Interference basics

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Date received (in revised form): 15th June, 2004

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Keywords: *interference proceeding, patentable subject matter, interfering subject matter, two-way test, preliminary motions phase, priority phase, invalidity, conception, reduction to practice*

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Abstract

A US patent is a prized form of intellectual property, and the first to invent the claimed subject matter is awarded the patent right. When two or more parties, however, simultaneously invent the same claimed subject matter, priority issues arise. An interference proceeding is a complex endeavour before the US Patent and Trademark Office that resolves the issue of priority of invention. Patentable and interfering subject matter are the prerequisites for a declaration of an interference. Once declared, the proceeding itself involves two stages: the preliminary motions phase and the priority phase. Each phase may be outcome determinative, and the preliminary motions phase provides the parties with the opportunity to invalidate an opponent's claimed subject matter. An interference proceeding thus involves high stakes and high drama, and considerable care must be taken to navigate it wisely.

INTRODUCTION

By providing a limited monopoly, patents are important strategic corporate and academic resources. The right afforded by a patent – to exclude others from making, using, selling or offering for sale the claimed invention[1] – enables companies and academia to exert considerable influence. For example, a company holding a robust patent portfolio has the potential of wielding effective leverage over competitors vis-à-vis an exclusive place in the market, licences or royalties. Further, such a company has the potential of acquiring the heightened interest of investors. Thus, at its most basic level, a patent is a source of corporate power and revenue.

The USA, a major market for most companies, is a 'first-to-invent' jurisdiction, unlike perhaps the jurisdictions of the rest of the world which are 'first-to-file' systems. That is, in the USA a patent on a given invention is granted to the party that is first to *invent*, in contrast to other jurisdictions in which a patent on a given invention is granted to the party that is first to *file* an application therefor.

When two or more parties seek to patent the same invention in the USA, however, a proceeding called 'an interference' typically results. The rules governing interference practice are complex, and failure to comply and follow the rules can lead to loss of patent rights.[2]

INTERFERENCE PROCEEDINGS GENERALLY

An interference is an action to determine 'priority of invention'. That is, an interference resolves the question of who between two or more parties is the first to invent a given claimed invention.[3] Other issues, however, can be raised in an interference proceeding. These issues include, for example, invalidity in view of prior art (lack of novelty, obviousness), invalidity due to insufficiency of disclosure (lack of enablement, lack of written description) and priority challenges.

Usually these proceedings involve at least one pending US patent application and are conducted as an administrative action before the Board of Patent Appeals and Interferences (BPAI), an organisation in the Office of the General Counsel of the United States Patent and Trademark Office (USPTO). A panel usually consisting of three Administrative Patent Judges (APJs) conduct the interference proceeding. An APJ is vested with the authority to declare interferences.[4]

While somewhat rare, the United States Code provides for an action

between owners of interfering patents. Such a patent *v* patent interference falls outside the jurisdiction of the USPTO and is handled, instead, by a US District Court.[5] 35 USC §§135 and 291, however, are not mutually exclusive.[6] Thus, a judicial interference and a PTO interference can co-exist. A party is not required to select one over the other and there can be concurrent PTO interference proceedings and judicial litigation of priority.[7]

How to initiate an interference

An interference may be initiated by the USPTO or provoked by an applicant during prosecution of their patent application. According to 37 CFR §1.604, an applicant may seek to have an interference declared with an application of another by: (1) suggesting a proposed count and presenting at least one claim corresponding to the proposed count or identifying at least one claim in its application that corresponds to the proposed count, (2) identifying the other application and, if known, a claim in the other application which corresponds to the proposed count, and (3) explaining why an interference should be declared.

When an applicant seeks to provoke an interference with a patent, 37 CFR §1.607(d) requires that the patentee be notified (1) when the attempt to provoke the interference is first made, and (2) if an interference is not declared, of the final decision not to declare an interference. Moreover, under 35 USC 135(b), an interfering claim in a pending application must be made prior to one year from the date on which the interfering patent is granted or before one year after the date on which an interfering application is published under 35 USC 122(b).

Interference proceedings are both very expensive and very time-consuming. An interference, from start to finish, can cost about the same as other *inter partes* proceedings, especially if many issues are raised. Also, an interference proceeding can last two or more years, and proceedings as long as five years or more are not unusual (although APJs endeavour to conclude PTO interferences within two years).

Furthermore, interference proceedings can be coincidental with opposition proceedings between the same parties that are occurring in first-to-file jurisdictions, such as the European Patent Office. Thus, when facing an interference, the possibility of parallel proceedings in different jurisdictions, a global strategy to address such different proceedings, and working with counsellors who team up with other advisors throughout the world to work together on these parallel proceedings should be considered.

SOME MECHANICS OF AN INTERFERENCE

The prerequisites and the declaration of interference

Before an interference is declared by the USPTO, two conditions must be satisfied. First, each inventive party must have patentable subject matter. Secondly, the patentable subject matter must actually interfere.[8]

With respect to the first requirement, it is well settled in the Federal Circuit that the PTO must make a threshold *ex parte* determination of patentability of claimed subject matter to any potential party before declaring an interference.[9] In other words, the claimed subject matter of all the potential parties in an interference must be allowable or allowed by the USPTO, for example, found by the USPTO in the first instance to be definite, enabled, described, and novel and non-obvious (inventive) over the prior art. This showing of patentability is a condition precedent to the declaration of any interference by the USPTO. Thus, if an interference is declared without a prior finding of patentability, the interference is void *ab initio*.[10]

The second requirement is that the allowable subject matter of both parties must actually interfere, commonly known as 'interference-in-fact'. Interference-in-fact exists when at least one claim of a party that is designated to correspond to a count, and at least one claim of an

opponent that is designated to correspond to the count, define the 'same patentable invention'.[11]

The two-way patentability test is a prerequisite to an interference

The test for determining whether claims define the 'same patentable invention', referred to as the two-way patentability test, is set forth in 37 CFR §1.601(n), which states (with emphasis added): 'Invention ''A'' is the *same patentable invention* as an invention ''B'' when invention ''A'' is *the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of* invention ''B'' assuming invention ''B'' is prior art with respect to invention ''A'' ' and vice versa.[12]

In essence, the USPTO treats each party's invention as prior art to the other's for purposes of this test. Thus, if invention A is the same as or obvious in view of invention B (assuming B is prior art to A) *and* if invention B is the same as or obvious in view of invention A (assuming A is prior art to B), then interference-in-fact exists.

Typically, a species is usually considered a separate patentable invention from the genus within which the species falls, thereby negating a finding of interference-in-fact.[13] A recent decision finding that the USPTO can hold that a genus and a species are not the same patentable invention and, thus, not interfering, is *Eli Lilly & Co. v Board of Regents of The University of Washington*.[14] The subject matter of the *Lilly* case related to a complementary deoxyribonucleic acid ('cDNA') sequence that coded for human protein C, which plays an important role in the regulation of blood coagulation and generation of fibrinolytic activity *in vivo*. Lilly filed a reissue application and requested an interference with US Patent No. 5,302,529 ('529 patent) held by the University of Washington. Applying the two-way test according to 37 CFR §1.601(n), the Board found that, whether claim 1 of the '529 patent is construed as a genus or as a species, the corresponding claims of the reissue application did not define the 'same patentable invention' as claim 1 of the '529 patent, and determined that there was no interference-in-fact between the corresponding claims of the reissue application and claim 1 of the '529 patent.[15] The Federal Circuit agreed. Adopting the Board's reasoning, the Court noted:

> First, with respect to the species claim construction of claim 1 of the '529 patent proposed by Lilly, the Board found no interference-in-fact because the specific cDNA sequence of claim 1 of the '529 patent does not teach or suggest the cDNA sequences claimed in the corresponding claims of the '663 reissue application. Because the cDNA sequences claimed in the corresponding claims of the '663 reissue application are not anticipated by and not obvious over a narrowly construed claim 1 of the '529 patent (assuming the '529 patent is the prior art), the cDNA sequences claimed in the '663 reissue application do not define the same patentable invention. Thus, under the species claim construction as proposed by Lilly, the Board found that Lilly failed to carry its burden to show that claim 1 of the '529 patent should be designated as corresponding to the count. Similarly, with respect to the genus claim construction of claim 1 of the '529 patent proposed by Lilly, the Board found no interference-in-fact because the evidence presented failed to teach or suggest the selection of the cDNA sequences claimed in the corresponding claims of the '663 reissue application from among the vast number of cDNA sequences potentially encompassed by a broadly construed claim 1 of the '529 patent. Because the cDNA sequences claimed in the corresponding claims of the '663 reissue application are not anticipated by and not obvious over a broadly construed claim 1 of the '529 patent (assuming the '529 patent is the prior art), the cDNA sequences claimed in the '663 reissue application do not define the same patentable invention.

> Thus, under the genus claim construction as proposed by Lilly, the Board also found that Lilly failed to carry its burden to show that claim 1 of the '529 patent should be designated as corresponding to the count.[16]

The Federal Circuit's decision in *Lilly* complies with the Court's earlier decisions in *In re Deuel* and *In re Bell*.[17,18] That is, unless there is motivation to select, for example, a nucleic acid or amino acid sequence 'species' that differs even slightly from the 'genus' of nucleic acid or amino acid sequences, the species is deemed a separate patentable invention from the genus. Once both of these conditions are satisfied – allowable subject matter and interference-in-fact – the USPTO issues a declaration of interference assigning an APJ to the case and setting the proceeding into motion.

The 'count' defines the scope of the interference

In the declaration, the subject matter of the interference is defined by one or more 'counts'. A 'count' typically takes the form of a patent claim. A common way that the USPTO makes a 'count' is to take the language of each of the parties' claims, in the alternative. For example, if party A has a claim that recites 'A composition comprising X and Y' and party B has a claim that recites 'A composition comprising X and Y and Z', the count may be 'A composition comprising X and Y or a composition comprising X and Y and Z'.

All the parties' application and/or patent claims that fall within the scope of the count(s) (that is, are the same as or obvious in view of the count) are in play for purposes of the interference. In turn, any claims that do not correspond to the count (that is, are patentably distinct from the count) are not involved in the interference and, consequently, are not subject to any final judgment in the proceeding.

Thus, an important consideration upon receipt of a declaration of interference is whether any claims that have been deemed to correspond to the count actually are patentably distinct from the count. That is, a party to an interference can have claims insulated from the interference by having those claims deemed to not correspond to the count; and, an important preliminary motion (discussed below) can be to have claims designated as not corresponding to the count.

The APJ also specifies the order of the parties as either 'junior' or 'senior' based on the filing dates of the applications and/or patents involved in the interference. Senior party status is afforded to the party that has the benefit of an earlier filing date, whereas the party having a later filing date is considered the junior party. A rebuttable presumption exists that the inventors made their invention in the chronological order of their effective filing dates. Thus, the APJ's order of party status is important because it places the initial burden of proof on the junior party. That is, the burden of proof is on the junior party to prove invention prior to the senior party. The senior party accordingly has a procedural advantage. Therefore, while the USA is not a 'first-to-file' jurisdiction, it is still important to be the first to file because the earlier filing date can result in being senior party in an interference, and having the procedural advantages that come with being senior party.

The interference proceeding involves two stages: the preliminary motions phase and the priority phase. Either one of these may be dispositive, in that an interference may be won (or lost) during either the preliminary motions phase or the priority phase. An interference must terminate with an award of priority to one of the parties, or a decision of no interference-in-fact; it cannot terminate by mere settlement of the parties. And, any settlement agreement in an interference must be filed with the USPTO (although such agreements may be filed under seal to keep them out of the public record). The parties to an interference may, however, choose to have an interference or any aspect of an interference decided by arbitration (see 35 USC 135(d)). The

Commission of Patents must be notified of such arbitration decision and award in order for the award to be enforceable.

The preliminary motions phase

An opponent's claims may be invalidated during the preliminary motions phase

The first phase in an interference is the preliminary motions phase. During the preliminary motions phase, each party in the interference is afforded an opportunity to file a number of motions for tactical and strategic purposes. These motions may, for example, attempt to redefine the count, challenge priority, have claims designated as corresponding to the count (as mentioned above), attack inventorship, abort the proceeding for failure of a condition precedent, or seek judgment for failure of an opposing party's claims to meet the requirements for patentability. Accordingly, at the outset of an interference, it is important to study the other party's prosecution and to have a firm idea of what motions can be made.

After a motion is filed, the opposing party is entitled to submit an opposition paper in rebuttal, after which the moving party is permitted to submit a paper in reply. While these motions are decided by a three judge panel of the entire Board of Patent Appeals and Interferences (that includes the APJ directly handling the particular interference), the APJ has discretion to have these motions decided in any order, or to defer decision on these motions until the conclusion of the priority phase (final hearing).

The papers declaring the interference include an initial date by which the parties are to submit a list of potential preliminary motions. Again, this demonstrates why it is critical to fully understand the other party's prosecution at a very early date. Moreover, the APJ seeks to have this list of potential preliminary motions so as to see if either party is considering any potentially dispositive motions.

For instance, the APJ can decide that a motion for 'no interference-in-fact' – which challenges one of the conditions precedent for the declaration of the interference – is a dispositive motion; namely that if the motion is granted, all other motions and further actions in the case are moot or unnecessary. The APJ may thus set an early time by which the parties must file such dispositive motions, so that they may be decided ahead of other preliminary motions.

The preliminary motions period is critical and can be outcome-determinative. For example, a successful motion may eliminate the interference and avoid the priority phase altogether, thereby saving a considerable amount of money and time. Moreover, modification of and final establishment of the count can have a significant effect on the parties and their ability to withstand motions regarding priority and patentability. Thus, if it can be shown – and if the Board so decides – that, for example, interference-in-fact does not exist or that a party's claims corresponding to the count are unpatentable (for instance, for failing the written description requirement, failing the definiteness requirement, not being enabled, not being novel over the prior art, or not being non-obvious over the prior art), the interference ends.

Likewise, if it can be shown – and the Board so decides – that certain claims do not correspond to the count, those claims can be taken out of the interference proceeding and, if in an issued patent, survive the interference regardless of the outcome, or if in a pending application, be the subject of a separate patent application, apart from the outcome of the interference.

The importance of the preliminary motions period cannot be overemphasised, as it has a direct impact on the course of an interference. For example, the motions filed and served by one party in an interference may influence the other party's decision to concede priority of the subject matter of the count.[19]

Therefore, it is clear that care should be taken to wisely navigate the preliminary motions period. For example, if a party fails to raise an issue that could have been

raised during the preliminary motions period, the party may lose its right to address that issue during final hearing. Again, this emphasises the importance of knowing your entire case at the outset of the proceeding.

The priority phase

The priority phase determines who invented first

If the interference is not terminated during the preliminary motions period, the interference moves into the priority phase. It is during this phase that the ultimate issue of which party invented first – and, thus, which party deserves the patent – is resolved. The parties submit testimony and evidence to support their positions on priority. In order to determine priority, US statutory law requires consideration of the respective dates of 'conception' and 'reduction to practice' of the invention. That is, 'invention' under US law has two components: conception and reduction to practice.

Conception is the completion of the mental part of the invention.[20] It is the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention. Basically, the inquiry is whether the idea was firm enough that the inventor could have conveyed – or did convey – it to someone who could have carried it out with his or her hands.

Reduction to practice, by contrast, is the physical element of the inventive process. There are two types of reduction to practice: actual and constructive. Actual reduction to practice occurs when the invention has been actually performed and demonstrated to be useful for its intended purpose.[21] Constructive reduction to practice, on the other hand, is the filing of a patent application that meets the statutory disclosure requirements.[22]

Generally, the first to both conceive and reduce to practice is awarded priority. An inventor who was not first to reduce to practice, however, can still establish priority if they can prove that they acted with diligence from a time prior to the other party's conception until the time they achieved reduction to practice.[23]

Typical evidence of conception and reduction to practice include written records, such as laboratory notebooks. The evidence, however, must be corroborated. More specifically, it is not enough to simply submit a written record by the inventor, such as an entry in a laboratory notebook as evidence. The entry must also be supported by additional testimony, of a non-inventor corroborating witness, who read and understood the written record; for instance the testimony of an individual who witnessed the notebook entry and understood its meaning on a date certain.

The date accorded a written record by an inventor is the date it is corroborated. Thus, if a notebook entry is made on 10th January, but not countersigned by a non-inventor as having been read and understood until 17th January, the latter date is the date accorded the record. While many fear that their laboratory notebook records may not meet this corroboration standard, there are other ways to demonstrate corroboration. For example, if an organisation has procedures for reporting the status of research projects to superiors or a patent department, those reports and the testimony of those who receive those reports may be corroborating documents and testimony. Consider that inventor A reports to R&D Vice President Z on a monthly basis, and that there are quarterly meetings of the Research Group, and that there are memoranda circulated for these meetings that include a detailed discussion of the research/experiments and results, including possibly pages from laboratory notebooks. Those memoranda can become documents to corroborate inventor A's work; and the testimony of Z and others in the research group that they received those memoranda and read and understood them on particular dates can be corroborating documents and testimony.

One anecdote about analysing such memoranda and testimony: keep in mind

the country from whence these documents come, and the holidays in that country. More specifically, consider an interference in which a foreign application has been accorded senior party status based on a filing date of Tuesday, 4th September of a particular year due to a priority application having been filed that day in a foreign country, and a US corporation junior party trying to 'beat' that date, with a memorandum from September of that particular year and testimony stating how the memorandum was typically issued at the beginning of the first week of each month. While at first blush it may seem that the junior party has shown that the memorandum was issued prior to the filing date of the senior party, such would likely not be the case because Monday, 3rd September was the first Monday in September – a national holiday in the USA – such that it is likely that the US corporation was not open for business and the memorandum was not issued, or read or understood by corroborating witnesses, on that day.

Thus, more generally, there are many ways to demonstrate corroboration, but the party reviewing proof of corroboration should be objectively sceptical.

The Board's decision on an interference is appealable

Judgment and court review

At the conclusion of the testimony period, the parties submit briefs and present arguments at a hearing before the Board. After the final hearing, the Board renders a final decision. The final decision resolves the issues raised during the interference. The Board may, for example, enter judgment, in whole or in part, remand the interference to an APJ for further proceedings, or take any further action that is not inconsistent with the law.

If the Board enters an adverse judgment to a count against a party, ie if that party loses, the claims of that party which correspond to the count are deemed unpatentable to that party. Further, that party is precluded from pursuing the lost claims in subsequent *ex parte* prosecution. These two results underscore the necessity to take an interference proceeding seriously and with extreme caution. Finally, a party not satisfied with the Board's decision has one month to request reconsideration from the Board. A decision on reconsideration is then made by the Board. If a party is still not satisfied with the outcome, the party may appeal for judicial review.

Judicial review may be before the Court of Appeals for the Federal Circuit (CAFC). More specifically, a party dissatisfied with an adverse final decision from the Board may directly appeal to the CAFC, which has jurisdiction of an appeal from the Board with respect to patent interferences. The CAFC will review the Board's decision anew, and will address only those issues actually raised on the record in the interference. The CAFC's decision on appeal governs further proceedings in the interference.

Alternatively, the party receiving the adverse decision in the interference may seek judicial review in a civil action before a District Court. However, judicial review in the district court is waived if the party already appealed to the CAFC. Like judicial review in the CAFC, a District Court can address issues of priority and patentability, as well as decide whether the Board erred in applying the law or whether its findings were clearly erroneous.

CONCLUSION

The preceding is just a glimpse of the tremendous complexity of an interference action. One thing, however, is abundantly clear. An interference proceeding involves high stakes. For example, even before an interference is declared, considerable amounts of time and money have already been spent by the parties on research and patent procurement. Thus, when preparing and prosecuting a patent application, the possibility of an interference before the USPTO, should be kept in mind, and that a valuable corporate asset – the patent – is ultimately on the line.

References and notes

1. The rights afforded by a US patent also include the right to exclude others from importing the patented invention into the USA (see 35 U.S.C. §271(a)).
2. See, eg, M. *v* V., 6, USPQ2d 1039, 1040 (BPAI 1987).
3. See 35 USC §135.
4. See 37 CFR § 1.610(a) ('each interference will be declared by an administrative patent judge').
5. See 35 USC §291.
6. See *Medichem, S.A., v Rolabo, S.L.,* 353 F.3d 928 (Fed. Cir. 2003); *Stampa v. Jackson*, 65 USPQ2d 1942, 1945 (BPAI 2002) ('A prior § 291 interference proceeding does not preclude the Director from declaring an interference under §135(a)').
7. Compare *Amgen, Inc. v Chugai Pharm. Co., Ltd.*, No. 87-2617-Y, 1989 WL 169006 (D. Mass. Dec.11, 1989), aff'd in part, vacated in part, 927 F.2d 1200 (Fed. Cir. 1991), cert. denied, 502 US 856 (1991) with *Fritsch v Lin*, 21 USPQ2d 1731 (BPAI 1991); *Fritsch v. Lin*, 21 USPQ2d 1737 (BPAI 1991); and *Fritsch v Lin*, 21 USPQ2d 1739 (BPAI 1991) (judicial litigation of priority issue and concurrent PTO interference proceedings).
8. See 37 CFR §1.601.
9. See *Perkins v Kwon*, 886 F.2d 325, 327 (Fed. Cir. 1989) (explaining that the 'implementing rules provide . . . for the threshold determination under 37 C.F.R. §1.603 or §1.606 that the interfering subject matter is patentable to both parties').
10. *See Squires v Corbett*, 560 F.2d 424 (CCPA 1977).
11. *See* 37 CFR §1.601(j).
12. *See also Winter v Fujita*, 53 USPQ2d 1234, 1243 (BPAI 1999) ('The claimed invention of Party A is presumed to be prior art vis-à-vis Party B and vice versa. The claimed invention of Party A must anticipate or render obvious the claimed invention of Party B and the claimed invention of Party B must anticipate or render obvious the claimed invention of Party A'); *ex parte Standish*, 10 USPQ2d 1454, 1459 (BPAI 1988) (the interference test 'plainly and simply' is whether one inventor's claims render another's claims either obvious or anticipated).
13. See, eg, Commentary to Rules of Practice, 49 Fed. Reg. 48416, 48433 (12th December, 1984), 1050 OG 395 (29th January, 1985), corrected to 50 Fed. Reg. 23122 (31st May, 1985), 1059 OG 27 (22nd October ,1985) ('Thus, if a species is patentable over a genus, the species is a ''separate patentable invention'' from the genus'). Compare In re Taub, 348 F.2d 556, 146 USPQ 384 (CCPA, 1965); see also In re Sasse, 629 F.2d 675, 207 USPQ 107 (CCPA 1980) (explaining that a claim to a genus and a claim to a species within the genus are not claims to the same or substantially the same subject matter in the sense of interference under 35 USC §135(b)).
14. 334 F3d 1264, 67 USPQ2d 1161, Appeal No. 02-1610, from Interference No. 104,753 (Fed. Cir. 3rd July, 2003).
15. See *Ibid*. at 1266.
16. *Ibid*. at 1271-72.
17. 51 F.3d 1552, 34 USPQ2d 1210 (Fed. Cir. 1995). The claims in Deuel were directed to DNA molecules coding for heparin-binding growth factor. The Federal Circuit asserted that the genetic code between proteins and nucleic acids failed to render a particular DNA sequence obvious from a disclosed amino acid sequence. The Court noted that a known general method of isolating cDNA or DNA molecules was irrelevant to the question of whether the specific molecules themselves would have been obvious, in the absence of prior art that suggested the claimed DNA. Further, the Court emphasised that even if it was obvious to try to isolate a DNA sequence and that a known method existed for doing so, the claimed sequence itself would still not be obvious.
18. 991 F.2d 781, 26 USPQ2d 1529 (Fed. Cir. 1993). The subject matter in Bell involved DNAs coding for insulin-like growth factors I & II. The Federal Circuit held that a claimed DNA molecule with a specific nucleotide sequence was not prima facie obvious in view of prior art reference disclosing the full amino acid sequence of the polypeptides encoded by the claimed DNAs, and a prior art reference providing a method for cloning DNA. According to the Court, the established relationship in the genetic code between a particular DNA and the protein it encodes does not make the gene prima facie obvious.
19. See, eg, *Khavari et al.*, *v Tang et al.*, Interference No. 104,696 in which Party Khavari conceded priority after a number of motions, including those based on invalidity of the Khavari patent, were filed by party Tang but before a decision on the motions was made by the Board. After receiving judgment in its favour in the Interference, Tang was awarded US Patent No. 6,706,693. On the other hand, Khavari's loss of priority of the subject matter of the count had two legal effects. First, Khavari was no longer entitled to the claimed subject matter of US Patent No. 6,087,341, the patent involved in the Interference. In other words, as Khavari lost the Interference, such that priority was awarded to Tang, the Khavari patent was no longer valid and, therefore, no longer enforceable. Secondly, by losing priority, the count of the Interference now acted as prior art against Khavari in the event Khavari attempted to pursue related subject matter in an *ex parte* application. More specifically, if a

party loses priority in an interference and then presents claims in an *ex parte* proceeding, the count of the interference becomes prior art under both 35 USC §§102(g) and 103. See *ex parte* Ogiue, 517 F.2d 1382, 1389 (CCPA 1975).

20. See, eg, *Coleman v Dines*, 754 F.2d 353 (Fed. Cir. 1985).
21. See, eg, *Eaton v Evans*, 204 F.3d 1094 (Fed. Cir. 2000).
22. See, eg, Hybritech, Inc. *v* Monoclonal Antibodies, Inc., 802 F.2d 1367 (Fed. Cir. 1986).
23. See, eg, *Griffith v Kanamaru*, 816 F.2d 624, 626 (Fed. Cir. 1987).