

Higher Patent Damages Likely Under New Standard for Willful Infringement

The U.S. Supreme Court just made it easier for patent owners to obtain enhanced damages against infringers. In *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, a unanimous Court overturned the previous test for enhanced damages, which was created by the Federal Circuit in 2007 in *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007). Under the *Seagate* standard, a patent owner seeking enhanced damages had to show that the infringement was "willful," which required a patent owner to prove, by clear and convincing evidence, that: (1) the infringer acted with objective recklessness; and (2) the risk of infringement was either known or so obvious that it should have been known to the infringer. Now, patent owners will have a new tool to fight infringers who steal their inventions. Infringers, on the other hand, must pay close attention to the story a patent owner will be able to tell, since it will be more powerful than ever.

The *Seagate* standard has been criticized over the years as setting an impermissibly high bar that put enhanced damages essentially out of reach in the vast majority of patent cases. The U.S. Supreme Court agreed with this criticism, holding that *Seagate* is not consistent with the plain language of 35 U.S.C. § 284 which provides that, in a case of patent infringement, courts "may increase the damages up to three times the amount found or assessed."

The Supreme Court overturned *Seagate*, eliminating the established framework for establishing willfulness. However, the Court did not adopt a new, similarly rigid framework. Instead, it established an "I know it when I see it" type of test a la Justice Potter Stewart's obscenity analysis in *Jacobellis v. Ohio*. Specifically, the Court held:

Awards of enhanced damages under the Patent Act over the past 180 years establish that they are not to be meted out in a typical infringement case, but are instead designed as a "punitive" or "vindictive" sanction for egregious infringement behavior. The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant or—indeed—characteristic of a pirate.

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The Court then placed discretion in the hands of district courts and clarified that: (1) the burden of proof is not "clear and convincing evidence," as established by *Seagate*, but rather "preponderance of the evidence"; and (2) any such decision should be reviewed by the appellate courts for abuse of discretion. This holding will make it much easier for patent owners to tell their story to a jury.

Patent owners should be aware of this reduced standard in determining the best options for enforcing their patent rights—the likelihood of large verdicts in cases of infringement just increased fairly substantially. Potential infringers, on the other hand, should be aware that they can no longer rely on their counsel's creative arguments to escape a determination of willful infringement and treble damages.

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