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Willful Blindness and Enhanced Damages: Is Ignorance Bliss?

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In the United States, a judge may increase the damages for patent infringement up to threefold^[1] resulting in awards of millions, or even billions, of dollars. In 2016, the Supreme Court, in *Halo Electronics v. Pulse Electronics*,^[2] rejected the then prevailing objective standard for determining enhanced damages and replaced it with a subjective one requiring, at a minimum, knowledge of patent infringement. Thus, in the wake of *Halo*, some organizations have adopted policies that prohibit review of third-party patents. This post explores whether enhanced damages are nonetheless a possibility where an infringer purposefully avoids knowledge of patent infringement.

Enhanced Damages after *Halo*

In *Halo*, the Supreme Court rejected “any rigid formula for awarding enhanced damages,”^[3] leaving district courts with broad discretion in making such an award. The Supreme Court did make clear, however, that enhanced damages awards are only available in “egregious cases” of misconduct that involve more than “typical” infringement.^[4] Further, the Court made clear that enhanced damages were “designed as a ‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior,” and reserved for behavior that was “willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.”^[5]

Typically, 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 § 284, plaintiffs and courts often refer to claims for enhanced damages as “willful infringement claims.”^[6] Indeed, some parties and courts go so far as to suggest that ‘willful infringement’ is an independent cause of action, despite the Patent Act not mentioning or suggesting that such a cause exists.^[7] Rather, as the Supreme Court clarified in *Halo*, willful misconduct is simply one example—albeit the archetype—of culpable behavior that may justify enhanced damages.^[8]

In practice, the determination of a claim for enhanced damages is a two step process: (1) the jury determines whether the infringement is “willful”^[9] (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 judge determines whether the

behavior is sufficiently egregious to warrant enhanced damages and the amount of enhancement, up to the statutory limit of treble damages.[10]

Knowledge, Willful Blindness, and Claims for Enhanced Damages

The Federal Circuit has made clear that “[k]nowledge of the patent alleged to be willfully infringed” is a prerequisite for enhanced damages.[11] But “‘willful misconduct’ [does] not mean that a court may award enhanced damages simply because the evidence shows that the infringer knew about the patent and *nothing more*.”[12] Instead, the Supreme Court’s *Halo* decision has been interpreted as requiring—at a minimum—knowledge of infringement.[13] And “[i]t is circumstance that transforms simple knowledge into such egregious behavior” that warrants punishment.[14]

The doctrine of willful blindness allows a finding of willful blindness to substitute for a finding of actual knowledge in criminal or civil proceedings. But neither the Supreme Court nor the Federal Circuit has weighed-in on whether the doctrine applies to claims for enhanced damages. In the context of induced infringement, however, the Supreme Court has allowed willful blindness to replace actual knowledge that the acts induced constituted patent infringement.[15] 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.”[16] In the eyes of the Supreme Court, acting with willful blindness is “just as culpable as . . . actual knowledge” because the actor “can almost be said to have actually known the critical facts.”[17]

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.”[18] And “[u]nder 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.”[19]

In absence of guidance from the Supreme Court or the Federal Circuit, several district courts have openly questioned whether willful blindness can support a claim of willful infringement, but all have ultimately concluded that, as a matter of law, it can—at least at the pleading stage.

Interestingly, in *Ansell Healthcare Products LLC v. Reckitt Benckiser LLC*, the Delaware District Court speculated that the doctrine may be more limited when applied to willful infringement and enhanced damages.[20] 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.”[21] But if instead, a defendant was 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.[22] This latter scenario could readily arise in the context of corporate policies of non-review, 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 still required.[23] Indeed, the court in *Ansell* held that where willful blindness applies, “it only substitutes for actual knowledge, as opposed to egregious behavior.”[24] And additional circumstances are required, beyond simple knowledge of actual infringement, to warrant enhanced damages.

Corporate IP Policies and Enhanced Damages

Although commentators have condemned the practice,[25] some organizations have adopted policies that prohibit review of third-party patents to protect against enhanced damages. In 2019, several district courts considered such policies with mixed results.

In *Motiva Patents v. Sony Corp., HTC Corp.*, the Eastern District of Texas held that a policy of non-review was sufficient to state a claim of willful blindness.[26] The court stated that both the creation and enforcement of “a policy prohibiting review of patents” by defendant HTC Corp. were the kinds of “‘deliberate action to avoid learning’ of potential infringement” that could amount to willful blindness and support a finding of willful infringement.[27]

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 the alleged policy of not reviewing third party patents, such a policy “does not per-se constitute ‘willful blindness.’”[28] And because there was no suggestion the defendant subjectively believed a high probability of patent infringement existed, there was no willful blindness.[29] Thus, in this case, an alleged policy of ignoring patents was insufficient, without more, to “surpass recklessness and negligence” and rise to the level of “willful blindness.”[30]

Similarly, in *VLSI Tech. LLC v. Intel Corp.*, the District of Delaware dismissed a claim for enhanced damages where the sole basis for the willful blindness claim was an alleged “corporate policy forbidding its employees from reading patents held by outside companies or individuals.”[31] Similar to *Nonend Inventions*, some plausible allegation that the corporation “subjectively believed that there was a high probability that the . . . patent existed” would have been necessary to find willful blindness.[32] In addition, even if willful blindness had been found, the court noted that only willful blindness “to [each] patent’s existence” had been alleged, and not willful blindness to the *infringement* of those patents.[33]

Importantly, *Motiva*, *Nonend*, and *VLSI* concern motions to dismiss.[34] Such motions do not resolve whether the plaintiff will ultimately prevail, but simply whether the complaint was sufficient to cross the court’s pleading threshold.[35] In *Intel Corp. v. Future Link Sys., LLC*, the District of Delaware considered a policy of non-review in the context of a motion for summary judgment.[36] On such a motion, a court is required to consider the evidence in the light most favorable to the non-moving party.[37] For this reason, the Court denied Intel’s motion. [38] 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.”[39]

None of these case demonstrates how a jury will view these issues or whether a court is likely to enhance damages. When a jury is confronted with a policy of non-review, its willfulness determination may turn on, for example, the reason for the policy, the details of its implementation and enforcement, industry practice, and circumstantial evidence related to the corporation’s assessment of the infringement risk. And a court will likely consider the circumstances surrounding both the adoption of the policy and the infringement when deciding whether to enhance damages. For example, a court could find that a policy of non-review was adopted in bad faith to try to shield the corporation from infringement and ultimately enhance damages. Conversely, if a corporation had a policy of non-review 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.[40] 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.[41]

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 patent infringement. But a corporate policy of non-review should not be considered “willful,” absent both a subjective belief that there is a high probability of patent infringement and deliberate actions to avoid learning of that particular 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 perceived likelihood of patent infringement and the justification for any such policy (*e.g.*, economic limitations). Corporations should carefully consider such factors before adopting policies of non-review. After all, the Federal Circuit has only provided one exemplar of behavior that will protect an organization from enhanced damages: an opinion of counsel[42]—an option that is not available to a corporation with no actual knowledge of the patent because of its policy of non-review.

[1] 35 U.S.C. § 284.

[2] *Halo Electronics v. Pulse Electronics*, 136 S. Ct. 1923 (2016).

[3] *Halo*, 136 S. Ct. at 1934.

[4] *Id.* at 1935.

[5] *Id.* at 1932.

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

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

[8] *Halo*, 136 S. Ct. at 1934.

[9] *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.”)

[10] *Halo*, 136 S. Ct. at 1934.

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

[12] *Halo*, 136 S. Ct. at 1936 (Breyer, J., concurring) (emphasis in original).

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

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

[15] *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 786 (2011) (“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).”).

[16] *Id.* at 766.

[17] *Id.* at 769.

[18] *Id.*

[19] *Id.*

[20] *Ansell Healthcare Prod. LLC v. Reckitt Benckiser LLC*, No. 15-CV-915-RGA, 2018 WL 620968 (D. Del. Jan. 30, 2018).

[21] *Id.* at *7.

[22] *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*).

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

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

[25] *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.’”).

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

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

[28] *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).

[29] *Id.* at *3.

[30] *Id.*

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

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

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

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

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

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

[37] *Id.* at 623.

[38] *Id.*

[39] *Id.*

[40] *Halo*, 136 S. Ct. at 1936–37 (Breyer, J., concurring).

[41] *Id.* at 1937 (Breyer, J., concurring).

[42] 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.

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