v. United States, 292 F.2d 918, 130 USPQ 231 (Ct. Cl. 1961)—which is binding precedent in the Federal Circuit under South Corp. v. United States, 690 F.2d 1368, 215 USPQ 657 (Fed. Cir. 1982)(en banc).

<sup>17</sup> 309 F. Supp. at 162, 164 USPQ at 609-10.

<sup>18</sup> Query: If the factual backgrounds of the three patents were that closely related, mightn't the issue preclusion affect of the board's decision in the interference before it have materially affected the outcome of the infringement litigation involving the other two patents?

<sup>19</sup> To the extent that the court's third point was different from its second point, it was apparently referring to the unfair competition counts in the district court litigation.

<sup>20</sup> 309 F. Supp. at 162, 164 USPQ at 610.

<sup>21</sup> 309 F. Supp. at 952, 164 USPQ at 243.

<sup>22</sup> The procedure described in this opinion is, of course, totally different from the procedure today.

<sup>23</sup> 416 F. Supp at 953, 193 USPQ at 243-44.

<sup>24</sup> 108 FRD at 72, 228 USPQ at 783.

<sup>25</sup> 14 USPQ2d at 1562.

<sup>26</sup> 14 USPQ2d at 1562.

<sup>27</sup> The modern practitioner cannot help being staggered by the speed with which the PTO acted in those days.

<sup>28</sup> 14 USPQ2d at 1565. Actually, court review under 35 USC 146 is more properly termed “quasi de novo review.” See generally Dunner et al., Court of Appeals for the Federal Circuit:

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Practice and Procedure § 10.03, “Comparative Analysis of Federal Circuit and District Court Review.”

<sup>29</sup> The opinion does not give the exact date on which the infringement action was commenced.

<sup>30</sup> I was co-counsel for Novartis in the interference.

<sup>31</sup> 55 USPQ2d at 1510.

<sup>32</sup> Of course, the APJ was talking about conclusion of the administrative phase of the interference and neglected the possibility of court review under either 35 USC 141 or 35 USC 146.

<sup>33</sup> 55 USPQ2d at 1511-12.

<sup>34</sup> Unfortunately, the opinion does not indicate how much after.

<sup>35</sup> Inexplicably, the opinion refers to Motorola’s pending application as “the Thro Patent”!

<sup>36</sup> 57 USPQ2d at 1663.

<sup>37</sup> The modern practitioner is, once again, left to wonder in awe at the speed with which the PTO handled such matters “back in the day.”

<sup>38</sup> Actually, of course, the interference involved the patentability (not the validity) of the claims in the ‘453 patent, not the patent as a whole.

<sup>39</sup> 57 USPQ2d at 1663-64.

<sup>40</sup> The court at this point dropped a footnote reading: “The Court has not found and neither party has cited any credible authority as to the likely duration of the interference.” 57 USPQ2d at 1664 n.2. That is surprising because statistics concerning interference pendencies are readily available on the BPAI’s web site.

<sup>41</sup> 57 USPQ2d at 1664.