



**Three Significant Upcoming Patent Law Decisions Expected
from the Supreme Court and Federal Circuit**

Commil USA v. Cisco Systems
Kimble v. Marvel Enterprises
SCA Hygiene Products v. First Quality Baby Products

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Outline for *Commil USA v. Cisco Sys.*
No. 13-896
U.S. Supreme Court

I. Question presented:

Whether a good-faith belief that a patent is invalid is a defense to inducement liability under Section 271(b) of the Patent Act.

II. Oral Argument:

Scheduled for March 31, 2015

III. Facts

Commil owns U.S. Patent No. 6,430,395, which claims an improved method of implementing a short-range wireless network. Cisco acquired a line of “split-MAC” WLAN products from a company called Airespace. Commil accused these products of infringing the ’395 patent. In late 2004 or early 2005, Commil’s predecessor told a Cisco mergers and acquisitions manager about Commil’s technology and patents and that they “lined the core” of the accused products. At trial, one of the founders of Airespace testified that Cisco knew about the ’395 patent.

IV. Procedural Posture

Commil filed a patent infringement lawsuit against Cisco in 2007, asserting that Cisco directly infringed the ’395 patent and induced its customers to infringe. In a first trial in 2010, the jury returned a verdict that Cisco directly infringed, but did not induce infringement of the ’395 patent and awarded \$3.7 million in damages. Based on Cisco’s counsel’s improper references at this trial about the fact that the owner of Commil and inventors of the ’395 patent were Jewish, the trial court granted a new trial on the issues of inducement and damages. In the second trial, Cisco sought to introduce evidence that it had a “good faith belief” that the ’395 patent was invalid, but the trial court excluded it from evidence. The jury returned a verdict that Cisco induced infringement and damages of \$63.7 million. Prior to the second trial, Cisco had requested ex parte reexamination of the ’395 patent, and the USPTO granted the request. The USPTO ultimately confirmed the validity of the asserted claims of the ’395 patent. On appeal, the Federal Circuit held that a “good-faith belief of invalidity may negate the requisite intent for induced infringement,” and thus concluded that the district court had erred in excluding Cisco’s proffered evidence of good-faith belief. The Federal Circuit vacated the infringement and damages determinations, affirmed the validity determinations, and remanded for a new trial on inducement and damages. After the Federal Circuit denied Commil’s petition for rehearing en banc, Commil petitioned for a writ of certiorari to the U.S. Supreme Court. The writ was granted.

V. Commil's Arguments

- A. Supreme Court precedent establishes that “good faith beliefs” are irrelevant to the intent requirement for indirect infringement.
1. The Supreme Court’s decisions in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), which dealt with contributory infringement, and *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), which dealt with induced infringement, establish that a defendant’s good-faith belief about potential defenses is irrelevant to the intent requirement for induced infringement.
 2. The *Aro* decision stands for the proposition that once the patentee has given the defendant notice of the patent and its assertion that the accused products infringe, whatever views the defendant might have about invalidity are irrelevant.
 3. The *Global Tech* case holds that the “same knowledge” required by the *Aro* decision for contributory infringement is also required for induced infringement. The key question in these cases, and the cases on which they rely, is whether defendant has knowledge of the patent’s existence and its potential applicability to the conduct at issue, not any good faith belief in potential defenses to the allegation of infringement.
- B. Good faith belief defenses are contrary to the purpose and policies underlying 35 U.S.C. §§ 271(b) & (c).
1. The purpose of the indirect infringement doctrine is to provide patent holders with a remedy against the party responsible for causing infringement where the direct infringers themselves are undesirable parties to litigation.
 - a. Direct infringers might be too diffuse or numerous to make litigation against them practical. The legislative history confirms that the indirect infringement provision were added to the 1952 Patent Act in order to provide a practical way to go after the “mastermind” of the infringement, rather than the end user who is directly infringing. The Supreme Court recognized this in the *Aro* decision.
 - b. Direct infringers may simply use the accused product for its intended purpose without sufficient knowledge of its operation to make it reasonable to call them to account for infringement.
 - (i) Cisco itself has argued in other litigation that it is better for patentees to sue manufacturers of products accused of

infringement, rather than customers who are simply using the product for its intended purpose.

- (ii) The manufacturers are the real parties in interest.
 - (iii) End-users may have no real knowledge of the accused products and therefore will be the least capable of understanding and defending the accused technologies.
 - (iv) The manufacturers are in the best position to defend the technology at issue.
 - (v) Resolution of an indirect infringement claim against the manufacturer can globally resolve the infringement question for all customers' use of the products rather than requiring piecemeal and individualized trials against each customer.
2. There are two primary purposes of the knowledge requirement for indirect infringement.
- a. Patent law should not permit patentee to control market for unpatented staple items of commerce.
 - b. Patent law should not impose liability on seller of product capable of noninfringing and infringing uses when the seller has not encouraged infringing use.
3. "Good faith belief" defense undermines these policies.
- a. Such a defense can only arise in cases where a patent has been determined to be valid and directly infringed. To deprive a patentee of his remedy under Section 271(b) or (c) because the defendant had a "good faith," but incorrect, belief in the patent's invalidity would undermine the policies set forth above.
 - b. It would be extremely difficult to establish a good-faith but incorrect belief that a patent is invalid and will inject uncertainty into cases involving claims of induced infringement. Will encourage defendants to seek self-serving opinions of counsel that the asserted patent is invalid.
 - c. A "good-faith belief" defense will encourage patentees to sue individual customers instead of manufacturers.

- d. Such a defense does not advance the public's interest in the right to use non-infringing products. A ruling that a patent is actually invalid and no directly infringed protects the public interest.
- C. Even if a good-faith belief in non-infringement were relevant to induced infringement, such a belief in patent invalidity is not.
1. Infringement and invalidity are distinct legal issues under the Patent Act and case law, and are determined separately. Invalidity is not mentioned in Section 271(b), and it should not be imported there.
 2. A "good-faith belief" test undermines the statutory presumption of validity of patents, and flips the burden of proof on its head. Patentees have to prove infringement only by a preponderance of the evidence. Accused infringers have to prove invalidity by clear and convincing evidence. However, under the Federal Circuit's rule, an infringer could escape all liability if the patentee is unable to *disprove* the alleged infringers subjective state of mind about the patent's validity.

VI. Cisco's Arguments

- A. The *Aro* and *Global-Tech* cases do not stand for the proposition Commil asserts. Rather, both decisions require that, in order for the intent requirement of induced infringement to be met, the defendant must not only have knowledge of the asserted patent but also knowledge that the product infringes.
- B. The appropriate test for the intent requirement of induced infringement finds support in the text of 35 U.S.C. § 271 and the purpose behind it.
1. The text of Section 271(b) requires two conduct elements and a scienter element. The first conduct element is direct infringement by someone. The second conduct element is active inducement of that infringement. Under Commil's proposed test, the scienter element would not require knowledge that the induced conduct actually constitutes infringement. This is a not a reasonable reading of the statute.
 2. The purpose of Section 271(b) (and 271(c)) was to create liability for conduct that not only is instrumental to infringement, but culpably so. If a defendant has a good-faith belief that a process does not infringe a valid patent, actions taken to facilitate that process cannot be culpable.
- C. Principles of aiding and abetting do not support Commil's position.
1. In tort, aiding-and-abetting liability requires proof of knowledge of another's wrongdoing and an intent to assist the wrongdoing.

2. Criminal aiding-and-abetting liability requires knowing aid to persons committing a crime, with the intent to facilitate the crime.
- D. The America Invents Act and longstanding Congressional acquiescence show Congress agrees that Section 271(b) requires knowledge of infringement.
1. The AIA added Section 298 to the Patent Act. Section 298 prohibits courts and juries from using the failure of an infringer to obtain the advice of counsel for purposes of “prov[ing] that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent.” There would be no need for this provision if knowledge that the accused product infringes was not a requirement of induced infringement.
 2. The Federal Circuit has held repeatedly over the past 25 years that inducement liability requires knowledge of “actual infringements.” Congress has never disturbed this line of cases.
- E. The notice-letter standard proposed by Commil would exacerbate the significant and wasteful burdens placed on innovative companies by non-practicing entities.
- F. Evidence of a good faith belief in the invalidity of the asserted patent is relevant to culpability, which is required under Section 271(b).
1. There can be no culpability if the infringer has a good faith belief that he is not violating an right of the patentee because the owner of an invalid patent has no rights that can be violated.
 2. Because patent infringement pre-supposes patent validity, knowledge of infringement requires knowledge of validity. It does not matter *for scienter purposes* if infringement and validity are treated as separate legal issues for other purposes.
 3. Willful infringement precedent supports the conclusion that a good faith belief that the patent is invalid precludes a finding of induced infringement. An opinion of counsel letter concluding that an asserted patent is invalid can sufficiently shield the defendant from a finding that he acted recklessly, which is the standard for willful infringement. The scienter requirement for induced infringement is higher than recklessness – actual knowledge or willful blindness. Thus it would be incongruous if evidence of a good faith belief in invalidity were relevant to willful infringement, but not inducement.
- G. The Federal Circuit’s rule fosters innovation.
1. Without it, innovative companies like Cisco, when they receive a notice letter, face the Hobson’s choice of pulling the accused products from the

market, taking a license, or facing expensive litigation, at the end of which they may be ordered to pay massive royalties.

2. A defense to induced infringement based on a good faith belief in the invalidity of an asserted patent offers them slightly more leverage against abusive non-practicing entities.

Outline for *Kimble v. Marvel Enterprises, Inc.*
No. 13-720
U.S. Supreme Court

VII. Question Presented:

Should the Court overrule the rule in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), that “a patentee’s use of a royalty agreement that projects beyond the expiration date of the patent is unlawful per se”?

VIII. Oral Argument:

Scheduled for March 31, 2015

IX. Facts

Kimble created a web-shooting (a la Spider-Man) toy and obtained a patent on it in 1991. Prior to that, in 1990, Kimble had met with the predecessor of Marvel, to discuss his pending patent application and other “ideas and know-how.” The company agreed to compensate Kimble if the company used any of his ideas. Kimble sued the company in 1997 for patent infringement and breach of the agreement, claiming the company had used his ideas without compensation. The district court granted summary judgment of noninfringement of the patent and the jury found for Kimble on the contract claim. The parties then settled, with Kimble conveying the patent to Marvel, as well as the non-patent intellectual property rights. In return, Kimble received a lump-sum payment and a running royalty of 3% on “net product sales.” There was no reduction in the royalty rate after the patent expired. Years later, when a dispute arose concerning royalties, Kimble sued for breach of the settlement agreement, and Marvel counterclaimed that it would owe no further royalties after the assigned patent expired.

X. Procedural Posture

The district court granted summary judgment in favor of Marvel. The Ninth Circuit affirmed. Essentially both courts held that because there was no reduction in the royalty rate to account for the expiration of the patent rights, the obligation to pay post-expiration royalties was unenforceable.

XI. Kimble’s Arguments: The per se rule of *Brulotte* should be overruled.

A. Patent policy favors overruling.

1. Post-expiration royalties do not extend patent right to exclude others from practicing the invention. License payment terms that do extend royalties beyond patent expiration reflect the anticipated value of the authorization to use the patented invention before the patent expires. Even if certain patent royalty payments nominally are measured by post-expiration use,

they nonetheless represent an amortization of the predicted value of the pre-expiration authorization.

2. *Brulotte* discourages innovation because it impairs contracting parties' ability to allocate risk of developing and commercializing new technologies.

B. Economic policy favors overruling.

1. Patent royalties on postexpiration use can be procompetitive, as they can lower prices and raise output during the patent term by means of an upfront royalty rate reduction, and also lower prices and increase competition after the end of the patent term by encouraging market entry by new, lower-priced competitors of the licensee. Can help avoid deadweight loss of patent monopoly. Can be particularly useful in the pharmaceutical industry, with its long and uncertain development cycles and regulatory delays.
2. Congress and the Court in recent years have pointedly rejected patent-equals-market-power presumption.

C. Post-expiration royalties should be governed by rule-of-reason analysis. The courts of appeal already do this for allegations of patent misuse.

D. Stare decisis does not require Congressional action to overrule *Brulotte*. Simply because the *Brulotte* decision cites old 35 USC § 154 does not mean it is "statutory" for stare decisis purposes. It also relies on the Constitution's authorization to secure "for limited times" to inventors "the exclusive right" to their discoveries", and in such cases, the Court is free to overrule the holding. Further, stare decisis is not an inexorable command, and *Kimble* has provided "special justification" for overruling it.

XII. Marvel's Arguments: *Brulotte* should not be overruled.

A. *Brulotte* is a narrow statutory decision. It prohibits only a specific form of patent misuse: extracting royalties for post-expiration use of invention. It still allows licensors/licensees to enter licenses in which payments for pre-expiration use are postponed until after patent expires. What is important for *Brulotte* is when the obligation to pay royalties is incurred, not when the royalties are paid.

1. Parties may agree simultaneously on patent royalties and non-patent royalties without triggering patent misuse concerns, as long as they distinguish between the two.
2. Allowing a patentee to demand royalties on a licensee's post-expiration use would affect the licensee's prices or outputs in the free market for the post-expiration period in a way that deferred payments do not.

3. Parties generally can structure their licenses to comply with *Brulotte's* per se rule.
 4. Licensing negotiations that *Brulotte* targets unfold before expiration, when the patentee can still misuse its patent rights to secure future advantages.
- B. *Brulotte* is not an antitrust case, and thus whether royalties on post-expiration use could potentially be pro-competitive is not relevant. In any event, *Brulotte* is economically sound.
1. Under Kimble's proposed rule, there would be uncertainty. Parties negotiating licenses with post-expiration royalties could never know if their agreement would withstand scrutiny. This would lead to more litigation, and increased litigation costs .
 2. Even if a licensee knows that he can use a patented invention for free after expiration does not prevent the licensee from exercising leverage before expiration.
 3. *Brulotte* does not prevent parties from amortizing royalties for pre-expiration use over a post-expiration time period.
 4. As for pharmaceuticals, the Hatch-Waxman Act authorizes a patent term extension to compensate for regulatory delays. Also provides for periods of non-patent exclusivity for up to 7.5 years regardless of the existence or expiration of underlying patents.
 5. Parties can allocate risks and rewards in other ways besides post-expiration royalties, such as through joint ventures, exchanges of equity, or agreements to grant back rights to future inventions.
 6. Overruling *Brulotte* would exacerbate the problems of royalty stacking and nuisance litigation brought by non-practicing entities.
- C. The Court should not adopt a rule-of-reason analysis.
1. Rule-of-reason analysis is complex and costly to apply.
 2. Would not shield patent system from misuse.
- D. *Brulotte* serves patent policy by furthering the statutory aim of limiting the time of a patent grant. Patent misuse carries out concerns that antitrust does not, including protection of the public domain.
1. Even a single licensee paying royalties beyond the patent term disrupts the balance struck by the patent laws.

2. Federal patent law forbids private parties from rebalancing the risks and rewards inherent in the patent bargain, as *Kimble* suggests they should be allowed to do.
 3. *Brulotte* does not harm innovation or inventors in any measureable way. No evidence offered that a single licensing opportunity was lost because of *Brulotte*.
- E. Stare decisis counsels against overruling. Change must come from Congress, not the Court.
1. *Brulotte* interprets the statutory limited patent term in 35 U.S.C. § 154.
 2. Stare decisis is favored in cases involving property rights where reliance interests are involved. *Brulotte* meets this criteria. It is the legal linchpin for an extensive body of patent licensing law, including hybrid licensing of both patent and other intellectual property rights. It has doubtless informed negotiations for numerous past and present licenses. To overrule it would spur needless and wasteful litigation over licenses without express end dates for royalties.
 3. Stare decisis may only be overcome with “special justification.” Simply because a decision may have been wrongly decided is not itself a “special justification” for overturning settled law.
 4. Stare decisis applies with special force to decisions Congress may later alter through further legislation. Congress is free to abrogate or modify *Brulotte* if it likes. Congress has amended the Patent Act frequently (33 times since the 1952 Act), while it has seldom amended the Sherman Act (9 times since its enactment 124 years ago.).
 5. Stare decisis may be overcome if a decision has proved to be unworkable in practice. *Brulotte* has not proven unworkable.
 6. Congress has declined to modify the *Brulotte* rule for half a century. Congress has rejected proposals to modify *Brulotte* after hearing arguments for and against it. See Patent Misuse Reform Act, Pub. L. No. 100-703, tit. II, 102 Stat. 4674, 4676 (1988). Congress has made other changes to patent misuse law in that time.
- F. If *Brulotte* is modified, it should be changed to require the patentee to rebut the presumption that it has improperly extended its patent rights, rather than overruling the decision.

Outline for *SCA Hygiene Prods. v. First Quality Baby Prods.*
No. 2013-1564
U.S. Court of Appeals for the Federal Circuit

XIII. Questions presented:

- A. In light of the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer*, 134 S.Ct. 1962 (2014) (and considering any relevant differences between copyright and patent law), should this court's en banc decision in *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992), be overruled so that the defense of laches is not applicable to bar a claim for damages based on patent infringement occurring within the six-year damages limitations period established by 35 U.S.C. § 286?
- B. In light of the fact that there is no statute of limitations for claims of patent infringement and in view of Supreme Court precedent, should the defense of laches be available under some circumstances to bar an entire infringement suit for either damages or injunctive relief? *See, e.g., Lane & Bodley Co. v. Locke*, 150 U.S. 193 (1893).

XIV. En Banc Hearing Granted

XV. Facts:

On October 31, 2003, plaintiff SCA sent a letter to defendant First Quality, suggesting that certain First Quality products might infringe SCA's '646 patent covering certain adult incontinence products. First Quality responded on November 21, 2003, identifying a prior art U.S. Patent that it thought invalidated the '646 patent. The parties exchanged four more brief letters over the next eight months concerning a different patent before communications ceased. On July 7, 2004, SCA filed an ex parte reexamination of its '646 patent, asking the PTO to review its patentability in light of the prior art patent identified by First Quality as well as other prior art. SCA never notified First Quality about the reexamination.

In 2006, while the '646 patent was under reexamination, First Quality began expanding its line of adult incontinence products by acquiring another company and along with it some of the products at issue in the case. First Quality's expansion continued in 2009 at a cost of more than \$10 million. Meanwhile, on March 27, 2007, the PTO confirmed the patentability of all claims of the '646 patent and issued new claims added during reexamination. SCA did not contact First Quality again until August 2, 2010, when it filed a lawsuit against it for infringement of the '646 patent.

XVI. Procedural posture:

The district court granted First Quality's motion for summary judgment based on laches and equitable estoppel. SCA appealed to the Federal Circuit, which affirmed the judgment of laches but reversed the grant of equitable estoppel and remanded for further

proceedings. SCA petitioned for panel rehearing or rehearing en banc of the panel's decision on laches, based in part on Supreme Court's decision in *Petrella*. Federal Circuit granted petition for rehearing en banc on the laches issue.

XVII. SCA's Arguments: *Auckerman* should be overruled in view of *Petrella*.

- A. When Congress provides a limitations period, the judicial doctrine of laches cannot apply. The Supreme Court has never approved the application of laches to bar a claim for damages brought within the time allowed by a federal statute of limitations. Laches was developed by courts of equity to fill a gap when Congress had provided no statutory limitations period. If Congress puts a limit upon the time for enforcing a right which is created, that is the end of the matter.
- B. 35 U.S.C. § 286 is a statute of limitations, as demonstrated by the legislative history.
 - 1. 1870 – Congress passed statute that all actions had to be brought during patent term or within 6 years of expiration.
 - 2. 1874 – Patent statute of limitations not carried forward into Revised Statutes.
 - 3. 1897 – Congress passed statute that said there “shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action . . .” Indeed, the House Report for this legislation stated that it was a “statute of limitations in patent cases.”
 - 4. 1922 – Congress passed amendments to patent law, but not the limitations language enacted in 1897, and in the margin of the bill the drafters referred to the 1897 provision as “Time limit for action, etc.”
 - 5. 1946 – Congress again amended patent laws, shortening provision to state, “but recovery shall not be had for any infringement committed more than six years prior to the filing of the complaint in the action.”
 - 6. 1952 – Congress passed current form of § 286. House Report states that the “next few sections” after section 282 relate to, *inter alia*, “the statute of limitations.” This same language appears in the Senate Report.
- C. *Petrella* rejects the argument in *Auckerman* that the merger of law and equity supports the application of the *equitable* doctrine of laches to bar a *legal* claim for damages.
- D. *Petrella* rejects the argument in *Auckerman* that Rule 8 of the Federal Rules of Civil Procedure, which lists laches as an affirmative defense, supports the

application of laches as a legislation-overriding (*i.e.*, statute of limitations-overriding) defense to claims at law.

- E. *Auckerman* misreads Supreme Court precedent to find that patent infringement is a continuous tortious act. By refusing to acknowledge that each new act of infringement starts the laches clock anew, *Auckerman* was able to measure the laches period from the first infringement rather than from each new act of infringement. *Petrella* rejects this approach.
- F. *Auckerman* cites to the practice of circuit courts prior to the passage of the 1952 Patent Act allowing the interposition of laches as a defense to patent claims in certain contexts as well as Congress' failure to abolish laches as a defense. But this only mirrors the *Petrella* dissent, which obviously failed to persuade the majority.
- G. There is no principled difference between copyright law and patent law on this point.
 - 1. Patent infringement, like copyright infringement, is a continuing tort. Each First Quality sale is a new act of infringement, just as the creation of each new copy of the motion picture *Raging Bull* was a new act of infringement in *Petrella*.
 - 2. Development of national limitations period in copyright law followed the institution of limitations period in patent law.
 - a. Congress enacted the predecessor to Section 286 in 19th Century because until then there had been no federal statute of limitations, some of the federal circuit courts were applying state statutes of limitations, and others refused to recognize any limitations period.
 - b. Congress followed this same process 60 years later for copyright law, because there was no limitations period for copyright law and federal courts were again using state statutes of limitations to evaluate timeliness of suit.
- H. Laches is not a listed defense in 35 U.S.C. § 282.

35 U.S.C. § 282 enumerates the defenses to patent infringement, namely: non-infringement, invalidity, and unenforceability. The doctrine of laches is not a listed defense and, by *expressio unius est exclusio alterius*, cannot be read into the statute.
- I. If *Auckerman* survives, the Federal Circuit should abolish its presumption of unreasonable delay and prejudice as inconsistent with *Petrella*.

1. Presumptions rely on the premise that continuing torts (such as patent infringement) constitute a unitary harm, not independent acts. This theory was rejected by *Petrella*, which held that each act of infringement is a separate act.
 2. *Petrella* held that there is nothing untoward about waiting to see whether an infringer's exploitation causes harm and that the operation of the limited look-back period is a sufficient remedy.
- J. The Supreme Court decision in *Lane & Bodley* is not in conflict with *Petrella*.
1. *Lane & Brodley* was brought in the equity side of the court years before passage of the predecessor to Section 286. The issue in that case was whether the plaintiff should be limited to his remedies on the legal side of the court, not barred from seeking infringement damages. Moreover, the defense asserted in *Lane & Bodley* was estoppel, not laches standing alone. *Petrella* approved the use of estoppel in actions at law, where laches may be one factor in the analysis, but stated unequivocally that laches alone is insufficient to support barring a damage claim.
 2. Laches remains a relative factor in determining whether to grant or tailor injunctive relief. Particularly in the field of equitable principles, patent law must be consistent with other areas of jurisprudence. *eBay v. MercExchange*, 126 S. Ct. 1837m 1839-40 (2006).

XVIII. First Quality's Arguments (from opposition to petition for rehearing): *Auckerman* should not be overruled in light of *Petrella*.

- A. 35 U.S.C. § 286 is not a statute of limitations. It only restricts the extent one can recover pre-filing damages. Since there is no statute of limitations, laches serves the "gap-filling" role endorsed by *Petrella*.
1. "A statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that *no suit shall be maintained* on such causes of action unless brought within a specified period after the right accrued." *Standard Oil, Co. v. Nippon Shokubai Kagaku Kogyo Co.*, 754 F.2d 345, 347 (Fed. Cir. 1985) (emphasis in original). "Reading § 286 in light of this definition shows that this statute is not a statute of limitations barring suit in the usual meaning of the term. It does not say that 'no suit shall be maintained.'" *Id.*
 2. Section 286 provides, "Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." On its face, Section 286 merely limits the time frame for which damages can be incurred. In contrast, 17 U.S.C. § 507(b), which was the statute at issue in *Petrella*, is a typical statute of limitations stating: "No civil action

shall be maintained under the [Act] unless it is commenced within three years after the claim accrued.”

3. At one time, the Federal patent statutes included a true statute of limitations that provided “all actions for the infringement of patents shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof.” *Aukerman*, 960 F.2d at 1030 n.8 (quoting Patent Act of 1870, ch. 230, § 55, 16 Stat. 198, 206). That statute of limitations was replaced with current limitation on damages.

B. Laches is a defense available under 35 U.S.C. § 282.

1. Simply because laches is not expressly listed as a defense under Section 282 does not mean that it is not a defense available under that section; neither are estoppel, misuse, inequitable conduct, or exhaustion expressly listed in Section 282.
2. In Section 282, “defenses to a suit for infringement are stated in general terms.” H.R. Rep. No. 82-1923, at 10 (1952).
3. Previous panels of the Federal Circuit have concluded that Section 282 includes equitable defenses such as laches, estoppel, and unclean hands.
4. At the time *Auckerman* was decided, laches had been a recognized defense for nearly 100 years. *See, e.g., Leggett v. Standard Oil Co.*, 149 U.S. 287, 294 (1893) (applying laches to bar suit where plaintiff delayed fifteen years in bringing suit).

C. *Auckerman*’s presumption of delay and prejudice is not affected by *Petrella*.

1. *Petrella* did not extend the separate accrual rule outside of copyright law. That is, each copyright infringement is a separately accruable harm, while patent infringement is a continuing harm.
2. Using the statutory 6-year period as the period of delay that creates a presumption of unreasonable delay and prejudice enhances the rationality and stability of the process.