THE REPORTS OF WILLFULNESS'S DEMISE ARE GREATLY EXAGGERATED:
AN EMPIRICAL ASSESSMENT OF WILLFUL PATENT INFRINGEMENT
IN THE WAKE OF IN RE SEAGATE

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Willful infringement is a critical issue in patent litigation. A finding of willfulness can result in an award of enhanced damages up to triple the amount of actual damages proven by the patentee, as well as the possibility of paying the patentee's reasonable attorney's fees. Indeed, penalties of tens of millions of dollars for willful infringement are not uncommon.

For most of its existence, the Federal Circuit held that if a potential infringer had actual notice of a patent, it must satisfy an "affirmative duty of care to determine whether or not he is infringing." Among other things, this duty of care usually obligated an accused infringer to obtain an opinion of counsel before engaging in any potential infringing acts. Failure to do was likely to result in a willfulness finding.

In 2007, however, the Federal Circuit significantly altered the standard governing willful infringement with its *en banc* decision in *In re Seagate*. Specifically, *Seagate* abandoned the "affirmative duty of due care," and instead required the patentee to show by clear and convincing evidence that the accused infringer had been "objectively reckless" in its infringement. It also held that there was no longer an obligation by potential infringers to obtain an opinion of counsel. As a result, many knowledge observers asserted that *Seagate* would make proving willful infringement much more difficult for patentees, ultimately resulting in far fewer willfulness findings. Nearly three years later, however, no scholarly study has empirically analyzed the actual effect of *Seagate* in patent litigation.

This study attempts to answer that question by examining willful infringement decisions in the district courts from September 2004 through July 2010. The empirical evidence reveals that predictions that *Seagate* would have a dramatic impact on willfulness were apparently incorrect, as willful infringement continues to be found at rates only slightly lower than those before the decision. Indeed, if anything, the Federal Circuit's decision in *Knorr-Bremse*—which repealed the so-called "adverse inference" rule—may have had a more significant impact than *Seagate* itself. Finally, this study evaluates the impact of several common factors, such as copying and substantial defenses to infringement, on willfulness findings after *Seagate*.

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