NAVIGATING THE BOUNDARIES: A CASE STUDY ON THE APPLICATION OF FEDERAL RULE OF EVIDENCE 407 IN INTELLECTUAL PROPERTY LITIGATION

ABSTRACT

Intellectual property rights are of great value to their respective owners but are costly to obtain and enforce. With society developing and technology advancing at a rapid rate, intellectual property protection is more important today than it ever has been before. With an increase in importance placed on securing intellectual property rights comes increased high-stakes litigation involving patents, trademarks, and trade dress. When tens or even hundreds of millions of dollars are on the line in high-profile intellectual property litigation, it is crucial that the law is settled on when certain rules of evidence apply. Without uniformity in the application of the Federal Rules of Evidence, and similarly the state-specific rules of evidence, intellectual property litigants could let the outcome of their case lie squarely with the discretion of the judge to apply rules of evidence that are uncommonly applied to intellectual property subject matter.

Federal Rule of Evidence 407 prohibits evidence of subsequent remedial measures offered to prove negligence or culpable conduct. However, the rule permits evidence of these remedial measures for other reasons, such as to impeach or to prove feasibility, control, or ownership of the remedial measure. It is not uncommon for an entity to make changes to a trademark they are using or the design of a product they are manufacturing to avoid continued infringement once it has been alleged by a respective patent or trademark holder. This Note addresses the split amongst circuit and district courts on whether Rule 407 should apply to intellectual property cases where remedial measures are taken subsequent to an allegation of intellectual property infringement. This Note argues that the majority view is correct in determining Rule 407 should apply to bar evidence of remedial measures to prove culpable conduct when the right circumstances are present.

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I. Introduction

One opportunity for a judge's discretion to directly impact the outcome of a case is a judge's interpretation of the Federal Rules of Evidence and their applicability.[1] The determination of whether evidence of a remedial measure should be admitted to potentially prove culpable conduct or willful infringement in an intellectual property (IP) case could have a major implications on the outcome of a litigant's case.[2] Without settled precedent, litigants leave the determination of what evidence will be presented to the jury in their case up to the individual judge's discretion and interpretation of the rules of evidence.[3]

Another example of a judge having the ability to use their discretion to impact the outcome of an intellectual property case, but in a settled area of the law, is in a Markman hearing.[4] In a legal dispute that involves a patent, the district court hearing the case will often hold a special hearing, called a Markman hearing, to determine the meaning of different patent terms, also known as claim construction.[5] "'Markman' hearings are common in patent litigation and often constitute crucial junctions in infringement cases."[6] During this hearing, after each side presents their arguments on the interpretation of patent claim language, the

1. *See, e.g.*, William G. Conly, *Determining Relevancy: Article IV of the Federal Rules of Evidence*, 36 LA. L. REV. 70, 98 (1975).

2. *See* FED. R. EVID. 407; Duhn Oil Tool, Inc. v. Cameron Int'l Corp., No. 1:05–cv–01411 OWW GSA, 2011 WL 121547, at *1 (E.D. Cal. Jan. 13, 2011).

3. *See, e.g.*, Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 555 (D.C. Cir. 1993) (noting that "the district court's discretion is at its height when carrying out" the balancing test of Rule 403).

4. Melissa L. Watt & Meghan L. Savercool, *The Role of Markman Hearings in Patent Litigation*, FARUKI: BLOG (Aug. 16, 2022), https://www.ficlaw.com/blog/the-role-of-markman-hearings-in-patent-litigation [https://perma.cc/APF9-2M4K].

5. *Id.*

6. *Id.*

judge has the power to determine what the meaning of the language used in a patent claim will be in the present action.[7] The result of a Markman hearing can be in a party's favor encouraging pursuit of litigation, neutral between the parties encouraging further litigation for both parties, or detrimental to a party's case encouraging settlement negotiations to limit damages.[8] While the Markman hearing is one prominent example of a point at which the judge's determination can heavily impact the outcome of a case, there are several other instances where a judge's interpretation of the rules can similarly impact the outcome of a case.[9] This Note will explore how past courts have used their discretion and decided to apply Federal Rule of Evidence 407 in intellectual property cases and provide recommendations for whether the rule should apply in intellectual property matters going forward.

"A company's value, reputation, and success can be directly tied to its intellectual property, and therefore, it is critically important to safeguard that IP."[10] An intellectual property asset generally falls within one of the four primary types of intellectual property: patents, trademarks, copyrights, and trade secrets.[11] A patent typically protects the functional, utilitarian aspects of an apparatus, system, or method that is new, useful, and nonobvious in view of the prior art.[12] Patents generally provide an owner with "a government-granted monopoly to build, sell, and use [their] invention (and prevent others from doing so)."[13] A trademark is a type of protection that grants ownership rights in the use of "words, phrases, symbols, sounds, smells and color schemes" that are distinctive and "identify the

7. *Id.*

8. *Id.*; Alex Dement, *Claim Construction and the Power of Markman Hearings in Patent Litigation: A Primer*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (Apr. 30, 2025), http://www.fordhamiplj.org/2025/04/30/claim-construction-and-the-power-of-markman-hearings-in-patent-litigation-a-primer/ [https://perma.cc/ZX3U-MNL7].

9. *See infra* Part II.A; Watt & Savercool, *supra* note 4.

10. Pedram Sameni, *Rising to the Top in a Post-Pandemic IP World: A look at the Most Active Patent Litigators and the Latest District Court Patent Litigation Data*, IPWATCHDOG (Jan. 31, 2023, at 07:15 CT), https://ipwatchdog.com/2023/01/31/rising-top-post-pandemic-ip-world-look-active-patent-litigators-latest-district-court-patent-litigation-data/id=155974/ [https://perma.cc/NKR9-M8E4].

11. Peter Ackerman, *The 4 Main Types of Intellectual Property and Related Costs*, DECIPHER IP (Jan. 6, 2017), https://www.innovation-asset.com/blog/the-4-main-types-of-intellectual-property-and-related-costs [https://perma.cc/7X46-NQG7].

12. *Id.*

13. Sterling Miller, *Modern General Counsel: Four Types of Intellectual Property*, THOMSON REUTERS (Nov. 12, 2021), https://legal.thomsonreuters.com/en/insights/articles/four-types-of-intellectual-property [https://perma.cc/L343-B9PF].

source of [the] underlying products or services" associated with the mark.[14] Copyright protection grants ownership rights in the expression of ideas or original works of authorship, that are fixed in a tangible medium of expression, i.e., in a physical rendering that lasts more than a mere transitory duration.[15] Lastly, trade secrets consist of patterns, formulas, business information, etc., that derive economic value from not being known and are subject to reasonable efforts to keep confidential.[16] Each type of intellectual property protection has different procedures, registration requirements, costs, and benefits.[17] Although there are four distinct categories that an IP asset can be protected with, these forms are not mutually exclusive and can be combined in unique situations for increased protection.[18]

One commentator noted, "[D]ifferent forms of IP infringements diminish the benefits accrued to IP owners from their innovations."[19] Patents, trademarks, copyrights, and trade secrets can all be infringed in ways unique to each area of IP protection.[20] Patents, for example, can be infringed in a variety of different ways, such as directly or indirectly.[21] This could be by making, using, or selling a product that contains each claimed element of an actively patented invention, or by simply using patent-protected items in your own services or products without obtaining permission from the patent holder.[22] Trademark infringement, on the other hand, could look like using another's trademark on your product to take advantage of the brand equity the trademark has built up.[23] Trademark infringement could also look like using a trademark that is too close in resemblance to another trademark previously used on similar goods or services.[24] As IP infringement can be determined by a comparison of claimed elements in a patent or of similarities in another trademarked logo, an allegation of infringement may lead the alleged

14. Ackerman, *supra* note 11.

15. *Id.*

16. Miller, *supra* note 13.

17. Ackerman, *supra* note 11.

18. *Id.*

19. Chris Book, *What is Intellectual Property Infringement?*, FORTRA: BLOG (May 9, 2023), https://www.digitalguardian.com/blog/intellectual-property-infringement [https://perma.cc/LR2J-Q2YH].

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.*

infringer to make changes so that they subjectively no longer infringe.[25] This scenario is the subject of this Note's discussion.

The amount of intellectual property cases filed per year has increased consistently over the last two decades.[26] From 1996 to 2018, California had nearly double the amount of IP filings than any other state, with Texas and New York rounding out the top three.[27] Although litigation filings have increased, the number of patent applications has seen a recent dip post-COVID.[28] While 2020 saw a two percent increase in patent applications, patent applications fell from 2021 to 2023.[29] Despite the brief drop in filings, damage awards in infringement cases have risen, with $4.3 billion awarded in patent cases in 2024 alone.[30] To further emphasize the stakes of a typical high profile patent litigation, the average cost to litigate a claim is between $2.3 million and $4 million over the course of several years.[31]

Federal Rule of Evidence 407, which prevents the use of subsequent remedial measures to prove negligence, culpable conduct, defect, or need for warning, has traditionally applied to personal injury and negligence cases.[32] However, in recent years some district and circuit courts have applied the Rule to cases that primarily revolve around an intellectual property dispute.[33] Because courts have inconsistently applied Rule 407 to intellectual property matters, "There is . . . less confidence for IP litigants to predict and rely upon the applicability of

25. *See id.*

26. *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, U.S. CTS. (Feb. 13, 2020), https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark [https://perma.cc/2CQ3-LPNE].

27. *See id.*

28. *US Patent Trends (Updated 2025)*, INSIGHTS BY GREYB (Aug. 18, 2025), https://insights.greyb. com/us-patents/ [https://perma.cc/9HUH-UB25]; Branka Vuleta, *25 Patent Litigation Statistics - High-Profile Feuds About Intellectual Property*, LEGALJOBS (May 20, 2023), https://legaljobs.io/blog/patent-litigation-statistics/ [https://perma.cc/7LK8-KQDN].

29. *See US Patent Trends (Updated 2025)*, *supra* note 28.

30. Carla Rydholm, *Lex Machina 2025 Patent Litigation Report Shows 22% Surge in Filings and Record $4.3B in Damages*, LEXISNEXIS (July 11, 2025), https://www.lexisnexis.com/community/insights/legal/lex-machina/b/lex-machina/posts/lex-machina-2025-patent-litigation-report-shows-22-surge-in-filings-and-record-4-3b-in-damages [https://perma.cc/P8MH-K95R].

31. Vuleta, *supra* note 28.

32. Sharad Bijanki & Patrick Muffo, *Remedial Measure Evidence Use in IP Cases Needs Clarity*, LAW360 (Nov. 19, 2020, at 16:14 EST), https://www.law360.com/articles/1330280/remedial-measure-evidence-use-in-ip-cases-needs-clarity [https://perma.cc/C95J-HQQ7].

33. *See id.*

the rule."[34] Without clarity on how, or if, the Rule will apply at different times, with different judges, or in different jurisdictions, litigants struggle to understand the relative strength of the parties' positions.[35]

Part II provides background on Rule 407, insight on how it is traditionally applied, and an introduction to the other evidence rules that Rule 407 is supported by. Part III discusses cases where district and circuit courts have discussed or made determinations based on Rule 407 in cases that involved intellectual property subject matter. Part IV provides a hypothetical example of how this issue could arise and takes the position that Rule 407 should generally apply when appropriate circumstances are present. Lastly, Part V concludes the Note by summarizing the position taken and briefly highlights some of the issues that remain if Rule 407 is left to be ambiguously interpreted and applied by the courts.

II. UNDERSTANDING FEDERAL RULE OF EVIDENCE 407

A fundamental concept associated with the admission of any type of evidence in a civil or criminal trial is relevancy.[36] At the most basic level, "relevant evidence is generally admissible, while non-relevant evidence is excluded . . . ."[37] Article IV of the Federal Rules of Evidence has two primary purposes: to articulate the basic principle of relevance and to provide guidance on "the admissibility of common types of circumstantial evidence."[38] This Part examines the language of Rule 407, the rationales behind it, and how it is typically applied in its normal capacity—a negligence case. This Note is primarily focused on application of the Federal Rule of Evidence prohibiting evidence of subsequent remedial measures to intellectual property cases to prove negligence or culpability, since intellectual property law is mostly a product of federal law.[39] However, it is important to recognize most—if not all— states will have a similar rule that could be applied to trademark or right of publicity claims brought under state law.[40] For example, the

34. *Id.*

35. *See id.*

36. Conly, *supra* note 1, at 70.

37. *Id.*

38. *Id.*

39. *See U.S. Federal Intellectual Property Laws and Regulations*, WISER MKT., https://www.wisermarket.com/u-s-federal-intellectual-property-laws-and-regulations/ [https://perma.cc/W7J2-GYEK] (highlighting that Article I, Section 8 of the U.S. Constitution provides Congress with the power to regulate patents and copyrights, and that trademark laws have been created under Article 1, Section 8, Clause 3 of the U.S. Constitution).

40. *See, e.g.*, IOWA R. EVID. 5.407; MINN. R. EVID. 407; S.D. CODIFIED LAWS § 19-19-407 (2025).

Iowa Rule on subsequent remedial measures has the same effect as the federal Rule, with only minor stylistic changes in the organization of the language.[41]

A. *Background and Language of the Pertinent Rules*

In order to understand Rule 407, we must first examine its basis in Rules 401–403.[42] Rule 401 provides, "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence . . . ."[43] The discretion to decide whether a particular item of evidence makes a fact more or less probable, as defined by Rule 401, lies with the judge.[44] Rules 402 and 403 serve to assist the judge in making their discretionary relevancy determination.[45] Rule 402 states that relevant evidence is admissible unless the U.S. Constitution, a federal statute, the Federal Rules of Evidence, or other rules "prescribed by the Supreme Court" say otherwise.[46] Rule 403 provides a balancing test, which states that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[47] Despite these dangers, the judge should attempt to adhere to the Federal Rules' liberal, pro-admission stance on relevant evidence.[48] As explained above, Rules 401–403 lay the general foundation for admissibility of evidence and articulate the standard with which such evidence should be considered.[49]

Rule 407 is among the specialized relevance rules which guide courts on admissibility of relevant evidence that falls under specific circumstances.[50] Specifically, Rule 407 deals with "[c]hanges made to products or conditions after

41. *See* IOWA R. EVID. 5.407.

42. *See* FED. R. EVID. 401–403.

43. FED. R. EVID. 401.

44. Conly, *supra* note 1, at 73.

45. *See* FED. R. EVID. 402–403.

46. FED. R. EVID. 402.

47. FED. R. EVID. 403.

48. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993) (discussing Fed. R. 702 and the "liberal thrust" of the Federal Rules of Evidence regarding expert opinion testimony); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988) (embracing the "liberal thrust" of the Federal Rules of Evidence for admissibility of public records under Rule 803(8)).

49. *See* FED. R. EVID. 401–403.

50. *See* FED. R. EVID. 407–411; *see also* James A. Macleod, *Evidence Law's Blind Spots*, 109 IOWA L. REV. 189, 235 (2023) (discussing policies of Rules 407–411).

an injury;" such changes are referred to as "subsequent remedial measures."[51] The language of Rule 407 prohibits admission of evidence of measures "taken that would have made an earlier injury or harm less likely to occur . . . to prove[] negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction."[52] However, Rule 407 also specifies that evidence of subsequent remedial measures may be admitted for other purposes, aside from proving negligence or culpability, such as: "impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures."[53]

B. *Specific Purposes of and Concerns for the Subsequent Remedial Measures Rule*

The Rule drafters were mindful of the policy rationale behind Rule 407 in ensuring that it effectively "encourage[s] people to make changes that will make conditions safer and not penalize them for doing so by making such changes evidence against them in a lawsuit."[54] Without this Rule, individuals may be less likely to repair something that has caused harm, or take further preventative measures after an incident has occurred, if they believe the act of doing so could be used against them in a future lawsuit.[55] The Rule drafters have essentially taken Rule 407 as an opportunity to articulate that "the fact that an accident occurred is not, by itself, proof that a product was defective or a condition was unreasonably dangerous . . . ."[56] However, it is not unrealistic to think that a jury may consider a subsequent remedial measure made by a defendant to be an indication that the defendant agrees that a product was defective or a condition unreasonably dangerous.[57] It would be extremely difficult for a jury to overcome a presumption that indicates that the defendant themself thinks they have been negligent or demonstrated culpable conduct.[58] Therefore, the best way to avoid the prejudicial effect of such a presumption is to not allow the jury to make that presumption in the first place.[59]

51. *To Remediate, or Not to Remediate: That is the Question*, RUDMAN WINCHELL, https://www.rudmanwinchell.com/to-remediate-or-not-to-remediate-that-is-the-question/ [https://perma.cc/75UT-SVWV].

52. FED. R. EVID. 407.

53. *Id.*

54. *To Remediate, or Not to Remediate: That is the Question*, *supra* note 51.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*; *see* FED. R. EVID. 407.

Multiple exceptions to the Rule provide an avenue for admission of evidence of subsequent remedial measures if they are for specific purposes outside of proving negligence or culpable conduct.[60] It is common for plaintiffs to use these exceptions—impeachment, or to prove ownership, control, or feasibility—as an alternative method of introducing evidence of a defendant's remedial measures.[61] It is not unreasonable for a plaintiff to think that a jury may misuse this type of evidence as proof of negligence or culpable conduct, even if admitted under an exception and subject to a limiting instruction by the judge—a warning to the jury not to consider evidence for a particular purpose, although it may be considered for other purposes.[62] Even with a limiting instruction, misuse by the jury is a strong possibility, thus a plaintiff is motivated to get this kind of evidence to the jury under any means possible.[63] Acknowledging the potential for misuse and "[f]earing that the exceptions could swallow the rule, some courts will even exclude evidence that fits into one of these exceptions because it is ostensibly too prejudicial."[64]

It should not surprise the reasonable mind that a study indicates "evidence of subsequent remedial measures substantially increases the likelihood that a defendant will be found liable."[65] In other words, "evidence of subsequent remedial measures increase[s] plaintiff's win rate."[66] On the contrary, the same study also indicates "[j]uries might find the defendant to be less blameworthy and reduce damages accordingly" if evidence is admitted showing a defendant implemented remedial measures.[67] Even though a defendant is more likely to be found liable, juries can reward what they deem a good, honest deed in the defendant's remediation efforts by rewarding them with less damages to pay.[68] Lastly, the study shows that a "simple limiting jury instruction did not have any effect on liability . . . ."[69] This exemplifies the general theory that it is better for judges to avoid the possibility for jurors to misuse the evidence than to admit the evidence with hopes that it will be used for its admissible, limited purpose.[70]

60. *See* FED. R. EVID. 407.

61. Bernard Chao & Kylie Santos, *How Evidence of Subsequent Remedial Measures Matters*, 84 MO. L. REV. 609, 613 (2019).

62. *See id.* at 647; FED. R. EVID. 105.

63. *See* Chao & Santos, *supra* note 61, at 647.

64. *Id.* at 613.

65. *Id.* at 645.

66. *Id.* at 634–35.

67. *Id.* at 625.

68. *See id.*

69. *Id.* at 640.

70. *See id.*

Overall, when evidence of remedial measures is admitted, whether directly or through an exception and subject to a limiting instruction, juries are more likely to find liability, but also likely to take the measures into consideration by reducing the award of damages.[71] Bottom line, it is important to consider, "Jurors might mistakenly construe such evidence as an admission or proof of guilt when, in fact, making something *even* safer does not necessarily mean that the prior precautions were unsafe or unreasonable to begin."[72] This has to be the primary purpose for inclusion of this exclusionary rule within the Federal Rules.[73]

C. *An Example of Rule 407 Applied in* Tuer v. McDonald

With the language and purpose of Rule 407 in mind, consider how the Rule has been traditionally applied in the context of negligence or culpable conduct.[74] In *Tuer v. McDonald*, Eugene Tuer was to undergo coronary bypass graft surgery to treat angina pectoris, which he had suffered from for 16 years.[75] After admission to the hospital for the surgery, Mr. Tuer was prescribed Heparin, an anticoagulant, which served its purpose to ease his chest pains and shortness of breath until surgery could take place the following week.[76] In accordance with hospital protocol, the Heparin administration was discontinued to allow the drug to metabolize approximately two-and-a-half to three-and-a-half hours prior to his surgery.[77] Shortly before his surgery was to begin, an emergency arose that required his doctors to postpone his surgery by three to four hours.[78] During this delay, the Heparin administration was not restarted, despite Mr. Tuer's doctor having considered doing so.[79] After the delay, Mr. Tuer went into cardiac arrest, then survived resuscitation efforts and seven hours of surgery, but ultimately died the next day.[80] As a result of Mr. Tuer's death, the hospital changed its protocol so that "Heparin is continued until the patient is taken into the operating room; had that protocol been in effect . . . the Heparin would not have been discontinued at 5:30 a.m., and no issue would have arisen as to restarting it."[81]

71. *See id.* at 624–25.
72. *Id.* at 617.
73. *See id.*
74. *See supra* Part II.B.
75. 701 A.2d 1101, 1102 (Md. 1997).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

The first theory for admission of the protocol-changing remedial measure by the defendants was for feasibility purposes.[82] Despite the plaintiff's arguments, the court held that "feasibility has to include more than mere physical possibility."[83] The court highlighted, "The assertion that a given course [of treatment] would be unsafe, in the sense that it would likely cause paramount harm to the patient, necessarily constitutes an assertion that the course would not be feasible."[84] However, the doctor was not saying the original protocol was unsafe in a way implying the protocol was not feasible; the doctor was saying it was possible, just not advisable.[85] On this finding, the court ruled that this was not an issue of feasibility, but an issue of judgment; therefore, the evidence was not admissible through the feasibility exception.[86]

The court also considered whether the admission of the evidence was warranted under the impeachment exception to Rule 407.[87] The court followed along with their analysis of feasibility by maintaining that admission under the impeachment exception should be read narrowly.[88] The court noted, "The fact that the protocol was changed following Mr. Tuer's death in no way suggests that Dr. McDonald did not honestly believe that his judgment call was appropriate at the time."[89] The court held that this "kind of reevaluation is precisely what the exclusionary provision of the Rule was designed to encourage," and therefore impeachment should not be allowed for this purpose.[90] All subsequent remedial measures impeach to some extent, so courts must be sure to limit the exception to where credibility is at issue, not culpability.[91]

This case supports the general theory that the exceptions to Rule 407 should be construed narrowly to prevent misuse by the jury.[92] Further, this case highlights two justifications for the Rule's goal of excluding evidence to prove culpability:

> [F]irst, that the subsequent conduct "is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence," and second, the "social policy of encouraging

82. *See id.* at 1109–12.
83. *Id.* at 1111.
84. *Id.*
85. *Id.* at 1111–12.
86. *Id.* at 1112.
87. *Id.* at 1112–13.
88. *Id.* at 1112.
89. *Id.* at 1113.
90. *Id.*
91. *Id.* at 1112–13.
92. *See id.* at 1109–13.

people to take, or at least not discouraging them from taking, steps in furtherance of added safety."[93]

III. How Rule 407 Has Been Considered in Matters Involving Intellectual Property Disputes

This Part will provide examples of courts deciding whether Rule 407 applies in matters involving intellectual property disputes. Recall that Rule 407 has traditionally and predominantly applied to negligence and products liability cases.[94] Further, this Part offers examples demonstrating the extent to which courts have applied Rule 407 in intellectual property cases. The overall debate among courts is whether Rule 407 should prohibit evidence of subsequent changes in patents and trademarks to prove culpable conduct—like willful infringement.[95]

A. *Majority View: Rule 407 Applies to Decide on Admissibility of Evidence of Intellectual Property Remedial Measures*

To date, among the circuit courts, only the Federal Circuit, Sixth Circuit, and Ninth Circuit have issued rulings that discuss and have applied Rule 407 in intellectual property cases.[96] While the issue has been raised in district courts, "most district courts have ignored the underlying rationale for FRE 407. Instead, district courts typically address the issue very concisely and only interpret the plain text of the rule."[97] The analysis below examines the facts and rationales that have led the courts to apply Rule 407 to intellectual property cases.

The Federal Circuit issued an opinion discussing Rule 407 that revolved around patent infringement of material used in microfiltration membranes.[98] In *Pall Corp. v. Micron Separations, Inc.*, Pall sued after Micron introduced a microfiltration membrane made of nylon 66, which Pall alleged infringed its patent.[99] Three years after the suit was filed, Micron "converted most but not all of its nylon 66 membrane production to nylon 46."[100] On appeal, Micron argued "that

93. *Id.* at 1108 (quoting Rules of Evidence for U.S. Cts. & Magistrates, 56 F.R.D. 183, 225–26 (1972)).

94. *To Remediate, or Not to Remediate: That Is the Question*, *supra* note 51.

95. *See, e.g.*, Gen. Motors Corp. v. Keystone Auto. Indus., Inc., 453 F.3d 351, 357 n.1 (6th Cir. 2006).

96. *See id.*; Pall Corp. v. Micron Separations, Inc., 66 F.3d 1211, 1221 (Fed. Cir. 1995); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1020 (9th Cir. 1985).

97. Bijanki & Muffo, *supra* note 32.

98. *See Pall Corp.*, 66 F.3d at 1221.

99. *Id.* at 1215.

100. *Id.*

the district court violated Federal Rule of Evidence 407 in finding that [their] continued production of nylon 66 membranes, after [they] switched to nylon 46, was willful infringement."[101] Micron argued that Rule 407 should bar evidence of remedial action to prove culpability and thus not permit the district court to find willful infringement based on their remedial actions.[102] However, the appeals court found that Rule 407 was not violated in the lower court as the conversion of material "was not relied on as evidence of culpability for the prior infringement . . . , and the court declined to find willfulness for that prior infringement."[103] Essentially, the court held that Rule 407 was not violated in this case because factually it did not apply.[104] The court stated, "Attempts to avoid or mitigate infringement, whether or not successful, do not of themselves enlarge the culpability of the continuing activity."[105]

The United States District Court for the Central District of California found that the court's ruling in *Pall* "implicitly acknowledge[d] that Rule 407 applies in patent infringement actions."[106] The Central District of California granted a motion in limine—a pretrial motion seeking exclusion of specific evidence—to exclude evidence under Rule 407 "to the extent the evidence is offered to prove culpability, including willfulness . . . ."[107] Specifically, the defendants sought exclusion of evidence of their sale of different products in lieu of being accused for patent infringement on other models.[108] Therefore, the district court had applied Rule 407 to a patent infringement action for its intended purpose: to prevent evidence of remedial measures to prove negligence or culpability.[109]

Next, consider a trademark case in the Sixth Circuit revolving around the production of replacement automobile parts.[110] In *General Motors Corp. v. Keystone Automotive Industries, Inc.*, General Motors (GM) sued Tong Yang, a company that manufactured aftermarket replacement automobile parts with the "GMC" letters and Chevrolet "bow tie" commonly seen on their respective grilles.[111] Tong Yang manufactured these grilles for Keystone to distribute to

101. *Id.* at 1221.
102. *Id.*
103. *Id.*
104. *See id.*
105. *Id.* at 1222.
106. Interactive Health LLC v. King Kong USA, Inc., No. CV 06-1902-VBF(PLAx), 2008 WL 11339129, at *8 (C.D. Cal. July 24, 2008).
107. *Id.* at *7.
108. *Id.*
109. *See id.* at *8.
110. Gen. Motors Corp. v. Keystone Auto. Indus., Inc., 453 F.3d 351, 353 (6th Cir. 2006).
111. *Id.*

consumers.[112] The court noted that, "After GM filed suit, Tong Yang changed its grilles to remove the trademarked 'bow tie' and 'GMC' designs from its placeholders."[113] GM made the argument that the "modifications show that Tong Yang's intent [was] to copy the GM trademarks," proven by the fact they modified their designs after suit was filed, thus indicating culpable conduct.[114] The Sixth Circuit stated, "The [d]istrict [c]ourt properly excluded this subsequent remedial evidence under Fed.R.Evid. 407."[115] This ruling by the Sixth Circuit is in line with the traditional rationale of excluding evidence of remedial measures if the intent is to admit evidence that the measures taken show negligence or culpable conduct.[116]

In another circuit court case alleging trademark and copyright infringement, the Ninth Circuit upheld the trial court's decision to admit evidence of instruction sheets being revised subject to the exceptions under Rule 407.[117] In this case, Judge Arthur Alarcon permitted "[a] side-by-side comparison of the old and the [newly revised instruction sheets] in the jury's presence."[118] After an objection to the admittance of the evidence on grounds that it was a subsequent remedial measure falling within the exclusionary rule, the Ninth Circuit found that the revised instruction sheet could be admitted for feasibility or impeachment purposes by the exception to Rule 407.[119]

The Southern District of New York also addressed the issue of Rule 407 in a case alleging patent infringement, trademark infringement, and false advertising.[120] In *Mobileye, Inc. v. Picitup Corp.*, Mobileye contended that since many of the allegedly false statements had been removed from their website after the suit was filed, the removal was "a tacit admission that those statements [were] at least impliedly false . . . ."[121] However, the Southern District of New York reiterated that Rule 407 applies in situations like this, and ruled that the evidence is clearly inadmissible as it was introduced to "prove culpable conduct," which the Rule prohibits.[122]

112. *Id.*
113. *Id.*
114. *Id.* at 357 n.1.
115. *Id.*
116. *See id.*
117. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1020 (9th Cir. 1985).
118. *Id.*
119. *Id.*
120. Mobileye, Inc. v. Picitup Corp., 928 F. Supp. 2d 759, 764, 776 n.15 (S.D.N.Y. 2013).
121. *Id.* at 776 n.15.
122. *Id.*

In another example of a district court choosing to apply Rule 407 in an intellectual property case involving trade dress infringement, the Western District of Washington granted a motion to exclude evidence that the products were redesigned after legal action had been brought.[123] In *National Products, Inc. v. Arkon Resources, Inc.*, the defendant, Arkon, filed a motion to exclude "evidence that it redesigned its accused products after the start of th[e] lawsuit . . . ."[124] The plaintiff, National Products, responded to the motion by arguing that the evidence is permissible under Rule 407 as the purpose for admission is to show availability of alternative products and not to show culpability or infringement.[125] In addition to finding that evidence of a redesign can be excluded by Rule 407, the court ruled that evidence related to Arkon's redesigned products should be excluded.[126] The court reaffirmed the justifications previously seen for the Rule in its standard negligence or products liability manner by finding that the risk of the jury misinterpreting the evidence weighs strongly against admission of the evidence.[127]

In summary, multiple circuit courts, along with a variety of different district courts, have recognized that Rule 407 applies in cases involving intellectual property disputes.[128] Largely, the courts that have applied the Rule have done so in a manner that closely resembles how the Rule is normally applied in negligence or products liability cases.[129] The main justification remains that the jury should not be permitted to hear evidence of remediation that would likely be construed as the defendant admitting their negligence or culpability by implication.[130]

B. *Minority View: Rule 407 Does Not Apply to Intellectual Property Matters Regarding Admissibility of Evidence of Remedial Measures*

While some courts have chosen to apply Rule 407 to intellectual property actions, other courts have decided that these matters are outside of the intended

123. Nat'l Prods., Inc. v. Arkon Res., Inc., No. C15-1553-JPD, 2017 WL 5499801, at *1, *12–13 (W.D. Wash. Nov. 16, 2017).

124. *Id.* at *12.

125. *Id.*

126. *Id.*

127. *Id.* at *13; *see supra* Part II.B.

128. *See, e.g.*, Gen. Motors Corp. v. Keystone Auto. Indus., Inc., 453 F.3d 351, 357 n.1 (6th Cir. 2006); Pall Corp. v. Micron Separations, Inc., 66 F.3d 1211, 1221 (Fed. Cir. 1995); Interactive Health LLC v. King Kong USA, Inc., No. CV 06-1902-VBF(PLAx), 2008 WL 11339129, at *8 (C.D. Cal. July 24, 2008).

129. *See, e.g.*, *Interactive Health LLC*, 2008 WL 11339129, at *7–8 (noting that Rule 407 can still apply in intellectual property cases despite there being no issues of safety as in standard tort cases).

130. *See Nat'l Prods., Inc.*, 2017 WL 5499801, at *13.

purpose of the Rule.[131] "For IP infringement cases, most district courts have ignored the underlying rationale for FRE 407. Instead, district courts typically address the issue very concisely and only interpret the plain text of the rule."[132]

The Central District of Illinois ruled in a patent infringement case that the circumstances led to the conclusion that Rule 407 did not apply.[133] After an action alleging multiple different causes of action was brought, Sukup revised their tower dryer brochures.[134] In this case, "GSI allege[d] an injury caused by Sukup's advertising and related business practices."[135] Unlike the plaintiffs' injuries seen in other cases that relate to Rule 407, the injury to GSI caused by advertising and related business practices was not caused by an "event."[136] The court made it clear that subsequent remedial measures are changes that are taken to prevent future harm, which revisions to advertising cannot be said to have the same effect.[137] For Rule 407 to apply, the injury must be caused by an event; the Rule does not bar admission of evidence of things that do not constitute an "event."[138] Therefore, the motion by Sukup to prevent admission of any evidence of revision of their advertising materials relating to the patent infringement was denied.[139]

While the remedial measure taken in *GSI Group* is arguably different from standard Rule 407 cases because the advertising and related business practices was not an event, the District of Hawaii similarly ruled that Rule 407 does not apply to patent infringement cases.[140] In *Kowalski v. Anova Food, LLC*, the defendant filed a motion in limine to exclude any testimony, evidence, argument, or other reference that relates to the defendant's subsequent remedial measures.[141] The court was brief addressing this issue, stating, "Defendant's subsequent remedial measure argument is inappropriate in a patent infringement case. Courts have held in patent infringement cases that the design changes are not 'subsequent remedial

131. *See, e.g.*, Kowalski v. Anova Food, LLC, No. 11–00795HG–RLP, 2015 WL 1119411, at *1, *3 (D. Haw. Feb. 18, 2015).

132. Bijanki & Muffo, *supra* note 32.

133. GSI Grp., Inc. v. Sukup Mfg. Co., 641 F. Supp. 2d 732, 747 (C.D. Ill. 2008).

134. *Id.*

135. *Id.*

136. *Id.* (defining an "event" as a "traumatic event, such as an accident, that causes injury").

137. *Id.*

138. *See id.*

139. *Id.*

140. *See* Kowalski v. Anova Food, LLC, No. 11–00795HG–RLP, 2015 WL 1119411, at *3–4 (D. Haw. Feb. 18, 2015).

141. *Id.* at *3.

measures' within the meaning of Fed.R.Evid. 407."[142] Therefore, the court denied the defendant's motion, choosing not to apply Rule 407, and allowing the evidence to be admitted as long as it was relevant.[143]

The District of Minnesota is another example of a jurisdiction that has chosen to limit the application of Rule 407 in a case involving intellectual property.[144] In *Master Craft v. Stanley Works*, the defendant objected to an interrogatory question that asked them to identify all persons responsible for deciding to cease using the allegedly infringing marks and what the reasons for ceasing use of the allegedly infringing marks.[145] Presumably, in serving this interrogatory, the plaintiff hoped the defendant would admit the reason they stopped using the allegedly infringing mark was because the defendant itself thought it was an infringement.[146] The defendant's objection to this interrogatory was on the grounds that the defendant's decision to stop using the allegedly infringing marks was inadmissible as a subsequent remedial measure pursuant to Rule 407.[147] However, the court ruled that the defendant's objection to the interrogatory based on Rule 407 was "premature."[148] The court stated, "Rule 407 is a rule of admissibility at trial, however, 'it is not a rule governing pretrial procedure.'"[149] Therefore, the court granted the plaintiff's motion to compel as it relates to the interrogatory and held Rule 407 does not apply to pretrial, intellectual property matters.[150]

The final example of a court determining that Rule 407 does not apply in an intellectual property case comes from the District of Delaware.[151] In *Johns Hopkins University v. Alcon Laboratories Inc.*, Alcon argued Rule 407 precluded evidence that its in-house counsel suggested it stop selling the allegedly infringing products and change them to be noninfringing.[152] Johns Hopkins responded by arguing that Rule 407 does not control where no remedial measure was taken.[153] The court

142. *Id.* (quoting Duhn Oil Tool, Inc. v. Cameron Int'l Corp., No. 1:05–cv–01411 OWW GSA, 2011 WL 121547, at *1 (E.D. Cal. Jan. 13, 2011)).

143. *Id.* at *4.

144. *See* Master Craft v. Stanley Works, No. 04-132 (JMR/JSM), 2005 WL 8158996, at *1, *14–15 (D. Minn. May 24, 2005).

145. *Id.* at *14.

146. *See id.*

147. *Id.*

148. *Id.* at *15.

149. *Id.* (quoting Jumper v. Yellow Corp., 176 F.R.D. 282, 284 (N.D. Ill. 1997)).

150. *Id.*

151. *See* Johns Hopkins Univ. v. Alcon Lab'ys Inc., No. 15-525, 2018 WL 4178159, at *1, *18–19 (D. Del. Aug. 30, 2018).

152. *Id.* at *18.

153. *Id.* at *19.

emphasized that although Alcon's in-house counsel did recommend that Alcon stop selling the infringing products, Alcon kept selling the products.[154] Therefore, although remedial measures were suggested to the company, they were never actually taken.[155] The court found that Rule 407 does not support exclusion of the evidence in this case where no remedial measure was taken.[156]

Overall, the minority rule ignores the underlying rationale of Rule 407 and interprets the plain language of the rule too narrowly.[157] Further, the minority rule determines that Rule 407 should not apply in circumstances where it factually does not meet the criteria to be applied.[158] Rule 407 should be applied to evidence of subsequent remediation in intellectual property matters.[159]

IV. WHY RULE 407 SHOULD APPLY IN INTELLECTUAL PROPERTY LITIGATION UNDER THE RIGHT CIRCUMSTANCES

Consider a hypothetical trademark dispute involving World Wrestling Entertainment and World Wildlife Fund—parties that had an actual name-brand dispute in the early 2000s—as a simplified example to aid in understanding how Rule 407 could be used in intellectual property litigation.[160] In the real-world dispute, World Wrestling Entertainment (WWE) changed its name from World Wrestling Federation after World Wildlife Fund prevailed in litigation in the United Kingdom—a dispute over the use of the "WWF" trademark.[161] For the purposes of this hypothetical, assume that World Wildlife Fund is operating in the United States with a valid trademark on the mark "WWF" in connection with clothing and merchandise it sells. A few years later, a professional wrestling organization is created, called the World Wrestling Federation. Similar to the World Wildlife Fund, the World Wrestling Federation begins to sell clothing and merchandise to promote their brand—similarly utilizing "WWF" as a trademark on their products. Shortly after the World Wrestling Federation gains popularity among consumers throughout the United States, the World Wildlife Fund sends a cease and desist letter, followed by a formal complaint alleging trademark infringement, based on its registered "WWF" mark. Once the formal complaint is

154. *Id.*
155. *Id.*
156. *Id.*
157. Bijanki & Muffo, *supra* note 32.
158. *See* Pall Corp. v. Micron Separations, Inc., 66 F.3d 1211, 1221 (Fed. Cir. 1995).
159. *See infra* Part IV.
160. *See* Richard Sandomir, *SportsBusiness; Wildlife Fund Takes Down Wrestlers in Name Game*, N.Y. TIMES (May 7, 2002), https://www.nytimes.com/2002/05/07/sports/sports-business-wildlife-fund-takes-down-wrestlers-in-name-game.html.
161. *Id.*

filed, the World Wrestling Federation consults a trademark attorney and ultimately decides its best option is a massive rebrand—now to be named World Wrestling Entertainment—as identified by a "WWE" trademark. The original trademark infringement case proceeds to trial and the World Wildlife Fund offers evidence that the World Wrestling Federation changed its name shortly after the complaint was filed, indicating it recognized its actions were infringing and changed its name because of this. However, the lawyers for World Wrestling Entertainment object to this evidence under Rule 407, arguing that evidence of subsequent remedial measures should not be admitted to prove culpable conduct, as is the purpose of the evidence under this hypothetical. In addition, the evidence of the rebrand is not admitted under any other permissible purpose recognized by the Rule, such as impeachment or to prove ownership, control, or the feasibility of precautionary measures.[162] Based on the majority position taken on Rule 407, this evidence should be excluded as it fits squarely within the type of evidence the Rule is meant to exclude.[163]

The scope of Rule 407 can become a lot broader in application than it has traditionally been applied.[164] Other scholarly articles have called for Rule 407 to apply to areas beyond tort law, such as in breach of contract claims.[165] These articles have advocated for a broad interpretation of "culpable conduct."[166] Businesses and individuals with valuable intellectual property rights have a greater need for clarification than the normal beneficiaries of the Rule on whether it applies to their cases.[167] There is an argument that Rule 407 should not apply to IP cases as "there is little or no moral hazard regarding remediation in connection with IP injuries as compared to traumatic personal injuries."[168] However, with patent or trademark disputes, there is a lot of money on the line in terms of sales and potential damages that could be mitigated if evidence of subsequent remedial measures were barred and clarity was provided to potentially infringing parties.[169]

162. *See* FED. R. EVID. 407.

163. *See id.*; *supra* Part III.A.

164. *See supra* Part II.B.

165. *See, e.g.*, Benjamin Sheppard, *Subsequent Remedial Contractual Measures: The Case for Applying Rule 407's Bar on Subsequent Remedial Measures in Breach of Contract Claims*, 41 J.L. & COM. 1, 30 (2022); Patricia A. Brass, Comment, *Federal Rule of Evidence 407: Should It Apply to Products Liability*, 11 TOURO L. REV. 253, 253–54 (1994).

166. *See* Sheppard, *supra* note 165, at 40.

167. *See* Bijanki & Muffo, *supra* note 32.

168. *Id.*

169. *See id.*; *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, *supra* note 26 (discussing the increasing volume of litigation and damages awarded in intellectual property cases).

There are a variety of different circuit and district courts that have endorsed the application of Rule 407 to intellectual property matters, a cohort with which all courts should fall in line.[170] A great example of this is the Sixth Circuit barring evidence of remedial measures of an alleged infringer removing the allegedly infringing aspect of their product after a trademark suit was filed.[171] Further in support is the Central District of California—the state with the highest number of intellectual property disputes filed—interpreting a ruling of "the Federal Circuit . . . to implicitly acknowledge that Rule 407 applies in patent infringement actions."[172] Another popular jurisdiction for intellectual property litigation, the Southern District of New York, has similarly noted the Rule "clearly prohibits the introduction of subsequent remedial measures to prove culpable conduct."[173]

Regarding the minority view that the Rule should not apply, the circumstances in those cases led to outcomes where the evidence was not being used within the bounds of Rule 407's protection against using the evidence to prove culpable conduct.[174] In *GSI Group, Inc.*, the Rule did not apply because there was no "event," which leaves questions about what an "event" is in this context if not revising advertising materials after an alleged injury.[175] Other instances where courts have held that the Rule doesn't apply in intellectual property cases include a case where a party tried to apply it to pretrial procedures and a case where remedial actions were considered, but not taken.[176] Therefore, these jurisdictions who have deemed the Rule to not apply have done so, in a majority of the cases, in circumstances that arguably do not meet the plain language application requirements of the Rule.[177]

An alternative solution that has been suggested is to "prohibit[] the applicability of FRE 407 to IP lawsuits having no personal injury considerations

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170. *See supra* Part III.A.

171. *See* Gen. Motors Corp. v. Keystone Auto. Indus., Inc., 453 F.3d 351, 357 n.1 (6th Cir. 2006).

172. *See* Interactive Health LLC v. King Kong USA, Inc., No. CV 06-1902-VBF(PLAx), 2008 WL 11339129, at *8 (C.D. Cal. July 24, 2008); *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, *supra* note 26.

173. Mobileye, Inc. v. Picitup Corp., 928 F. Supp. 2d 759, 776 n.15 (S.D.N.Y. 2013); *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, *supra* note 26.

174. *See supra* Part III.B.

175. GSI Grp., Inc. v. Sukup Mfg. Co., 641 F. Supp. 2d 732, 747 (C.D. Ill. 2008).

176. *See* Master Craft v. Stanley Works, No. 04-132 (JMR/JSM), 2005 WL 8158996, at *15 (D. Minn. May 24, 2005); Johns Hopkins Univ. v. Alcon Lab'ys Inc., No. 15-525, 2018 WL 4178159, at *19 (D. Del. Aug. 30, 2018).

177. *See supra* Part III.B.

and instead utilize[] FRE 403's balancing test for these same inquiries."[178] This suggestion, while a reasonable one, is unnecessary as the policy goals set out for Rule 407 are met when applied under proper circumstances in intellectual property cases.[179] To reiterate, the first policy goal for this Rule is "to encourage people to make changes that will make conditions safer and not penalize them for doing so by making such changes evidence against them in a lawsuit."[180] One of many examples of how this policy goal could be met is in a trademark case, where encouraging remediation would prevent potential consumer confusion as to allegedly similar trademarks—similar to the WWF vs. WWE hypothetical previously discussed.[181] In addition, when parties can better understand their relative litigating positions, the Rule furthers the other policy goal of encouraging settlement.[182]

V. CONCLUSION

While the amount of intellectual property rights applied for continues to rise year after year, intellectual property litigation numbers have generally trended upward throughout the country.[183] To allow the application of Rule 407 to continue to be applied at the discretion of judges, without any uniformity or guidance from the higher courts, would fail to promote the best interest of either litigants or the courts.[184] Rule 407 should be applicable in intellectual property cases, as long as it is applied to evidence that would prove culpable conduct.[185] Additionally, variance in how the Rule is recognized and applied in various geographic areas could lead to unwanted forum shopping based on the importance of the evidence that may or may not be admitted.[186] On the other hand, some litigants may find themselves on the right side of a favorable outcome based on the ambiguity of the application of the Rule.[187] This issue would be a great candidate for discussion and ruling by a high court.

178. Bijanki & Muffo, *supra* note 32.
179. *See id.*; *supra* Part II.B.
180. *To Remediate, or Not to Remediate: That Is the Question*, *supra* note 51.
181. *See id.*
182. *See id.*
183. Vuleta, *supra* note 28.
184. *See* Bijanki & Muffo, *supra* note 32.
185. *See* Sheppard, *supra* note 165, at 30.
186. *See id.* at 39.
187. *See* Bijanki & Muffo, *supra* note 32.

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