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Does Willful Blindness Beget Enhanced Patent Damages?

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Damages for patent infringement can amount to millions, or even billions, of dollars, and, under Title 35 of U.S. Code Section 284, a district court may further enhance those sums, awarding up to treble damages. After the [U.S. Supreme Court](#)'s 2016 decision in *Halo Electronics Inc. v. Pulse Electronics Inc.*,^[1] uncertainty exists as to when and how enhanced damages are to be awarded.

In an effort to protect themselves from treble damages, some organizations have adopted policies that prohibit review of third-party patents. This article thus poses the question: Are enhanced damages available when an infringer purposefully avoids knowledge of a patent? To answer it, we must first consider the role of knowledge in enhanced damages post-Halo.

Enhanced Damages after Halo

Section 284 of the Patent Act “gives district courts the discretion to award enhanced damages against those guilty of patent infringement”^[2] and provides that “the court may increase the damages up to three times the amount found or assessed.”^[3]

In *Halo*, the Supreme Court “eschew[ed] any rigid formula for awarding enhanced damages under § 284,”^[4] giving district courts broad discretion, but offering them little guidance. It did make clear, however, that enhanced damages awards are available only in egregious cases of misconduct that involve more than typical infringement.^[5]

As the Supreme Court explained, enhanced damages were “designed as a ‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior,” behavior that the court described as “willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or — indeed — characteristic of a pirate.”^[6]

While Section 284 allows district courts to punish a full range of culpable behavior,^[7] the majority of claims for enhanced damages are based on allegations of willful misconduct — so much so that, although the words “willful” and “willfulness” do not appear in Section 284,

plaintiffs and courts often describe claims for enhanced damages as “willful infringement claims.”[8]

Indeed, some parties and courts suggest there is a willful infringement cause of action, despite the Patent Act not mentioning or suggesting that such a cause exists.[9] Rather, as the Supreme Court clarified in *Halo*, willful misconduct is only one example — albeit the archetype — of culpable behavior that may justify enhanced damages.[10]

In practice, the determination of a claim for enhanced damages is a two-step process: (1) the finder of fact determines whether the infringement is willful[11] (or, indeed, wanton, malicious, in bad-faith, deliberate, consciously wrongful, flagrant, or characteristic of a pirate, as alleged by the plaintiff) and, if so, (2) the court determines whether the behavior is sufficiently egregious to warrant enhanced damages and the amount of enhancement, up to the statutory limit of treble damages.[12]

Knowledge and Claims for Enhanced Damages

The [U.S. Court of Appeals for the Federal Circuit](#) confirmed post-*Halo* that “[k]nowledge of the patent alleged to be willfully infringed continues to be a prerequisite to enhanced damages.”[13] However, Justice Stephen Breyer emphasized in his concurrence that the Supreme Court majority’s “references to ‘willful misconduct’ do not mean that a court may award enhanced damages simply because the evidence shows that the infringer knew about the patent and nothing more.”[14]

Instead, it is “[t]he subjective willfulness of a patent infringer, intentional or knowing,” that may warrant enhanced damages.[15] And this “intentional or knowing” clause has been interpreted as requiring — at a minimum — knowledge of infringement.[16]

In the recent decision *Eko Brands LLC v. Adrian Rivera Maynez Enterprises Inc.*, the Federal Circuit further clarified that, at the first stage of the inquiry, “the concept of ‘willfulness’ requires a jury to find no more than deliberate or intentional infringement.”[17] But that willfulness is merely the threshold question for enhanced damages.

As Justice Breyer noted, the *Halo* majority held that intentional or knowing infringement may — not must — warrant a punitive sanction.[18] “It is circumstance that transforms simple knowledge into such egregious behavior, and that makes all the difference.”[19] The statute establishes that the punishment by enhanced damages is for the court, not the jury.[20] So after the willfulness threshold is met, the court must consider whether the infringer’s conduct was egregious and worthy of punishment.[21]

Halo gives little guidance on egregiousness, saying only that “courts should continue to take into account the particular circumstances of each case in deciding whether to award damages, and in what amount.”[22] As such, some district courts have continued to consider the pre-*Halo* Read factors[23] when determining enhanced damages.[24] But courts are not required to do so.[25] The only firm requirement is that they “explain the basis for the enhanced damages award, particularly where the maximum amount is imposed.”[26]

Willful Blindness as a Substitute for Knowledge in Patent Law

The doctrine of willful blindness allows a finding of willful blindness to substitute for a requirement of knowledge in criminal or civil proceedings. In *Global-Tech Appliances Inc. v. SEB SA*, the Supreme Court considered the application of the doctrine to allegations of induced patent infringement.[27]

To be liable for induced infringement under Section 271(b), a defendant must have known that the acts they induced constituted patent infringement,[28] and, in *Global-Tech*, the Supreme Court allowed willful blindness to substitute for such knowledge.[29] The court reasoned that “persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”[30] In the eyes of the Supreme Court, acting with willful blindness is “just as culpable as ... actual knowledge,” as the actor “can almost be said to have actually known the critical facts.”[31]

Willful blindness has two requirements: “(1) [t]he defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”[32] As the Supreme Court has stated: “Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing,” as opposed to one “who merely knows of a substantial and unjustified risk of such wrongdoing.”[33]

Neither the Supreme Court nor Federal Circuit has addressed whether the *Global-Tech* requirements are sufficient for a finding of willful infringement and the award of enhanced damages. Several district courts have openly questioned whether the holding of *Global-Tech* can be extended into the willful infringement and direct infringement context.[34] But ultimately, all concluded that, as a matter of law, willful blindness can support a claim of willful infringement — at least at the pleading stage.

Interestingly, in *Ansell Healthcare Products LLC v. Reckitt Benckier LLC*, the [U.S. District Court for the District of Delaware](#) speculated that application of the doctrine may be more limited outside the inducement context.[35] The court noted that if a defendant was willfully blind to a patent covering a product that it copied and then sold, it “could satisfy the knowledge requirement for willful infringement, because the defendant’s willful blindness demonstrates the same level of culpability as if the defendant copied the product with actual knowledge of the patent.”[36]

But if instead, a defendant were willfully blind to a field of patents, selling a product covered by a patent “might not necessarily demonstrate culpability tantamount to the culpability” of doing so with knowledge of the specific patent.[37] This latter scenario could readily arise in the context of corporate policies of nonreview, discussed further below.

Of course, even if the doctrine of willful blindness applies, “an award of enhanced damages does not necessarily flow from a willfulness finding;” egregious behavior is required.[38] Under *Global-Tech* willful blindness to infringement was held to substitute for knowing infringement,

but according to Justice Breyer's concurrence in Halo, knowing infringement is not necessarily tantamount to egregious behavior.[39]

Indeed, the court in Ansell held that where willful blindness applies, "it only substitutes for actual knowledge, as opposed to egregious behavior." [40] Just as additional circumstances are required beyond knowledge of actual infringement to warrant enhanced damages, so too should they be in cases of willful blindness.

Corporate Intellectual Property Policies and Enhanced Damages

Although commentators have condemned the practice,[41] some organizations have adopted policies that prohibit review of third-party patents to protect against enhanced damages. Several district courts have now considered such policies with mixed results.

In Motiva Patents v. Sony Corp., HTC Corp., the [U.S. District Court for the Eastern District of Texas](#) held that a policy of nonreview was sufficient to state a claim of willful blindness under Global-Tech.[42] The court stated that both "creating a policy prohibiting review of patents" and enforcing the policy were the kinds of "deliberate action to avoid learning" of potential infringement that could amount to willful blindness under Global-Tech, and plausibly to allegations of willful infringement.[43]

By contrast, in Nonend Inventions N.V. v. [Apple Inc.](#), et al., the same court dismissed a claim for enhanced damages on the grounds that, even if the defendant Motorola had a policy of not reviewing third party patents, as alleged by the plaintiff, such a policy "does not per-se constitute 'willful blindness'" and no facts suggested that the defendant had a subjective belief that there was a high probability of infringement of the claims of the patent-in-suit.[44] The court held that, under Global-Tech, more must be alleged to show that a policy of ignoring patents caused an alleged infringer's actions to "surpass recklessness and negligence" and rise to the level of "willful blindness." [45]

Similarly, in VLSI Tech. LLC v. Intel Corp., the District of Delaware dismissed a claim for enhanced damages where the sole basis for willful blindness to the patents was an allegation of a "publicly-known corporate policy forbidding its employees from reading patents held by outside companies or individuals." [46] The court found that, under Global-Tech, there needed to be, in addition to the policy of nonreview, some plausible allegation that the corporation "subjectively believed that there was a high probability that the ... patent existed." [47]

And even if willful blindness had been found, the court noted that only willful blindness "to [each] patent's existence" had been alleged, not willful blindness to the infringement of those patents.[48] For that additional reason, the court dismissed the enhanced damages claim.

Importantly, Motiva, Nonend and VLSI concern motions to dismiss.[49] The question resolved on such a motion is not whether the plaintiff will ultimately prevail, but simply whether the complaint was sufficient to cross the federal court's pleading threshold.[50] In Intel Corp. v. Future Link Systems LLC, the District of Delaware considered a policy of nonreview in the context of a motion for summary judgment.[51] On such a motion, a court is required to consider

the evidence in the light most favorable to the nonmoving party.[52]

For this reason, the court denied Intel’s motion. [53] In so doing, however, the court noted that “[i]t may be difficult to see how a reasonable factfinder would view” Intel’s conduct — including an alleged “corporate atmosphere encouraging employees to ‘turn a blind eye’ to patents” — to be “egregious ... wanton, bad-faith, deliberate, consciously wrongful, flagrant or — indeed — characteristic of a pirate.”[54]

None of these case demonstrates how a jury will see these issues or whether a court is likely to enhance damages. When a jury is confronted with a policy of nonreview, its decision may turn on facts such as the reason or justification for the policy, the details of its implementation and enforcement, industry practice, and circumstantial evidence related to the organization’s understanding of the risk of infringement.

And a court would likely consider the circumstances involved in both the infringement and the formation of the policy when determining enhanced damages. For example, a court could find that a policy of nonreview was adopted in bad faith to shield likely infringement and ultimately enhance damages.

Conversely, if an organization had a policy of nonreview because of its size and economic limitations, a court may reasonably deny an award of enhanced damages under Halo. Indeed, Justice Breyer, in his Halo concurrence, recognized that the costs associated with obtaining an opinion of counsel to avoid enhanced damages can prevent an innovator from getting a small business up and running.[55] And the court reiterated that the failure of a company to incur the costs of consulting counsel may not be used to prove willful infringement.[56]

Pleading Enhanced Damages

As noted above, Section 284 does not contain the words “willfulness” or “willful,” but willful infringement is commonly understood to be the lower bounds of behavior that may result in enhanced damages.[57] And because just the possibility of enhanced damages can affect settlement or trial strategy, enhanced damages-related claims are often the subject of extensive motion practice.

Post-Halo, the pleading standard for enhanced damages-related claims has remained unclear, and different courts have applied different standards.[58] That said, all courts require the plaintiff to plausibly allege knowledge (or an equivalent) of the patent-in-suit,[59] and nearly all courts also require a plausible allegation of knowing or intentional infringement.[60]

As explained by the District of Delaware: “[b]ecause of the difficulty in articulating precisely the range or type of circumstances that would transform a simple ‘intentional or knowing’ infringement claim into an enhanced damages claim,” when knowledge of infringement has plausibly been alleged, “the safest course is to allow an enhanced damage claim to proceed.”[61]

However, other courts have contended that because egregious conduct is necessary to award enhanced damages, an enhanced damages-related claim must allege this type of conduct to

survive.[62] While the Federal Circuit recently suggested that courts should not address the question of egregiousness until a finding of willfulness has been made, it is unclear if this holding will substantially affect the pleading standard for enhanced damages-related claims.[63]

Despite the lack of uniformity and uncertainties that remain, these cases suggest some best practices.

First, knowledge (or a theory of willful blindness) of the patent is required, and it is generally not sufficient to allege knowledge of the patent application, its family or a patent portfolio. Specific facts related to knowledge of the specific patents at issue should be plead with as much particularity as possible to avoid dismissal.

For example, in *Finjan*, the district court dismissed the claim for enhanced damages because the complaint failed to allege how knowledge of a “patent portfolio and patented technology” would lead to knowledge of the asserted patents.[64] Indeed, *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* apply, and conclusory statements about knowledge or willful blindness, or regarding egregious behavior, are insufficient to state a claim for enhanced damages.[65]

Second, because of the varying standards, it is important to know your court and know what showing is likely to be required. Failing to make the required showing from the outset may lead to unnecessary and expensive motion practice. Using the wrong standard may also necessitate an amended complaint, which also costs time and money. In addition, arguing the wrong standard in motions may annoy the judge and create a negative first impression with the court.

Conclusion

Until the Supreme Court or Federal Circuit hold otherwise, district courts are likely to continue to accept well-pled allegations of willful blindness as a substitute for knowledge of infringement. But a corporate policy of nonreview should not be considered willful blindness, absent both a subjective belief that there is a high probability of patent infringement and deliberate actions to avoid learning of that fact.

Moreover, to justify the award of enhanced damages, the circumstances of the case must support a finding of egregious misconduct that is worthy of punishment.

Ultimately, the protection from treble damages provided by a policy of not reviewing third-party patents will likely depend on the probability of patent infringement and the justification for any such policy (e.g., economic limitations).

Corporations should carefully consider such factors before adopting policies of nonreview. After all, the Federal Circuit has only provided one exemplar of behavior that will protect an organization from enhanced damages: an opinion of counsel[66] — an option that is not available to a corporation with no actual knowledge of the patent because of its policy of nonreview.

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[1] [Halo Electronics v. Pulse Electronics](#), 136 S. Ct. 1923 (2016).

[2] *Id.* at 1935.

[3] 35 U.S.C. § 284.

[4] Halo, 136 S. Ct. at 1934.

[5] *Id.* at 1935.

[6] *Id.* at 1932.

[7] *Id.* at 1933.

[8] [Boston Scientific Corp. v. Nevro Corp.](#), No. CV 18-0644-CFC, 2019 WL 6310225, at *7 (D. Del. Nov. 25, 2019).

[9] Boston Scientific, No. 2019 WL 6310225, at *7.

[10] Halo, 136 S. Ct. at 1934 (emphasis added).

[11] See [WBIP, LLC v. Kohler Co.](#), 829 F.3d 1317, 1341 (Fed. Cir. 2016) (“We do not interpret Halo as changing the established law that the factual components of the willfulness question should be resolved by the jury.”)

[12] Halo, 136 S. Ct. at 1936 (Breyer, J., concurring) (quotations omitted).

[13] WBIP, LLC, 829 F.3d at 1341.

[14] Halo, 136 S. Ct. at 1936.

[15] *Id.* at 1933.

[16] See e.g. Boston Scientific, No. 2019 WL 6310225, at *8.

[17] [Eko Brands v. Adrian Rivera Maynez Enterprises](#), 946 F.3d 1367, 1378 (Fed. Cir. 2020) (emphasis added).

[18] Halo, 136 S. Ct. at 1936.

[19] Id.

[20] Eko Brands, 946 F.3d at 1378.

[21] Id.

[22] Halo, 136 S. Ct. at 1933.

[23] The Read factors are “(1) whether the infringer deliberately copied the ideas or design of another; (2) whether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; (3) the infringer’s behavior as a party to the litigation; (4) [d]efendant’s size and financial condition; (5) [c]loseness of the case; (6) [d]uration of defendant’s misconduct; (7) [r]emedial action by the defendant; (8) [d]efendant’s motivation for harm; and (9) [w]hether defendant attempted to conceal its misconduct.” Read Corp. v. Portec, Inc., 970 F.2d 816, 827 (Fed. Cir. 1992).

[24] See e.g. [Liqwd, Inc. v. L’Oreal USA, Inc.](#), No. CV 17-14-JFB-SRF, 2019 WL 6840353, at *6 (D. Del. Dec. 16, 2019).

[25] [Presidio Components, Inc. v. Am. Tech. Ceramics Corp.](#), 875 F.3d 1369, 1383 (Fed. Cir. 2017) (holding that district courts are not required to consider the Read factors because the Halo test “merely requires the district court to consider the particular circumstances of the case to determine whether it is egregious”).

[26] [Polara Eng’g Inc. v. Campbell Co.](#), 894 F.3d 1339, 1355 (Fed. Cir. 2018) (quoting Read Corp., 970 F.2d at 828).

[27] [Global-Tech Appliances, Inc. v. SEB S.A.](#), 563 U.S. 754, 786 (2011).

[28] Global-Tech, 563 U.S. at 766.

[29] Id. at 786 (“Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).”).

[30] Id. at 766.

[31] Id. at 769.

[32] Id.

[33] Id.

[34] [Ansell Healthcare Prod. LLC v. Reckitt Benckiser LLC](#), No. 15-CV-915-RGA, 2018 WL 620968, at *7 (D. Del. Jan. 30, 2018); [Adidas Am., Inc. v. Skechers USA, Inc.](#), No. 3:16-CV-

1400-SI, 2017 WL 2543811, at *5 (D. Or. June 12, 2017) (“It is unclear, however, that the doctrine of willful blindness as articulated in *Global-Tech*, an induced infringement case, applies in the direct infringement analysis context.”).

[35] *Ansell Healthcare*, 2018 WL 620968.

[36] *Id.* at *7.

[37] *Id.*, at *7; see also [WBIP, LLC v. Kohler Co.](#), 829 F.3d 1317, 1341 (Fed. Cir. 2016) (holding that “[k]nowledge of the patent alleged to be willfully infringed continues to be a prerequisite to enhanced damages” after *Halo*).

[38] [Presidio Components, Inc. v. Am. Tech. Ceramics Corp.](#), 875 F.3d 1369, 1382 (Fed. Cir. 2017).

[39] *Global-Tech*, 563 U.S. at 786; *Halo*, 136 S. Ct. at 1936.

[40] *Ansell Healthcare*, 2018 WL 620968, at *7.

[41] See, e.g., Dmitry Karshedt, *Enhancing Patent Damages*, 51 U.C.D. L. Rev. 1427, 1480 (2018) (“As colorfully described by a patent lawyer I know, this ‘would be the patent equivalent of a driver putting on a blindfold and later claiming (truthfully) he had no actual knowledge of all the pedestrians he ran over.’”).

[42] [Motiva Patents, LLC v. Sony Corp., HTC Corp.](#), No. 9:18-CV-00180-JRG-KFG, 2019 WL 4737051 (E.D. Tex. Sept. 27, 2019).

[43] *Id.*, at *10–11 (quoting *Global-Tech*, 563 U.S. at 769) (cleaned up).

[44] *Nonend Inventions, N.V. v. Apple, Inc., et al.*, No. 2:15-CV-466-JRG-RSP, 2016 WL 1253740, at *3 (E.D. Tex. Mar. 11, 2016), report and recommendation adopted, No. 2:15-CV-466-JRG-RSP, 2016 WL 1244973 (E.D. Tex. Mar. 30, 2016).

[45] *Id.* at *3

[46] [VLSI Tech. LLC v. Intel Corp.](#), No. CV 18-966-CFC, 2019 WL 1349468, at *2 (D. Del. Mar. 26, 2019).

[47] *Id.*, at *2.

[48] *Id.*, at *2 (emphasis and alteration in original).

[49] *Motiva*, 2019 WL 4737051, at *1; *VLSI Tech.*, 2019 WL 1349468, at *1; *Nonend Inventions*, 2016 WL 1253740, at *1.

[50] *Motiva*, 2019 WL 4737051, at *4.

[51] [Intel Corp. v. Future Link Sys., LLC](#), 268 F.Supp.3d 605, 608–09 (2017).

[52] *Id.* at 623.

[53] *Id.*

[54] *Id.*

[55] *Halo*, 136 S. Ct. at 1936–37.

[56] *Id.* at 1937.

[57] See e.g. *Boston Scientific*, 2019 WL 6310225, at *8.

[58] See e.g. [Cont'l Circuits LLC v. Intel Corp.](#), No. CV16-2026 PHX DGC, 2017 WL 2651709, at *8 (D. Ariz. June 19, 2017) (collecting cases of different approaches).

[59] See *WBIP, LLC*, 829 F.3d at 1341 (“Knowledge of the patent alleged to be willfully infringed continues to be a prerequisite to enhanced damages.”); [Finjan, Inc. v. Cisco Sys. Inc.](#), No. 17-CV-00072-BLF, 2017 WL 2462423, at *5 (N.D. Cal. June 7, 2017).

[60] See e.g. *Boston Scientific*, 2019 WL 6310225, at *8; *Motiva Patents*, 2019 WL 4737051, at *13 (emphasis in original) (“[I]f Motiva had alleged actual knowledge, it would indisputably state a claim for willful infringement.”); [Kyowa Hakka Bio, Co. v. Ajinomoto Co.](#), No. CV 17-313, 2018 WL 834583, at *13 (D. Del. Feb. 12, 2018) (“[H]ere a complaint permits an inference that the defendant was on notice of the potential infringement and still continued its infringement, the plaintiff has pled a plausible claim of willful infringement”). But cf. [Raytheon Co. v. Cray, Inc.](#), No. 216CV00423JRGRSP, 2017 WL 1362700, at *5 (E.D. Tex. Mar. 13, 2017) (“Because Raytheon’s allegations concerning knowledge of the patents-in-suit are sufficient, a proper claim for willfulness has been made.”)

[61] *Boston Scientific*, 2019 WL 6310225, at *8.

[62] See e.g. *Finjan, Inc.*, 2017 WL 2462423, at *5; see also [Meetrix IP, LLC v. Cisco Sys., Inc.](#), No. 1-18-CV-309-LY, 2018 WL 8261315, at *3 (W.D. Tex. Nov. 30, 2018) (“Cisco argues that Meetrix’s complaint fails to state a claim for willful infringement because the complaint does not allege any facts raising a plausible inference of the egregious behavior required under *Halo*. The court agrees.”); [XpertUniverse, Inc. v. Cisco Sys., Inc.](#), No. 17-CV-03848-RS, 2017 WL 4551519, at *6 (N.D. Cal. Oct. 11, 2017) (Dismissing a claim of willful infringement on finding that “[a]lthough XpertUniverse has alleged knowledge and continued infringement, it needs to do more to show that Cisco has engaged in ‘egregious cases of misconduct beyond typical infringement’ that could possibly warrant enhanced damages.”); [Gamevice, Inc. v. Nintendo Co.](#), No. 18-CV-01942-RS, 2018 WL 5310792, at *5 (N.D. Cal. Aug. 6, 2018) (finding that pre-suit notice and continued infringement is insufficient to plead willful infringement without more than a conclusion of egregious conduct).

[63] See *Eko Brands*, 946 F.3d at 1378. *Eko Brands* does make clear that finding that “conduct was ‘egregious behavior’ or ‘worthy of punishment’” should not be considered a requirement for a finding of willful infringement. *Id.* Cf. [CG Tech. Dev., LLC v. FanDuel, Inc.](#), No. 216CV00801RCJVCF, 2017 WL 58572, at *6 (D. Nev. Jan. 4, 2017) (citations omitted) (“[A] willful infringement plaintiff . . . must allege some “egregious ... misconduct” occurring before the initial claim of infringement was filed.”).

[64] See e.g. *Finjan, Inc.*, 2017 WL 2462423, at *5.

[65] See also *Kyowa Hakka Bio*, 2018 WL 834583, at *13 (“Mere formulaic pleading of willful infringement will not survive a Rule 12(b)(6) motion.”).

[66] But the converse does not hold. Under 35 U.S.C. § 298, the failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent.