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MIDWEST INDUSTRIES v. KARAVAN TRAILERS:
FEDERAL CIRCUIT REVERSES EARLIER
OPINIONS AND EXPANDS CONTROL OVER
INTELLECTUAL PROPERTY CLAIMS

I. INTRODUCTION

A. Introduction and Overview of Midwest

In a recent decision, the United States Court of Appeals for the Federal Circuit reversed its well-established doctrine regarding preemption of state intellectual property law by federal patent law, and arguably contradicted its Congressionally granted authority. The court, in a landmark en banc decision authored by Justice Bryson, declared that when causes of action under state law conflict with federal patent laws the Federal Circuit would apply its own law, not the law of the regional circuit from which the case came, to determine whether the state law is preempted by federal patent law. In so doing, the Federal Circuit held that it had the authority to preempt state laws that are "foreclosed" by federal patent law. Further, the court overruled a 1984 Federal Circuit decision in which the court held that in cases involving both patent and nonpatent issues it would apply its own law with respect to the patent issues, and apply the law of the regional circuit from which the case came to the nonpatent issues.

This decision is a dramatic change for the Federal Circuit, which had previously held that Federal Circuit law did not preempt state laws in nonpatent areas. Instead, the Federal Circuit had previously held that, while it could hear cases involving combined patent and nonpatent issues, it would use the law of the regional circuit, in which the district

2. Id. at 1358-59.
3. Id. at 1360.
4. Id. at 1358-59.
court hearing the case sits, to decide the nonpatent issues. Nevertheless, the court's decision was the correct one.

The *Midwest* decision, while certainly a change in doctrine, is consistent with the trend of recent decisions by the Federal Circuit evidencing the court's desire to infuse consistency into American intellectual property law. Moreover, this decision is the logical and necessary step, to among other things, decreasing forum-shopping. By providing a uniform body of law regarding these issues, there is less incentive for litigants to forum-shop. Additionally, it is arguable that intellectual property could be more effectively governed at the national level. Also of significant importance is a question of judicial competence, particularly given the apparent increase in complexity and abundance of intellectual property litigation.

Therefore, the *Midwest* decision was the logical and necessary step in strengthening intellectual property law by judicial recognition of the increasing interrelationship of different forms of intellectual property, and by providing cohesion among the different intellectual property disciplines.

**B. Scope of this Comment**

The purpose of this Comment is to evaluate how the *Midwest* decision has affected the federal preemption doctrine as it relates to intellectual property law and to explain the implications of this decision. Moreover, it is the author's intention to explain why this decision was the correct one. Part II will start with a review of the preemption doctrine and explain its importance as it affects intellectual property litigation. In Part III, this Comment will discuss the history and evolution of the most important Federal Circuit and Supreme Court cases dealing with preemption. Part IV of this Comment will discuss the *Midwest* decision and the resultant changes. Part V will conclude with a discussion of the advantages and disadvantages of the *Midwest* decision.

6. *Hunter Douglas*, 153 F.3d at 1333; *Cable Elec.*, 770 F.2d at 1029; *Interpart*, 777 F.2d at 684.


II. PREEMPTION

A. Preemption Generally

The preemption doctrine is based on the Supremacy Clause of Article VI of the United States Constitution, which declares that federal law is the "supreme law of the land." Therefore, any state law which interferes with the enforcement of a federal law is preempted. The essence of preemption is conflict. When evaluating a potential conflict the court will look at both "the purposes and effects of both the federal and the state laws."11

There are three different ways that federal law may preempt state law, including explicit preemption, field preemption, and conflict preemption.12 Explicit preemption occurs where Congress explicitly mandates that federal law will supersede related state law. Field preemption, on the other hand, occurs when "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress..."14 "intended the Federal Government to occupy [an area of law] exclusively."15 Conflict preemption occurs where there is a conflict between a state and a federal statute and it is impossible to comply with both statutes.16

B. Preemption in Intellectual Property

The United States Constitution grants Congress exclusive legislative control over patents and copyrights.17 Congress has exercised this

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11. Id.
13. Hricik, supra note 9, at 1072.
14. Id.
15. English, 496 U.S. at 79.
16. Hricik, supra note 9, at 1076.
17. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").
control, preempting state regulation of these areas.\textsuperscript{18} Congress has effectuated judicial control of patents by granting the Federal Circuit the authority to review patent appeals.\textsuperscript{19} However, Congress has left significant, although not exclusive, authority in the states to regulate trademarks.\textsuperscript{20}

Preemption in intellectual property law is by no means a new concept; on the contrary, federal courts found preemption in numerous intellectual property cases as early as 1964.\textsuperscript{21} However, federal preemption of intellectual property was traditionally restrained in scope to patents and copyrights with concurrent state and federal regulation of trademarks and unfair competition.\textsuperscript{22}

C. Traditionally State Areas

While the administration of patents and copyright concerns generally falls within the authority of the federal government, the states have been allowed to exercise significant, if not exclusive, control over most other intellectual property issues.\textsuperscript{23} Traditional areas of exclusive state law include publicity rights and some forms of idea protection.\textsuperscript{24}

However, the line between state and federal jurisdiction is not always clearly defined, nor is it necessarily the most optimal division. Conflict between state and federal law is inevitable.\textsuperscript{25} "[E]ven though a state may not have deliberately erected a competing regime for

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\textsuperscript{20} Ginsburg, \textit{supra} note 10, at 465.


\textsuperscript{22} \textit{Bonito Boats}, 489 U.S. at 154 (discussing \textit{Sears}, 376 U.S. at 232).

\textsuperscript{23} \textit{Sears}, 376 U.S. at 232 (holding that states "may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of goods").

\textsuperscript{24} Ginsburg, \textit{supra} note 10, at 465 (citing J. T. MCCARTHY, THE RIGHTS OF PRIVACY AND PUBLICITY § 6.3 (1987)).

\textsuperscript{25} Id. at 466.
regulating an area controlled by national law, application of state law in a given situation may produce results inconsistent with federal policy. If such conflict is present, then the federal regulation may preempt the state regulation.

III. HISTORY

A. History of The Federal Circuit

The United States Court of Appeals for the Federal Circuit was created by Congress in 1982 as an Article III Court. The court was given unlimited geographic jurisdiction but limited subject matter jurisdiction. The court has exclusive appellate jurisdiction over cases arising "under any Act of Congress relating to patents." Most Federal Circuit patent cases come up on appeal from one of the eighty-five regional federal district courts.

The following four sections analyze the jurisprudence of preemption over the Federal Circuit's relatively short history, including three cases which precede and foreshadow the Midwest decision, demonstrating the Federal Circuit's increasing acceptance of the need for a uniform body of laws governing intellectual property issues ancillary to patent law.

B. Cable Electric Products, Inc. v. Genmark, Inc.

The Federal Circuit addressed preemption of state law with respect to intellectual property in Cable Electric Products, Inc. v. Genmark, Inc. The court held that when called upon to determine whether a federal patent law preempts particular state law causes of action or
conflicts with rights created by other federal laws, the Federal Circuit would apply the law of the circuit from which the case came.\textsuperscript{33} The Federal Circuit overruled this part of \textit{Cable Electric} in \textit{Midwest}, opining that Federal Circuit law would be controlling.\textsuperscript{34} In \textit{Midwest}, the court reasoned that a change was necessary to establish uniformity, discourage inclusion of frivolous patent causes of action simply to gain an advantageous body of law with respect to nonpatent issues, and to reduce forum-shopping.\textsuperscript{35}

The Federal Circuit decided \textit{Cable Electric} in 1985 on appeal from the United States District Court for the Northern District of California.\textsuperscript{36} Cable Electric owns United States Patent No. 4,343,032 [hereinafter \textit{'032}] related to an electric lamp with a photo-sensor.\textsuperscript{37} Cable Electric alleged that Genmark infringed Cable Electric's \textit{'032} patent, and violated federal false designation of origin laws, state unfair competition laws, and state trademark infringement laws.\textsuperscript{38}

The Federal Circuit determined that they had jurisdiction to hear arguments concerning the nonpatent issues of the case.\textsuperscript{39} However the court held that:

\begin{quote}
[\textit{I}n deciding these nonpatent matters we do so 'in the light of the problems faced by the district court from which each count originated, including the law there applicable', and in the
\end{quote}

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1358-59 (Fed. Cir. 1999), cert. denied, 528 U.S. 1019 (1999).
\item \textsuperscript{35} \textit{Id.} at 1359.
\item \textsuperscript{36} \textit{Cable Elec.}, 770 F.2d at 1018 (reviewing Cable Elec. Prods., Inc. v. Genmark, Inc., 582 F.Supp. 93 (N.D. Cal. 1984)).
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.} at 1029 (citing 28 U.S.C. § 1295(a) (1982); Bandag, Inc. v. Al Bolster's Tire Stores, Inc., 750 F.2d 903, 907-09 (Fed. Cir. 1984); Atari, Inc. v. JS & A Group, Inc., 747 F.2d 1422 (Fed. Cir. 1984) (en banc)).
\end{itemize}

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction — (1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under § 1338(a) shall be governed by Sections 1291, 1292, and 1294 of this title.

remaining portions of this opinion we will be guided by the relevant law in the Ninth Circuit, to the extent it can be discerned.\textsuperscript{40}

To support this position the Federal Circuit relied upon \textit{Atari}: "it will be the role and duty of the advocates to brief and argue [the nonpatent counts] in the appeal... just as if they were appearing... before that circuit [from which the case originated]."\textsuperscript{41} The Federal Circuit in \textit{Atari} declared that in the future, nonpatent issues would be decided using the law from the appropriate regional circuit.\textsuperscript{42}

The Federal Circuit reasoned that it has exclusive jurisdiction over decisions from the district courts concerning patent cases and over issues involving or related to patent law as enunciated in 28 U.S.C. § 1338.\textsuperscript{43} The court recognized that in creating the Federal Circuit, Congress intended to create uniformity, reduce forum-shopping, and create a uniform body of law governing patents.\textsuperscript{44} The court also declared that its jurisdiction extended beyond patent claims, possibly foreshadowing the \textit{Midwest} decision. "[S]ection 1295(a)(1) does not limit the jurisdiction of the Federal Circuit over appeals from the district courts exclusively to the review of claims based on the patent laws."\textsuperscript{45}

The court held that when a patent claim and a nonpatent claim are connected, the Federal Circuit has jurisdiction over both claims.\textsuperscript{46} The Federal Circuit reasoned that this is necessary for judicial efficiency, stating that to hold otherwise would result in bifurcation—the patent issue being appealed to the Federal Circuit and the nonpatent issue to the regional circuit.\textsuperscript{47} However, when explaining the Federal Circuit's preemptive powers, the court held that in such "mixed case[s]" involving both patent and nonpatent issues, the law of the regional circuit would

\begin{itemize}
    \item \textsuperscript{40} \textit{Cable Elec.}, 770 F.2d at 1029 (quoting \textit{Bandag}, 750 F.2d at 909 (citing \textit{Atari}, 747 F.2d at 1440)).
    \item \textsuperscript{41} \textit{Id.} at 1029 n.18 (quoting \textit{Atari}, 747 F.2d at 1440).
    \item \textsuperscript{42} \textit{See id.} (citing \textit{Atari}, 747 F.2d at 1440).
    \item \textsuperscript{43} \textit{Id.} at 1032 (citing 28 U.S.C. § 1295(a)(1) (1994 & Supp. IV 1999)).
    \item \textsuperscript{44} \textit{Id.} Interestingly, the court suggested the same reasoning of increasing doctrinal uniformity and reducing forum shopping in \textit{Midwest} to support overruling \textit{Cable Electric}. See \textit{Midwest}, 175 F.3d at 1359. "We apply Federal Circuit law to patent issues in order to serve one of the principle purposes for the creation of this court: to promote uniformity in the law... and to minimize the incentive for forum-shopping." \textit{Id.}
    \item \textsuperscript{45} \textit{Cable Elec.}, 770 F.2d at 1032.
    \item \textsuperscript{46} \textit{Id.}
    \item \textsuperscript{47} \textit{Id.} (citing H.R. Rep. No 312, 97th Cong., 1st Sess. 41 (1981) (quoted and discussed in \textit{Atari}, 747 F.2d at 1435)).
\end{itemize}
apply to the nonpatent issues while Federal Circuit law would control
the patent issues.\textsuperscript{43} In \textit{Midwest}, the court affirmed \textit{Cable Electric} to the extent that the
Federal Circuit has the authority to hear and determine cases involving
state intellectual property laws.\textsuperscript{49} However, in \textit{Midwest}, the Federal Circuit held that it would not apply the law of the regional circuit, opting
instead to apply Federal Circuit law.\textsuperscript{50}

C. \textit{Interpart Corp. v. Italia S.p.A.}

The \textit{Midwest} decision also explicitly overruled \textit{Interpart}.\textsuperscript{51} In \textit{Interpart} the Federal Circuit held that it did not have jurisdiction over a
case that related to copyrights and trademarks, even though the
trademarks and copyrights were related to the patent that was the
subject of the case before the Federal Circuit.\textsuperscript{52} In holding this way, the
Federal Circuit evaluated whether California's plug molding statute was
preempted by federal law.\textsuperscript{53}

In \textit{Interpart}, the Federal Circuit enunciated the standard for
preemption to be "whether [the] law 'stands as an obstacle to the
accomplishment and execution of the full purposes and objectives of
Congress.'"\textsuperscript{54} The court further clarified the test for preemption by
stating that "the state law must fail if it 'clashes with the objectives of
the federal patent laws.'"\textsuperscript{55} Using this more conservative test for
preemption, the Federal Circuit found that preemption did not apply
because the California law had a different objective than federal patent
law and therefore did not clash with federal patent law.\textsuperscript{56}

The test in \textit{Interpart} is based on a subjective determination of
whether the state law conflicts with the purpose of federal patent law.\textsuperscript{57}

\begin{footnotes}
\item[48.] \textit{Id.} at 1033 (discussing Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964)
\item[49.] \textit{Midwest Indus., Inc. v. Karavan Trailers, Inc.}, 175 F.3d 1356, 1359 (Fed. Cir.), \textit{cert. denied}, 528 U.S. 1019 (1999).
\item[50.] \textit{Id.} at 1358-59.
\item[51.] \textit{Id.} at 1359 (overruling Interpart Corp. v. Italia, 777 F.2d 678 (Fed. Cir. 1985)).
\item[52.] \textit{Interpart}, 777 F.2d 678, 680 (holding that federal patent law did not preempt state unfair competition law relating to a plug molding process).
\item[53.] \textit{Id.} at 684 (construing CAL. BUS. & PROF. CODE § 17300 (West Supp. 1985)).
\item[54.] \textit{Id.} (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S 470 (1973) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).
\item[55.] \textit{Id.} (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964)).
\item[56.] \textit{Id.} at 685.
\item[57.] \textit{Id.}
\end{footnotes}
Conversely, the new, apparently more liberal standard for preemption enunciated in Midwest is whether the federal patent law is affected by the state nonpatent law or whether the state cause of action is "foreclosed by patent law." Therefore, according to the Midwest test, the existence of a conflict is not determinative; instead, whether there is interaction between the areas of coverage is hereafter determinative.


Midwest also overruled the more recent Federal Circuit decision of Hunter Douglas, Inc. v. Harmonic Design, Inc. The Hunter Douglas decision provided a much more liberal approach to federal preemption than Interpart. Consequently, it could be argued that Hunter Douglas was simply meant by the Federal Circuit to serve as a transition prior to the Midwest decision. Thus, the question is whether the Midwest decision was in fact consistent with an increasingly liberal approach by the Federal Circuit to preemption.

The court held in Hunter Douglas that "federal courts have exclusive jurisdiction over state law causes of action in which a substantial question of federal patent law is pleaded as a necessary element of that claim." In addition, the court enunciated two other points of significance for understanding Midwest. First, Hunter Douglas concluded that federal courts have jurisdiction over cases arising under federal patent law. Second, the court cautioned against overuse of federal preemption and suggested that the states still have significant authority over nonpatent causes of action when they do not involve patent law.

The Federal Circuit in Hunter Douglas explained that in order for a district court, and therefore, the Federal Circuit, to have jurisdiction

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58. Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1360 (Fed. Cir.), cert. denied, 528 U.S. 1019 (1999); see also Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1571 (applying the "foreclosed by patent law" standard to "mixed" questions of patent and nonpatent law).

59. 153 F.3d 1318 (Fed. Cir. 1998) (deciding whether window shade patents were invalid and whether state unfair competition laws were violated).

60. 777 F.2d at 678.

61. 153 F.3d at 1321.

62. Id. at 1324 (citing 28 U.S.C. § 1295(a) (1994 & Supp. IV 1999)).

63. Id. at 1333-34 (holding that state law causes of action should not be lightly preempted by federal law); see also id. at 1334 (holding that "state unfair competition law regulates conduct in a different field from patent law") (citing Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1477 (Fed. Cir. 1998)).
over a case or controversy it must "arise[] under patent law." The standard of "arising under" comes from a combination of Article III of United States Constitution, which extends power to federal courts to hear cases "arising under federal law," and 28 U.S.C. § 1338, which grants jurisdiction to federal district courts over "cases arising under any Act of Congress relating to patents." The "'arising under' patent law" standard is significant because the Federal Circuit relies upon this language in *Midwest* in order to extend the Court's authority to include nonpatent issues that "pertain to patent law." Although the Federal Circuit held that federal patent law was not controlling in *Hunter Douglas*, the case is significant because the court recognized its supremacy over nonpatent issues when they have a certain relation to patent law.

While the court applied a more liberal approach to preemption than it did in *Interpart*, the court still followed a relatively conservative approach when determining what "arises under patent law." Additionally, the *Hunter Douglas* decision evidenced the court's deference to state control and cautioned against overuse of the preemption doctrine with respect to nonpatent issues. "Congress does not 'cavalierly' preempt state law causes of action, for the 'States are independent sovereigns in our federal system.'" Moreover, the court reiterated the principle that state police powers are not preempted unless it is clear that Congress intended to preempt those powers. The court proceeded to conclude that Congress did not intend to preempt state unfair competition law.

64. Id. at 1325.
65. Id. (quoting U.S. CONST. art III, § 2, cl. 1; and 28 U.S.C. § 1338 (1994 & Supp. IV 1999)). "[A]lthough Article III empowers federal courts to hear cases 'arising under' federal law, a federal district court may only exercise jurisdiction pursuant to a congressional enactment." Id.
66. 175 F.3d at 1359 (holding that an issue is "governed by Federal Circuit law if the issue 'pertain[s] to patent law'") (citing Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574-75 (Fed. Cir. 1984)).
67. 153 F.3d at 1325 (holding that the federal courts do not have jurisdiction over a nonfederal cause of action unless the vindication of the nonfederally protected right is intimately related to patent law).
68. Id. at 1324 (applying 28 U.S.C. § 1338(a)).
69. Id. at 1332 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).
70. Id. (holding that "'[t]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,' particularly when Congress has legislated . . . in a field which the States have traditionally occupied." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).
71. Id. at 1333. "We readily conclude that, in accordance with Dow Chemical, there is
Finally, the most important aspect of the *Hunter Douglas* decision, with respect to preemption, was that even when patent issues, over which the Federal Circuit undeniably has jurisdiction, are present, state law should still govern nonpatent issues.72 "[S]tate law governs the maintenance of orderly contractual relations and this function is not preempted merely because patents and patent issues are presented in the substance of those contracts."73

**E. Historical Approach to Preemption in Intellectual Property**

In a 1991 Federal Circuit decision, the court explained what was then its approach to preemption and to the regional circuits: "]O]ur initial inquiry in determining whether deference to regional circuit law is due has been to decide whether the law that must be applied, whether procedural or substantive, is one '... over which this court does not have exclusive appellate jurisdiction."

The court considered four factors when deciding whether it had jurisdiction.75 First, the court determined whether an issue was "uniquely" related to patent law.76 Second, the court weighed whether a procedural issue was related to patent law.77 Third, the court inquired into the need for and their ability to create uniform law on a subject.78 Fourth, the Federal Circuit exercised restraint where there was already uniformity among the regional circuits, thereby recognizing the advantages of national uniformity in the law.79

**IV. MIDWEST—A MAJOR CHANGE?**

**A. Summary of Midwest Industries**

The Federal Circuit, sitting en banc, decided *Midwest Industries, Inc.*

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72. *Id.* at 1333-34 (citing Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1471-79 (Fed. Cir. 1998)).

73. *Id.* at 1334.

74. *Id.* (quoting *Dow Chemical*, 139 F.3d at 1478).

75. *Id.* at 1333.

76. *Id.* (citing Kalman v. Berlyn Corp., 914 F.2d 1473, 1480 (Fed. Cir. 1990)).

77. *Id.* (citing Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc., 908 F.2d 951, 953 (Fed. Cir. 1990)).

78. *Id.* (citing Forman v. United States, 767 F.2d 875, 880 n.6 (Fed. Cir. 1985)).

79. *Id.*
v. Karavan Trailers, Inc. on May 5, 1999. The case involved two competing manufacturers of trailers. The case is based, in large part, upon U.S. Patent No. 5,518,261 (the '261 patent), which relates to a winch post. Midwest sued Karavan in the United States District Court for the Southern District of Iowa, claiming that Karavan was infringing two of Midwest's design patents and was violating Midwest's federal and state (Iowa) trademark rights. Surprisingly, Midwest did not allege that Karavan infringed Midwest's '261 utility patent.

At trial, before the United States District Court for the Southern District of Iowa, Karavan requested that Midwest's nonpatent-related claims be dismissed. Karavan's contention was that federal and state design protection improperly extended the '261 patent. The district court granted Karavan's motion for dismissal on the nonpatent claims, concluding that those claims were preempted by federal patent law. The court concluded that because the curved winch post is disclosed in the '261 patent and claimed in one of the dependent claims of that patent, it is a "significant inventive component" of the patent and therefore not entitled to Lanham Act protection for trade dress. Midwest subsequently appealed to the Federal Circuit.

The Federal Circuit reversed the district court's grant of summary judgement, ruling "that patent law principles foreclose[d] Midwest's Lanham Act and state law claims." The Federal Circuit held that even

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81. Id. at 1357.
82. Id. at 1357-58. Claim ten of the '261 patent "recites as a limitation, a winch post that 'curve[s] forwardly and upwardly.'" Id.
83. Id.
84. Id. at 1358.
85. Id. Karavan filed its motion pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Id.
86. Id.; see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (holding that state unfair competition law could not be used to extend patent rights).
87. Midwest, 175 F.3d at 1358 (citing Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498 (10th Cir. 1995)). "To offer trade dress protection to a product configuration that embodies significant features of patented products would interfere with the public's ability to practice patented inventions after the patents have expired." Vornado, 58 F.3d at 1508. "Accordingly, the court held that a product configuration may not be accorded protection under the Lanham Act when the configuration is a 'described, significant inventive aspect' of an issued utility patent." Id. at 1510.
88. Midwest, 175 F.3d at 1358.
89. Id. at 1358.
90. Id. at 1361.
though the curved winch post was claimed in the '261 patent and was a "significant inventive aspect of the patent," it may still be deserving of trade dress protection.\textsuperscript{91} Moreover, the Federal Circuit held that the winch post could not be denied trade dress protection just because it was a "significant inventive aspect" of a utility patent.\textsuperscript{92}

B. Explanation of Midwest Decision

The Midwest decision constituted a significant change in intellectual property law. Henceforth, when state laws conflict with federal patent laws, the Federal Circuit will apply its own law to determine if the state's laws are preempted by federal patent law.\textsuperscript{93} Therefore, Federal Circuit jurisprudence controls conflict and preemption questions.\textsuperscript{94} The law of the regional circuits will no longer have any bearing on the interrelationship between patent law and state intellectual property laws, nor will it control the relationship between patent law and other federal intellectual property rights.\textsuperscript{95} All of this begs the question: What is the Federal Circuit law governing preemption?

1. Patent/Nonpatent Distinction Rejected

In the Midwest decision the court examined a 1989 Federal Circuit decision in which it held that the Federal Circuit should apply its own law to patent issues but apply regional circuit law to nonpatent issues.\textsuperscript{96} Unfortunately, the distinction between patent and nonpatent issues has never been clear.\textsuperscript{97} Initially, the Federal Circuit had attempted to clarify the patent/nonpatent question by explaining that their law would control substantive patent law issues and issues which "pertain to patent law."\textsuperscript{98} However, this distinction proved to be unworkable. In a number of cases between 1984 and the 1999 Midwest decision, the court attempted to establish a workable distinction between patent and nonpatent issues, and therefore between issues that were controlled by Federal Circuit law and issues that were controlled by regional circuit

\textsuperscript{91} Id. at 1364.
\textsuperscript{92} Id. at 1364 (citing Vornado, 58 F.3d at 1510).
\textsuperscript{93} Id. at 1358-59.
\textsuperscript{94} Id. at 1361.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 1359 (citing Atari, Inc. v. JS & A Group, Inc., 747 F.2d 1422, 1440 (Fed. Cir. 1984) (en banc)).
\textsuperscript{97} Id.
\textsuperscript{98} Id. (citing Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574-75 (Fed. Cir. 1984)).
law. This distinction proved to be more elusive than the Federal Circuit apparently expected, thus necessitating the clarification provided in *Midwest*.

In *Midwest*, the Federal Circuit finally rejected this complicated analysis and held that it would apply its "[own] construction of patent law to the questions whether and to what extent patent law preempts or conflicts with other causes of action." Therefore, the court decided that Federal Circuit precedent would determine what patent law permits and what patent law prohibits with respect to Midwest's state and federal trademark claims.

2. "Functionality" Requirement

In *Midwest*, the court ruled that Midwest's trademark and state trade dress protection of its winch post did not improperly extend Midwest's '261 patent, which claimed a winch post. The court recognized that, if used improperly, trade dress protection may unfairly extend patent rights and discourage competition. However, this does not mean that the existence of a patent precludes per se protection of similar features under either state unfair competition law or federal trade dress law.

To protect against an anti-competitive extension of patent rights by trademarks or unfair competition law, the Federal Circuit has invoked the "functionality" requirement. The Federal Circuit explained that functionality, not the existence of a patent, either valid or expired, determines whether a trademark or unfair competition protection is valid.

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99. *Id.* at 1359 (citing Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1564 (Fed. Cir. 1994); Biodex Corp. v. Loredon Biomedical, Inc., 946 F.2d 850, 858-59 (Fed. Cir. 1991); Gardco Mfg., Inc. v. Herst Lighting Co., 820 F.2d 1209, 1212 (Fed. Cir. 1987); *Panduit*, 744 F.2d at 1574-75)).

100. *Id.* at 1360.

101. *Id.* at 1361.

102. *Id.* at 1364.


104. *Id.* at 1362 (citing *In re Mogen David Wine Corp.*, 328 F.2d 925, 930 (C.C.P.A. 1964) (discussing that trademark rights and unfair competition rights do not extend patent rights, but are independent and provide different protection)).

105. *Id.* (citing Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995); see also Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527, 1530-31 (Fed. Cir. 1994)).

106. *Id.* (holding that "the fact that a patent has been acquired does not convert what otherwise would have been protected trade dress into nonprotected matter").
3. Federal Circuit Rejects "Significant Aspect" Test

Reiterating the Federal Circuit's reliance upon "functionality" in determining the validity of trademark and unfair competition protection, the Federal Circuit rejected the Tenth Circuit's ruling that unfair competition and trademark laws do not protect a product configuration that is claimed in a patent and is "a significant inventive aspect" of the patented invention. Whether or not a feature is described or even whether it is a "significant inventive aspect" of a patent is irrelevant in determining trade dress protection. Finally, because this issue involves a question of whether federal patent law conflicts with or preempts state law, the law of the Federal Circuit, not the Tenth Circuit, is controlling. Therefore, the Federal Circuit remanded the case to the district court to determine the functionality of the winch post design.

4. State Law Trademark Statute

The court's decision regarding preemption and conflicts applies to state law claims as well. If a state law purports to grant trade dress protection to a "functional" feature, the state law conflicts with and is therefore preempted by federal patent law. Therefore, the district court was instructed to evaluate the functionality of the winch post when determining whether the winch post may receive Iowa trademark protection. Finally, if the winch post serves "as a designation of source" and the winch is not "functional," Midwest's state law claims and federal trademark claims are not barred by, nor do they conflict with, federal patent law. Accordingly, the "significant inventive aspect" test described in Vornado was overruled.

V. DISCUSSION OF THE MERITS OF THE MIDWEST DECISION

In order to fairly evaluate the merits of the Midwest decision, this

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107. Id. at 1364 (citing Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498, 1510 (10th Cir. 1995)).
108. Id.
109. Id. at 1361.
110. Id. at 1365.
111. Id.
112. Id. (citing Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 167 (1989)).
113. Id.
114. Id.
115. Id. at 1364 (overruling Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498, 1510 (10th Cir. 1995)).
section will explain some of the advantages and disadvantages of the decision before concluding that the decision was the correct one.

A. Arguments in Favor of the Expansionist Approach Taken by the Federal Circuit

1. National Regulation Provides for Uniformity

National regulation of intellectual property is certainly a more efficient method of regulating "inventions, works of authorship, trade symbols, and such, [which] resist confinement to local boundaries." This is because intellectual property is inherently resistant to state-by-state confinement.

Clearly, the use of numerous, possibly conflicting, methods of registration could only serve to frustrate efficiency, hamper dissemination, reduce commercial certainty, and affect insecurity among the intellectual property community. Therefore, the centralization of control resultant from the establishment of a standard set of judicial precedents from a single court will provide the very desirable qualities of both certainty and uniformity.

The Federal Circuit has long been concerned with the confusion and the conflict likely to result from requiring district courts to apply different laws dependent upon whether the case would be appealed to the Federal Circuit or to the regional circuit. The Federal Circuit reasoned that "[i]t would be at best unfair to hold in this case that the district court, at risk of error, should have 'served two masters', or that it should have looked, Janus-like, in two directions in its conduct." The policy of achieving uniformity in district court management of trials has been a significant factor in our occasional deference to regional circuit law.

117. Id.
118. Id.
119. Atari, Inc. v. J S & A Group, Inc., 747 F.2d 1422, 1439 (Fed. Cir. 1984) (en banc); see also In re Int'l Med. Prosthetics Research Assoc., Inc., 739 F.2d 618, 620 (Fed. Cir. 1984) ("Dealing daily with such...[questions] a district court cannot and should not be asked to answer them one way when the appeal on the merits will go to the regional circuit in which the district court is located and in a different way when the appeal will come to [the Federal Circuit].")
120. Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 856 (Fed. Cir. 1991) (quoting Atari, 747 F.2d at 1439).
121. Id.
In *Midwest*, had the Federal Circuit not decided to apply its own law, confusion between the circuits would have continued to exist. Counsel for Karavan argued that Tenth Circuit law should be applied. According to the Tenth Circuit, any state protection of a patented invention is barred if the feature is a "significant inventive aspect" of a patent. Counsel for Midwest argued that Eighth Circuit law should be applied. Under Eighth Circuit law, the existence of a patent did not preclude state trade dress protection.

2. National Regulation Prevents Forum-Shopping

Another obvious advantage of uniformity is that it prevents forum-shopping. Forum-shopping occurs when parties, aware of the differences in law between the circuits, attempt to file their cases in the circuit which they believe has the most favorable law for their case.

The elimination of forum-shopping was one of the purposes for the creation of the Federal Circuit. In creating the Federal Circuit, Congress stated that, "[t]he creation of the Court of Appeals for the Federal Circuit will produce desirable uniformity in this area of [patent] law." Applying different laws to the same matter, based solely upon the circuit of origin, perpetuates disparities among the circuits and creates a perception of unfairness and arbitrariness of the courts. Therefore, *Midwest* is consistent with Congress's expressed intent in creating the Federal Circuit.

123. Vornado Air Circulation Sys. v. Duracraft Corp., 58 F.3d 1498, 1510 (10th Cir. 1995).
127. *Id.*
128. S. Rep. No. 275, 97th Cong., 1st Sess. 5 (1981), and H.R. Rep. No. 312, 97th Cong., 1st Sess. 17-22 (1981). In addressing the problem of forum shopping, Congress noted, "Some circuit courts are regarded as 'pro-patent' and others 'anti-patent,' and much time and money is expended in 'shopping' for a favorable venue .... [T]he validity of a patent is too dependent upon geography to make effective business planning possible .... [t]he creation of a single court of appeals for patent cases will promote certainty where it is lacking to a significant degree and will reduce, if not eliminate, the forum-shopping that now occurs."

*Id.*
Interestingly, the Federal Circuit used the same line of reasoning to support its holding in *Cable Electric* that applying the law of the regional circuit would prevent forum-shopping when it noted that "[s]uch a rule will reduce the incentive for forum-shopping with respect to a significant threshold issue in state causes of action." However, the appearance of conflicting interpretations between the regional circuits, as demonstrated in *Midwest* by the disparities between the law of the Eighth and Tenth Circuits, has apparently proven to the Federal Circuit that requiring the district courts to apply the law of the regional circuit does not work.

3. The Constitutional Framers Intended National Regulation

Although *Midwest* is a significant change in doctrine, it can be argued that the decision more closely achieved the constitutional Framers' intentions with respect to the regulation and promotion of the "useful Arts." By granting itself more control over the various intellectual property disciplines, the Federal Circuit has made a more nationalized system for the enforcement of intellectual property rights.

From what evidence we have of the Framers' intentions, with respect to intellectual property law, it appears that they recognized the value of nationalized control, at least with respect to copyrights and patents.

The little available evidence of the Framers' intent in including this authority indicates that they recognized the inefficacy of disparate state regulation of inventions and works of authorship: in Federalist No. 43 James Madison observed, "the utility of this power will scarcely be questioned ... The States cannot separately make effectual provisions for either ... [copyright or patent]."

Further, it appears that they recognized the difficulty that the states would have with respect to creating an effective system for the regulation and enforcement of intellectual property issues.

4. The Federal Circuit is More Competent to Evaluate Intellectual

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134. *Id.*
Property Causes of Action

Possibly the most pragmatic argument in favor of the Midwest decision is that the Federal Circuit's docket is occupied by a significantly larger number of intellectual property cases than any regional circuit. Therefore, it is logical to posit that the Federal Circuit, "trained in exegesis," is more competent to decide issues of this type than the regional circuits, which rarely hear state trademark and unfair competition cases and never hear patent and copyright cases. Conversely, a significant portion of the Federal Circuit's docket includes state trademark and unfair competition claims combined with patent and copyright cases.

5. Midwest's Expansion of Control is Consistent with Recent Expansion of Authority

The Midwest decision is arguably consistent with some of the Federal Circuit's previous holdings, that extended the court's authority over a limited set of circumstances. The Federal Circuit has held that its jurisdictional competence is bound solely by whether the question before the court is "foreclosed by patent law." In essence, the court held that any issue that is significant to the outcome of a patent suit is within the jurisdictional competence of the Federal Circuit.

Therefore, the Midwest decision which dictates that Federal Circuit precedent must be applied to "mixed" questions of patent and nonpatent law is a logical extension of the court's earlier rulings. In
support of this expansionist approach, the Federal Circuit reasons that its

responsibility as the tribunal having sole appellate responsibility for the development of patent law requires that [it does] more than simply apply [its] law to questions of substantive patent law. In order to fulfill [its] obligation of promoting uniformity in the field of patent law, it is equally important to apply our construction of patent law to the questions whether and to what extent patent law preempts or conflicts with other causes of action.\textsuperscript{142}

In the Midwest decision, the Federal Circuit cited other cases where it had intruded upon traditionally state issues and expanded its control "beyond the limits of substantive patent law."\textsuperscript{143} These include "whether the district court has personal jurisdiction over the defendant in a patent suit;"\textsuperscript{144} "whether the plaintiff has established its right to preliminary injunction in a patent case;"\textsuperscript{145} "whether there is a sufficient controversy between the parties to permit an accused infringer to bring an action seeking a declaratory judgment of patent noninfringement or invalidity;"\textsuperscript{146} "whether a patentee is entitled to have the issue of inequitable conduct tried in the jury trial that the patentee has demanded on the issue of infringement;"\textsuperscript{147} and "whether particular materials are relevant for purposes of discovery in a patent case under Fed. R. Civ. P. 26."\textsuperscript{148}

The court, as a conciliatory gesture, conceded that its jurisdiction, although growing beyond "the limits of substantive patent law," is still bound by the requirement that it may only expand to include issues "in which the disposition of nonpatent-law issues [are] affected by the

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1359-60.
\textsuperscript{144} Id. at 1359 (citing Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1564 (Fed. Cir. 1994)).
\textsuperscript{145} Id. (citing Hybrit ech Inc. v. Abbott Labs., 849 F.2d 1446, 1451 n. 12 (Fed. Cir. 1988)).
\textsuperscript{146} Id. (citing Goodyear Tire & Rubber Co. v. Releasomers, Inc., 824 F.2d 953, 954-55 n.2 (Fed. Cir. 1987)).
\textsuperscript{147} Id. (citing Gardco Mfg., Inc., v. Herst Lighting Co., 820 F.2d 1209, 1212 (Fed. Cir. 1987)).
\textsuperscript{148} Id. (citing Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc., 813 F.2d 1207, 1212 (Fed. Cir. 1987) and FED. R. CIV. P. 26).
special circumstances of the patent law setting in which those issues arise." In so conceding, the Federal Circuit seemed to say that it does not intend to extend its authority ad infinitum, but that the court's jurisdiction does have firm boundaries which the court will respect and maintain.

In support of the expansionist approach in Midwest, the court cited numerous instances where it had similarly used its patent jurisdiction to decide nonpatent issues. Further, while the Midwest decision was an expansion of the Federal Circuit's control into areas which it traditionally did not govern, this is not an unprecedented move by the court. Finally, possibly to stave off criticism that it is expanding its authority unchecked into areas in which it does not belong, the Federal Circuit cited areas in which its law does not control.

6. It Is Not Always Possible to Easily Separate Patent Issues from Nonpatent Issues

The intellectual property bar over the past few years has come to recognize a major change in intellectual property. Even the name itself has changed, and so emphasizes the change; the term "intellectual property law" has been coined, to include copyrights, publicity rights, trademarks, patents, and licensing. Recognizing this change, the Federal Circuit in Midwest concluded that characterizing an issue either as a patent issue or nonpatent issue is becoming increasingly complicated. Because trademark, copyright, and other intellectual property causes of action are often so closely related to patent causes of action, allowing regional circuit law over these issues would eviscerate the court's control over patent issues.

B. Problems with the Approach Taken by the Federal Circuit

While the Midwest decision was both correct and necessary, there are some gaps in the decision which need to be addressed by the court in order to prevent confusion and provide further clarity to the intellectual

149. Id. at 1359-60 (discussing Pro-Mold v. Great Lakes Plastics, 75 F.3d 1568 (Fed. Cir. 1996) and Nobelpharma AB v. Implant Innovations, 141 F.3d 1059 (Fed. Cir. 1998)).

150. Id. (citing Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574-75 (Fed. Cir. 1984); Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 858-59 (Fed. Cir. 1991); Gardco Mfg., Inc. v. Herst Lighting Co., 820 F.2d 1209, 1212 (Fed. Cir. 1987); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1564 (Fed. Cir. 1994); Hybritech, Inc. v. Abbott Labs., 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1988); Truswal, 813 F.2d at 1212).

151. Id. at 1361.

152. Id. at 1359.
property bar. I will discuss these deficiencies in the following section.

1. Congressional Intent

Preemption is controlled by Congressional intent.\textsuperscript{153} Therefore, the controlling question with respect to Midwest is what Congress intended with respect to nonpatent issues when it enacted 28 U.S.C. § 1338. "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,' particularly when Congress has 'legislated . . . in a field which the States have traditionally occupied.'"\textsuperscript{154} Congressional intention is to be strictly construed.\textsuperscript{155} Therefore, the most important consideration should be Congress' intent with respect to which court should have control over nonpatent issues in "mixed" cases.

The Federal Circuit's jurisprudence indicates that Congress's intentions with respect to 28 U.S.C. § 1338 were not clear to the court. In Hunter Douglas, the Federal Circuit "conclude[d] that, in accordance with Dow Chemical, there is no reason to believe that the clear and manifest purpose of Congress was for federal patent law to occupy exclusively the field pertaining to state unfair competition law."\textsuperscript{156} The court went on to show deference to state control by stating that "state unfair competition law regulates conduct in a different field from federal patent law."\textsuperscript{157}

Only one year later the Federal Circuit appears to have overcome its conservative approach to preemption, holding that Federal Circuit law preempted both state and regional circuit law with respect to Iowa state trademark law.\textsuperscript{158} The discrepancies between the decisions are difficult to justify and suggest at best a misunderstanding of Congressional intent


\textsuperscript{154} Hunter Douglas, 153 F.3d at 1332 (quoting Rice, 331 U.S. at 230).

\textsuperscript{155} Id. at 1332.

\textsuperscript{156} Id. at 1333 (citing Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1471-79).

\textsuperscript{157} Id. at 1334 (citing Dow Chem., 139 F.3d at 1477).

\textsuperscript{158} See Midwest, Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1360-61 (Fed. Cir.), cert. denied, 528 U.S. 1019 (1999) ( "We will therefore apply our own law to the question in this case—whether principles of patent law foreclose Midwest's claims under section 43(a) of the Lanham Act and under Iowa state trademark law." ).
and at worst a reckless disregard for *stare decisis*.

2. Midwest Removes Inconsistency only to Replace it with Ambiguity and Confusion

To support its holding the Federal Circuit explained that it was necessary to overturn *Cable Electric*¹⁵⁹ and *Hunter Douglas*¹⁶⁰ to promote uniformity.¹⁶¹ "We apply Federal Circuit law . . . to promote uniformity in the law."¹⁶² The Federal Circuit reasoned that if it did not use preemption its ability to decide a case would depend, not upon the merits of the case, but on the regional circuit from whence the appeal was made.¹⁶³ The court stated that "[i]n order to fulfill our obligation of promoting uniformity in the field of patent law, it is equally important to apply our construction of patent law to the questions whether and to what extent patent law preempts or conflicts with other causes of action."¹⁶⁴ The question that arises after the *Midwest* decision is whether *Midwest* promotes uniformity or whether it adds more confusion.

Unfortunately, while the source of the dispute is no longer determinative, the distinction between issues "pertaining to patent law" and those that do not pertain to patent law is not clear.¹⁶⁵ Further, the clarification that the court gives, supposedly to provide assistance to the district courts when faced with the decision of whether Federal Circuit law applies, is still somewhat obtuse.

The Federal Circuit explained that an issue "pertain[s] to patent"¹⁶⁶ law if "as applied in a particular case, [it] is foreclosed by patent law."¹⁶⁷ Assumedly, whether a nonpatent issue is foreclosed by patent law depends upon whether or not it is determinative of the case; maybe the issue is foreclosed by patent law if it is simply significant to the determination of the case. Clearly, more clarification on this point is necessary before the district courts and practitioners know whether regional circuit law, state law, or Federal Circuit law is controlling on a particular issue.

¹⁵⁹. 770 F.2d 1015 (Fed. Cir. 1985).
¹⁶⁰. 153 F.3d at 1318.
¹⁶¹. *Midwest*, 175 F.3d at 1359.
¹⁶³. *Id.* at 1360.
¹⁶⁴. *Id.*
¹⁶⁵. *Id.* at 1359 (citing Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574 (Fed. Cir. 1984)).
¹⁶⁶. *Id.* (citing Panduit, 744 F.2d at 1574-75).
¹⁶⁷. *Id.* at 1360.
This distinction among regional circuit law, state law and Federal Circuit law does not provide the clarification that many practitioners had hoped for. However, it must be noted that judges are not permitted to legislate from the bench and must limit their opinions to the interpretations of the laws which control the cases and controversies before them.\textsuperscript{168}


The Federal Circuit acknowledged that some confusion might remain after Midwest.\textsuperscript{169} "[T]here is a risk that district courts and litigators could find themselves confronting two differing lines of authority when faced with conflicts between patent law and state or federal trademark claims."\textsuperscript{170} Unfortunately, the court mentions this concern but fails to provide any firm parameters.

The only guidance that the Federal Circuit provides is that "patent law principles foreclose[d] Midwest's Lanham Act and state law claims."\textsuperscript{171} The Federal Circuit also acknowledged that it does not have appellate jurisdiction over all intellectual property issues.\textsuperscript{172}

\textbf{VI. CONCLUSION}

Henceforth, when state laws conflict with federal patent laws the Federal Circuit will apply its own law to determine if the state's laws are preempted by federal patent law. Therefore, Federal Circuit jurisprudence controls conflict and preemption questions. The law of the regional circuits will no longer have any bearing on the interrelationship between patent law and state intellectual property laws, nor will it control the relationship between patent law and other federal intellectual property rights.

The Midwest decision was the logical and necessary step by a court attempting to strengthen intellectual property law through ensuring consistency and by a court which recognizes the increasing

\textsuperscript{169} Midwest, 175 F.3d at 1356.
\textsuperscript{170} Id. at 1361.
\textsuperscript{171} Id.
\textsuperscript{172} Id. ("We recognize, of course, that questions involving conflicts between patent law and other causes of action can and do arise in cases over which this court does not have appellate jurisdiction—cases in which claims under the Lanham Act or state law claims are not joined with a claim under the Patent Act.").
interrelationship of different forms of intellectual property and the need to provide cohesion among the different intellectual property disciplines. Further, Midwest furthers Congress's goal by serving as a disincentive for litigants to engage in forum-shopping.

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