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Issue Spotlight

When Multiple Plaintiffs/Relators Sue for the Same Act of Patent False Marking

No one can deny that the number of § 292 patent false-marking suits filed in the courts this year has exploded.[1] The judicial switch from a "per-act" to a "per-article" monetary penalty for a false marking violation has, as expected, led to this state.[2] With the multitude of new suits, and the increased magnitude of the defendant's monetary exposure,[3] the district courts must address new procedural and substantive issues, often with little or no prior on-point precedent. One such issue concerns the scenario where multiple *qui tam* plaintiffs (called relators) bring different § 292 actions for the same act of patent false marking.

Section 292 does not provide explicit instruction for procedurally addressing multiple false marking claims. For the reasons stated below, the plain text of § 292, the doctrine of claim preclusion, and possibly the doctrine of double jeopardy, support the conclusion that a false-marking defendant cannot be subjected to multiple penalties for the same act of patent false marking. Resolution of that question, however, does not show how procedurally district courts should handle a false marking action where a prior § 292 suit is pending and arguably addresses the same alleged acts of false marking. As explained below, federal comity supports allowing the first-filed

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* The article has been revised to include additional case law developments that became available after the original July 20th publishing of the article, and to expand on some of the points discussed.

[1] The dramatic increase in false marking suits filed this year has led one court to remark that false-marking actions now "dot the greensward of patent litigation like an infestation of dandelions." *Zojo Solutions, Inc. v. Stanley Works*, 2010 WL 1912650, *2 (N.D. Ill. May 12, 2010).

[2] *Forest Gp., Inc. v. Bon Tool Co*., 590 F.3d 1295, 1300-04 (Fed. Cir. 2009). *See generally*, Robert A. Matthews, Jr., *Annotated Patent Digest* § 34:102 Penalties for Violation [*hereinafter* APD]; Robert A. Matthews, Jr., *Patent Happenings*, "False Patent Marking Roulette Wheel," Jan. 2010 at pp 1-4 (available at www.PatentHappenings.com).

[3] *See e.g., Forest Gp., Inc. v. Bon Tool Co*., No. H-05-4127 2010 WL 1708433, *2 (S.D. Tex. Apr. 27, 2010) (setting false marking penalty at the *highest* selling price of the falsely marked article); *Presidio Components Inc. v. American Technical Ceramics Corp.*, __ F. Supp.2d __, __, 2010 WL 1462757, *42 (S.D. Cal. Apr. 13, 2010) (setting false marking penalty at approximately one third the selling price of the article).

§ 292 action to proceed with the second-filed suit either dismissed, stayed or transferred.

A more elegant solution applied recently by one district court concludes that a § 292 *qui tam* action effectively assigns the federal government's cause of action for the false-marking penalty to the plaintiff who filed first.[4] Hence, for any second-filed § 292 suit, the later plaintiff has no legal standing to bring an action. Under this view, the court must dismiss any second-filed false marking suit where the violations asserted in the second suit fall within the scope of the violations asserted in the first-filed § 292 suit.

Does § 292 Permit Multiple Penalties?

Section 292(a) of Title 35 provides that for acts of false marking the defendant "[s]hall be fined not more than $500 for every such offense." By its language, the statute only provides for one fine for each offense, with that fine having a maximum value of $500. Nothing in the statutory language indicates that multiple fines may be imposed for the same accused act of false marking. Thus, the language of § 292(a) appears to preclude fining a defendant more than once for the same act of false marking.[5]

Furthermore, Section 292(b) provides that "[a]ny *person* may sue for *the* penalty, in which event one-half shall go to *the person suing* and the other to the use of the United States." (Emphases added) While not expressly stating so, the reference to "*the* penalty" and "*the* person suing" in the singular form further signifies that only one action may be maintained since only one person may sue for the penalty.[6] General principles of statutory construction regarding the narrow construction given to definite article "the" as limiting the reach of a statute to the specific "envisioned" members of the class further supports this conclusion.[7]

Additionally, since a *qui tam* action by definition is a suit for the benefit of the United States, and in the case of a § 292 action, the government shares in half the fine, claim preclusion principles should apply to cut off any additional false marking actions pending or brought once one action results in a judgment sufficiently final to invoke claim preclusion.[8] If claim

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[4] *San Francisco Technology, Inc. v. Glad Products Co.*, No. 10-CV-00966 JF (PVT), 2010 WL 2836775, *4 (N.D. Cal. Jul. 19, 2010), *substituted opn.*, 2010 WL 2943537, at *4 (N.D. Cal. Jul. 26, 2010).

[5] *Simonian v. Quigley Corp.*, No. 10 C 1259, 2010 WL 2837180, *2 (N.D. Ill. Jul. 19, 2010) ("[T]he false marking statute contains no provision allowing for multiple private plaintiffs to share in a recovery. Rather, it contemplates only a single action brought by a private individual on behalf of the United States."). *See United States v. Dwight Mfg. Co.*, 213 F. 522, 524 (D. Mass. 1914) (instructing that a *qui tam* statute "contemplates but one recovery of one penalty for each violation of its provisions").

[6] *Simonian v. Quigley Corp.*, No. 10 C 1259, 2010 WL 2837180, *2 (N.D. Ill. Jul. 19, 2010) ("Just as the United States could not bring multiple identical actions against a defendant under the false marking statute, multiple private plaintiffs cannot do so on the government's behalf."). *See United States v. B. F. Goodrich Co.*, 41 F. Supp. 574, 575 (S.D.N.Y. 1941) (in the context of a False Claims Act *qui tam* suit stating "There can be no division of the moneys collected because, among other reasons, the statute expressly provides that such a suit shall be at the sole cost and charge of the person bringing it; and the proceeds are to be divided one-half to him and the other half to the United States. Others are excluded. Even the sovereign has no right to interfere. The first plaintiff has sole control of the action, except that he cannot dismiss it without consent of the judge and the District Attorney." – ruling that second-filed *qui tam* action brought by different named party, but on the government's behalf, had to be stayed in view of the first-filed *qui tam* action). *Cf. Ferrett v. Atwill*, 8 F. Cas. 1161, 1162-63 (S.D.N.Y. 1846) (dismissing several copyright false marking actions, because the actions were brought in the name of two plaintiffs, but the statute used the singular term "person" as the entity who could bring a suit for the penalty, and therefore, the informer action could only be brought by a single plaintiff).

[7] *See Freytag v. Comm'r*, 501 U.S. 868, 902 (Scalia, J., *concurring*) (analyzing the definite article "the" as narrowing a class to specific "envisioned" members of the class); *Work v. United States*, 262 U.S. 200, 208, 43 S.Ct. 580, 582, 67 L. Ed. 949 (1923) (drawing a distinction between "the" and "an" in a statute – "If by the words quoted from section 4 of the act it was intended to authorize a new appraisement of the surface reservations, the language would not have been '*the*' appraisement but '*an*' appraisement. The use of the definite article means an appraisement specifically provided for."); *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) ("[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" – citations omitted).

[8] *See U.S. ex rel. Chovanec v. Apria Healthcare Gp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) (Judge Easterbrook instructing that since the United States is the real party in interest in a *qui tam* action claim preclusion can apply to bar a later suit based on the same alleged violation, and stating that "[o]nly when the initial action concludes without prejudice (or covers a different transaction) will a later suit-by the original relator, a different relator, or the

preclusion does not apply to subsequently filed false marking suits, the federal government could obtain multiple one-half shares of penalties. But the statute provides that the government only gets one "one-half" share of a penalty. Hence, multiple false marking suits should be prohibited since, for the same acts of false marking, these suits could improperly give the government a double or triple recovery.[9]

In addition to claim preclusion, the doctrine of "double jeopardy" may apply to false marking claims. Double Jeopardy precludes multiple punishments, including monetary penalties, for the same criminal offense.[10] Supreme Court precedent limits double jeopardy to successive criminal punishments. Consequently, a criminal defendant can be punished in both a criminal manner and in a civil manner. Thus, before double jeopardy applies, a court must determine that the statute imposing the punishment is a criminal statute, rather then a civil remedial statute.[11]

The Supreme Court, in *Hudson v. United States*, 522 U.S. 93 (1997), summarized the factors relevant to showing a statute is a "criminal," for purposes of applying double jeopardy as follows:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty[.]"
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> In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), provide useful guideposts, including: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." It is important to note, however, that "these factors must be considered in relation to the statute on its face," and "only the clearest proof" will suffice to override legislative intent and transform what

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Department of Justice-be permissible."). *Accord Dwight Mfg.*, 213 F. at 524-25 (in a suit to recover a penalty under the Immigration Act, noting that had a first-filed *qui tam* action been brought to a final judgment, that suit would bar any further *qui tam* suits). *See generally*, APD § 38:10 [Claim Preclusion] Requires a Final Judgment on the Merits.

[9] *See Dwight Mfg.*, 213 F. at 524-25 (adopting a certain construction of a *qui tam* statute because it avoided placing the defendant "in the position of having to pay two penalties for the same violation.").

[10] *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n.1 (1994) ("The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. Although its text mentions only harms to 'life or limb,' it is well settled that the Amendment covers imprisonment and *monetary penalties*.").

[11] *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) ("The application of the double jeopardy clause to particular cases has not been an easy task for the courts. The subject has recently been thoroughly explored in *Helvering v. Mitchell*, 303 U.S. 391, in which the Court analyzed the cases now pressed upon us and emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to 'jeopardy' within the constitutional meaning. We may start therefore with the language of the Mitchell case: 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether (the statute in question) imposes a criminal sanction. That question is one of statutory construction.' Is the action now before us, consisting of double damages and the $2,000 forfeiture, criminal or remedial?" – ruling that a prior criminal indictment, which resulted in the defendant paying a fine, did not create double jeopardy to bar a later penalty being assessed as a violation under the False Claims Act since the penalty under the False Claim Act was deemed to be a remedial measure to make the government whole from the prior fraud and not a second criminal penalty, therefore double jeopardy did not apply).

> has been denominated a civil remedy into a criminal penalty[.][12]

Applying the factors indentified in *Hudson*, one can offer a plausible argument that § 292 should be deemed a "criminal" statute, and therefore, subject to double jeopardy where the defendant faces multiple actions based on the same alleged acts of false marking. The statutory language of § 292 is silent as to the nature of the offense and the penalty. But the legislative history of § 292,[13] in two locations, unequivocally identifies § 292 as being a "criminal" statute:

1) "Section 292 *is a criminal statute* relating to falsely marking an article as being patented when it was not…. [T]his section … makes it *an ordinary criminal* action as well as an informer action as in the present statute.";[14] and

2) "This *is a criminal provision*. … The informer action is included as additional to an *ordinary criminal* action." [15]

Further, the penalty provided under § 292 can only be imposed under authority of the judiciary after a law suit has been filed.[16] 35 U.S.C. § 292(b). No administrative agency, such as the Patent and Trademark Office, has authority to assess the penalty.[17] A punishable act of false marking has an element of scienter, since it requires an intent to deceive the public.[18] Additionally, the penalty imposed under the statute does not provide remedial compensatory damages to remedy any dollar loss the

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[12] *Id.*, 522 U.S. at 99-100 (citations omitted). Notably, *Hudson* expressly overruled *United States v. Halper*, 490 U.S. 435 (1989), where the Court held that a $130,000 "civil" penalty under the False Claims Act was a "criminal" punishment for purposes of double jeopardy where there was only $16,000 dollars in actual damages suffered by the government. The *Halper* court applied an analysis focusing not on the criminal or civil nature of the statute imposing the penalty, but on whether the penalty as imposed was a punishment or was remedial. It explained:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

Id. at 447-48. In *Hudson*, the Court repudiated the punishment/remedial analysis and instead held that the analysis had to proceed on the basis of whether the statute imposing the penalty was truly a criminal statute. 522 U.S. at 101-03.

[13] Traditionally, legislative histories are often relied on to construe statutes. *Guarantee Ins. T. & S. D. Co. v. Sellers*, 123 U.S. 276, 285 (1887) ("No doubt, the words of a law are generally to have a controlling effect upon its construction; but the interpretation of those words is often to be sought from the surrounding circumstances and preceding history." – using legislative history of early version of Patent Act to construe statutory provision regarding expiration of U.S. patents to coincide with expiration of corresponding foreign patents). But some have cautioned against placing too much weight on them. *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568-69 (2005).

[14] S. REP. No. 1979, 82 Cong., 2d. Sess. (1952), *reprinted in*, 1952 U.S.C.C.A.N. 2394, 2403 (emphasis added).

[15] *Id.* at 2424 (emphasis added).

[16] *Cf. Lees v. United States*, 150 U.S. 476, 479 (1893) (noting that enforcing a criminal penalty in a civil suit did not make the statute any less "criminal" and, in discussing a *qui tam* statute imposing a penalty for importing into the U.S. foreigners to perform labor, stating: "[A]lthough the recovery of a penalty is a proceeding criminal in its nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts."); *Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1363 (Fed. Cir. 2010) (stating in the context of discussing § 292 that "[a] *qui tam* action is civil in form, even though it arises under a criminal statute.").

[17] *Cf. Hudson*, 522 U.S. at 1003-05 (ruling that statute expressly identified by Congress as imposing a "civil" remedy for the defendant's wrong doing, which penalty was imposed by a civil government administrative agency, did not require scienter as an element of the offense, and in addition to imposing a monetary penalty for deterrent purposes revoked a privilege of a license to engage in rendering a certain type of professional services, a traditionally civil form of punishment, was not a "criminal" statute for purposes of double jeopardy).

[18] 35 U.S.C. § 292(a); *see generally*, APD § 34:101 Deceptive Intent.

acts of false marking directly inflicted upon the federal government.[19] To the extent that a patentee's false marking harms a competitor, that competitor may seek redress for that harm under the unfair competition laws.[20] While unfair competition claims may provide compensation to competitors harmed by false marking, only § 292 makes certain acts of false marking criminal. The penalty of § 292 punishes the defendant for conduct that deceives the public regarding the patented status of the marked product and imposes that punishment to deter such behavior in the future.[21]

Considering the totality of the foregoing, under the *Hudson* factors, § 292 could be classified as a "criminal" statute. If so, double jeopardy should apply to preclude a defendant from being subjected to two penalties from two different § 292(b) suits based on the same alleged acts of patent false marking as both suits involve the "same offense" punishable as a "criminal" violation.

Presently, few cases have addressed the applicability of double jeopardy to § 292. In *Filmon Process Corp.*, handed down almost three decades before *Hudson*, the D.C. Circuit[22] held that § 292(b) is not a "criminal" statute for purposes of double jeopardy, and therefore an unsuccessful *qui tam* plaintiff could appeal a district court's finding that it failed to prove § 292 violation. Explaining its rationale, the D.C. Circuit stated:

> In our view the double jeopardy clause does not apply where the nub of the action is civil *qui tam* enforcement of essentially remedial provisions. We are in agreement with the judicial pronouncements that 35 U.S.C. § 292(b), while penal, is not a criminal statute. In our view, that position is a sound basis for rejecting the double jeopardy claim in case of an action by an informer for misuse of his patent mark without his consent. That provision is designed to protect the exclusiveness of the use of the invention granted to the patentee. The patentee is given this remedy to protect his patent position, and as a practical matter, the patentee is the only likely enforcer of it, as recovery requires proof that the statements were made without his consent. We think the statute's remedial purposes outweigh the conceptual difficulties posed by the ostensibly non-compensatory character of the penalty relief awarded against a defendant who appropriates a patentee's mark. [inserted n.10: Appellees rely on language in the Committee Reports, reporting the 1952

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[19] *Pequignot v. Solo Cup Co.*, 640 F. Supp.2d 714, 728 (E.D. Va. 2009) ("Unlike false claims against the government, misuse of a patent marking does not involve a proprietary injury to the United States that must be vindicated through the actions of private prosecutors; rather, the injury to the United States is only to its sovereignty. … To the extent that there is any real injury caused by false marking, it is to competitors of the entity abusing patent markings. Congress could easily provide such competitors with a private right of action without enacting a *qui tam* statute. The only practical impact of the *qui tam* provisions of § 292(b) appears to be its potential to benefit individuals, such as the plaintiff in the case at bar, who have chosen to research expired or invalid patent markings and to file lawsuits in the hope of financial gain."), *on subsequent proceedings*, 646 F. Supp. 2d 790 (E.D. Va. Aug. 25, 2009), *aff'd*, 608 F.3d 1356 (Fed. Cir. 2010). *Cf. United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991) ("The government concedes here that these civil fines would constitute punishment, if paid, inasmuch as the government is unable to demonstrate a rational relationship between the fines and the government's costs.").

[20] *See e.g., Technology Licensing Corp. v. Intersil Corp*., No. C 09-04097 RS, 2009 WL 5108395, *1-*3 (N.D. Cal. Dec. 18, 2009); *Third Party Verification, Inc. v. SignatureLink, Inc*., 492 F. Supp.2d 1314, 1323-27 (M.D. Fla. 2007); *Medtox Scientific, Inc. v. Tamarac Medical, Inc.*, No. 06-3546 (JRT/FLN), 2007 WL 37793, *3 (D. Minn. Jan. 4, 2007); *RegScan, Inc. v. Brewer*, No. 04-6043, 2007 WL 879420 (E.D. Pa. Mar. 16, 2007); *M. Eagles, Tool Warehouse Inc. v. Fisher Tooling Co.*, 68 F. Supp. 2d 494, 506, 52 USPQ2d 1748, 1758 (D.N.J. 1999). *See also* APD § 34:108 Lanham Act and Acts of Patent False Marking.

[21] *See e.g., Forest Gp., Inc. v. Bon Tool Co*., No. H-05-4127 2010 WL 1708433, *2 (S.D. Tex. Apr. 27, 2010) (setting penalty at the highest selling price of the false marked article to "fulfill[] the deterrent goal of § 292's fine provision").

[22] The Federal Circuit has not yet addressed whether double jeopardy applies to § 292. As § 292 derives from the Patent Act, and therefore falls within the court's exclusive jurisdiction, the Federal Circuit will apply its own law, and not regional circuit law, in resolving questions related to § 292. *See Golan v. Pingel Enterprise, Inc.*, 310 F.3d 1360, 1368 (Fed. Cir. 2002) ("Federal Circuit law applies to causes of action within the exclusive jurisdiction of the Federal Circuit."); *see also Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1360-61 (Fed. Cir. 1999) (*en banc*). *See generally*, APD § 2:6 Choice of Circuit Law.

> revision of the patent laws, as indicating that § 292 is a 'criminal' statute. We think that language does not undercut the conclusion that insofar as enforceable by an informer the statute is remedial. The change merely permitted enforcement by the Government through collection of a 'fine'; it did not alter the basic character of this informer's action.][23]

The *Filmon Process* court's analysis seems questionable in view of *Hudson*. First, in concluding that § 292 is remedial, the court focused on only the perceived remedial nature of the statute to the *patentee* when someone unlawfully marks its products with the patentee's patent number. The court did not consider what has become today's prevalent scenario where the patentee is accused of having falsely marked its products with its own patent number because its patent had expired at the time the patentee marked its product.[24] The D.C. Circuit's remedial characterization falls flat for this scenario. Additionally, the court did not consider the factors spelled out in *Hudson*, including whether § 292 requires scienter (it does), whether any other statute criminalizes patent false marking (none do), and whether § 292 promotes the traditional aims of punishment-retribution and deterrence (which it does). In short, it is questionable whether the rationale relied in *Filmon Process* rises to the level of presenting "only the clearest proof" as required to override Congress's express characterization of § 292 as being a criminal statute in the legislative history.[25]

Perhaps the strongest argument against finding that § 292 is a "criminal" statute for purpose of double jeopardy arises from the burden of proof applied to these claims. The Federal Circuit has held that a plaintiff need only show a false marking violation by the preponderance of the evidence.[26] Typically, due process requires that for criminal convictions, a court must apply the "beyond a reasonable doubt" evidentiary standard.[27] The use of "beyond a reasonable doubt" for criminal convictions, but only a preponderance of the evidence for false-marking violations supports viewing § 292 as not being a "criminal" statute. But in its earliest inception, courts *have* applied the "beyond a reasonable doubt standard to false-marking penalty actions.[28] Even the Federal

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[23] *Filmon Process Corp. v. Spell-Right Corp.*, 404 F.2d 1351, 1355, 158 USPQ 533 (D.C. Cir. 1968) (citations omitted –stating it agreed with several earlier district court cases that viewed § 292(b) as being penal but not a criminal statute, and therefore the double jeopardy clause would not apply to bar an appeal of a district court's finding that a defendant was not guilty of false marking).

[24] *See generally*, APD § 34:106 Marking Expired Patents.

[25] *See Hudson*, 522 U.S. at 100 ("It is important to note, however, that 'these factors must be considered in relation to the statute on its face,' and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]").

[26] *Forest Gp., Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1300 (Fed. Cir. 2009); *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352-53 (Fed. Cir. 2005). *See generally*, APD § 34:99.50 Standard of Proof for False Marking. When the Federal Circuit first adopted the preponderance of the evidence standard for § 292 claims in *Clontech* it cited no authority to support the position. *Clontech*, 406 F.3d at 1352-53. *Forest Gp*. only cited *Clontech* as support for the proper evidentiary standard. *Forest Gp.*, 590 F.3d at 1300. Most likely the Federal Circuit assumed, and reasonably so, that since § 292 is enforced via a civil action, the traditional burden of proof for civil actions applies. *See United States v. Regan*, 232 U.S. 37, 46-48 (1914) ("preponderance of the evidence" rather than proof "beyond a reasonable doubt" was sufficient in an action to recover a penalty for conduct that was a criminal misdemeanor, where the government sought recovery in a civil suit codified as a *qui tam* action, as the government's action was in the nature of recovering a debt in a civil proceeding); *Hepner v. United States*, 213 U.S. 103, 108-11 (1909) (in action to recover a civil penalty under a *qui tam* statute, the government was entitled to have the civil procedure rules apply and to have a directed verdict in its favor if the undisputed facts showed the government was entitled to the judgment as a matter of law).

[27] *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). A preponderance of the evidence standard can be applied to determine the magnitude of a sentence or forfeiture for a criminal violation, but only after the violation was proven under the "beyond a reasonable doubt standard." *McMillan v. Pennsylvania*, 477 U.S. 79, 84-86 (1986).

[28] *Tompkins v. Butterfield*, 25 F. 556, 558 (D. Mass. 1885) (charging the jury that "Now, another consequence flowing from this being … in the nature of a criminal proceeding, is this: that the offense must be proved by evidence that leaves upon the minds of the jury no reasonable doubt that the penalty has been incurred. …"); *Nichols v. Newell*, 18 F.Cas. 199, 200 (D. Mass. 1853) (charging the jury that

Circuit, subsequent to *Clontech* and *Forest Gp.* has noted that "[t]he bar for proving deceptive intent here *is particularly high*, given that the false marking statute is a criminal one, despite being punishable only with a civil fine."[29] Moreover, the Federal Circuit has analyzed substantive aspects of § 292 under criminal law,[30] which provides further support to treat § 292 as a criminal statute for purposes of double jeopardy.

When applicable, double jeopardy generally does not attach until a jury is empanelled or, in a nonjury trial, when a judge *begins* hearing evidence.[31] A patent false marking claim, despite its criminal nature, is tried as a civil action. In proceeding as a civil action, false marking claims may be subject to summary judgment motions.[32] If double jeopardy applies to § 292, a summary judgment motion bearing on the merits of the false marking claim may cause jeopardy to attach *at that point in time* since the district court can hear evidence on the merits of the accusation and adjudicate the guilt or innocence of the defendant.[33]

What to Do with the Second-filed Suit?

While it seems evident from the analysis set forth above that § 292 does not permit multiple fines for the same act of false marking, it is not clear what to do where multiple plaintiffs have filed patent false

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"The burden of proof is upon the plaintiff, to satisfy you, beyond a reasonable doubt, of such facts as are necessary to constitute the offense."); Odin B. Robert, *Actions Qui Tam Under the Patent Statutes of the United States*, 10 Harv. L. Rev. 265, 269 (1896) (in the context of analyzing the predecessor to § 292, "As to the burden of proof. The plaintiff in order to prevail must prove beyond a reasonable doubt that the marks were affixed to unpatented articles by the defendant, that they were so affixed with intent to deceive the public, and that the articles were unpatented."). *But see Graffius v. Weather-Seal*, 165 F.2d 782, 782 (6th Cir. 1948) (applying "weight of the evidence" standard for false-marking claim); *Hotchkiss v. Samuel Cupples Wooden-Ware Co.*, 53 F. 1018, 1021 (E.D. Mo. 1891) (instructing jury it needed to find a false marking violation by "a clear preponderance of evidence"); *Hawloetz v. Kass*, 25 F. 765, 767-68 (S.D.N.Y. 1885) (ruling that jury did not have to apply the "beyond a reasonable doubt" standard of proof to a patent false marking claim, but instead could find a violation based upon "evidence to their reasonable satisfaction").

If the government, when prosecuting a false-marking violation by itself, must treat the proceeding as "an ordinary criminal action," and apply the proof standard of "beyond a reasonable doubt," it seems unlikely that the law would permit a civil plaintiff suing on the government's behalf to escape that high proof burden. *Cf. United States v. Shapleigh*, 54 F.2d 126, 134 (8th Cir. 1893) (ruling that when the government proceeded in a civil suit to recover a fine for acts classified as a crime, it still had to met the "beyond a reasonable doubt" standard of proof despite the civil nature of the proceeding). *But see Regan*, 232 U.S. at 46-48 (where government has the option of pursuing either a criminal action or an informer action, and chooses to pursue the civil informer action, the criminal procedure rules do not apply to that action).

[29] *Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1363 (Fed. Cir. 2010) (emphasis added). Nonetheless, *Pequignot* adhered to the principle that the "preponderance of the evidence" standard applies. *Id.*

[30] *E.g. Pequignot*, 608 F.3d at 1363 (relying on the Supreme Court's distinguishment between "purpose" and "knowledge" in the context of a criminal law in analyzing the issue of intent to deceive the public for purposes of false marking).

[31] *Serfass v. United States*, 420 U.S. 377, 388 (1975) ("In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.'" – citations omitted).

[32] *E.g., Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1364-65 (Fed. Cir. 2010) (affirming summary judgment of no false-marking violation for because plaintiff failed to raise an issue of fact to show deceptive intent); *Arcadia Machine & Tool, Inc. v. Sturm, Ruger & Co.*, 786 F.2d 1124, 1125 (Fed. Cir. 1986) (same); *Chamilia, LLC v. Pandora Jewelry, LLC*, 85 USPQ.2d 1169, 1178-79 (S.D.N.Y. Sept. 24, 2007) (granting patentee summary judgment dismissing plaintiff's false marking claim); *DP Wagner Mfg. Inc. v. Pro Patch Sys., Inc.*, 80 USPQ.2d 1341, 1347-48 (S.D. Tex. April 21, 2006) (granting summary judgment finding patentee engaged in false marking); *M-3 & Associates, Inc., v. Cargo Sys. Inc.*, No. 3:99-CV-547 AS, 2004 WL 834690, *6-*7 (N.D. Ind. March 18, 2004) (recommending granting summary judgment that patentee falsely marked its product as being patented after the patent claims were held invalid by the Federal Circuit).

[33] *See Serfass*, 420 U.S. at 391-92, 95 S. Ct. at 1064 ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.' Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.").

marking suits against the same defendant for the same alleged acts of false marking, but none of the suits have reached a trial or have been otherwise adjudicated. Does the first-filed suit bar all later-filed suits? Does the first suit to reach a summary judgment hearing on the merits of the alleged violation create double jeopardy to bar the remaining suits? When faced with a second-filed suit, should a district court dismiss the suit or stay it until the first suit is resolved and then analyze whether any aspect of the second suit survives the first suit?

For *qui tam* actions under the False Claims Act, the 1986 amendments added a provision expressly imposing a first-to-file limitation precluding subsequent suits based on the same alleged wrongful conduct. The provision mandates that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Courts have noted that "[t]he first-to-file bar [of § 3730(b)(5)] functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim."[34] Indeed, the legislative history notes that "private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances."[35]

As one court has explained:

> Simply put, this provision [§ 3730(b)(5)] establishes a first in time rule. The *qui tam* complaint filed first blocks subsequent *qui tam* suits based on the same underlying facts. In so doing, the statute prevents a double recovery. A subsequently filed *qui tam* suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to separate and distinct recovery by the Government.[36]

Accordingly, "[t]he pendency of the initial *qui tam* action consequently blocks other private relators from filing copycat suits that do no more than assert the same material elements of fraud, regardless of whether those later complaints are able to marshal additional factual support for the claim."[37] Courts have explained that the "'jurisdictional limit on the courts' power to hear certain duplicative *qui tam* suits,' furthers the policies animating the FCA by ensuring that the government has notice of the essential facts of an allegedly fraudulent scheme while, at the same time, preventing 'opportunistic plaintiffs from bringing parasitic lawsuits.'"[38]

The policy rationale of "preventing 'opportunistic plaintiffs from bringing parasitic lawsuits'" and preventing a double recovery, applies equally to § 292 false marking claims. Nonetheless, it has been recently held that the first-to-file limitation under the False Claims Act, 31 U.S.C. § 3730(b)(5), does not apply by implication to false marking claims under § 292 because the plain language of § 3730(b)(5) limits its applicability to its "subsection," *i.e.*, claims brought under the False Claims Act.[39]

While § 3730(b)(5) does not apply to § 292 suits, federal comity dictates that second-filed § 292 suits should not proceed while a first-filed § 292 suit is pending based on the same alleged acts of false marking. As a matter of federal comity, "the general principle is to avoid duplicative litigation" between federal courts.[40] This concept has deep historical roots in our jurisprudence. In 1824, Justice Marshall

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[34] *In re Natural Gas Royalties Qui Tam Litig. (CO2 Appeals*), 566 F.3d 956, 961 (10th Cir. 2009).

[35] S. Rep No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290.

[36] *Erickson ex rel. U. S. v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989). *Accord Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("[S]o long as a subsequent complaint raises the same or a related claim based in significant measure on the core fact or general conduct relied upon in the first *qui tam* action, the § 3730(b)(5)'s first-to-file bar applies.").

[37] *Grynberg*, 390 F.3d at 1279.

[38] *U.S. ex rel. Poteet v. Medtronic, Inc*., 552 F.3d 503, 512, 513 (6th Cir. 2009).

[39] *Simonian v. Hunter Fan Co.*, No. 10 C 1212, 2010 WL 2720749, *2-*3 (N.D. Ill. Jul. 8, 2010) (rejecting argument that the first-to-file limitation under the False Claims Act, 31 U.S.C. § 3730(b)(5) applies to false patent marking actions under 35 U.S.C. § 292, and refusing to consider whether § 292, independently imposes a first-to-file limitation since the patentee waived that argument, for the purposes of the motion to dismiss, by not raising it until its reply brief, therefore denying patentee's motion to dismiss for lack of subject matter jurisdiction).

[40] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation.").

explained that "[i]n all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it."[41] Accordingly, courts have recognized that "[a] federal suit may be dismissed for reasons of wise judicial administration whenever it is duplicative of a parallel action already pending in another federal court. District courts are accorded a great deal of latitude and discretion in determining whether one action is duplicative of another, but generally, a suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions."[42]

Today, the principle announced by Justice Marshall in *Smith* is effectuated by the "first-to-file" rule.[43] The first-to-file rule permits the court presiding over a duplicative second-filed action to transfer, stay, or dismiss that suit:

> Where a complaint involving the same parties and the same issues has already been filed in another federal district, the court presiding over the later-filed suit may either transfer, stay, or dismiss that suit. This is known as the 'first-to-file rule.' The purpose of the rule is 'to avoid the waste of duplication, to avoid rulings which may trench upon the authority of other courts, and to avoid piecemeal resolution of issues that call for a uniform result.' It is also intended to foster federal comity. Accordingly, the rule 'should not be disregarded lightly.'[44]

As noted by the Supreme Court, the first-to-file rule "prevent[s] multiplicity of actions and ... achieve[s] resolution in a single lawsuit of all disputes arising out of common matters."[45]

The first-to file rule should apply with a heavy hand to § 292 false marking suits. "[Q]ui tam plaintiffs are merely agents suing on behalf of the federal government, which is always the real party in interest."[46] Thus, multiple § 292 actions, based on the

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[41] *Smith v. McIver*, 22 U.S. 532, 535 (1824). *Accord Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 447 (1916) ("The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction, is confined in its operation to instances where both suits are substantially the same; that is to say, where there is substantial identity in the interests represented, in the rights asserted, and in the purposes sought. This is not such an instance. The proceeding sought to be enjoined, although in some respects resembling the prior suits, is essentially different from them." – citations omitted); *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982) ("In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case. It should make no difference whether the competing courts are both federal courts or a state and federal court with undisputed concurrent jurisdiction." – affirming dismissal of second-filed federal action where parallel state court action was pending and ready for trial).

[42] *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993) (citations and internal quotations omitted – affirming dismissal of an age discrimination suit since another suit raising the same claim was pending in the forum).

[43] In the patent context, the first-to-file rule often gets invoked where a patentee and an accused infringer have each filed competing infringement and declaratory judgment actions. *E.g. Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952); *see generally*, APD § 37:93. Under the first-to-file rule, the courts will "favor[] the forum of the first-filed case, unless considerations of judicial and litigant economy, and the just and effective disposition of disputes, requires otherwise." *Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347 (Fed. Cir. 2005). The first-to-file rule does not provide an absolute rule in this context. Numerous exceptions can exist that will give a second-filed patent suit precedent over a first filed suit. *See generally*, APD § 37:96 Exceptions to First-to-File Rule. Indeed, recent Federal Circuit opinions addressing the first-to-file rule in the context of patent infringement and declaratory judgment actions, instruct the district courts to consider convenience factors of litigating in the respective forums when deciding which suit to allow to proceed. *Micron Technology, Inc. v. Mosaid Technologies, Inc.*, 518 F.3d 897, 905 (Fed. Cir. 2008). Given the personal stake the relator has in its § 292 false marking claims, the timing of the *qui tam* suits should ordinarily be paramount, and convenience factors and other exceptions to the first-to-file rule should have little or no weight if they would deprive a first-filed relator of its lawful right to the penalty.

[44] *USA Scientific, LLC v. Rainin Instrument, LLC*, No. C 06-4651 SBA, 2006 WL 3334927, *1 (N.D. Cal. Nov. 16, 2006) (citations omitted – applying first-to-file rule to stay second-filed action until a motion to dismiss was ruled upon in the first-filed action).

[45] *Southern Construction Co. v. Pickard*, 371 U.S. 57, 60 (1962).

[46] *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996). *Accord Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 768 (9th Cir. 1997) ("A *qui tam* plaintiff by definition asserts not his own interests, but only those of United States.").

same alleged acts of false marking, are suits brought by the same real party in interest (the federal government), against the same defendant, for the same claim, *i.e.*, the penalty for the same acts of false marking.[47] With this understanding, and applying the first-to-file rule, the court having the first-filed § 292 action should have precedence over all later-filed § 292 suits.

At a minimum, therefore, the court presiding over a later-filed *qui tam* suit, if it chooses not to dismiss the action, has the power to stay that suit until the first-filed suit is resolved[48] or, possibly, has sufficiently proceeded to the point where jeopardy attaches. In some cases, the district court may also choose to dismiss the later-filed *qui tam* suit as being a duplicative action of the first suit.[49] Indeed, one recent district court opinion held that where a second-filed false marking action is identical to a prior suit, the second-filing plaintiff lacks standing, and therefore the second-filed action must be dismissed, rather than stayed or transferred.[50] On that same day, another district court concluded that a second-filing plaintiff lacks standing because the government has effectively assigned its claim for a false-marking violation to the first filer, thereby depriving standing to any later filing plaintiff.[51]

Conclusions

Since § 292 does not permit imposing multiple penalties for the same act of false marking, defendants should not have to simultaneously defend multiple false marking suits. Undoubtedly, defendants facing multiple § 292 false marking suits would prefer that the courts presiding over the second filed suits automatically dismiss those suits outright. But whether to stay or dismiss the later-filed action presents a fact-dependent question.

Where it is clear that all the acts of false marking alleged in the second-filed complaint are covered by a first-filed suit, and that the first suit is not jurisdictionally defective, the arguments for dismissing the second filed case, rather than staying it,

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[47] *United States v. B. F. Goodrich Co*., 41 F. Supp. 574, 575 (S.D.N.Y. 1941) ("Obviously, under the general rule well known and so long adhered to, one plaintiff should not be permitted to bring and maintain at the same time more than one action for the same relief. The only plaintiff in an action such as this must be the United States, no matter who brings it on its behalf." – ruling that second-filed *qui tam* action brought by different named party, but on the government's behalf, had to be stayed in view of the first-filed *qui tam* action).

[48] *See e.g.*, *United States v. Anaconda Wire & Cable Co.*, 52 F. Supp. 824, 826-27 (E.D. Pa. 1943) (denying motion to dismiss a second-filed *qui tam* suit, but granting motion to stay that suit until a final determination of the first suit and stating that "[w]hile there is thus authority for granting either of the prayers of the defendant's motion in the present case, I am of the opinion that the action should be stayed rather than dismissed."); *United States v. B. F. Goodrich Co*., 41 F. Supp. 574, 575 (S.D.N.Y. 1941) (ruling that second-filed *qui tam* action brought by different named party, but on the government's behalf, had to be stayed in view of the first-filed *qui tam* action).

[49] *E.g. U.S. ex rel. Benjamin v. Hendrick*, 52 F. Supp. 60, 62 (S.D.N.Y. 1943) (dismissing second-filed *qui tam* action because it was barred in view of the government's first filed action, and rejecting argument that the second filed suit was for different wrongful acts because it pled wrongful conduct more broadly, the court finding that the plaintiff failed to plead facts showing additional wrongful acts that were not within the scope of the government's first-filed suit) *Cf. Francis v. United States*, 72 U.S. 338, 340-41 (1867) (informer could not "intrude" in action where government already commenced an action, therefore denying informer's motion to intervene in the government's suit); *Hillgrove v. Wright Aeronautical Corp.*, 146 F.2d 621, 622 (6th Cir. 1945) (dismissing *qui tam* action brought after government had instituted its own action and stating "If the two petitions were in substance the same, clearly the dismissal was proper.").

[50] *Simonian v. Quigley Corp*., No. 10 C 1259, 2010 WL 2837180, *2 (N.D. Ill. Jul. 19, 2010) (following reasoning of *B.F. Goodrich* that multiple qui tam suits are not permitted for the same alleged violation and dismissing false marking action that was filed several hours after another identical suit by a different plaintiff and concluding that in view of the first-filed suit the second filing plaintiff lacked standing).

[51] *San Francisco Technology, Inc. v. Glad Products Co.*, No. 10-CV-00966 JF (PVT), 2010 WL 2836775, *4 (N.D. Cal. Jul. 19, 2010), *substituted opn.*, 2010 WL 2943537, *4 (N.D. Cal. Jul. 26, 2010) (granting motion to dismiss for lack of standing where plaintiff's false marking claims against one defendant appeared to fall within the scope of violations asserted in a prior suit brought by a different plaintiff, where the same patents and same technology were at issue, and rejecting the plaintiff's argument that since different packaging was at issue the claims in the two suits were different since the allegations in the first-filed complaint were broad enough to include the different packaging, and therefore the government was deemed to have assigned its claim for the false marking violation to the first-filed, thereby depriving the second-filing plaintiff of standing).

are strongest. If the government is deemed to have assigned its claim to the first-filer, as concluded in *San Francisco Technology*, dismissal for lack of standing, rather than a stay, may be required.

But if the second-filed suit raises additional acts of false marking that may not fall within the scope of the acts being adjudicated in the first suit, the more prudent course of action may be to stay the second-filed suit until the first suit reaches a final judgment. At that point the court in the second-filed suit can determine whether the additional acts of false marking pled in the second-filed action are barred by claim preclusion from the first-filed action,[52] or whether they give rise to a second and independent claim for recovery of the penalty for which the suit may proceed.

Alternatively, the court presiding over the second-filed action could transfer the action so that the court presiding over the first-filed action, with its familiarity of the scope of violations encompassed within the first-filed action, can make the determination to what extent claim preclusion or double jeopardy apply to the second-filed action.

Further complexities may arise. For example, if a second-filed suit pleads additional acts of false marking not covered by a first suit, and the district court stays that action, should the plaintiff in the first-filed action have the right to amend its complaint to include those additional acts to its complaint? Or, in that situation does the second-filed suit assume the position as the "true" first-filed suit for those additional acts of false marking. To the extent that claim preclusion from the first suit would bar a plaintiff from pursuing a penalty for those additional acts in a second complaint, the amendment probably should be allowed in the first case (assuming all other prerequisites for granting leave to amend are met). But if claim preclusion would not bar the penalty for the additional acts, the second-filing plaintiff has a respectable fairness argument that it should be treated as a first-filer for those additional acts of false marking.

[52] Claim preclusion bars subsequent litigation not only of the claims actually raised in an underlying suit, but also of all claims that could have been raised in that first suit. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983) ("Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, 'it is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'"); *Pactiv Corp. v. Dow Chem. Co.*, 449 F.3d 1227, 1230 (Fed. Cir. 2006) ("[T]he defense of claim preclusion will generally be available where the asserted claim was, or could have been, raised in a prior action between the parties which has been adjudicated on the merits."); *see generally*, APD § 38:7 Bars All Issues that Were Raised or Could Have Been Raised.

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