The Policy of the On Sale Bar After Pfaff v. Wells Electronics

NOTE
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INTRODUCTION
Prior to Pfaff v. Wells Electronics, Inc.,¹ there was no consensus in the federal courts as to whether an invention was “on sale” within the meaning of 35 U.S.C. § 102(b).² Through its decision in Pfaff, the Supreme Court changed what some district courts had previously assumed, namely that an invention had to be reduced to practice before it could be placed on sale within the meaning of section 102(b).

This note briefly traces the history of the on sale bar, including the recent decision of Pfaff, and discusses whether the rule in Pfaff promotes the policies underlying section

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² In particular, the circuit courts and the Supreme Court have differed on the issue of whether reduction to practice triggers the on sale bar. Some courts have held or assumed that for the invention to be considered on sale, the invention must be reduced to practice or the invention must be substantially complete. See, e.g., UMC Electronics Co. v. United States, 816 F.2d 647 (Fed. Cir. 1987) (requiring use of the reduction to practice test to be used under the “totality of the circumstances” standard); Timely Prods. Corp. v. Aaron, 523 F.2d 288 (2d Cir. 1975) (using the reduction to practice test); Dart Indus. v. E.J. duPont De Nemours & Co., 489 F.2d 1359 (7th Cir. 1973) (using a reduction to practice analysis). Cf. Alexander Milburn Co. v. Davis Bournville Co., 270 U.S. 390 (1926) (holding a patent invalid even though the claim was not yet reduced to practice); Dolbear v. American Bell Tel. Co., 126 U.S. 1 (1888) (holding that conception or the filing for an invention is enough to trigger the on sale bar).
102(b). I will argue that the Pfaff standard, as enunciated by the Court, is inconsistent with the policies behind section 102(b) because the rule in Pfaff does not promote prompt and widespread disclosure of information, fails to encourage useful and innovative inventions, forces inventors to commit time and resources to inventions that are useless or not economically worthwhile, and fails to reduce the problem of inventors extending the grace period beyond the statutory authorized limit.

I. BACKGROUND

Under section 102(b) of the Patent Act of 1952, a patent cannot be granted for an invention that has been on sale for more than one year prior to the filing of a patent application. This is known as the on sale bar. In relevant part, the on sale clause provides that:

A person shall be entitled to a patent unless--

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

Many courts struggled to define what was required for the invention to be considered “on sale” within the meaning of section 102(b). The courts determined that the first requirement for an invention to be on sale centered on the meaning of “sale” (e.g., is an offer for sale enough to trigger the bar?), and the requirements for the invention to be placed on sale.

3 35 U.S.C. § 102(b) (year).
4 Id. (emphasis added).
A. The Threshold Question

Since the promulgation of section 102(b), there has been much litigation involving what activities trigger the on sale bar. It was thought that section 102(b) required certain events to occur before the invention could be deemed sufficiently ready to be placed on sale. Essentially, the threshold question was “at what point [was] the invention sufficiently developed such that, coupled with an offer to sell, the inventor's commercial activities [would] invoke the on sale bar.” While courts could easily determine whether the invention was offered for sale, a determination of when the invention was fully developed and ready to be patented was not easily achieved.

The difficult task for courts to determine was whether the invention was ready for patenting simply because the invention was shown to have been placed on sale. In other words, the issue focused on whether the invention had been sufficiently developed to trigger the on sale bar. This issue was important because if the invention had not been sufficiently developed, it was presumed that the invention was not ready to be placed on sale, and thus the experimental-use defense was available to the inventor to negate the triggering the on sale bar.

B. Policy Reasons for Section 102(b) ("On Sale Bar")

Fearing the unlimited monopoly of an invention, Congress provided for “public franchises granted to the inventors of new and useful improvements for the purpose of securing to them . . . for the limited term . . . .” Under the Patent Act of 1839, Congress provided for a two-year grace period in order to allow experimental use. Essentially, the inventor had two years to file a patent application once she placed her invention on

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7 See UMC Electronics Co. v. United States, 816 F.2d 647 (Fed. Cir. 1987); Timely Prods. Corp. v. Aaron, 523 F.2d 288 (2d Cir. 1975); McCreery Eng’g Co. v. Massachusetts Fan Co., 195 F. 498 (1st Cir. 1912).
8 See Schacht, supra note 6, at 138 (citing Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 623 (Fed. Cir. 1985)).
9 City of Elizabeth v. American Nicholson Pavement Co., 97 U.S. 126 (1877) (defining experimental use as one in which the inventor discloses her invention to the public for the purpose of discovering the invention’s weaknesses under normal usage).
10 Pfaff, 525 U.S. at 63 (quoting Seymour v. Osbourne, 78 U.S. 516, 533 (1870)).
11 Blandy v. Griffith, 3 F. Cas. 675, 678 (S.D. Ohio 1869) (No. 1,529).
sale, and exceeding that grace period barred her from obtaining a patent. In 1939, Congress observed that the two-year grace period was unduly long and operated as a handicap to industry, so the grace period was reduced to one year.\textsuperscript{12} Furthermore, Congress determined that the one-year grace period would serve to bring the date of patenting closer to the date of the invention’s creation.\textsuperscript{13}

There are four policy considerations underlying the on sale bar for limiting an inventor's monopoly over her creation. First, the on sale bar discourages the removal of an invention from the public domain after the public has come to reasonably believe the product is freely available as a consequence of prolonged sales activity.\textsuperscript{14} Second, the on sale bar is meant to encourage prompt and widespread disclosure of new inventions to the public.\textsuperscript{15} Third, the bar is intended to allow the inventor time to determine whether the patent is economically worthwhile, and to allow ample time for the expensive and protracted processing of a patent application.\textsuperscript{16} Fourth, Congress intended to prevent an inventor from exploiting her invention beyond the statutory authorized time limit of one year.\textsuperscript{17}

II. DEVELOPMENT OF ON SALE MODES OF ANALYSIS

A. Development of On Hand Analysis

The most difficult question the courts faced regarding on sale litigation, was the question of when an invention became sufficiently developed, such that coupled with an offer of sale, the on sale bar would be triggered.\textsuperscript{18} To determine when the on sale bar

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\textsuperscript{12} Act of Aug. 5, 1939, ch. 450, § 1, 53 Stat. 1212.
\textsuperscript{13} Id.
\textsuperscript{15} King Instruments Corp. v. Otari Corp., 767 F.2d 853, 860 (Fed. Cir. 1985).
\textsuperscript{16} C.R. Bard, Inc. v. M3 Sys, Inc., 157 F.3d 1340, 1355-56 (Fed. Cir. 1998).
\textsuperscript{17} See William C. Rooklidge, \textit{The On Sale and Public Use Bars to Patentability: The Policies Reexamined}, 1 FED. CIR. B. J. 7, 10 (1991) (quoting General Electric Co. v. United States, 654 F.2d 55, 61 (Ct. Cl. 1981)).
\textsuperscript{18} See Schacht, \textit{supra} note 6, at 138 (citing Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 623 (Fed. Cir. 1985)).
would be triggered, the courts developed the on hand doctrine.\textsuperscript{19} The on hand doctrine was first expounded in \textit{McCreery Engineering Co. v. Massachusetts Fan Co.}, in which the court held that the on sale bar was triggered when the invention was actually produced and “on hand” for delivery to the purchaser before the critical date.\textsuperscript{20} The invention had to be produced, sold, and delivered more than one year before the filing of the patent application for the on sale bar to apply.\textsuperscript{21}

Eventually, courts began to abandon the on hand doctrine because it was viewed as being inconsistent with the policy consideration of limiting monopolies on newly developed inventions.\textsuperscript{22} In abandoning the on hand rule, courts opted for the more lenient requirement that the invention be reduced to a physical embodiment.\textsuperscript{23} In the on hand rule analysis, the court concluded that the invention was required to be sold and delivered in order to fall within the meaning of section 102(b).\textsuperscript{24} However, an inventor could circumvent this rule by placing the invention on sale but delaying its delivery, effectively lengthening the period of monopolization beyond the statutory period.\textsuperscript{25} Because it defeated the purpose and intent of section 102(b), courts rejected the on hand rule.\textsuperscript{26}

\textsuperscript{19} McCreery Eng’g Co. v. Massachusetts Fan Co., 195 F. 498 (1st Cir. 1912) (establishing the on hand analysis). \textit{See also} Forbro Design Corp. v. Raytheon Co., 390 F. Supp. 794 (D. Mass. 1975) (following \textit{McCreery’s} on hand analysis); Trane Co. v. Nash Eng’g Co., 27 F.2d 334 (1st Cir. 1928) (same).


\textsuperscript{21} \textit{McCreery}, 195 F. at 502.

\textsuperscript{22} Dart Indus., Inc. v. E.I. du Pont De Nemours & Co., 489 F.2d 1359, 1365 (7th Cir. 1973) (criticizing \textit{McCreery’s} on hand analysis); Philco Corp. v. Admiral Corp., 199 F. Supp. 797, 816 (D. Del. 1961) (rejecting the on hand analysis). \textit{See also} Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831, 836 (Fed. Cir. 1984) (showing trends courts have made in moving away from the on hand standard).


\textsuperscript{24} \textit{McCreery}, 195 F. at 502.

\textsuperscript{25} \textit{See Barmag}, 731 F.2d at 836.

\textsuperscript{26} \textit{Id.} \textit{See Dart Indus.}, 489 F. 2d, at 1365.
B. Reduction to Practice Analysis

Courts, gradually began to move away from the on hand standard. Subsequently, courts began to apply the reduction to practice standard to analyze when the on sale bar was triggered.\(^{27}\) In *Timely Products Corp. v. Arron*, the court rejected the on hand mode of analysis in favor of a reduction to practice analysis because the on hand rule allowed an inventor to keep an invention secret while commercially exploiting it at the same time, undermining the policies of section 102(b).\(^{28}\) The *Timely Products* analysis had a three-part test to determine whether the on sale bar was triggered.\(^{29}\) The three-part test examined whether “(1) the complete invention claimed [had] been embodied in or obvious in view of the thing offered for sale . . . , (2) [whether the invention had] been tested sufficiently to verify that it [was] operable and commercially marketable . . . , and (3) [whether] the sale [was] primarily for profit rather than for experimental purposes . . . \(’^{30}\) The *Timely Products* analysis was influential until courts realized that it too had problems similar to the on hand analysis.

Courts after *Timely Products* slowly began to depart from the reduction to practice analysis or at least limit its effect.\(^{31}\) The *Timely Products* analysis was criticized because it allowed an inventor to commercialize her invention more than one year prior to filing by simply avoiding an actual reduction to practice.\(^{32}\) In essence, under the reduction to practice scheme, the inventor was permitted to prematurely exploit her invention commercially, and thus extend the statutory period.\(^{33}\) Like the on hand standard, the reduction to practice rule defeated the purpose and intent of section 102(b),

\(^{27}\) See Zieg, *supra* note 5, at 495-500 (examining how the on hand analysis was replaced by other modes of analysis).

\(^{28}\) 523 F.2d 288, 302 (2d Cir. 1975).

\(^{29}\) Id.

\(^{30}\) Id. (citations omitted).


\(^{33}\) Id.
and had the effect of creating a loophole for an inventor to avoid “expeditious disclosure of the invention for the benefit of society.”

Subsequent courts began to adopt the on sale bar under the “totality of the circumstances” test instead of just focusing on whether the invention was reduced to practice. In determining whether the invention had been sufficiently developed to trigger the on sale bar, these courts examined whether there was “substantial embodiment” of the invention. Previously, courts required that there be a physical embodiment of the invention before the on sale bar would start to run, which was another way of saying that the invention had to be reduced to practice. Again, courts gradually began to withdraw or at least limit the reduction to practice analysis. In *UMC Electronics Co. v. United States*, the court held that reduction to practice was not an absolute requirement of section 102(b). The court reasoned that if a “substantial embodiment” of the claimed invention existed more than one year prior to the critical date, coupled with the degree of commercialization of the invention, then the invention was not required to be reduced to practice in order to trigger the on sale bar.

III. *PFAFF v. WELLS ELECTRONICS*

A. Facts of the Case

In *Paff v. Wells Electronics, Inc.*, the plaintiff, Pfaff, designed a new computer chip socket and showed the details of the design to Texas Instruments some time before

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34 *Id.*
35 See e.g., Western Marine Electronics, Inc. v. Furuno Elec. Co., 764 F.2d 840, 844-45 (Fed. Cir. 1985) (declining to apply a strict reduction to practice analysis, opting instead for a totality of circumstances analysis). See also *In re Brigance*, 792 F.2d 1103, 1107-08 (Fed. Cir. 1986); Shatterproof Glass Corp. v. Libby-Owens Ford Co., 758 F.2d 613, 623 (Fed. Cir. 1985); TP Lab. Inc. v. Professional Positioners, Inc., 724 F.2d 965 (Fed. Cir. 1984) (holding that experimental nature of activity is to be examined upon consideration of surrounding circumstances).
36 *UMC Electronics Co. v. United States*, 816 F.2d 647 (Fed. Cir. 1987) (using substantial embodiment analysis although failing to clarify its meaning).
37 See *McCreery Eng’g Co. v. Massachusetts Fan Co.*, 195 F. 498, 501 (1st Cir. 1912); see also *RCA Corp. v. Data General Corp.*, 887 F.2d 1056 (Fed. Cir. 1989) (rejecting the physical embodiment requirement for triggering the on sale bar because inconsistent with underlying policies of section 102(b)); *Barmag Barmer Maschinenfabrik AG v. Marata Mach Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).
38 *UMC Electronics*, 816 F. 2d at 652.
39 *Id.* at 657.
March 17, 1981.\textsuperscript{40} A detailed drawing of the chip socket was sent to the manufacturer around March 1981.\textsuperscript{41} Before April 8, 1981, Pfaff received a written confirmation of the previous oral order for 30,100 of his new chip sockets.\textsuperscript{42} Pfaff filled the order for the chip sockets around July 1981, but did not test the prototype before offering it for commercial sale.\textsuperscript{43} It was not until later in the summer of 1981 that Pfaff began reducing his invention to practice.\textsuperscript{44}

On April 19, 1982, Pfaff applied for a patent for his invention, and the patent was issued.\textsuperscript{45} After the patent issued, Pfaff lost an infringement action he filed against Wells Electronic (“Wells”).\textsuperscript{46} Pfaff claimed that Wells’ modified version of the chip socket infringed six of his patent claims.\textsuperscript{47} The district court held that Pfaff’s claims had not been infringed, and the court rejected Wells’ defense that Pfaff possessed an invalid patent because his invention was placed in commerce more than one year prior to the filing of the patent application.\textsuperscript{48} Wells argued that Pfaff applied for the patent on April 19, 1982, making April 19, 1981 the date the on sale bar began to run.\textsuperscript{49} The Court of Appeals for the Federal Circuit (“Federal Circuit”) reversed the district court, and held that Pfaff had an invalid patent since he had placed his invention on sale for more than the statutory authorized period of one year.\textsuperscript{50} In reversing, the Federal Circuit held that it was the placing of the invention on sale for more than the statutory period, not the reduction to practice, that triggered the on sale bar.\textsuperscript{51} Pfaff petitioned for certiorari, and the Supreme Court granted the request due to the split in the district courts as to whether

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\textsuperscript{40} Pfaff v. Wells Electronics, 525 U.S. 55, 58 (1998).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 57.
\textsuperscript{46} Pfaff v. Wells Electronics, 5 F.3d 514 (Fed. Cir. 1993).
\textsuperscript{47} \textit{Id.} at 516.
\textsuperscript{48} \textit{Id.} at 515.
\textsuperscript{49} Pfaff v. Wells Electronics, 124 F.3d 1429, 1431 (Fed. Cir. 1997).
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 1434.
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reduction to practice was necessary for the invention to be “on sale” within the meaning of section 102(b). Subsequently, the Supreme Court affirmed the federal circuit court of appeals in favor of Wells.

B. The Holding

Until the Supreme Court decision in Pfaff, the district courts held that an invention could not be on sale within the meaning of section 102(b) unless it was first reduced to practice. The Supreme Court’s reasoning relied heavily on the Telephone cases. The Court held in Pfaff that the claimed invention was on sale within the meaning of section 102(b) because the inventor had a description or drawing that had “sufficient clearness and precision to enable those skilled in the matter to produce the device,” despite the fact that the invention was not reduced to practice. The Court reasoned that there is no textual support in section 102(b) for requiring “substantial completion” of the claimed invention, nor is there reference to a “reduction to practice.” Moreover, the Court observed that it is well settled that an invention may be patented before it is reduced to practice.

The Court developed a two-prong test to analyze when the on sale bar applies. Under the Court’s analysis, a claimed invention triggers the on sale bar if (1) the invention is offered for a commercial sale, and (2) the invention is ready for patenting, meaning the invention must have either (i) been reduced to practice, or (ii) there are sufficient descriptions or drawings available to enable those skilled in the art to produce the device. In applying the two-prong test, the Supreme Court concluded that the on sale bar began on April 19, 1981, since Pfaff filed an application for the patent on April 19, 1981.

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52 See Pfaff, 525 U.S. at 60 (citing Timely Products Corp. v. Aaron, 523 F.2d 288, 299-302 (2d Cir. 1975); Dart Indus., Inc. v. E.J. duPont De Nemours & Co., 489 F.2d 1359, 1365 n.11 (7th Cir. 1973).
53 Pfaff, 525 U.S. at 68-69.
54 Id. at 60 (citing Timely Products, 523 F.2d at 299-302; Dart Indus., 489 F.2d at 1365 n.11).
56 Id., 525 U.S. at 62.
57 Id. at 61 (citing 35 U.S.C. §§ 100, 100, 102(g)).
58 Id.
59 Id. at 67-68.
19, 1982. 60 While Pfaff had reduced the chip socket to practice in the summer of 1981, he also had offered the invention for sale long before April 8, 1981. 61 Furthermore, some time before March 17, 1981, Pfaff showed Texas Instruments a detailed drawing of his invention, and he later sent the manufacturer a drawing in March 1981. 62 In any case, the Court concluded that since Pfaff showed a detailed drawing that had “sufficient clearness and precision” and made an offer of sale more than one year prior to the filing of the patent application, his patent was invalid. 63

IV. PFAFF IS INCONSISTENT WITH POLICIES UNDERLYING THE ON SALE BAR

One policy underlying the on sale bar is to enable the inventor to reap the fruits of her creation within the one year grace period. 64 The Court may have intended to give the inventor unequivocal notice as to when the grace period begins in order help her avoid the forfeiture of her patent. However, the rule in Pfaff fails to do this. Unlike the reduction to practice rule where the start of the grace period is the point in time when the device is reduced to practice, the Pfaff rule fails to give the inventor concrete guidance as to when the on sale bar is triggered. Theoretically, the mere showing that the inventor offered the device for commercial sale, coupled with a casual drawing on a table napkin, may invoke the grace period. In fact, the lack of notice under the Pfaff rule prevents the inventor from enjoying the full benefits of the grace period. 65 A bright line rule would better serve the goals of increasing compliance with the grace period, and would thus maximize the inventor's full enjoyment of her grace period. 66 Otherwise, the inventor runs the risk of miscalculating the grace period, and thus jeopardizes her ability to obtain a valid patent. 67

60 See id. at 68.
61 Id. at 58.
62 Id.
63 Id. at 68.
64 Barrett, supra note 14, at 735.
66 Id. at 164.
67 See id.
An inventor who is unable to determine when the grace period begins is further faced with the dilemma of whether or when to disclose the invention by filing a patent application. The inventor may choose not to disclose her invention for fear of forfeiting her patent should she miscalculate the grace period, and may instead opt to maintain the invention as a trade secret.\textsuperscript{68} The inventor choosing to maintain the invention as a trade secret will, in essence, deprive the public of useful, innovative creations since there can be no improvements on an undisclosed device.\textsuperscript{69} In this sense, the rule in \textit{Pfaff} does not promote useful and innovative creations.

The inventor may also choose widespread disclosure. In this case, the rule in \textit{Pfaff} may cause inventors to prematurely file for a patent application when the invention has not yet been proven to work as intended.\textsuperscript{70} The rule essentially forces the inventor to offer a premature, inferior disclosure.\textsuperscript{71} In essence, the \textit{Pfaff} standard will not promote the private or the public interest, since the inventor will be forced to prematurely disclose her invention out of fear that the on sale bar may have already been invoked, and will be forced to commit time and resources to any invention that may not ultimately work as intended.\textsuperscript{72} As a result, she will acquire a weaker patent in addition to disclosing shoddy and incomplete information to the public regarding her invention, which will be of little use to the public given the premature nature of the disclosure.\textsuperscript{73} In this sense, the rule in \textit{Pfaff} does not promote the policy of increasing prompt and widespread disclosure of the invention to the public, and the disclosure that results is shoddy and incomplete.\textsuperscript{74}

There is also the economic problem of timing and quality of disclosure that is related to the issue of notice as discussed earlier. Specifically, when the invention is prematurely disclosed, the patent is weaker and is worth less because it fails to operate as

\textsuperscript{68} \textit{Id.} at 163.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{See} UMC Electronics Co. v. United States, 816 F.2d 647, 660 (Fed Cir. 1987) (Smith, J., dissenting).
\textsuperscript{71} Landry, \textit{supra} note 20, at 1172.
\textsuperscript{72} \textit{See id.}
\textsuperscript{73} \textit{See id.}
\textsuperscript{74} \textit{See id.}
intended. But even if the inventor avoids premature disclosure, she may later discover that she miscalculated her disclosure date with respect to the grace period. In any event, the rule in *Pfaff* requires the inventor to commit enormous time and resources only to discover later that the invention is worthless for failure to comply with the grace period.\(^{75}\) Essentially, the inventor is forced to waste time and money on an invention that has not yet been proven to work. In Judge Smith's words, the public will not be served with a system that "wastes the resources of inventors."\(^{76}\)

Unlike the *Timely Products* test, the rule in *Pfaff* can be criticized for its failure to provide a predictable test for the on sale bar.\(^{77}\) The effect of the two-prong test under *Pfaff* is that the inventor is not adequately put on notice regarding the triggering of the on sale bar until after the fact, meaning the inventor may suffer the "irretrievable loss of a valuable right" to the patent.\(^{78}\) It is not the policy of the on sale bar to chill the innovative process by financially burdening the inventor. In this sense, a bright line rule, as opposed to the rule in *Pfaff*, may better promote the underlying goals of section 102(b).

Furthermore, it has been argued that "a reduction to practice requirement is less likely to be abused, less susceptible to abuse, and more aligned with legislative intent . . . ."\(^{79}\) The reduction to practice standard arguably decreases the possibility that a wily inventor will refrain from placing her ideas in a description or drawing in order to avoid the on sale bar, but will nonetheless offer the invention for sale.\(^{80}\) Also, under the reduction to practice standard, the inventor would not run the risk of "inadvertently" invoking the on sale bar.\(^{81}\)

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\(^{75}\) *Id.* at 1172.
\(^{76}\) See *UMC Electronics*, 816 F.2d at 660 (Smith, J., dissenting).
\(^{77}\) Rooklidge, *supra* note 17, at 14.
\(^{78}\) See *UMC Electronics*, 816 F.2d at 659-660 (Smith, J., dissenting).
\(^{79}\) See Landry, *supra* note 20, at 1184.
\(^{80}\) *Id.* at 1178; see also William C. Rooklidge & Stephen C. Jensen, *Common Sense, Simplicity and Experimental Use Negation of the Public Use and On Sale Bars to Patentability*, 29 J. MARSHALL L. REV. 1 (1995).
\(^{81}\) Landry, *supra* note 20, at 1178.
The *Pfaff* decision may, on the other hand create a better defense for an alleged infringer.\(^{82}\) Permitting a better defense to alleged infringers may decrease monopolies on inventions and increase the creation of competing inventions. This will ultimately benefit the public, including the inventor herself for she may be that alleged infringer in some circumstances. However, providing a better defense for infringers also creates a greater burden on the innovative process beyond the policies underlying the on sale bar.

**CONCLUSION**

The recent decision in *Pfaff*, while purporting to advance the policies behind the on sale bar and limiting the reduction to practice regime, is inconsistent with the traditional policies behind section 102(b). The lack of concrete guidance in *Pfaff* increases the degree of uncertainty and unpredictability for the inventor who wishes to know whether the on sale bar has been invoked. Her miscalculation of the grace period will only be known once litigation has terminated. However, by then she would have committed enormous time and resources on the invention, the application, and perhaps litigation. In effect, the ambiguity of the rule in *Pfaff* fails to give the inventor concrete notice prior to the irretrievable loss of her right to the patent.

The decision in *Pfaff* flies in the face of the policies underlying section 102(b) by discouraging prompt and effective widespread public disclosure of inventions, chilling useful and innovative inventions, forcing inventors to waste time and resources on potentially worthless creations, and failing to prevent circumvention of the grace period beyond the statutory authorized limit. Instead, the rule in *Pfaff* places a burden on inventors such that it may chill the innovative process of inventing.

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