B.3 Infringement

3.10 WILLFUL INFRINGEMENT

[This instruction should be given only if willfulness is in issue.]

In this case, [patent holder] argues that [alleged infringer] willfully infringed the [patent holder]'s patent. If you have decided that [alleged infringer] has infringed, you must go on and address the additional issue of whether or not this infringement was willful. Willfulness requires you to determine whether [patent holder] proved that it is more likely than not that [alleged infringer] knew of [patent holder]'s patent and that the infringement by [alleged infringer] was intentional. You may not determine that the infringement was willful just because [alleged infringer] was aware of the [ ] patent and infringed it. Instead, you must also find that [alleged infringer] deliberately infringed the [ ] patent.

To determine whether [alleged infringer] acted willfully, consider all facts and assess [alleged infringer's] knowledge at the time of the challenged conduct. Facts that may be considered include, but are not limited, to:

(1) Whether or not [alleged infringer] acted consistently with the standards of behavior for its industry;

(2) Whether or not [alleged infringer] intentionally copied a product of [patent holder] that is covered by the [ ] patent;

(3) Whether or not [alleged infringer] reasonably believed it did not infringe or that the patent was invalid;

(4) Whether or not [alleged infringer] made a good-faith effort to avoid infringing the [ ] patent, for example, whether [alleged infringer] attempted to design around the [ ] patent; and

(5) Whether or not [alleged infringer] tried to cover up its infringement.

[Give this additional instruction only if the alleged infringer relies on a legal opinion as a defense to an allegation of willful infringement]

[Alleged infringer] argues it did not act willfully because it relied on a legal opinion that advised [alleged infringer] either (1) that the [product] [method] did not infringe the [ ] patent or (2) that the [ ] patent was invalid. You must evaluate whether the opinion was of a quality that reliance on its conclusions was reasonable.

[If jury is made aware that there was not a legal opinion that alleged infringer is relying on]

You may not assume that merely because [alleged infringer] did not obtain a legal opinion about whether [it] infringed the [ ] patent, that the opinion would have been unfavorable. The absence of a legal opinion may not be used by you to find that [alleged infringer] acted willfully. Rather, the issue is whether, considering all the facts, [patent holder] has established that [alleged

infringer]'s conduct was willful.

Authorities

35 U.S.C. § 284; *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016) (preponderance of the evidence standard for finding willfulness); *Eko Brands, LLC v. Adrian Rivera Mayanez Enters., Inc.*, No. 2018-2215, slip op. at 16 (Fed. Cir. January 13, 2020) ("Under *Halo*, the concept of willfulness requires a jury to find no more than deliberate or intentional infringement."); *Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.*, 876 F.3d 1350, 1371 (Fed. Cir. 2017) ("*Halo* emphasized that subjective willfulness alone—i.e., proof that the defendant acted despite a risk of infringement that was 'either known or so obvious that it should have been known to the accused infringer,'—can support an award of enhanced damages." (quoting *Halo*, 136 S. Ct. at 1930)); *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016) ("Knowledge of the patent alleged to be willfully infringed continues to be a prerequisite to enhanced damages."); *WMS Gaming Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1354 (Fed. Cir. 1999) (knowledge of the patent necessary to show willfulness and explaining, in the context of willful infringement, that "the patent law encourages competitors to design or invent around existing patents"); *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (willful blindness is "just as culpable as … actual knowledge").

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 or that the infringer intended to induce infringement of the patent.").

Committee Comments

Some model jury instructions provide an instruction on legal opinions of counsel both where the accused infringer does and does not raise a legal opinion as a defense to willful infringement, *see, e.g.*, 2018 AIPLA Model Patent Jury Instructions, at 11.1 (https://www.aipla.org/home/news-publications/model-patent-jury-instructions). Others only provide an instruction where the accused infringer relies on a legal opinion, *see, e.g.*, N.D. Cal., Model Patent Jury Instructions, at 3.8 (https://www.cand.uscourts.gov/juryinstructions).

Some model jury instructions provide a list of non-exhaustive factors for consideration, *see, e.g.*, N.D. Cal., Model Patent Jury Instructions, at 3.8 (https://www.cand.uscourts.gov/juryinstructions). Others decline to provide a list of factors, on the theory that the factors are better left to attorney argument or may mislead a jury to believe other factors should not be considered. *See, e.g.,* Seventh Circuit, 2008 Patent Jury Instructions, at 11.2.14 (www.ca7.uscourts.gov/Pattern-Jury-Instr.) It is the Committee's view that to the extent the court decides to provide a list of factors for the jury's consideration (an issue on which the Committee takes no position), only the factors for which there is evidentiary support should be included. *Cf. Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1231 (Fed. Cir. 2014) (stating that "the district court erred by instructing the jury on multiple *Georgia-Pacific* factors that are not relevant, or are misleading, on the record before it").