

Appellee's Brief

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
RESPONSE BRIEF OF APPELLEE
BEATRICE FOODS COMPANY
DEC. 7 1988

In The
United States Court of Appeals
For the Federal Circuit

FRANCIS X. GINDHART
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Appeal Nos. 88-1574
88-1575

BEATRICE FOODS CO.
Plaintiff-Appellee,

v.

NEW ENGLAND PRINTING AND
LITHOGRAPHING CO.
Defendant-Appellant.

Appeal From The United States District Court
For The District Of Connecticut
Judge Thomas F. Murphy

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December 5, 1988

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TABLE OF ABBREVIATIONS

1. The following abbreviations are used in the brief:

<u>Abbreviation</u>	<u>Explanation</u>
Webcraft	Collective reference to Beatrice Foods Co., Webcraft Packaging Co., and Webcraft Technologies, Inc. (Appellee)*
N.E.	New England Printing and Lithographing Co. (Appellant)
Cadillac	Defendant in <i>Webcraft Packaging, Inc. v. Cadillac Printing and Lithographing Corp.</i> , C.A. 74C-413, U.S. District Court for the Northern District of Illinois, Eastern Division, an infringement action involving the '817 Method and '673 Product Patents, settled in October, 1978.

* The suit was originally brought by Beatrice Foods Co. on behalf of Webcraft Packaging Co., at the time a division of Beatrice. This division later became Webcraft Technologies, Inc., presently a separate corporation and the real party in interest.

<u>Abbreviation</u>	<u>Explanation</u>
'817 Method Patent	U.S. Patent No. 3,665,817, a method of manufacturing multipage pamphlets with integral envelopes wherein a single web of paper is slit into ribbons, those ribbons superimposed, an envelope is formed, the ribbons secured, folded and cut off into individual pamphlets. Claim 10 involves the use of a strip from a separate source in order to form envelope containing pamphlets. (A1686-91)
'273 Method Patent	U.S. Patent No. 3,743,273, a different method of manufacturing multipage pamphlets with integral envelopes through a series of folding, gluing, slitting and cut off operations. (A1682-85)
'673 Product Patent	U.S. Patent No. 3,713,673, a multipage pamphlet with integral envelope product which can be manufactured using the patented methods. (A1679-81)

2. The following citation forms are used in this brief:

<u>Citation</u>	<u>Explanation</u>
(A__)	Joint Appendix at page__.
NB__)	Page Reference in New England's Brief for Appellant

STATEMENT OF RELATED CASES

Counsel for Plaintiff-Appellee, Beatrice Foods Co. submits the following statement pursuant to Rule 47.5 of this Court.

(1) The Civil Action in Appeal No. 88-1574 has previously been before this Court on appeal in *Beatrice Foods Co. v. New England Printing and Lithographing Co.*, Appeal No. 84-1284 (Fed. Cir. December 21, 1984) (before Newman and Bissell, Circuit Judges and Cowen, Senior Circuit Judge).

(2) A class action infringement case involving the same patents at issue here is pending in the United States District Court for the Northern District of Illinois, Eastern Division, *Webcraft Technologies, Inc. v. Alden Press, Inc., et al.*, Civil Action No. 85-C-3369.

(3) An infringement case involving the same patents at issue here is pending in the United States District Court for the District of New Jersey. *Webcraft Technologies, Inc. v. American Inline Graphics*, Civil Action No. 87-669.

CERTIFICATE OF INTEREST

Counsel for the appellee, Beatrice Foods Co., certifies the following:

1. The full name of every party or amicus represented by me is:

Beatrice Foods Co.
Webcraft Technologies, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Webcraft Technologies, Inc.

3. The publicly held affiliates of any corporate party or amicus represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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I. STATEMENT OF ISSUES ON APPEAL

Webcraft disagrees with the Statement of the Issues as presented by appellant. Therefore, pursuant to Rule 28(b) of this Court, Webcraft offers the following as issues:

1. Whether the district court abused its discretion in deciding all inferences against N.E. in light of N.E.'s intentional destruction of job tickets, the only yardstick to measure accurately the extent of N.E.'s infringements in dollars?

2. Whether the district court was clearly erroneous in awarding Webcraft lost profits resulting from N.E.'s massive infringements of three of Webcraft's patents during the period from July 1, 1974 through the date the infringements ended in February, 1983?

3. Whether the district court abused its discretion by determining that the award \$22,107,837.69 with interest at 10% from July 7, 1980 plus costs was adequate to compensate for N.E.'s massive infringements of three patents during the period from July 1, 1974 through the date infringement ended in February, 1983?

4. Whether the district court abused its discretion in awarding excess costs, expenses, and attorneys fees pursuant to 28 U.S.C. §1927 having determined that four motions filed by N.E.'s attorneys unreasonably and vexatiously multiplied the proceedings?

II. STATEMENT OF THE CASE

Webcraft disagrees with much of N.E.'s facts, which are colored with argument, distortions and misrepresentations. Furthermore, N.E. has ignored key facts important to resolving the issues raised by this appeal. Where possible, Webcraft will designate these erroneous statements with the same headings used in N.E.'s brief.

A. NATURE OF THE CASE

This appeal is from a judgment pursuant to 35 U.S.C. §284 awarding Webcraft damages of \$22,107,837.69 with prejudgment interest at 10% from July 7, 1980 as adequate compensation for N.E.'s infringements of Webcraft's three patents in suit. The relevant accounting period was from July 7, 1974 through February, 1983. (A9) Webcraft was foreclosed from an accurate and full accounting of N.E.'s infringements in the accounting period due to N.E.'s intentional destruction of foundational accounting documents. (A2)

Contrary to N.E.'s representation (NB3), the principal issue tried in the accounting phase was to determine the damage award adequate to compensate for N.E.'s massive infringements of Webcraft's three patents over a period of some nine years. Integral to this damage issue was a full and complete inquiry to determine the *true* value of what was taken. The district court *did not* award N.E.'s actual gross sales as will be discussed *infra*; rather, it found, through the determination of the true value of what was taken, that the damages awarded were adequate to compensate for the infringements pursuant to 35 U.S.C. §284.

Additionally, there was *never* any agreement between the parties as to the *total* number of infringing products manufactured by N.E. during the accounting period. Due to N.E.'s intentional destruction of crucial accounting records, any threshold agreement reached was only as to the absolute *minimum* infringing quantities. Moreover, there was *no agreement whatsoever* as to estimated sales dollars for even minimum quantities. N.E. *never* revealed to Webcraft or the district court its total infringing sales dollars.

B. COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

Webcraft disagrees that N.E.'s relevant facts are primarily what occurred in the district court (NB3). The

most compelling facts established N.E.'s intentional destruction of critically relevant and material accounting documents and N.E.'s actions to prevent a determination of the full extent of its infringements. These facts have been ignored by N.E.

1. NEW ENGLAND INTENTIONALLY DESTROYED THE BEST EVIDENCE

It was a conclusively established fact that N.E. intentionally destroyed those vital documents which would have proved, with absolute certainty, the total number of infringements. The district court correctly stated, "The most outrageous [incident] is, of course, defendant's intentional destruction of its job tickets, the only yardstick to measure accurately defendant's guilt in dollars, thus hindering plaintiff in proving defendant's illegal use of its patents." (A2)

A blank form job ticket, the only surviving example (A7045), illustrates the nature of the missing data. As indicated on the face of the job ticket form, entries made give full and complete instructions to the press operators as to manufacturing processes. The job ticket also is an envelope which generally contains press instructions, specification sheets, and samples of the product produced in the actual run. (A472) The job tickets are normally maintained not only as an historical record, but they are also utilized with repeat orders.

N.E. admitted at the trial that the *best* evidence of determining what products were made and what processes were used at N.E. throughout the years 1974-1983 would have been the job tickets (A471-72). Inspection of the job tickets would have immediately determined whether or not N.E.'s products and methods of production constituted infringements of the patents in suit.

N.E. had a legal duty to maintain its records and it was on notice to do so from the inception of the suit on July 7, 1980. In response to interrogatories in 1980, N.E.

stated that job tickets, *inter alia*, for the entire accounting period were available. (A7046-47) According to Mr. Gorman, then Vice President of Manufacturing for N.E. who testified on deposition in 1981, it was a company policy that such job tickets were maintained for a period of six years. (A286) N.E. intentionally destroyed not only the job tickets for the six year period prior to the July 7, 1980 filing date, but *all* job tickets for *all* jobs ever produced by N.E.

All that survived the destruction were a job order book with entries from 1975 and a limited set of invoices from sometime in 1978 through 1983 (invoices from 1974-1978 were destroyed).

2. NEW ENGLAND DENIED THE EVIDENTIARY VALUE OF WHAT LITTLE REMAINED

During discovery, Webcraft obtained various purchase orders from third party customers of N.E. which specified the type of product, quantity, price, etc. In some instances the purchase orders were specifically annotated with actual shipping dates, N.E.'s own invoice numbers, etc. (e.g. A4128-36) In seeking to ascertain N.E.'s infringing production quantities, Webcraft propounded extensive interrogatories and requests for admissions. In responses N.E. denied that purchase orders established a sale and stated that the orders did not indicate the quantity actually purchased. (A4422, 4426)

Webcraft made additional requests for admissions regarding the limited set of invoices which had not been destroyed, again seeking to ascertain the full extent of infringing production and sales. N.E. responded, "For each request that asks the defendant to admit that a copy of an invoice 'establishes a sale', *the request is denied*. An invoice only establishes that an invoice was prepared, *it does not establish that the goods were actually made, or shipped, or that any payment was made or received.*" (Emphasis added) (A4434-35)

One document which survived N.E.'s intentional document destruction was the "job book". (A7343-7448) The rubric is that N.E. *refused to admit* that "N.E. maintained a record of production in job book entries." (A4472-74)

Webcraft's interrogatories specifically inquired as to the total quantity of pamphlet products manufactured and the total billings for each identifiable customer. N.E. responded, "Defendant has not yet completed the calculation by which it will formulate a contention in this regard. When and if such a contention has been formulated, this answer will be supplemented in accordance with F.R.C.P. 26(e)." (A4499-4500) N.E. *never* provided such supplementation although it was repeatedly requested. (A7449-50) N.E. even refused to identify its own nomenclature for the infringing product as annotated in the job order book and on invoice entries (A4528-31).

For example, N.E.'s *liability* trial counsel stated in 1981 that N.E. had manufactured some 145,000,000 infringing products for Union Fidelity Insurance, an original Webcraft customer, and proffered job book entries as evidence. (A3874-3902) These infringing entries had product descriptions of "newspaper inserts", "oblong inserts w/perf.", "newspaper preprints", "inserts", and "preprint" to name a few. However, N.E.'s *accounting* trial counsel refused to confirm that these product descriptions applied to infringing products (A4528-31) and even refused to admit the veracity of the 1981 letter (A4422-23).¹ Webcraft was thus denied the "Rosetta Stone" to interpret N.E.'s hieroglyphic job book and invoice entries.

The unassailable facts are that N.E. had destroyed all of the essential job tickets, denied that its *own* invoices

¹ N.E.'s bad faith can be seen at trial where, in an effort to advance its own alleged non-infringing substitute position, N.E. asserted that invoices *were* records of production and sale, that third party purchase orders *were* records of sale, and that the job order book *was* a record of production (e.g. A438-445).

established a sale, denied that purchase orders established a sale, and refused to respond to inquiries seeking production and sales figures. N.E. refused up to the eve of trial to admit the production of a *single* infringing product and then at the start of trial sought only to agree as to a number it would "not contest."

3. WEBCRAFT WAS FORCED TO EX-TRAPOLATE NEW ENGLAND'S INFRINGING PRODUCTION AND SALES

Throughout the pretrial stages, Webcraft was foreclosed from a full and complete determination of the extent of N.E.'s infringing productions because of N.E.'s job ticket destruction. The numbers presented to the district court were, therefore, not the usual precise figures, generally available in accounting cases. Rather, Webcraft's evidence was based on evaluations of N.E.'s job book annotations and invoices, interpretations, estimates, and proposed calculations. N.E.'s witness, Mr. Avery, who was in charge of production, stated repeatedly that he himself was unable to ascertain the structure of the products or the method of production solely from invoice and job book annotations (e.g., A354-375). Even then, N.E.'s witness, Mr. Avery, was not the person who kept or made the entries in the job book. (A449-451)

Any determination involved interpreting the cryptic annotations made on N.E.'s invoices and in the job book as product descriptions. Having been denied N.E.'s Rosetta Stone, Webcraft had to evaluate each invoice for some indication as to the product sold. Webcraft looked to customers, the product description, the additional charges, and other documents where N.E.'s own nomenclature matched with that used in the job book. The job book contained approximately 5,400 job entries representing *billions* of products. (A454-455) Where invoices had corresponding job book entries, these were compared. Where there were corresponding purchase orders, these were compared. Only those entries which could be reasonably presumed

to have been infringements, based only on the scant evidence available, were included in the count.

The quantities identified to the district court were, as a result of the methodology, only *minimal* quantities. (A55) Untold millions, perhaps hundreds of millions or even billions escaped inclusion due to cryptic annotations. For example, testimony at trial revealed that N.E. manufactured infringing products for T.V. Guide (A468). The job book records hundreds of millions of pamphlets produced for T.V. Guide; yet, the infringements are concealed by cryptic descriptions. Another example of the cryptic concealment is seen in the Job Nos. 2863-2872 (A7391-92). These jobs were produced for National Liberty Insurance, another of Webcraft's original customers. No quantities or product descriptions are listed and the corresponding invoices were destroyed. However, the ledger entries for these job numbers reveal sales in excess of \$281,000.00. This is only a small sampling of the massive extent of infringing production which escaped the accounting. This escape was made possible by the destruction of the very documents (i.e., job tickets) which would have unequivocally identified the product structure and the method of manufacture.

Cryptic descriptions in the job book and on invoices do not convert N.E.'s infringements to non-infringements. They merely camouflaged the true extent and magnitude of the infringements.

4. PROCEEDINGS LEADING TO THE ACCOUNTING TRIAL

N.E.'s discussion regarding pretrial activity is bare of facts and heavy on argument. The actual facts are irrefutable.

On November 18, 1986, Judge Murphy's secretary sent a letter seeking to move the case along. (A7515) Webcraft then sought to coordinate a joint submission. (A7516-34) After several months of attempted negotiating with N.E.,

Webcraft filed a submission *ex parte*. N.E. opposed this submission and requested a pretrial conference. (A7535-37) The court set the conference date for July 23, 1987.

Prior to the conference, on July 22, 1987 without any knowledge of N.E.'s proposed accounting pretrial order, Webcraft filed its July 22, 1987 Motion for Partial Summary Judgment On The Issue of Marking of Method Patents Under 35 U.S.C. §287. (A30)

At the pretrial conference Webcraft unequivocally stated that its previously filed motion was *not* to be included in the order. Several weeks later Judge Murphy signed the accounting pretrial order, proposed by N.E., which made no provision for retroactive filings. (A650-51)

Local Rule 9(a) of the Connecticut District Court requires that an opposition memorandum be filed within 21 days and that failure to submit such an opposition memorandum is deemed sufficient cause to grant the motion (A1671). Rule 9(b) provides the mechanism for requesting extensions. (A1672) N.E. did not request an extension and failed to file an opposition memorandum within the prescribed time. The district court, pursuant to the rules, granted Webcraft's motion (A699). N.E.'s motion to set aside the order was denied by Judge Murphy. (A750)

Pursuant to the accounting pretrial order, N.E. filed four motions and Webcraft filed a motion for partial summary judgment and a motion *in limine*. (A30) The district court granted Webcraft's motions and denied all of N.E.'s motions *on the merits*, stating ". . . it has been done with a great deal of consideration, pro and con, of each motion and memorandum." (A13) The district court further determined that N.E.'s attorneys had "unreasonably and vexatiously" multiplied the proceedings and awarded Webcraft fees pursuant to 28 U.S.C. §1927. Local Rule 9(c) provides that motions for reconsideration of court orders be filed within 10 days. (A1673) N.E. *never* filed such a motion.

5. THE DAMAGE DECISION

N.E.'s "facts" in this portion are also sparse. N.E.'s interpretation of what Judge Murphy "suggested" or "implied" are not *facts*. Nevertheless, substantial, unrefuted testimonial evidence supported the finding that N.E. intentionally destroyed vital documents (discussed *infra*).

Judge Murphy did not improperly shift burdens of proof and unequivocally stated, ". . . *plaintiff's evidence at the hearing was sufficient to prove its damages without any difficulty. . .*" (A2)

N.E.'s assertion, as fact, that \$22,107,837.69 represented N.E.'s actual gross sales (NB9) is unconscionably false, as will be discussed *infra*.

Finally, Webcraft has *always* sought and, indeed, is entitled to damages adequate to compensate it for N.E.'s infringements (A40). The district court carefully considered all the evidence and testimony presented at trial, utilized its inherent equity powers and determined Webcraft's damages to be \$22,107,837.69 with 10% interest from July 7, 1980 plus costs. (A9)

III. SUMMARY OF ARGUMENT

The district court properly awarded Webcraft its lost profits as damages adequate to compensate for N.E.'s massive infringements of Webcraft's three patents during the accounting period pursuant to 35 U.S.C §284. In so doing, the district court properly cited and applied the most recent legal requirement for ascertaining lost profits. In accordance with *Panduit Corp. v. Stahl Bros. Fibre Works Inc.*, 575 F.2d 1152, 1156, 197 U.S.P.Q. 726 (6th Cir. 1978), and *Bio-Rad Laboratories v. Nicolet Instrument Corp.*, 739 F.2d 604, 222 U.S.P.Q. 654 (Fed. Cir.), *cert. denied*, 469 U.S. 1038 (1984) the district court properly found that Webcraft had met its burden of proof for the award of lost profits and that \$22,107,837.69 with interest at 10% from July 7, 1980 was adequate to compensate for N.E.'s infringements.

On the surface this would appear to be a standard, "vanilla-flavored" accounting case. However, this entire accounting has been ominously overshadowed by a document destruction of a magnitude never before witnessed by this Court and perhaps not even by its predecessor courts. The massive, wholesale and intentional destruction by a defendant infringer of the only documents which would have specifically revealed the full extent of the infringements appears unprecedented. The district court properly applied the firmly established law relating to the destruction of documents and resolved all doubts and uncertainties against N.E.

This accounting has been thoroughly clouded with bad faith by N.E. and culminates in N.E.'s unwarranted attack on Judge Murphy. Without having first presented the issues of alleged bias and prejudice, a new trial, or a new judge through proper procedures in the district court, N.E. had waived such positions for appellate review. N.E.'s assertions that Judge Murphy was biased and prejudiced are meritless, unsupported by the record, and insulting to the Court. The trial record reveals that N.E. was given every opportunity to try its case and to address any issue, without evidentiary exclusion. However, the fact that the evidence established unconscionable behavior by N.E. which is reflected in the tone of the final opinion does not support N.E.'s bias assertion. Furthermore, the district court's opinion and award against N.E.'s attorneys pursuant to 28 U.S.C. §1927 in conjunction with pretrial motions was correct and not an abuse of discretion.

N.E. asks this Court to view the case as an erroneous award of N.E.'s total sales. What New England leaves out, however, is that the "sales" figures addressed in the district court's opinion are *not* N.E.'s actual sales figures. The figures in the chart (A7) attached to the district court's opinion are illustrative reflections only of an attempted calculation of the quantity of production which was exacerbated by the intentional destruction of documents. These figures were based on incomplete data, estimates,

averages, and a plethora of assumptions caused by that document destruction. The district court clearly found that the actual extent of infringement could have been "perhaps double or triple" the minimal figure of about one billion. Furthermore, N.E. fails to address the proper standards for appellate review; rather, N.E. simply dismisses the district court's findings as due "no deference."

Pivotaly important, however, is the intentional document destruction. This Court in exercising its duties should not hold the district court's findings to be "clearly erroneous" or view Judge Murphy's ruling as an "abuse of discretion" in light of N.E.'s massive destruction of documents. To do so would send an unmistakable message to present and potential infringers that advantages are to be gained, should they be held to an accounting, by committing essential documents to the flames of destruction. Instead, this Court's message must reinforce the consequences which such large scale destruction of evidence will spawn.

IV. ARGUMENT

There are *three* patents in suit - two method patents (A1682-91) and one product patent (A1677-81). With each pamphlet manufactured, N.E. infringed *two* of Webcraft's patents - one or the other of the method patents and the product patent.² Webcraft is entitled to damages for *each* patent that has been infringed. *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1561, f.n. 8, 219 U.S.P.Q. 377 (Fed. Cir. 1983).

The three essential points to consider when evaluating the correctness of the district court's award of damages are:

² New England admitted that no other method of manufacture was used to produce its multipage pamphlet with integral envelope. (A280) New England also admitted that it was its specific intention to produce the patented product. (A6480, 6612-13)

First, the law mandates that the damages be "adequate to compensate for the infringement." 35 U.S.C. §284;

Secondly, Webcraft has been significantly and substantially damaged by N.E.'s massive infringements throughout the accounting period. Webcraft's damages are manifested in its lost profits which are attributable to N.E.'s infringements of the patents in suit; and

Thirdly, N.E. intentionally destroyed the critical job tickets, "the only yardstick to measure accurately defendant's guilt in dollars, thus hindering plaintiff in proving defendant's use of its patents." (A2)

A. THE DISTRICT COURT PROPERLY RULED THAT WEBCRAFT WAS ENTITLED TO ITS LOST PROFITS AS THE MEASURE OF DAMAGES

When a patent owner would have made the sale of a product "but for" the infringement, the award based on his lost profits is appropriate. *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 863, 226 U.S.P.Q. 402 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

The district court, as the finder of fact, by examining the documentary evidence and evaluating the credibility of live witnesses, resoundingly concluded that Webcraft would have made all of the infringing sales made by N.E. (A5). Having made such a causation finding, the district court enumerated the oft cited "test" in *Panduit Corp.*, 575 F.2d at 1156, and unequivocally held that:

- (1) demand existed for the patented product and patented methods;
- (2) there was an absence of acceptable non-infringing substitutes; and
- (3) Webcraft had the manufacturing and marketing capability to meet the demand for the patented product.

N.E.'s assertion that Judge Murphy made no attempt to apply the *Panduit* test is baseless in light of the district

court's specific findings as to the elements necessary to prove entitlement to lost profits. (A1-6) The district court made the ultimate conclusion that, *but for* the infringement, Webcraft would have made all of the infringing sales. (A5)

N.E.'s argument that Webcraft failed to prove the "but for" causation requirement of the *Bio-Rad* test is likewise baseless and ignores the district court's specific finding on this point (A5). The evidence was unrefuted that Webcraft only faced sporadic *infringing* competitors. (A130)

N.E. should not be heard to complain that because there were other infringers out there, the award of Webcraft's lost profits is improper . . . that if N.E. had not obtained the business, some other infringer would have. (See *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 598, 138 U.S.P.Q. 357 (5th Cir. 1963). None competed directly, geographically or in the same magnitude for the same customers as did N.E. In fact, the large insurance and direct mail companies were originally Webcraft's customers. (A102, 122-23, 6302).

The facts are unrefuted that, as to the sales addressed in this accounting, essentially a two-supplier market existed (i.e. Webcraft and N.E.). Causation can therefore be inferred and the award of lost profits is proper. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065, 219 U.S.P.Q. 670 (Fed. Cir. 1983) It is further demonstrated by the pending class action case brought in 1985 against some 42 infringers who took over after N.E. shut down.

Webcraft settled an infringement suit with Chicago based Cadillac in late 1978 and granted a license, limited by the terms of the agreement to one specific plant in Chicago (A1724-30, 109, 132) under 2 of the 3 patents in

suit.³ An inconsequential increase such as Cadillac does not preclude the award of lost profits.⁴ *Bio-Rad*, 739 F.2d at 616. The evidence was unrefuted that customers preferred manufacturing facilities in close proximity (A124-126) and that virtually *all* of the sales in issue came from the same geographical area, i.e., within 300 miles of both Webcraft and N.E. (A123-126, 6302, 7505).

Webcraft was not obligated to negate every possibility that a purchaser might not have bought the patented product instead of N.E.'s infringing product. *Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 21, 223 U.S.P.Q. 591 (Fed. Cir. 1984). Recovery of lost profits only requires a *reasonable probability* that, but for the infringement, Webcraft would have made all the infringing sales that were made by N.E. *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1326, 5 U.S.P.Q. 2d 1255 (Fed. Cir. 1987). The evidence firmly established that the award of lost profits was the proper measure of damages.

Having properly concluded that the measure of damages was Webcraft's lost profits, it was unnecessary for the district court to address any determination of a reasonable royalty. The facts clearly support the district court's proper conclusion that, but for the infringements by N.E., Webcraft would have made all N.E.'s sales.

**1. THE DISTRICT COURT PROPERLY
FOUND THAT DEMAND EXISTED
FOR THE PATENTED PRODUCT
AND PATENTED METHODS**

The district court properly found that demand existed for the patented product and methods. The infringer's sales

³ Webcraft was foreclosed from determining the full extent of Cadillac's infringement by court order. (A7508-14).

⁴ Webcraft did not include Cadillac's customer, C.I.T., in the accounting.

of the patented product using either of the patented methods is compelling evidence of demand for the patented product and for the patented methods. *Gyromat Corp. v. Champion Spark Plug*, 735 F.2d 549, 552, 222 U.S.P.Q. 4 (Fed. Cir. 1984). If there was no demand N.E. would not have pursued the sales and run the risk of infringement. *Id.* As the district court correctly concluded, "Defendant's multitudinous sales of the pamphlet product is the best proof of the demand — some 973,960,924 pamphlets." (A5) Additionally, the fact that Webcraft itself has sold in excess of 2 billion patented products produced by the patented methods is persuasive on the issue of demand. (A117) *Paper Converting Machine Co.*, 745 F.2d at 22. The fact that N.E. apparently concedes this point by failing to allege that the district court erred as to "demand" is compelling.

2. THE DISTRICT COURT PROPERLY FOUND THAT THERE WERE NO ACCEPTABLE, NON-INFRINGEMENT SUBSTITUTES

The district court unequivocally concluded that there were no acceptable, non-infringing substitutes. (A3, 6)

N.E. offered a number of products which it asserted were non-infringing substitutes, yet N.E.'s own counsel did not know where the allegedly non-infringing products came from (A345) and its own witness Avery was unable to testify that the products were, in fact, produced by N.E. (A335, A344) However, it is well established that the mere existence of a competing device does not make that device an *acceptable* substitute. *TWM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 901, 229 U.S.P.Q. 525 (Fed. Cir.) *cert. denied*, 479 U.S. 852 (1986).

The test is not whether potential competing devices existed; but rather, whether any products and methods were *acceptable* to the customer as substitutes for the patented product and the patented methods. N.E. offered no testimony or evidence that these potentially competing products were commercially *acceptable* to the customer as

substitutes for the patent product. Similarly, N.E. offered no testimony or evidence that *any* other non-infringing methods would have been *acceptable* cost wise, production wise, or time wise to the customer as substitutes for the patented methods. Industry *acceptance* of a competing device was beyond the scope of the knowledge of N.E.'s witness (A536-37). Webcraft's proofs even established the negative point of unacceptance regarding other formats. (A82-84).

The district court had previously found that "there's nothing like a Webcraft six pager with integral envelope." *Beatrice Foods Co. v. N.E. Printing and Lithographing Co.*, 224 U.S.P.Q. 982, 986 (D.Conn), *aff'd in part*, No. 84-1284 (Fed. Cir. 1984). Such a finding of uniqueness reinforces the *lack* of acceptable non-infringing substitutes. *Carella v. Starlight Archery*, 804 F.2d 135, 141, 231 U.S.P.Q. 644 (Fed. Cir.), *amended*, 1 U.S.P.Q.2d 1209 (Fed. Cir. 1986). (A6) Webcraft presented unrefuted evidence that customers would not accept another format in lieu of the patented product, thereby establishing that there were no acceptable non-infringing substitutes. (A82-84) *Panduit Corp.*, 575 F.2d at 1162; *TWM Mfg. Co., Inc.*, 789 F.2d at 901.

N.E. offered only *different* products and ignores the fact that the patented product replaced the prior art type products. (A6) Furthermore, N.E.'s "different" products did not incorporate *all* of the elements of Webcraft's patented product and could not be considered acceptable, non-infringing substitutes. *Radio Steel & Mfg. Co. v. MTD Products, Inc.*, 788 F.2d 1554, 1556, 229 U.S.P.Q. 431 (Fed. Cir. 1986).

The district court's previous determination at the liability stage, bolstered by Webcraft's evidence and undiminished by N.E.'s arguments, reaffirmed the proper finding that "... there is none in the marketplace like plaintiff's product." (A3)

**3. THE DISTRICT COURT PROPERLY
FOUND THAT WEBCRAFT HAD THE
MANUFACTURING AND MARKET-
ING CAPACITY TO MEET THE
ENTIRE DEMAND**

N.E. apparently concedes this point and does not allege error as to this element of the *Panduit* test. Nevertheless, the district court's findings as to Webcraft's manufacturing and marketing capacities are unassailable. (A5)

Webcraft's documentary and testimonial proof showed that it possessed sufficient manufacturing capacity to handle the entire demand for the patented product during the infringement period. (A96, 114-117, 163, 207, 214, 256-57).

The district court's findings specifically apply, as well, to Webcraft's marketing capacity. Webcraft proved that it had the sales and marketing capabilities to meet the entire demand for the patented product produced by the patented methods. (A102-5, 104-110, A5) The evidence at trial conclusively established and the district court so held that Webcraft had the sales and marketing capacity to exploit the entire demand.

**4. THE AMOUNT OF PROFIT
WEBCRAFT WOULD HAVE MADE**

The evidence substantiated the amount of profit Webcraft would have made, but for N.E.'s infringements. Webcraft's evidence including extensive documentation, coupled with live testimony, substantiated the profitability of the patents in suit. Webcraft is entitled to its lost profits for each of the patents which N.E. infringed. *Stickle*, 716 F.2d at 1561, f.n. 8. Furthermore, Webcraft is entitled to the profitability *before* N.E.'s infringements. See, *King Instrument Corp.*, 767 F.2d at 864; *Saf-Gard Products, Inc. v. Service Parts, Inc.*, 491 F.Supp. 996, 1002, 206 U.S.P.Q. 976 (D.Az. 1980). This precludes the insidious impact of the price erosion caused by N.E.'s infringements. *Id.*

Webcraft is entitled to its lost profits directly attributable to N.E.'s infringements of Webcraft's patents. The method patents encompass start-to-finish methods which convert a web of paper on a roll into individual multipage pamphlets with integral envelope. *All of the profit is*, therefore, attributable to the patented methods. Similarly, the product is a completed, patented product. It is *not* a patented component in a larger unpatented product. Therefore, the *entire profit* realized from the sales is attributable to the patents. The profit for the patented methods is directly related to the patented product profits and is reflected in Webcraft's profitability proofs - namely, at least 30% net profit pre-tax on Webcraft's sales of its patented products or products made by its patented methods. (A93) This figure is generally substantiated by Webcraft's monthly summaries even after the scars of years of devastating price erosion caused by N.E.'s massive infringements. (A219-226, 3906-7)

Webcraft proved that the profitability of the preparation department is properly includable in Webcraft's lost profits. The "prep" department provided services essential to the manufacture of the patented product by one or the other of the patented methods. (A85) The profitability of the "prep" department was 50%, (A87) which contributed an additional 5% to the overall, pre-infringement net pre-tax profit on sales using the patented methods and of the patented products. (A87)

The third element of the profit Webcraft would have made, but for N.E.'s massive infringements, is the substantial profitability of Webcraft's own freight concern. The proofs at trial were that Webcraft had its own shipping division, KSS. (A75) KSS was an exceptionally profitable area for Webcraft and the testimony was unrefuted that KSS had a freight net pre-tax profit of 65% which was directly related to the sales of the patented products and was lost due to N.E.'s infringements. (A86-88, 226)

Therefore, the evidence clearly proved that the net, pre-tax profit Webcraft would have made, but for N.E.'s infringements, was 30% of sales dollars for the manufacturing of product, plus an additional 5% of "prep" charges, plus 65% of freight billings. (See, A153)

5. THE DISTRICT COURT PROPERLY FOUND THAT NEW ENGLAND SIGNIFICANTLY ERODED THE PRICE TO OBTAIN THE BUSINESS FOR WEBCRAFT'S PATENTED PRODUCT

The district court's finding that N.E. eroded the price in order to obtain Webcraft's business is uncontested by N.E. Nevertheless, the district court's finding is strongly supported by substantial evidence of the price erosion caused by N.E.'s infringements. (e.g. A101) This price erosion is clearly illustrated as it relates to a major insurance company, Union Fidelity. (A89-90)

In 1972, the year infringement began, N.E. reported a price per thousand of \$9.00. (A3514-15) Webcraft had introduced the patented product at \$12.00/m (A3176, A88). N.E.'s price of \$9.00/m was an initial erosion of 25%. A graph and supporting testimony show N.E.'s consistently lower price. (A7217, A231-36) N.E.'s price slashing prevented Webcraft from increasing its prices even when the cost of paper drastically increased. (A89)

The district court specifically found price erosion (A4) and the evidence and testimony substantiated a price erosion of at least 25%.

B. THE DISTRICT COURT PROPERLY AWARDED DAMAGES ADEQUATE TO COMPENSATE FOR THE INFRINGEMENTS

The primary question in awarding damages pursuant to 35 U.S.C. § 284 is, "Had N.E. not infringed, what would Webcraft have made?" *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1578, 220 U.S.P.Q. 490 (Fed. Cir. 1983), citing *Aro Mfg. Co. v. Convertible Top Replace-*

ment Co., 377 U.S. 476, 507 (1964). As the district court properly acknowledged, "The true measure of a patentee's general damages must be the value of what was taken." *Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1582, 217 U.S.P.Q. 977 (Fed. Cir. 1983) (A4) The "value of what was taken" was the proper award of lost profits to Webcraft. In this case, the district court utilized its "inherent equity power" and determined that the damage award of \$22,107,837.69 with interest at 10% from July 7, 1980 plus costs was "adequate to compensate for the infringement."

This Court has repeatedly stated that the trial court must be afforded reasonable flexibility in awarding lost profits damages. *King Instrument Corp.*, 767 F.2d at 863. However, the determination of a damage award is not an exact science. The trial court must best approximate the amount to which the patent owner is entitled. *Paper Converting Machine Co.*, 745 F.2d at 22. It is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Paper Converting Machine Co.* 745 F.2d at 22.

Ordinarily, the actual calculations of Webcraft's lost profits would have been a simple mathematical exercise of multiplying Webcraft's profit margins in those areas where profit was directly attributable to the patents in suit (i.e., sales of the patent product, sales of preparation goods and services, and freight) by the sales of the defendant (adjusted, of course, for price erosion). However, these were not ordinary circumstances. N.E.'s destruction of its job tickets forever foreclosed a determination of the full extent of its massive infringements and totally frustrated the district court's task. In recognition of this frustration Judge Murphy said, "Although we appointed a CPA as a Special Master to as ^{ee} plaintiff's damages, he was never consulted." (A1)

**1. THE DISTRICT COURT PROPERLY
FOUND THAT NEW ENGLAND
INTENTIONALLY DESTROYED
CRITICAL ACCOUNTING DOC-
UMENTS**

The evidence supporting the finding by the district court that crucial accounting documents were intentionally destroyed was overwhelming, unrefuted, and, indeed, even admitted by N.E.

There can be no doubt that subsequent to the filing of this suit on July 7, 1980, and up to the closing of its doors in 1983 N.E. had *all* the documents necessary for an accurate determination of the full extent of N.E.'s infringing production. On October 7, 1980, N.E. stated in responses to interrogatories, "For the period 1974 to the present, invoices, quotations, purchase orders, job tickets and cost sheets appear to be available." (A7046-47) The law is clear that N.E. had a duty to maintain those records. (See, *Computing Scale Co. v. Toledo Computing Scale Co.*, 279 F. 648, 673 (7th Cir. 1921), *cert. denied*, 257 U.S. 657 (1922).

However, these records were intentionally destroyed sometime *before* the liability trial and N.E. then sought to affirmatively rely on this document destruction in asserting an unsuccessful laches defense. In N.E.'s Motion for Separate Trial of Laches, dated July 6, 1983, N.E. unequivocally stated that many of its sales documents had been destroyed or were missing (A617, 623). At the liability trial, in an attempt to advance the laches argument, Mr. Avery testified that job tickets and other records were no longer in existence (A474-75). This reliance on its own destruction of documents was reiterated in Defendant's Post-Trial Brief (A7069, 7087). All this evidence was before the district court at the accounting trial.

Once N.E. became aware of the ramifications of the destruction of documents, this intentional act which had been advanced with vehemence as a strongly asserted

element of its laches argument, now became "a mere failure to retain documents" or a routine discarding of documents. (NB12) The documents which had been affirmatively asserted as *destroyed* are now "probably discarded", "could not be located" and "absent" (NB12).

N.E. would mislead this Court by citing *Loctite Corp. v. Ultraseal Ltd.*, 225 U.S.P.Q. 67 (E.D. Wis. 1984), *aff'd in part*, 781 F.2d 861, 228 U.S.P.Q. 90 (Fed. Cir. 1985) for the proposition that "the mere failure to retain documents does not give rise to an inference of bad faith or willful destruction." (NB12). In *Loctite*, 228 U.S.P.Q. at 100-101, Ultraseal, the defendant, alleged that plaintiff brought suit in bad faith. Loctite had merely lost the infringement opinion of outside counsel. For N.E., who intentionally destroyed *all* of the job tickets verifying hundreds of millions of infringements in the face of an accounting, to cite *Loctite* as authority to legally justify its behavior is highly improper. The law is *well established* that destruction of documents can constitute bad faith. (See, *Scott Paper Co. v. Moore Business Forms, Inc.*, 594 F.Supp. 1051, 224 U.S.P.Q. 11, 38 (D.Del. 1984).

Nonetheless, unrefuted proofs were placed into evidence that the job tickets were intentionally destroyed and precluded Webcraft from making a full and accurate determination of the extent of N.E.'s infringements. N.E.'s contention that the document destruction did not prevent a full accounting is patently untrue. (NB12).⁵

2. THE IMPACT OF NEW ENGLAND'S DOCUMENT DESTRUCTION

The exceptional nature of this case is, as evident in the tone of Judge Murphy's opinion, that the district court was incensed, and rightfully so, about N.E.'s intentional

⁵ As an example, it should be noted that N.E.'s witness admitted infringing production for T.V. Guide (A468), yet N.E. never revealed the extent of that production.

destruction of documents. The district court termed this destruction "outrageous" and "cowardly", suggested fraudulent behavior, and invited an inquiry by the Connecticut Bar. Having addressed the inferences which must be drawn from such destruction, (A2) the district court was justifiably outraged at the resulting impact of N.E.'s intentional act -- namely, foreclosure from routinely determining the full extent of N.E.'s infringements.

Courts throughout this century have been faced with such "cowardly" defendants. As early as 1908, defendants who failed to produce accounting records were admonished about the consequences of their acts. One court stated:

It is evident that the master believed, what no one else could help believing, that the defendant's books, if produced, would prove what number of stools the defendant had sold, or that, if no record of any kind had been kept, *it must have been for the purpose of concealment and making the proof of the extent of the infringement difficult, if not impossible.* *Yesbera v. Hardesty Mfg. Co.*, 166 F. 120, 122 (6th Cir. 1908), *cert. denied*, 214 U.S. 513 (1909).

Intentional document destruction and its impact continued to appear as a frustration to the courts. (See, *Computing Scale Co.*, 279 F. at 673) This Court has on a limited basis addressed the failure to keep *accurate* records. *LAM, Inc.*, 718 F.2d at 1065; *TWM Mfg. Co.*, 789 F.2d at 900.

However, this Court has *never* been faced with an infringer who, with a duty to maintain records, intentionally destroyed those records on a wholesale level. N.E. here relied on such destruction first as a sword to assert a laches defense, and then as a shield to hide the full extent of its massive infringements. N.E.'s behavior in this case has been unconscionable. The district court in its justifiable outrage has properly termed N.E.'s behavior "outrageous" and "cowardly". (A2, 4)

3. THE COURT PROPERLY INCLUDED CONVOYED SALES IN THE DAM- AGE AWARD

"Convoyed" sales were in two distinct categories: 1) those products produced by N.E. for Webcraft's original customers which cannot be determined, due to the document destruction, to be infringing products; and; 2) those products sold by N.E. to Webcraft's original customers in conjunction with specific, related sales programs which included infringing products.

Only N.E. possessed the knowledge whether the jobs in category 1) were infringing products produced by infringing methods, and N.E. would not and did not tell Webcraft. Arguably, *millions* of pamphlet products presently included as convoyed sales would be properly included in the infringing category had the exact method of manufacture and the structure of each product been known. N.E.'s destruction of the vital, identifying records had precluded ascertaining this information. N.E. must bear the adverse consequences of its acts. See, *Nickson Industries, Inc., v. Rol Mfg. Co., Ltd.*, 847 F.2d 795, 799, 6 U.S.P.Q.2d 1878 (Fed. Cir. 1988); *TWM*, 789 F.2d at 900.

As to Category 2) Mr. Kaisand, Vice President of Webcraft, specifically testified about the *nexus* between the sale of the patented product and the sale of convoyed products. Mr. Kaisand testified (A110-113) that mass marketers had sales programs which included not only the patented product, but other print media products as well. This additional printing was originally and profitably handled by Webcraft along with the production of the patented products for the same customers taken over by N.E.

The law fully supports the inclusion of convoyed sales in awarding Webcraft lost profits. (See, *Paper Converting Machine Co.*, at 22-23.

4. THE DISTRICT COURT *DID NOT* AWARD WEBCRAFT N.E.'S ACTUAL GROSS SALES

The quantities depicted on Exhibit A (A7) are Webcraft's attempted minimal calculations based on estimates, extrapolations and averages. These calculations are *not* N.E.'s actual gross sales. That number is unknown. N.E.'s assertion that the district court committed reversible error in awarding "N.E.'s gross sales" as the measure of damages is wholly unfounded.

N.E.'s consciousness of the weakness of its position is betrayed by the manipulation of Judge Murphy's opinion in N.E.'s brief. (NB15). In an outrageous distortion of the document which it attacks as "clearly erroneous," N.E. attempts to make Judge Murphy appear to say that the "New England's Sales" are the damages, which he never purported to do. N.E., at NB15, deletes from the portion of Judge Murphy's opinion quoted there, nearly two full pages of text, without ellipses. The sentence referring to "New England's Sales of Pamphlet Products," appearing at A4 is followed immediately by the concluding sentence of the opinion. (A6)⁶ Nowhere in Judge Murphy's opinion does he state that he is awarding Webcraft N.E.'s gross sales. Indeed, the District Court, following the recitation of the *Panduit* test (A5), concluded, "Plaintiff's damages we find are \$22,107,837.69 with interest at 10% from July 7, 1980." (A6).

Webcraft was unequivocally foreclosed from determining which of N.E.'s sales actually constituted infringements. The proof showed that it was reasonably inferable

⁶ This use of a quotation containing concealed deletions is comparable to the conduct which caused this Court to state that such distortions by deletion "will not in this Court be encouraged by acquiescence." *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486, 221 U.S.P.Q. 649 (Fed. Cir.), *cert. denied*, 469 U.S. 924 (1984).

that *many millions* or even *billions* of infringing products properly includable in this accounting had been hidden from Webcraft as a result of the document destruction. Additionally, for those jobs without corresponding invoices, the dollar figures were illustratively calculated by multiplying the indicated quantity (which *did not* include the standard 3% overage) by an *average* price. For N.E. to assert now that \$22,107,837.69 is its actual sales figure is an absurdity.

The only potentially accurate figures as to any of N.E.'s sales dollars can be found in A2760-97. This document illustrates N.E.'s total overall sales for all production, infringing and non-infringing products, during the accounting period were in excess of 85 million dollars. Webcraft calculated only an estimated percentage of gross sales as infringing sales. (A4728) Obviously, the district court did not award N.E.'s actual gross sales. Due to N.E.'s document destruction it was impossible to determine what its actual gross sales were for the infringements.

Perhaps the most telling evidence that the damage award was *not* N.E.'s actual gross sales are N.E.'s own responses to requests for admissions and interrogatory answers as to its total sales of infringing products during the infringement period. N.E. *denied* "that during the period from 1974 through 1983, N.E. produced and sold at least 704,160,506 pamphlet products at a gross billing amount of at least \$16,255,868.00."⁷ (A4431) Furthermore, N.E. *denied* that its own invoices established a sale (A4435).

In response to interrogatories, N.E. *refused to state* the total dollar amount of sales by customer and the total overall dollar amount of sales during the infringement period. (A4527) Despite repeated requests for supplementation (A7449-50) none was provided.

⁷ Each matter in which an admission was requested was separately set forth in accordance with Rule 36(a), F.R.C.P. and made no reference whatsoever to Exhibits A & B.

While N.E. refused to *admit* the extent of its infringing sales, it offered into evidence "Defendant's Tabulation of Invoices and Job Book Entries *Which Will Not Be Contested By N.E. At Trial.*" (Emphasis added)⁸ (A2690-2701). N.E. chose not to reveal to the district court its gross sales of infringing products. Indeed, N.E. offered no price whatsoever for job orders without corresponding invoices.

N.E. attached to its post-trial briefs numerous charts, which had not been entered into evidence at trial, but *none* included its actual gross sales of infringing products. N.E. *never* provided either the district court or Webcraft with full and complete evidence of its gross sales of infringing products during the accounting period. Furthermore, N.E. continued throughout to contest Webcraft's calculations.

For N.E. to now represent to this Court, despite its unswerving denials and refusals to state its own gross sales, that a chart (A7) of Webcraft's minimal illustrative estimates, based on assumptions addressed above and exacerbated by the destruction of records, are N.E.'s actual gross total sales of the infringing product is plainly preposterous.

The evidence at trial clearly supported the conclusion that the actual sales of infringing products by N.E. *far exceeded* the \$22,107,837.69 figure. Untold millions of infringing products were camouflaged under cryptic and general descriptions. Job order book entries do not reflect customary overage quantities (A457). Entries could be "impressions" and could therefore be three times the indicated quantities. (A455) N.E. destroyed all of the job tickets and most of the invoices from which an accurate count of N.E.'s total infringing production and gross sales would have been ascertained.

⁸ The Court should note the significant distinction between "will not be contested" and an admission. This exhibit did not include any entries regarding *admitted* infringing production for T.V. Guide. (A468)

Therefore, in light of the *true* nature of the total figure depicted on Exhibit A (A7), the district court *did not* award Webcraft N.E.'s actual gross sales. Rather, the district court exercised its inherent equity power and determined that damages adequate to compensate for the infringement pursuant to 35 U.S.C. §284 were \$22,107,837.69 with interest at 10% from July 7, 1980.

**5. THE DAMAGE AWARD WAS ADE-
QUATE TO COMPENSATE FOR THE
INFRINGEMENTS**

The proper appellate inquiry should be whether or not the award was in accordance with 35 U.S.C. §284 and is just and reasonable given the totality of the circumstances. The district court is free to use its discretion in choosing a method for calculating damages, as long as the measure is just and reasonable. *Kori Corp. v. Wilco Marsh Buggies, Inc.*, 761 F.2d 649, 654, 225 U.S.P.Q. 985 (Fed. Cir.), *cert. denied*, 474 U.S. 902 (1985). Furthermore, the measure of damages provides an opportunity for the court to balance equitable concerns as it determines Webcraft's damages. *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 201, 228 U.S.P.Q. 367 (Fed Cir. 1986). The principal equitable concerns *here* are Webcraft's entitlement to adequate compensation and N.E.'s "cowardly" destruction of the best evidence which would have substantiated the full extent of N.E.'s infringements.

While Webcraft will never know exactly how many infringing products were manufactured and sold by N.E. during the accounting period, all inferences about this quantity *must* be resolved against N.E. The law is unmistakably clear on this point:

If a manufacturer, knowing of a patent, decides to chance an unlicensed use, he should realize that he may be caught by a final decree on the merits and be ordered to respond accordingly; and, so realizing, *he should be held to the duty of keeping separate and accurate records of all his infringing*

acts; and, on his failure to keep such records, the court, in measuring the damages on account of his trespasses, should resolve all doubts against him. Computing Scale Co., 279 F. at 673. (Emphasis added)

This principle of law has been adopted by this Court. Any uncertainty as to the actual number of infringing pamphlets produced and sold by N.E. must be resolved against N.E. since it failed to keep accurate records. *LAM, Inc.*, 718 F.2d at 1065; *TWM Mfg. Co., Inc.*, 789 F.2d at 900. Indeed, the district court stated, "It seems a pity that defendant's counsel did not warn its client about the inferences such destruction of evidence would spawn shortly after the suit was filed." (A2).

N.E.'s witness at trial, Mr. Avery, stated that certain quantities recorded in the job order book were "impressions." (A388) Testimony and documentary evidence showed that the number of products produced could be "three times" the number of "impressions". (A455) Recall once again the N.E. refused to admit that the job book was a record of production (A4472-74) or that the quantities recorded are accurate. (*Id.*) Therefore, based on the destruction of the corresponding invoices which would substantiate the quantities (A350) (despite N.E.'s denials of admission requests (A4434-35)), the inference that those quantities recorded in Exhibit B for "Work Orders" are "impressions" must be decided against N.E. and tripled.

Furthermore, the testimony (A243-44, 457) and evidence (A7451-51a) showed that it was industry practice to include at least 3% overage and that N.E. adhered to that practice. (A457) Therefore, the inference that 3% overage must be added to the quantity gleaned from the job book must also be decided against N.E. for the same reasons.

The final inference which must be decided against N.E. is that the actual extent of its infringements could be, as the district court properly concluded, "double or triple" the minimal figures of Exhibits A & B (A5).

Having found that Webcraft had proven its entitlement to lost profits as the proper measure of damages, the district court determined damages adequate to compensate for the infringements. The district court, thoroughly frustrated by N.E.'s intentional document destruction, utilized its inherent equity powers and awarded \$22,107,837.69 plus interest. The fact that \$22,107,837.69 coincides with the illustrative minimal figure on Exhibit A is not determinative. It is an illustrative calculation, a minimum estimate predicated on interpretation of cryptic descriptions in surviving documents due to the destruction of the job tickets (which would have identified all of the infringements) and the corresponding invoices (which would have identified actual sales dollars).

The district court did not purport to award N.E.'s actual profits or sales as damages. Rather, it used Webcraft's best evidence of N.E.'s illustrative sales as its fair measure of damages. It is crucial to note that N.E. does not assert that the dollar amount is clearly erroneous or excessive.

In determining an award "adequate to compensate" pursuant to 35 U.S.C. §284, there must be room to take into account the totality of the circumstances. *TWM*, 789 at 902. The totality of the circumstances in this case includes the proven elements of Webcraft's entitlement to its lost profits as the proper measure of damages and the fact that millions or even billions of infringing products escaped this accounting because of N.E.'s intentional document destruction. The award of \$22,107,837.69 plus interest as damages, considering the totality of the circumstances and the district court's inherent equity power, is just and reasonable and has a rational basis in the record. (See *Del Mar Avionics, Inc.*, 836 F.2d at 1327).⁹

⁹ Webcraft was also awarded prejudgment interest of 10% from July 7, 1980. (A9) N.E. apparently agrees with this element of the damages as it is not appealing the interest award.

The reasonableness of the award can be seen even in simple arithmetic. For exemplary comparison, the district court's finding that N.E.'s actual sales could have been three times the illustrative minimal calculation in Exhibit A, when multiplied by Webcraft's proven profit margin of 35%, $((\$22,107,837.69) \times (3) \times (.35))$ yields \$23,213,229.57. As compared with the district court's award it does indicate a rational basis and reasonableness of the award. Even then there is no taking into account the impact of the price erosion, 3% overage on Job Book entry sales or loss of freight profits by Webcraft.

N.E. cannot argue that the district court's methodology is improper since any difficulties in exactness were of N.E.'s own making. *Story Parchment Co.*, 282 U.S. at 563; *Lam, Inc.*, 718 F.2d at 1065. N.E. continues its "smoke screen" approach to this appeal by asserting that the district court awarded actual gross sales, knowing full well, indeed having admitted (A4431), that the illustrative minimal calculated amount in the chart (A7) is not true sales.

A ruling by this Court which disturbs the district court's award of \$22,107,837.69 with interest at 10% from July 7, 1980 would be an unjust windfall for N.E. It would send an unmistakable message to potential infringers, contrary to a century of established law, that there is something to be gained from the intentional destruction of critical accounting records. This Court might well be as incensed as the district court at N.E.'s behavior and should, in affirming the award, send the proper message that such document destruction results in *all* doubts being resolved against the infringer. N.E.'s documents destruction is tantamount to an admission that its *actual* infringing

production far exceeded the quantities N.E. merely does "not contest."¹⁰

**C. NEW ENGLAND IMPROPERLY SEEKS
REDRESS FROM THIS COURT**

**1. JUDGE MURPHY CONDUCTED A
FAIR AND IMPARTIAL TRIAL**

Shockingly, N.E. has chosen as the keystone of this appeal its charges of bias and prejudice. N.E.'s brief repeatedly accuses Judge Murphy of "pervasive bias" (NB10,11,15) and "bias of the most perverse and pervasive type" (NB15). N.E. charges that Judge Murphy showed "unwarranted contempt" for N.E. (NB17) and sullied "the appearance of justice" (NB17). N.E. further charges that the district court's rulings were "marked not by reason, but by scorn" (NB11); "outlandish and legally unsupportable" (NB15); "devoid of any principled justification or legal support that it can only be characterized as 'lawless'" (NB17); were "fatally tainted by Judge Murphy's bias" (NB22) and "entitled to no deference" (NB22, 29).

Such accusations are most serious, disingenuous, and wholly without substance in light of the facts, which emerged at trial, that N.E. had intentionally destroyed the

¹⁰ N.E.'s destruction of relevant documents may be treated as an admission by conduct that its case is weak and not to be won by fair means. *McCormick On Evidence*, §273, 2nd Ed. 1972, p. 660. The *inference* drawn from N.E.'s document destruction is an indication of a consciousness that its case is weak or unfounded. From that consciousness may be inferred the *fact* of the cause's lack of truth and merit. Such an inference operates indefinitely, though strongly, against the whole mass of alleged facts constituting N.E.'s cause. 2, Wigmore, *Evidence*, §278 (Chadbourn Rev. 1979) at 133. Cf. Judge Murphy's finding, "It almost amounts to a plea of guilty to every inference of fraud, but plaintiff's evidence at the hearing was sufficient to prove its damages without any difficulty or the need of inference from defendant's conduct." (A2)

best evidence of the full extent of its infringement and had refused to admit the sale of a *single* infringing product. Additionally, N.E. did unreasonably and vexatiously seek to multiply the proceedings. It did so by filing prolix and redundant motions before trial and by raising every issue conceivably possible in a patent infringement accounting regardless of merit. Having failed at its attempts to avoid paying damages rightfully due Webcraft, now N.E. lashes out at Judge Murphy.

The district court's Order awarding fees for unreasonably and vexatiously multiplying the proceedings pursuant to 28 U.S.C. §1927 is the subject of N.E.'s bias assertions (NB6, 7, 29, 34)¹¹ N.E. asserts that Judge Murphy was "pervasively biased" *throughout* the accounting phase (NB11). The law provides very specific remedies regarding alleged bias to ensure the fundamental right to a fair trial. If N.E. believed that Order was *incorrect*, it should have availed itself of Local Rule 9(e) to move for reconsideration, yet N.E. never filed such a motion.

If N.E. perceived *bias or prejudice*, or believed that Judge Murphy's §1927 decision prior to trial actually equated N.E.'s counsel with some of the sleaziest lawyers in literature (NB7), 28 U.S.C. §144 provides the mechanism to reassign the case to a new judge upon a sufficient showing. Such a filing must be made at the first opportunity after discovery the basis for alleged bias. *United States v. Int'l Business Machines Corp.*, 475 F.Supp. 1372, 1377 (S.D.N.Y. 1979), *aff'd*, *In Re Int'l Business Machines Corp.*, 618 F.2d 923 (2nd Cir. 1980). 28 U.S.C. §144 has a time requirement and N.E.'s failure to act in a timely manner, particularly in light of the continuing proceedings, constitutes a waiver. *In Re Int'l Business Machines Corp.*, 618 F.2d at 932. N.E. *did not* file to reassign the case based on bias or prejudice following the November Order.

¹¹ It should be noted that sanctions under 28 U.S.C. §1927 were directed at N.E.'s *counsel*, not at N.E.

Instead, N.E. continued to seek rulings from Judge Murphy and proceeded with the accounting trial. N.E. completed the trial and filed post-trial briefs without the slightest hint of alleged judicial bias or prejudice. As further evidence of N.E.'s pervasive bad faith, this tawdry issue of alleged judicial bias is raised for the first time, with this Court, *only after* the award of substantial damages to Webcraft.

The actual trial was conducted with the utmost fairness and impartiality. In fact, Judge Murphy even denied Webcraft's request for an extension of the trial date when Webcraft was faced with the two simultaneous trials, one in Connecticut and the class action case in Chicago. In the face of this denial, Webcraft was forced to try both cases concurrently. (A36) A complete reading of the trial transcript reveals that N.E. was afforded every opportunity to be heard. Judge Murphy offered to continue the trial through Good Friday (holiday), April 1, 1988 and on Saturday, Passover, April 2, 1988 to allow as much time as necessary for the parties to present their case. (A424, 430-31)

N.E. submitted its own pretrial order with *all* asserted defenses (A304), was permitted unrestricted cross-examination and re-cross of Webcraft's witnesses, and unrestricted direct examination of its own witnesses. In fact, irrespective of the prior ruling *in limine*, and over Webcraft's timely objections, Judge Murphy permitted *all* of N.E.'s exhibits to be the subjects of testimony and to be entered into evidence. *All* of the exhibits presented in N.E.'s Offer of Proof were entered into evidence. At no time during trial did Judge Murphy make any exclusionary rulings or truncate live testimony. Judge Murphy sustained a number of N.E.'s objections (e.g., A92, 216, 234); indicated his unbiased position as to attorneys fees (A244); and assisted N.E.'s counsel in cross-examination (A252).

N.E. was permitted to address every alleged defense. As an example, as to N.E.'s alleged reasonable royalty

position, Judge Murphy stated, when Webcraft's counsel objected to certain testimony, "I am willing to listen. Counsel is the one that objected, I didn't." (A521-22) N.E. cannot point to a single instance where Judge Murphy made any statements during the course of the trial which evidenced bias or prejudice. In fact, Judge Murphy even assisted N.E.'s counsel in overcoming a hearsay evidentiary objection by Webcraft to present N.E.'s proffered evidence. (A258). "Prejudice" must be made of "sterner stuff."

For N.E. to compare Judge Murphy's conduct with that of the judge in *Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979) is an affront to the integrity of the court. (NB15) In *Nicodemus*, 596 F.2d at 155, the judge, in making an oral ruling on a preliminary issue, ranted that he did not "believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe that they are worthy of credence by anybody." The court stated, "His [the district judge] statements also place in doubt his ability to conduct unbiased future proceedings in regard to this matter." *Nicodemus*, 596 F.2d at 156. To equate Judge Murphy's conduct with that of the judge in *Nicodemus* is outrageous.

Likewise, *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956) and *Crandell v. United States*, 703 F.2d 74 (4th Cir. 1983), cited in N.E.'s brief, dealt with judicial conduct during the course of a trial which reflected personal bias and prejudice. N.E. failed to cite a single case wherein alleged bias and prejudice was determined principally from the rhetoric of the court's opinion, following a fair and impartially conducted trial.

N.E. cites *Whitaker v. McLean*, 118 F.2d 596 (D.C. Cir. 1941), a case which concerned 28 U.S.C.A. § 25 and § 21 of the Judicial Code (upon which 28 U.S.C. § 144 is based) (NB10). However, that court also stated, "A bias which develops during the trial and is "grounded on the evidence" has been held not to be within the terms of Section 21."

Id. The Supreme Court stated, "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). N.E. has made no showing whatsoever that Judge Murphy's opinions and rulings had their source in extrajudicial or personal bias.

Judge Murphy's opinion was written after all the evidence was introduced, testimony was received, arguments of both counsel were heard, the hearing closed and post-trial briefs filed. His findings are *solidly* grounded on the evidence. Judge Murphy was rightfully incensed, as any court should be, by a party's intentional destruction of the best evidence and subsequent behavior during discovery.

Contrary to N.E.'s assertion, the evidence was overwhelming as to N.E.'s malfeasance (i.e., the intentional destruction of documents) and the intentional creation by N.E. of undue difficulty in accounting for the number of infringing products (e.g., refusal to admit the sale of even a *single* pamphlet). The allusion to actual knowledge by counsel as possibly being a subject for investigation by the Connecticut Bar Association is suggested in Avery's testimony at the trial. (A474-75) N.E. sought to rely on the destruction of documents for the alleged laches argument at the liability trial, which was read into the record in the present trial (A474-75).

Judge Murphy's justifiable outrage at N.E.'s conduct may be reflected in the opinion, but it is not supportive of a challenge to the court's fairness in conducting the proceedings. (See, *In Re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 165 (6th Cir. 1984)). The district court, contrary to N.E.'s assertion, is not estopped by the liability decision from finding "willfulness." Such a finding is of no separate import as the district court did not specifically award attorneys' fees.

Judge Murphy did not improperly shift any burdens of proof on the damages issues. Indeed, he stated at the outset of the trial that the burden of proof was on Webcraft (A66), and stated in his opinion "... plaintiff's evidence at the hearing was sufficient to prove its damages without any difficulty . . ." (A2). He asserted disbelief that N.E. would continue to question whether Webcraft had met its burdens in light of the evidence, but most assuredly did not shift those burdens to N.E.

N.E. repeatedly cites the district court's statement, "Defendant knows that the sales it made could not have been made by it without first stealing plaintiff's property." (NB8, 14, 22, 25) This is a simple statement of fact. N.E. *could not* have produced and sold a single patented product without first infringing Webcraft's patents!

The characterization of an adjudicated infringer as having "stolen" plaintiff's property rights continues the allegory proposed by Webcraft's counsel at trial and accepted by N.E.'s expert witness. (A559) Likewise, the characterization of N.E.'s destruction of documents as "cowardly" considering the impact of precluding a full accounting, is not clearly erroneous.

N.E. further flings insults at the district court. Judge Murphy did not *find* that N.E. had evaded taxes and had a Swiss bank account. His unique stylistic form of writing painted a verbal picture of an infringer who made *millions* of dollars by "stealing" something rightfully belonging to Webcraft. Such a picture is well founded in the facts.

The record shows that Judge Murphy conducted a fair and impartial trial, free of any bias or prejudice. Furthermore, his opinion is well founded on the facts and evidence presented at trial. Judge Murphy did not sully the "appearance of justice" as N.E. asserts. (NB17) Instead, he sent a clear and emphatic message that the intentional destruction of crucial documents properly carries severe consequences. N.E.'s attempt to ask this Court to condemn Judge Murphy's judicial integrity without the slightest shred of

supportive evidence, exacerbated by N.E.'s own failure to invoke the provisions of 28 U.S.C. §144 or Rule 59, F.R.C.P., is shameful and without merit.

2. NEW ENGLAND IMPROPERLY SEEKS A NEW TRIAL AND A NEW JUDGE

N.E. improperly requests a new trial before a new judge at this time, having lost twice before Judge Murphy in a period of nine years and after two trials. In fact, these requests are outside of this Court's authority to grant. The authority to grant a new trial rests with the district court, not the Court of Appeals. *Snellman v. Ricoh Co., Ltd.*, 836 F.2d 528, 534, 5 U.S.P.Q.2d 1341 (Fed. Cir. 1987), citing *McDonough Power Equipment Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

N.E. here *cannot* be seeking appellate review of an order denying a motion for a new trial pursuant to Rule 59, F.R.C.P. A motion under Rule 59, F.R.C.P. must be filed not later than 10 days after the entry of the judgment. N.E. *never* filed a timely motion and therefore waived its right to a new trial. The district court was never given the opportunity to exercise its discretion. N.E.'s request for a new trial must therefore be denied. *Snellman*, 836 F.2d at 534. Granting a new trial at the behest of N.E. who failed to comply with the Rules would be an injustice to Webcraft. *Id.* All the available evidence and testimony are a matter of record, the trial was conducted fairly and impartially and a new trial is improper.

Additionally, N.E. improperly requests this Court to, *sua sponte*, remand to a *new* judge. In support of this request N.E. cites a case involving a district court which failed to comply with previous remand instructions (*Sobel v. Yeshiva University*, 839 F.2d 18 (2d Cir. 1988)) and cases for the resentencing of convicted drug dealers (*United States v. Stratton*, 820 F.2d 562 (2d Cir. 1987)), counterfeiters (*United States v. Pugliese*, 805 F.2d 1117 (2d Cir. 1986)), and remand for improper evidentiary rulings regarding an

alleged litigious plaintiff (*Outley v. City of New York*, 837 F.2d 587 (2d Cir. 1988)). Such citations are clearly not applicable to this case. (NB17) However, this Court does not sit to judge the character of district judges nor does it have the authority to order assignment to a different judge. *Peterson Mfg. Co., Ltd. v. Central Purchasing, Inc.*, 740 F.2d 1541, 1552, 222 U.S.P.Q. 562 (Fed. Cir. 1984).

N.E. again failed to utilize proper procedural mechanisms in a timely manner. N.E. seeks to "end run" the tough standards of 28 U.S.C. §144 which safeguard the judiciary from frivolous and unwarranted attacks upon its dignity and integrity. 28 U.S.C. §144 provides the mechanism in the district court for reassignment to a new judge upon a sufficient showing of bias, yet N.E. failed to seek such reassignment in a timely manner. N.E. improperly asks this Court to grant relief which was never even requested in the district court.

3. NEW ENGLAND FAILED TO ADDRESS THE PROPER STANDARDS OF REVIEW

This Court's Rule 52(a) F.R.C.P. review of the findings is concerned with whether they were clearly erroneous in light of the entire record. However, N.E. has failed throughout its brief to assert and specifically substantiate that the district court's findings were clearly erroneous. Instead N.E. asks this Court to give Judge Murphy's specific findings of demand, capacity, lack of acceptable non-infringing substitutes and adequate compensation "no deference" (NB22).

In affirming an award of lost profits, this Court may view the Sisyphean task which N.E. faces to provide a "definite and firm conviction" that Judge Murphy has committed a mistake. *Paper Converting Machine Co.*, 745 F.2d at 22. N.E.'s brief consistently fails to specifically delineate any basis whatsoever as to why the district court's findings are "clearly erroneous" or why there was "abuse of discretion."

N.E. provides a smoke screen by alleging, without a proper basis or support in the record and without a timely motion pursuant to 28 U.S.C. §144, that Judge Murphy was biased and prejudiced. N.E. now asks this Court to view its smoke and simply conclude error. The standards of review demand much more than that. Nonetheless, N.E.'s argument as to alleged bias is just that — mere smoke. When the smoke is dissipated and the issues are viewed in the clear light of the record as a whole, it becomes apparent that N.E. has failed to address the proper standards, that its positions are meritless and, even on occasion, frivolous.

D. THE DISTRICT COURT DID NOT EXCLUDE EVIDENCE AT TRIAL

N.E.'s position with regard to denying Webcraft's evidentiary motion *in limine*, considering the conduct at the trial, is likewise frivolous and improper.

It is true that the exclusion of these documents under Rule 408, F.R.Ev. was the subject of Webcraft's granted motion *in limine*. The most applicable law was extensively cited in Webcraft's memoranda and the district court ruled *on the merits*, by granting Webcraft's motion.

Contrary to N.E.'s assertion, Webcraft made *no blanket offers* to the industry. Infringing competition sporadically arose (A130-31) and these infringers were individually notified. Each letter was a charge of infringement, which clearly constituted a "dispute", with an offer to settle. All were properly excludable under Rule 408, F.R. Ev. However, during the course of the trial, N.E. was *permitted to place into evidence any document, over Webcraft's objections, without a single evidentiary exclusion*. See, *Shiley, Inc. v. Bentley Laboratories, Inc.*, 794 F.2d 1561, 1569, 230 U.S.P.Q. 112 (Fed. Cir. 1986) *Each and every* exhibit on N.E.'s trial exhibit list and in N.E.'s Offer of Proof was placed into

evidence without evidentiary exclusion.¹² Furthermore, live testimony by N.E.'s witnesses addressed these documents and Mr. Katz's deposition testimony was read into the record. Nowhere does N.E. assert that the district court's action was clearly erroneous or an abuse of discretion. For N.E. to raise this issue *when all of the evidence proffered was accepted into evidence* is clearly frivolous.

E. THE DISTRICT COURT PROPERLY RULED THAT NEW ENGLAND'S ATTEMPT TO RELITIGATE THE VALIDITY OF CLAIM 10 WAS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

N.E. does not allege that the district court was clearly erroneous or abused its discretion on this issue. The validity and infringement issues as to the patents in suit were decided and affirmed long ago. The patents are presumed valid under 35 U.S.C. §282. At the accounting trial, N.E. asserted a concealed and admittedly infringing method which produced an infringing product and sought to retry the validity of Claim 10 of the '817 Method Patent. The district court had previously ruled on the validity of the '817 Method Patent and held that N.E. was precluded from asserting a theretofore concealed method of production. It is to be noted that N.E. admitted in open court that this concealed method was, in fact, a *literal infringement of Claim 10 of the '817 Method Patent (A422)*.

The '817 Method Patent was not originally the subject of the complaint; N.E. introduced the '817 Method Patent into the suit by *counterclaiming* for a declaratory judgment of the patent's invalidity, unenforceability and noninfringement. (A7269-73) During the liability phase N.E.'s counsel represented that the separate source method constituted only *de minimus* infringement (A7285-89). N.E.'s Vice President testified on deposition that the only methods used

¹² N.E.'s assertion of evidentiary exclusions at trial is false. (NB29)

were those ultimately adjudicated as infringements at trial (A280) and that N.E. *did not use* any other method (A280). N.E.'s stated intention to address Claim 10 in its declaratory judgment case was not pursued. (A7291-93).

Representative claims based on the evidence were selected for trial. As N.E. had *intentionally concealed* the extent of the separate source method, it was not addressed in Webcraft's case in chief. It was, however, an issue which should have been addressed in N.E.'s declaratory judgment case. The presumption of validity places the burden of invalidity on the attacker. *Hughes Tool Co. v. Dresser Industries, Inc.*, 816 F.2d 1549, 1555, 2 U.S.P.Q.2d 1396 (Fed. Cir.), *cert. denied*, 108 S.Ct. 261 (1987). Discovery in the accounting phase revealed at least 37 jobs for a total in excess of 53 million infringing parchment products. (A1604-09) All of this production occurred prior to Gorman's false testimony in January, 1981 and prior to N.E.'s counsel's *de minimus* representations.

The "law of the case" should apply to the district court's findings that the '817 Method Patent was not invalid and infringed. N.E. had its day in court but chose not to raise this issue as part of its declaratory judgment counterclaim. The district court found that N.E. ". . . never pressed that counterclaim as it could have done, nor on the framing of issues did not even consider it of enough importance to make its facts and law issues a part of the pretrial order." *Beatrice*, 224 U.S.P.Q. at 992.

The district court ruled that, under the Doctrine of Issue Preclusion, N.E. was *estopped* from attempting to litigate the validity of Claim 10 at the accounting trial. N.E.'s assertion that it had no hearing on this issue is likewise without merit. N.E. addressed the issue extensively at trial (A407-422) and in its post-trial briefs.

Furthermore, the parchment products also infringe the '673 Product Patent. N.E.'s own witness considered the parchment product to be an infringement by applying the same nomenclature to both products. (A337-38, 405). N.E.

presented no evidence at trial as to why the parchment product should not be included as infringing the '673 Product Patent.

The district court did not err in ruling that the Doctrine of Issue Preclusion estopped N.E. from relitigating the validity of an otherwise valid claim based on a heretofore concealed method. Given the admission of infringement and the infringing structure of the product, the district court did not err in including these products in the accounting. This is yet another feeble attempt by N.E. to raise an issue on appeal without the proper supporting basis either in law or fact.

F. THE DISTRICT COURT PROPERLY RULED THAT 35 U.S.C. §287 DOES NOT APPLY TO THE METHOD PATENTS IN SUIT

N.E. failed to assert that the district court abused its discretion or was clearly erroneous and its position on marking is without merit. The fact that this ruling came in the form of a default judgment was not error. The ruling was a *partial* summary judgment on a specific issue and was not, like N.E.'s case citations, dispositive of the case. Webcraft's motion was filed pursuant to Rule 56, F.R.C.P. and included an appendix of undisputed facts and the assertion that there were no genuine issues as to material facts. (A696-97)

The motion included supporting legal citation to Federal Circuit cases, *Bandag, Inc.*, 704 F.2d at 1581 ("... this statute [§287] does not apply where the patent is directed to a process or method.") and *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1082, 219 U.S.P.Q. 679 (Fed. Cir. 1983) ("... the patent is a process patent to which Section 287 does not apply.")

N.E. has *never* asserted that there was a genuine issue as to the facts presented with Webcraft's motion. N.E. did not dispute those facts as insufficient to support a summary judgment — not in its belated response, not in its motion

for reconsideration and not in its present appeal. Webcraft clearly established the absence of a genuine issue as to material facts. Rule 56, F.R.C.P. permits summary judgment under those circumstances and Local Rule 9 permits default on failure to respond. The district court did not err in granting Webcraft's motion for partial summary judgment.

Every multipage pamphlet with integral envelope produced by N.E. infringed one or the other of the patented methods. A patented product can be made by a non-infringing method (as admitted by N.E. (A1674, 1676 f.n)) and the patented methods can be used to produce non-infringing products. (A696-97) N.E. offered *no* evidence or testimony at trial that the patented methods and patented product are allegedly so "inextricably intertwined" as to require that the method patents be marked. As such, the district court did not err in ruling that 35 U.S.C. §287 does not apply to Webcraft's method patents.

N.E. does not assert as an issue on appeal that damages should be limited pursuant to §287. Therefore, the position regarding the district court's ruling on that point is also frivolous.

G. WEBCRAFT COMPLIED WITH THE MARKING REQUIREMENTS OF 35 U.S.C. §287

Webcraft placed into evidence documents which demonstrated that, regardless of the non-applicability of §287, Webcraft *did*, in fact, mark the products manufactured by the patented methods with the appropriate patent markings (See, A7452-53, 7039-40, 7216).

N.E.'s assertions as to alleged failure to mark the patented product are likewise without merit. Webcraft complied with the requirements of 35 U.S.C. §287 as applied to the patented product. 35 U.S.C. §287 does not require that *all* patented articles be marked. The requirement is that "substantially all" products produced under the patent

must be properly marked. *Hazeltine Corp. v. Radio Corp. of America*, 20 F.Supp. 668, 671-72 (S.D.N.Y. 1937).

Webcraft has produced in excess of two billion patented products (A117). The unrefuted evidence showed that it was corporate policy to properly mark all of the patented products and that substantially all such products were marked (A181-82). Webcraft's patent counsel advised Webcraft of the marking requirement (A7038) and compliance with advice of counsel and with the corporate marking policy is seen in Exhibits PAX-198 (A7039) and 199 (A7040) which evidences the '673 patent marking. PAX-220 (A7216) is an example of a marking template evidencing the proper patent markings. N.E. *did not introduce* a single Webcraft-produced patented product which did not have proper patent markings.

35 U.S.C. §287 is a limitation on damages provision predicated on notice. N.E. alleged that Webcraft failed to require Cadillac to mark patented products pursuant to Section 287, yet offered no product manufactured by Cadillac after the license was granted in October, 1978 until N.E. received actual notice of infringement in February, 1979 (A64) which required such a marking. Cadillac was granted rights under one of the method patents which required no patent marking under the statute.

N.E. has not alleged that damages should be limited pursuant to 35 U.S.C §287. Nevertheless, the evidence is unrefuted that Webcraft was in full compliance with the statute. The district court properly concluded that the accounting period as to *all three* patents extended from July 7, 1974 through the date infringement ended in February, 1983.

H. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING COSTS, EXPENSES AND ATTORNEY FEES PURSUANT TO 28 U.S.C. §1927

The facts which relate to N.E.'s motions which were the subject of the district court's order are addressed *supra*. The court did not sanction N.E.'s *right* to file motions; rather, the district court looked to the *subject matter* of those motions. The district court stated, "This ruling might appear as cavalier on our part but it has been done with a great deal of consideration, pro and con, of each motion and memorandum." (A13)

The district court properly found N.E.'s pretrial motions outrageous in multiplying the proceedings unreasonably and vexatiously. (A13) By citing the statute, the district court made clear its reasons for the ruling. (See, *In Re Oximetrix, Inc.*, 748 F.2d 637, 644, 223 U.S.P.Q. 1068 (Fed. Cir. 1984)). Further findings centered on the vexatious purpose of delay.¹³ (A10, 13)

The district court previously ruled that 35 U.S.C. §287 did not apply to the method patents in suit and that the marking of the patented product was an inappropriate issue for summary judgment. (A13) N.E. admitted that *all* their multipage pamphlets with integral envelopes were made by only the adjudicated '817 or '273 patented methods (A280). Further action would have been redundant. Indeed, N.E. admitted this redundancy by stating that "... N.E. had planned to and did raise the same questions ..." (NB4) Yet, N.E. vexatiously filed its motion for summary judgment on the relevant period of accounting.

Additionally, the district court and this Court had previously ruled that Webcraft did not unreasonably delay

¹³ N.E.'s citation to *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (NB34) is improper. The present statute was *changed* to include attorneys' fees awards after the ruling in *Roadway*.

bringing suit in deciding against N.E. on its laches argument. As N.E.'s only basis for asserting in its second motion regarding prejudgment interest was that it was precluded because of unreasonable delay, that motion was also vexatious.

N.E.'s Motion in Limine to Admit Evidence was similarly vexatious. It is black letter law that all relevant evidence is admissible. Rule 402, F.R.Ev. Motions in Limine are proceedings for *exclusion*, not inclusion. A motion to *include*, given Rule 402, is clearly vexatious.

N.E.'s final motion dealt with limiting proofs on increased damages. The issue of bad faith during the accounting period, in view of N.E.'s outrageous behavior, was a principal element in this case. N.E.'s motion did not identify specific exhibits sought to be excluded (although a preliminary exhibit list had been provided to N.E. in June, 1987 (A7520-34)), does not cite legal authority regarding bad faith in an accounting phase, and does not state *why* or *how* N.E. would have been allegedly prejudiced in the event the unidentified evidence is not excluded. The district court was not clearly erroneous, given the deficiencies of this motion, to conclude that it was merely for vexatious purposes. The meritless nature of this motion is confirmed in the conspicuous absence of these allegedly prejudicial documents from N.E.'s Offer of Proof and the lack of objection by N.E.'s counsel at trial at the introduction of evidence relating to N.E.'s bad faith.

Judge Murphy denied all of N.E.'s Motions *on the merits* and properly exercised his discretion by awarding fees under 28 U.S.C. §1927 *sua sponte*. N.E. opposed a joint response to the court's letter of November 18, 1986 and contested Webcraft's *ex parte* submission in June of 1987. (A7535) N.E.'s flurry of motions effectively delayed the proceedings from June, 1987 until the district court's ruling in November, 1987.

N.E.'s assertion that these motions were to "eliminate or simplify the issues" (NB34) is without merit. As further

evidence of N.E.'s vexatiousness, in disregard for the district court's rulings, N.E. addressed the subjects of each of its pretrial motions *again* at trial (A62, 68, 71-72, 135-137) and in its post-trial briefs.

N.E.'s complaint that it was not afforded the opportunity to be heard is wholly meritless (NB34). The Local Rules provided such an opportunity in the form of a Motion For Reconsideration. N.E. did not seek reconsideration of the Order. N.E. had its "opportunity to be heard", but chose not to take it.

N.E. has failed to specifically demonstrate that the motions were anything but vexatious or *why* such a ruling was an abuse of discretion. Judge Murphy's award of costs, expenses, and attorney fees, given the nature of N.E.'s motions, was not an abuse of discretion.

VII. CONCLUSION

This Court reviews judgments, not opinion language and attempts to discern from the district court's opinion or action the bases, albeit unexpressed, for its findings and conclusions. *Fromson v. Western Litho Plate & Supply Co. et al.*, 853 F.2d 1568, 1573, 7 U.S.P.Q.2d 1606 (Fed. Cir. 1988). This Court presupposes that the district court understood and applied the applicable law and took into account all the circumstances of the case. *PPG Industries v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1572, 6 U.S.P.Q.2d 1011 (Fed. Cir. 1988).

The "circumstances in this case" are ominously overshadowed by N.E.'s intentional destruction of crucial documents which forever foreclosed a determination of the full extent of the infringements. Nevertheless, the district properly balanced the equitable concerns. The evidence firmly established that the award of Webcraft's lost profits was the proper measure of damages and that the award was adequate to compensate for the infringement.

For the foregoing reasons and on the authority cited, the District Court's judgment and award of damages of

\$22,107,837.69 with interest at 10% from July 7, 1980 and costs and the order awarding costs, expenses and attorneys fees pursuant to 28 U.S.C. §1927 should be affirmed.

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December 5, 1988

Certificate of Service

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This 6 day of December, 1988.



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