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**See No Evil:
How the Supreme Court's Decision in *Global-Tech
Appliances, Inc. v. SEB S.A.* Further Muddles the Intent
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See No Evil: How the Supreme Court's Decision in *Global-Tech Appliances, Inc. v. SEB S.A.* Further Muddles the Intent Element of Induced Infringement

By Jeremy Adler*

I. INTRODUCTION

¶1 According to the United States Patent Act (the “Act”), one who “actively induces infringement of a patent” is liable for patent infringement.¹ This section of the Act holds actors accountable for inducing other infringing acts, including making, using, offering to sell, or selling any patented invention without the authority to do so.²

¶2 Until recently, the requisite mental state to assign liability under induced patent infringement was largely undetermined. The Federal Circuit has vacillated between only requiring intent to induce the acts that constitute patent infringement³ and a more stringent standard requiring knowledge that the defendant’s acts induced infringement of the patent in question.⁴ While the Supreme Court in *Global-Tech Appliances, Inc. v. SEB S.A.*⁵ finally ruled that the latter interpretation of § 271(b) of the Patent Act was correct, it went further. The Court held that a defendant could willfully blind itself to the fact that its actions induced patent infringement and be held liable.

¶3 This Note will serve as a critique of the Court’s decision to import the doctrine of willful blindness into patent law in general and induced infringement in particular. Section II will briefly track the development of induced patent infringement liability and its *mens rea* requirement. Section III will frame the *Global-Tech* case as an outgrowth of the uncertainty surrounding the intent standard in both the Federal Circuit and the Supreme Court. Section IV will describe the origin, purpose, and application of the willful blindness doctrine in the criminal context. Finally, Section V will argue that the Court’s adoption of willful blindness to satisfy induced patent infringement’s intent requirement was inappropriate in both a theoretical sense and as a matter of practical application.

* J.D., Northwestern University School of Law, 2013.

¹ 35 U.S.C. § 271(b) (2010).

² *See id.* § 271(a).

³ *See Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) (“[P]roof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement.”).

⁴ *See Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) (“The plaintiff has the burden of showing that the alleged infringer’s actions induced infringing acts *and* that he knew or should have known his actions would induce actual infringements.”).

⁵ 131 S. Ct. 2060 (2011).

II. THE DEVELOPMENT OF INDUCED INFRINGEMENT AND ITS INTENT ELEMENT

¶4 Secondary liability in patent law was originally expressed in terms of contributory infringement. The common law punished those who aided and abetted the commission of a tort. Courts applied this same doctrine to patent law in cases involving the modern equivalent of contributory infringement: those where a defendant assisted another party's infringement by providing a component specially adapted to infringe an owner's patent.⁶ The purpose of wielding this form of liability against defendants is to provide patent owners protection from infringement when the truly responsible party is not liable for direct infringement or when the direct infringer is impractical to sue.⁷

¶5 The paradigmatic instance of contributory infringement occurred when a third party sold a component of a patented invention that lacked any noninfringing uses.⁸ However, when the component was a dual-use product that potentially had both infringing and noninfringing purposes, courts looked to conduct other than the sale of a component when adjudicating indirect liability.⁹ For example, in *Westinghouse Electric & Manufacturing Co. v. Precise Manufacturing Corp.*,¹⁰ the defendants sold transformers and condensers that were later used in combination with other parts to "make possible" the production of the plaintiff's patented circuits.¹¹ Although the parts had both infringing and noninfringing uses, the Second Circuit Court of Appeals inferred that the defendants intended to infringe the patented invention. Thus the defendants were contributorily liable, in part because of their advertisements pointing out how to assemble and use the combination in a way that would infringe the plaintiff's patent.¹² In this way, the concept of induced infringement originated as a tool to infer intent in a contributory infringement case rather than as a separate offense.¹³

¶6 However, in 1952, Congress codified in the Patent Act both contributory patent infringement and active inducement of infringement as separate theories of secondary liability.¹⁴ Thus, in § 271(b), the Act states that one who "actively induces infringement of a patent shall be liable as an infringer."¹⁵ So while contributory infringement under § 271(c) holds defendants liable for the sale of components used to infringe a patent, induced infringement under § 271(b) holds defendants liable for other acts that aid and abet direct infringement.

¶7 While § 271(b) does not contain an explicit knowledge requirement, it is generally accepted that an actor must actively and knowingly aid and abet another's direct infringement of a patent to be held liable for induced infringement.¹⁶ This understanding

⁶ Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225, 227 (2005).

⁷ *Id.* at 228.

⁸ Charles W. Adams, *A Brief History of Indirect Liability for Patent Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 369, 375 (2006).

⁹ Lemley, *supra* note 6, at 227.

¹⁰ *Westinghouse Elec. & Mfg. Co. v. Precise Mfg. Corp.*, 11 F.2d 209 (2d Cir. 1926).

¹¹ *Id.* at 209.

¹² *Id.* at 211-12.

¹³ Lemley, *supra* note 6, at 227.

¹⁴ See 35 U.S.C. § 271(b)-(c) (2010).

¹⁵ *Id.* § 271(b).

¹⁶ 5 DONALD S. CHISUM, CHISUM ON PATENTS § 17.04 (2011). See also *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988) (pointing to case law and legislative history as imputing the word "knowing" into § 271(b)).

arises from indirect infringement's common law origins in accessory liability, which historically required the defendant to know that the behavior he or she aided was wrongful.¹⁷ Moreover, courts have held that active inducement under § 271(b) requires that the defendant possess "specific intent" to aid and abet the infringing actions.¹⁸

18 In the past, the Federal Circuit Court of Appeals has split on what exactly a defendant must know or specifically intend to be liable for induced patent infringement. At times, the court merely held that a defendant who intends to cause the acts which constitute infringement could be liable for inducement.¹⁹ This standard set the bar for liability quite low since "most people [do] intend the natural consequences of their acts."²⁰ Yet at other times, the court set the specific intent standard higher, requiring that the defendant not only intend to cause the acts that constitute infringement but, in addition, to actually intend to ultimately infringe the patent.²¹ This distinction constituted the underlying doctrinal dispute the Court in *Global-Tech* set out to resolve.²²

19 In 2005, the Supreme Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*²³ weighed in on the intent standard for infringement by employing patent law to resolve a copyright dispute. While the Court did not explicitly resolve the Federal Circuit split discussed above, it did attempt to explain what types of conduct evidenced inducement in both patent and copyright law. Metro-Goldwyn-Mayer ("MGM") and a group of copyright holders, including motion picture studios, recording companies, songwriters, and music publishers, accused Grokster and StreamCast Networks, Inc. of distributing their software to purposely enable users to reproduce and distribute copyrighted works in violation of the Copyright Act.²⁴ While the accused software had some noninfringing uses,²⁵ the Court refused to apply a rigid rule of secondary liability

¹⁷ Lemley, *supra* note 6, at 236. See also *Nat'l Presto Indus., Inc. v. West Bend Co.*, 76 F.3d 1185, 1194 (Fed. Cir. 1996) ("The statutory liability for inducement of infringement derives from the common law, wherein acts that the actor knows will lead to the commission of a wrong by another, place shared liability for the wrong on the actor.").

¹⁸ *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1364 (Fed. Cir. 2003) ("[M]ere knowledge of possible infringement by others does not amount to inducement; specific intent and action to induce infringement must be proven.").

¹⁹ *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) ("[P]roof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement."); *Moba, B.V. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1318 (Fed. Cir. 2003) (applying the *Hewlett-Packard* standard for intent to induce infringement).

²⁰ Lemley, *supra* note 6, at 238.

²¹ *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) ("It must be established that the defendant possessed specific intent to encourage another's infringement and not merely that the defendant had knowledge of the acts alleged to constitute inducement. The plaintiff has the burden showing that the alleged infringer's actions induced infringing acts *and* that he knew or should have known his actions would induce actual infringements.") (emphasis in original); *Ferguson Beaugard/Logic Controls v. Mega Sys., LLC*, 350 F.3d 1327, 1342 (Fed. Cir. 2003) (applying the *Manville Sales* standard for intent to induce infringement).

²² Some have argued that there was no intra-Federal Circuit split at all. See, e.g., Tal Kedem, Note, *Secondary Liability for Actively Inducing Patent Infringement: Which Intentions Pave the Road?*, 48 WM. & MARY L. REV. 1465 (2007) (arguing that the court in *Hewlett-Packard* through its own language merely set a necessary, and not sufficient, condition for finding intent to induce infringement).

²³ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005).

²⁴ *Id.* at 920–21.

²⁵ While 90% of the files available for download on the defendants' software were found to be copyrighted works, Grokster and StreamCast disputed this number and argued that musical performers often disseminated their works for free on peer-to-peer networks to gain new audiences. *Id.* at 922–23.

that would preclude a finding of copyright infringement merely because the software was capable of substantial lawful use.²⁶ Rather, the Court turned to the doctrine of induced patent infringement to support its view that other evidence of inducement, “such as advertising an infringing use or instructing how to engage in an infringing use,” could be relevant when adjudicating secondary liability for copyright infringement.²⁷ In relying on patent principles, the Court emphasized that inducement required “clear expression or other affirmative steps taken to foster infringement” and “purposeful, culpable expression and conduct.”²⁸ Commentators have differed over the level of clarity exhibited in *Grokster*,²⁹ but the Court undoubtedly framed induced infringement in terms of positive intent, evidenced by clear actions, to compel a third party to directly infringe another’s patent.

¶10 Despite the Court’s apparent position in *Grokster* that induced infringement required purposeful conduct, an en banc (in relevant part) Federal Circuit in *DSU Medical Corp. v. JMS Co.*³⁰ complicated matters by resurrecting a standard close to negligence to determine inducement liability. The court invoked prior language used in *Manville Sales Corp. v. Paramount Sys., Inc.*³¹ to define requisite specific intent for induced infringement. To be held liable, an infringer must intend not only to commit the inducing acts but also intend to cause the underlying infringement.³² However, in laying down this more stringent standard, the *Manville Sales* court had originally stated that “[t]he plaintiff has the burden of showing that the alleged infringer’s actions induced infringing acts and that he knew or should have known his actions would induce actual infringements.”³³ After using this quote from *Manville Sales* to seemingly resolve the Federal Circuit split discussed above, the *DSU Medical* court claimed that the *Grokster* decision validated its articulation of the state of mind requirement because the Supreme Court had emphasized “purposeful, culpable expression and conduct.”³⁴ These two concepts, a “should have known” negligence standard and purposeful, culpable conduct characterized by specific intent, seem to be at odds with one another.³⁵ Yet, the *DSU*

²⁶ *Id.* at 934.

²⁷ *Id.* at 936.

²⁸ *Id.* at 936–37.

²⁹ Compare Gary N. Frischling & Miriam Bitton, *Grokking Grokster: Has the Supreme Court Changed Inducement Under Patent Law?*, 34 *AIPLA Q. J.* 265, 284–85 (2006) (“The Supreme Court’s opinion seems to have converted a relatively bright line rule into an exercise of weighing intent evidence, without any firm benchmarks against which to test such evidence.”), with Richard J. Stark & Andrei Harasymiak, *Inducement of Patent Infringement: The Intent Standard and Circumstantial Evidence of Intent*, in *RECENT TRENDS IN PATENT INFRINGEMENT LAWSUITS: LEADING LAWYERS ON UNDERSTANDING RECENT CASES AND CONSTRUCTING EFFECTIVE DEFENSE STRATEGIES* 111 (2011 ed., 2011) available at 2011 WL 601766 at 8–9 (arguing that the Court in *Grokster* made it clear that it was using the substantive law of patent inducement to decide the case and that it settled the requisite level of intent).

³⁰ *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293 (Fed. Cir. 2006) (en banc).

³¹ *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990).

³² *DSU Medical*, 471 F.3d at 1304.

³³ *Manville Sales*, 917 F.2d at 553 (second emphasis added).

³⁴ *DSU Medical*, 471 F.3d at 1305–06 (quoting *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 937 (2005)).

³⁵ See Stark & Harasymiak, *supra* note 29, at 11–12 (“A negligence-type ‘should have known’ standard and a specific intent standard are simply not consistent with one another. As Justice Holmes famously noted, ‘Even a dog distinguishes between being stumbled upon and being kicked.’”) (internal citation omitted).

Medical court endorsed both in the same opinion and declared them equivalent in operation and rationale.

¶11 Following the *Grokster* and *DSU Medical* decisions, there was considerable confusion regarding how much knowledge and intent a third party must possess in order to be liable for induced patent infringement.³⁶ First, the Federal Circuit split in earlier decisions between holding liable those who intended actions that induced others to directly infringe patents and those who actually intended to bring about the ultimate infringement. Then, even as the Supreme Court in *Grokster* and the Federal Circuit in *DSU Medical* appeared to favor the latter interpretation, prior Federal Circuit language in *Manville Sales* reared its head and introduced a degree of uncertainty in the analysis by suggesting negligence could satisfy the intent requirement. The suggestion that a showing of negligence could somehow suffice to prove induced infringement was a reflection of the inherent difficulty of proving intent without a smoking gun and foreshadowed the Supreme Court’s use of another type of “should have known” standard: willful blindness.

III. GLOBAL-TECH COMPLICATES MATTERS FURTHER BY INTRODUCING WILLFUL BLINDNESS

A. *Factual Background*

¶12 SEB S.A. is a French maker of home appliances that invented a “cool-touch” deep fryer for home use in the late 1980’s.³⁷ A plastic outer housing surrounded the deep fryer’s metal pot, and a ring suspending the pot insulated the housing from heat by creating air space between the two components.³⁸ The invention’s air space ensured that the deep fryer’s external surfaces remained cool during the frying process.³⁹ SEB eventually obtained a patent for the design in 1991 and successfully sold the deep fryer under the “T-Fal” brand.⁴⁰

¶13 Sunbeam Products, Inc., a United States competitor of SEB, asked Pentalpha Enterprises, Ltd., a Hong Kong corporation,⁴¹ to supply it with deep fryers meeting certain specifications in 1997.⁴² To meet those specifications, Pentalpha purchased an SEB fryer bearing no U.S. patent markings in Hong Kong and copied all but the fryer’s cosmetic features.⁴³ Once Pentalpha copied the design, it retained an attorney to conduct a right-to-use study, but failed to inform the attorney that it had directly copied SEB’s design.⁴⁴ After a search in which he did not find SEB’s patent, the attorney issued an opinion letter in August 1997 stating that Pentalpha’s deep fryer did not infringe any

³⁶ See *id.* at 12–13 (listing numerous post-*DSU* Federal Circuit decisions variously applying either a specific intent standard or “knew or should have known” standard).

³⁷ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2063 (2011).

³⁸ *Id.* at 2063–64.

³⁹ *Id.* at 2063.

⁴⁰ *Id.* at 2064.

⁴¹ Pentalpha is a wholly-owned subsidiary of Global-Tech Appliances, Inc., the named petitioner at the Supreme Court. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

patents he had located.⁴⁵ Pentalpha proceeded to sell the deep fryers to Sunbeam, who in turn resold them in the United States under their trademarks and for a lower price than SEB's fryers, precipitating a defection in customers from SEB to Sunbeam.⁴⁶

¶14 In addition to suing Sunbeam for direct infringement of its deep fryer patent in 1998, SEB also notified Pentalpha of the lawsuit soon thereafter.⁴⁷ Despite this notification, Pentalpha continued selling the deep fryers to Fingerhut Corp. and Montgomery Ward & Co., prompting SEB to sue Pentalpha for direct infringement and active inducement of infringement under 35 U.S.C. § 271(b) after settling with Sunbeam.⁴⁸

¶15 After a five-day trial in federal district court, the jury found for SEB on both counts and also determined that Pentalpha's infringement had been willful.⁴⁹ Following the verdict, Pentalpha moved for a new trial or judgment as a matter of law, arguing that there was insufficient evidence to support the finding of induced infringement since Pentalpha did not actually know of SEB's deep fryer patent until it received notice of the Sunbeam lawsuit.⁵⁰ The District Court denied the relevant post-trial motions and entered judgment against Pentalpha in the amount of \$4,878,341, leading to Pentalpha's appeal to the Federal Circuit.⁵¹

B. *The Federal Circuit Decision and "Deliberate Indifference"*

¶16 In affirming the jury's finding of induced patent infringement, the Federal Circuit first considered the scope of *DSU Medical*,⁵² which had been decided after the jury verdict at the district court level.⁵³ The court determined that while *DSU Medical* stood for the requirement that an inducer under § 271(b) must knowingly induce infringement, which necessarily includes that the inducer knew or should have known of the patent-in-suit, the prior Federal Circuit decision did not "set out the metes and bounds of the knowledge-of-the-patent requirement."⁵⁴ As a result, the court was required to address the novel situation that arises when an accused induced infringer does not possess knowledge of the infringed patent, as was the case here since Pentalpha did not know of the patent until it was put on notice of the litigation involving Sunbeam.

¶17 The court determined that specific intent, which was required to find inducement, was "not so narrow as to allow an accused wrongdoer to actively disregard a known risk that an element of the offense exists."⁵⁵ The court went on to distinguish this "deliberate indifference" from the "should have known" standard articulated in *DSU Medical* by

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1368 (Fed. Cir. 2010) *cert. granted*, 131 S. Ct. 458 (2010) and *aff'd sub nom. Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).

⁵² *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293 (Fed. Cir. 2006) (en banc).

⁵³ *SEB S.A.*, 594 F.3d at 1375–76.

⁵⁴ *Id.* at 1376 ("As Chief Judge Michel's concurring opinion noted, the record in *DSU Medical* showed that the alleged infringer had actual knowledge of the patent-in-suit. 'Accordingly, the "knowledge of the patent" issue [was] not before us.') (internal citation omitted).

⁵⁵ *Id.*

noting that the latter is an objective test “whereas the former may require a subjective determination that the defendant knew of and disregard an overt risk that an element of the offense existed.”⁵⁶ Furthermore, the court emphasized that “deliberate indifference of a known risk is not different from actual knowledge, but is a form of actual knowledge.”⁵⁷

¶18 In its application of the “deliberate indifference” standard to the case at bar, the Federal Circuit noted that Pentalpha had copied all but the cosmetic features of SEB’s cool-touch deep fryer,⁵⁸ Pentalpha failed to tell the attorney conducting the right-to-use study that it had based its product on the SEB fryer,⁵⁹ and that Pentalpha’s president was “well versed” in the United States patent system.⁶⁰ The court also stated that while a defendant may defeat proof of knowledge through a showing of deliberate indifference by providing exculpatory evidence that it actually believed that a patent covering the accused product did not exist, Pentalpha produced no such evidence.⁶¹ Although Pentalpha argued that it should have been excused since the SEB deep fryer it copied bore no U.S. patent number, it did not argue that its reliance on a lack of a mark led to a belief that the deep fryer was not protected by a patent.⁶² Furthermore, even if Pentalpha had made that argument, the court would not have found it believable unless it was supplemented by an explanation for why Pentalpha expected a deep fryer purchased in Hong Kong to have U.S. patent markings.⁶³ Thus, the court found that the record supported the conclusion that Pentalpha deliberately ignored the risk that SEB had patented its deep fryer and that the jury’s finding of inducement was justified.⁶⁴

C. *The Supreme Court Decision and “Willful Blindness”*

¶19 On appeal, the Supreme Court affirmed the Federal Circuit’s decision but found induced infringement based on a standard of “willful blindness” instead of “deliberate indifference.” Justice Samuel Alito’s majority opinion first turned to the ambiguous language of 35 U.S.C. § 271(b). The Court determined that the statute’s reference to a party that “induces infringement” does not, on its face, resolve whether that party “must persuade another to engage in conduct that the inducer knows is infringement.”⁶⁵ Turning to the case law for answers instead, the Court ultimately relied on a previous

⁵⁶ *Id.*

⁵⁷ *Id.* at 1377 (citing *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007) (“Deliberate avoidance is not a standard less than knowledge; it is simply another way that knowledge may be proved); *Accord Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 84 n.14 (2d Cir. 2005) (“We note that a party’s knowledge of a disputed fact may also be proved through evidence that he consciously avoided knowledge of what would otherwise have been obvious [to] him.”)).

⁵⁸ *SEB S.A.*, 594 F.3d at 1377 (“The owner of a company related to Pentalpha testified that Pentalpha’s engineer took a T-Fal deep fryer and used ‘the same ring that separates . . . the wall making it a cool touch unit and the construction, basically everything the same; thermostat, it was the same; the timer was the same, just a little bit different on the cosmetics of the outside appearance for the deep fryer.’”).

⁵⁹ *Id.*

⁶⁰ *Id.* (“Pentalpha’s president, John Sham . . . testified that he was the named inventor on 29 U.S. patents . . .”).

⁶¹ *Id.* at 1377–78.

⁶² *Id.* at 1378.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Global-Tech*, 131 S. Ct. at 2065.

Supreme Court decision⁶⁶ holding that a contributory infringer under § 271(c) “must know ‘that the combination for which his component was especially designed was both patented and infringing.’”⁶⁷ Although the Court in that case was deeply divided, the majority opinion noted that the holding had become a mainstay in the law of contributory infringement under § 271(c) and thus proceeded on the premise that § 271(c) required knowledge of the existence of the infringed patent.⁶⁸ With that premise in mind, the Court held that § 271(b) required the same level of knowledge given the common origins of both provisions and the fact that each provision’s language creates the same interpretive choice.⁶⁹ Thus, the Court once and for all resolved the Federal Circuit split regarding the level of knowledge required of an inducer under § 271(b).

¶20 The Court then rejected the Federal Circuit’s use of the deliberate indifference standard, yet upheld its decision by employing the doctrine of willful blindness to satisfy the knowledge requirement under § 271(b).⁷⁰ SEB had argued in its brief that Pentalpha would possess requisite knowledge under a willful blindness standard and that the Federal Circuit’s “deliberate indifference” standard was just another formulation of willful blindness.⁷¹

¶21 The Court first noted that willful blindness was established in the criminal law as a way to hold defendants accountable when they “deliberately shield themselves from clear evidence of critical facts that are strongly suggested by the circumstances.”⁷² It cited the traditional rationale for willful blindness as the belief that a defendant who willfully blinds himself is just as culpable as someone who has actual knowledge.⁷³ Since the doctrine had gained wide acceptance in the federal judiciary,⁷⁴ the Court saw no reason why it should not apply in civil lawsuits for induced patent infringement.⁷⁵

¶22 Willful blindness, according to the Court, contains two basic requirements: “(1) the 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.”⁷⁶ The Court emphasized that this formulation identifies the willfully blind defendant “who can almost be said to have actually known the critical facts.”⁷⁷ Additionally, the Court distinguished the willful blindness test from the less stringent deliberate indifference standard applied by the Federal Circuit. It observed that the deliberate indifference standard allowed a finding of requisite knowledge when there was only a “known risk” that the induced acts

⁶⁶ See generally *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964).

⁶⁷ *Global-Tech*, 131 S. Ct. at 2067 (internal citation omitted).

⁶⁸ *Id.* at 2068.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Brief for Respondent at 33–43, *Global Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011) (No. 10-6), 2010 WL 5488407.

⁷² *Global-Tech*, 131 S. Ct. at 2068–69.

⁷³ *Id.* at 2069.

⁷⁴ The Court noted that every federal Court of Appeals, with the possible exception of the D.C. Circuit, had “fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.” *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2070.

⁷⁷ *Id.* at 2070–71.

were infringing.⁷⁸ But deliberate indifference did not require active efforts by the inducer to avoid knowing of the infringing nature of the act.⁷⁹

¶23 Although the Federal Circuit had employed the less demanding deliberate indifference test, the Supreme Court ruled that the jury “could have easily found” that Pentalpha willfully blinded itself to the infringing nature of the sales it encouraged Sunbeam to make before it was put on notice by SEB’s lawsuit in 1998 against Sunbeam.⁸⁰ The Court reasoned that (1) SEB’s cool-touch fryer “was an innovation in the U.S. market when Pentalpha copied it” with growing sales and that Pentalpha knew this, (2) Pentalpha believed that that SEB’s fryer embodied advanced technology valuable in the U.S. market since it copied only the cosmetic features of SEB’s fryer, (3) Pentalpha decided to copy a deep fryer in Hong Kong with the knowledge that products in foreign markets do not usually bear U.S. patent markings, and (4) Pentalpha failed to tell the attorney conducting the right-to-use study that the product to be evaluated was simply a knock-off of SEB’s deep fryer.⁸¹ Taken together, these details amounted to an easy case in the mind of the Court, even under the more demanding willful blindness test.

¶24 Justice Anthony Kennedy was the only dissenter. He approved of the majority’s initial construction of § 271(b), but disagreed with its invocation of willful blindness and suggested that the Federal Circuit should review the lengthy trial transcript with the new willful blindness test in mind on remand.⁸² Kennedy took issue with the Court’s ready acceptance of the notion that those who willfully blind themselves are equally culpable as those who have actual knowledge.⁸³ Perhaps, Kennedy suggested, a person’s culpability depends on one’s reasons for remaining blind.⁸⁴ Regardless, he believed this moral question should be left to the political branches, especially since the purposes of punishment in criminal law are wholly different from the utilitarian purpose of patent law found in the Constitution.⁸⁵ Additionally, Kennedy questioned the majority’s reliance on the Federal Judiciary’s acceptance of willful blindness as a trivial exercise in “counting courts.”⁸⁶ Finally, Kennedy noted that there was no need to invoke a novel doctrine since facts supportive of willful blindness may suggest actual knowledge and juries often use circumstantial evidence to infer knowledge from conduct.⁸⁷

IV. THE DOCTRINE OF WILLFUL BLINDNESS IN THE CRIMINAL CONTEXT

¶25 Before assessing the wisdom of the Court’s decision to invoke willful blindness in the civil patent context, it is first necessary to briefly discuss the doctrine’s use and justifications in criminal law.

⁷⁸ *Id.* at 2071.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2072, 2074.

⁸³ *Id.* at 2072.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2073. The majority takes issue with this assertion, arguing in a footnote that utilitarian concerns do not demand a stricter standard for knowledge. *Id.* at 2070 n.8.

⁸⁶ *Id.* at 2073.

⁸⁷ *Id.*

¶26 Willful blindness originated in the English common law as a substitute for actual knowledge, and early English judicial authorities referred to a state of mind where one “wilfully shut his eyes” as “connivance” or “constructive knowledge.”⁸⁸ In the late 19th century, several English cases appeared in which innkeepers and hall-porters denied knowledge of gaming on their premises. However, the courts stated that when a defendant purposely avoids acquiring knowledge, the requirement of actual knowledge was unnecessary.⁸⁹

¶27 There are three general uses of willful blindness in the criminal law. First, it is sometimes employed by courts as circumstantial evidence to infer that a defendant had actual knowledge but pretended not to possess that knowledge.⁹⁰ Other times, willful blindness may be used to satisfy a required *mens rea* that is different from and less stringent than actual knowledge.⁹¹ Finally, the most prevalent and controversial use occurs when a court employs willful blindness to satisfy the *mens rea* of actual knowledge.⁹²

¶28 The predominant justification for substituting willful blindness for actual knowledge is the “equal culpability” thesis, maintaining that those who willfully blind themselves are as culpable as those who possess actual knowledge. In *Global-Tech*, the majority endorsed this idea when it justified its decision to adapt willful blindness to patent law.⁹³ The thesis is deemed by some to be essential if willful blindness is to be considered as a defensible theory of liability at all.⁹⁴

¶29 The Court in *Global-Tech* also hinted at another rationale for the use of willful blindness. Justice Alito’s majority opinion suggested that those “who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”⁹⁵ As will be argued below, the addition of this justification in the Court’s reasoning confuses the operational nature of willful blindness as it relates to patent law because it implies that willful blindness is merely a tool to turn evidence suggestive of knowledge into evidence of actual knowledge.

¶30 The Model Penal Code contemplates willful blindness by providing an exception to the knowing state of mind required for some criminal offenses. The Code defines acting knowingly with respect to a material element of an offense⁹⁶ and allows that mental state

⁸⁸ Jonathan L. Marcus, Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2233 (1993).

⁸⁹ *Id.* at 2233–34.

⁹⁰ Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1360 (1992).

⁹¹ *Id.* at 1360. For instance, the doctrine may be used to satisfy recklessness or even negligence. *Id.*

⁹² *Id.* at 1361.

⁹³ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069 (2011) (“The traditional rationale for [willful blindness] is that defendants who behave in this manner are just as culpable as those who have actual knowledge.”).

⁹⁴ See, e.g., Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 53 (1994) (“Unless [willful blindness and genuine knowledge] were equally culpable, it would be outrageous to hold a defendant with the first mental state liable for violating a statute that required the second mental state.”).

⁹⁵ *Global-Tech*, 131 S. Ct. at 2069 (citing *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976)).

⁹⁶ MODEL PENAL CODE § 2.02(2)(b) (1985) (“A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause

to be established by awareness of a high probability of a fact's existence when that particular fact is an element of the offense.⁹⁷ An important distinction between this formulation and the one used by the Supreme Court in *Global-Tech* is the added requirement that the defendant consciously avoid learning the existence of that fact.

¶31 In addition to the Model Penal Code's portrayal of willful blindness, there are two others that consistently crop up in judicial opinions: recklessness-based descriptions and willfulness-based constructions.⁹⁸ The former involves expressions including: "recklessly stated as facts matters of which he knew he was ignorant"; "recklessly and willfully closed his eyes to sources of information"; and "demonstrated at the very least a reckless indifference to the truth."⁹⁹ The latter involves statements like "purposely refrains from obtaining . . . knowledge"; "willfully and intentionally remain ignorant of a fact"; and "deliberately closed his eyes to what would otherwise have been obvious to him."¹⁰⁰

¶32 As one can observe even from this brief and simplistic overview of willful blindness in criminal law, the doctrine is not as monolithic as the Court in *Global-Tech* presented it. There are differing justifications, uses, and definitions of willful blindness that together generate a complex picture of the doctrine's deployment in criminal cases. Unfortunately, the Supreme Court has imported the current confused nature of willful blindness into patent law.

V. INTRODUCING WILLFUL BLINDNESS INTO THE INDUCED INFRINGEMENT INTENT ANALYSIS RAISES A HOST OF ISSUES

¶33 The Supreme Court's decision to employ willful blindness as a tool to determine whether a defendant possesses the requisite level of knowledge in induced patent infringement cases had both theoretical and practical implications that only served to complicate, rather than clarify, the inquiry. While this Note focuses on the decision's impact on the adjudication of induced infringement, it is worth mentioning that willful blindness may now very well pervade contributory infringement analysis under 35 U.S.C. § 271(c) since the Court explicitly based its intent analysis on the common origins of contributory and induced infringement.

A. *Willful Blindness is Not a Universally Accepted Doctrine*

¶34 As an initial matter, it should be noted that willful blindness as a doctrine is not unanimously accepted and commentators have attacked the concept on multiple levels. The "equal culpability" thesis rests on unstable ground and is not well-defended.¹⁰¹ The

such a result.").

⁹⁷ *Id.* § 2.02(7) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

⁹⁸ Charlow, *supra* note 90, at 1368–71.

⁹⁹ *Id.* at 1368–69 (internal citations omitted).

¹⁰⁰ *Id.* at 1370–71 (internal citations omitted).

¹⁰¹ Husak & Callender, *supra* note 94, at 54 ("Yet the judgment that wilful ignorance and knowledge are equivalent in culpability, though frequently asserted, is seldom defended. Rollin Perkins and Ronald Boyce are perhaps the only theorists to have made an explicit attempt to argue in favor of the 'equal culpability' thesis. Their defense refers to what an 'honest person' would have done under the circumstances. They write: 'No honest person would deliberately fail to find out the truth for fear of learning that what he was

principal objection to the thesis is that it legally equates the culpability of a dishonest person with someone who has genuine knowledge and that not all dishonest people are equally culpable.¹⁰² It is also unclear if future courts will be certain which version of willful blindness to apply. Although the Supreme Court in *Global-Tech* did not adopt the Model Penal Code's approach to willful blindness, which disregards the actions of the defendant when faced with the high probability of the existence of a fact, the Court has used the Code's formulation in other cases in the past.¹⁰³ Any court that unwittingly applies the Model Penal Code's use of willful blindness to induced infringement would be subject to the criticisms usually leveled against the Code's version of the doctrine.¹⁰⁴ Finally, some have argued that the doctrine should incorporate a motive element in order to identify among willfully blind defendants those who are actually culpable.¹⁰⁵

B. Global-Tech's Language Does Not Clarify Which Notion of Willful Blindness It Uses

¶35

Another doctrinal issue raised by the Court's use of willful blindness was its confused justification. In its introduction of willful blindness, the Court first referenced the traditional rationale of the doctrine: that those who willfully blind themselves are just as culpable as those who have actual knowledge.¹⁰⁶ But in the sentence that immediately followed, the Court announced: "It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts."¹⁰⁷ The Court appears to have conflated two distinct uses of willful blindness: (1) as a way to hold a defendant that does not actually have knowledge of the patent liable, and (2) as an evidentiary tool to prove the defendant does indeed have knowledge of the patent.¹⁰⁸ In practice, the difference between these two may be negligible since actual knowledge and willful blindness are equally culpable levels of awareness. A court can look at a set of facts and conclude that a defendant either had actual knowledge or willfully blinded itself to shield actual knowledge. The result in both cases is the same after *Global-Tech*: the defendant is liable for induced patent infringement under § 271(b).

thinking of doing would violate the law.' Perkins and Boyce are clearly correct in their generalization about honest people. Their argument shows that the wilfully ignorant defendant is indeed culpable; his behavior hardly conforms to an ideal of honesty. Nonetheless, their argument does not show that the culpability of the wilfully defendant is equal to that of the defendant who possesses genuine knowledge. How can the degree of culpability of a particular defendant be ascertained by reference to the objective standard of an honest person? Not all dishonest persons are equally culpable.") (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 873 (3d ed. 1982).

¹⁰² *Id.*

¹⁰³ Marcus, *supra* note 88, at 2240.

¹⁰⁴ See, e.g., Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 231–32 (1990) (arguing that the Model Penal Code's formulation of willful blindness describes recklessness rather than knowledge and risks conviction for mere negligence). *But see* Marcus, *supra* note 88, at 2239–40 (arguing that the Model Penal Code, when properly applied, draws important distinctions between recklessness and the type of knowledge described by § 2.02(7)).

¹⁰⁵ *Recent Cases, Ninth Circuit Holds that Motive is Not an Element of Willful Blindness*, 121 HARV. L. REV. 1245, 1252 (2008).

¹⁰⁶ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069 (2011).

¹⁰⁷ *Id.*

¹⁰⁸ See Charlow, *supra* note 90, at 1360 ("[P]roof that a defendant appeared deliberately to avoid knowledge could be circumstantial evidence from which to infer that the defendant really did know but pretended not to know.").

¶36 But if the Court has indeed allowed the use of willful blindness as an evidentiary tool to infer actual knowledge, it has done so needlessly. As will be discussed below, courts have already been inferring actual knowledge from circumstantial evidence for some time now. To introduce a wholly novel (at least in the patent context) theory to essentially do the same work circumstantial evidence does is unduly repetitive and complicates matters by adding an unnecessary level of analysis that obscures the core issue of knowledge.

C. *Punishment Rationales in Patent and Criminal Law Differ*

¶37 Furthermore, Justice Kennedy’s argument in dissent that punishment rationales differ between criminal and patent law¹⁰⁹ deserves more attention. While the principal theories for punishment in criminal law are retributivism and consequentialism, including deterrence, incapacitation, and rehabilitation,¹¹⁰ the basis for the Act and its dictates lies in the utilitarian language of the Constitution to “promote the Progress of Science and useful Arts.”¹¹¹ Holding a willfully blind criminal defendant liable might deter an actor from taking steps to avoid knowledge even in the face of a high probability that an incriminating fact exists. But even if this same sequence would hold true in the civil patent context, the Act’s infringement sections might simply serve as mechanisms to enforce the rights of patent holders rather than deem what is morally culpable behavior and what is not. Since intellectual property rights generally strike a balance by supplying rights holders with defensive weapons to fend off other potentially socially beneficial innovators,¹¹² patent law in particular should not seek to punish the latter group unless their actions fall within the narrowly defined scope of infringement.

¶38 Moreover, even if the Patent Act contemplates moral culpability, it has been suggested that inducers are “considerably more culpable in the patent infringement context” since direct infringement is a strict liability offense and those liable under 35 U.S.C § 271(b) must “actively” induce.¹¹³ If this is true, it makes little sense to invoke a doctrine effectively lowering the standard of knowledge to bring additional defendants under the umbrella of a more serious type of patent infringement.

D. *Knowledge of a “High Probability” That a Patent is Infringed Requires a Legal Determination*

¶39 In addition to the theoretical complications it creates when introduced into patent law, the willful blindness doctrine will be practically difficult to translate into the patent context. It is not immediately obvious what constitutes a “high probability” that a particular innovation or product is patented and infringed. Put simply, a defendant must make a subjective legal determination in order to be aware of a high probability that it is

¹⁰⁹ *Global-Tech*, 131 S. Ct. at 2073.

¹¹⁰ Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 847–49 (2002).

¹¹¹ U.S. CONST. art. I, § 8, cl. 8.

¹¹² Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 846 (2006).

¹¹³ Timothy R. Holbrook, *The Intent Element of Induced Infringement*, 22 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 399, 400–01 (2006).

inducing infringing acts of a third party.¹¹⁴ The defendant may well be consciously inducing certain actions, but it is only liable for induced infringement if it is aware that those actions infringe a patent, which is a legal determination in itself. Willful blindness obscures the analysis further because it holds a defendant liable even if it is not actually aware that a patent exists. The defendant may only subjectively believe there is a “high probability” a patent exists *and* is infringed and can still be held liable for inducement if it takes deliberate actions to avoid learning of these facts. In a judicial setting, a court must make these post-hoc determinations, which are exceedingly difficult considering that patents themselves grant only probabilistic rights if they are awarded,¹¹⁵ and predictability in innovation and patent protection varies among industries.¹¹⁶

E. The Facts in Global-Tech Make a Supposedly Difficult Standard Easy to Meet

¶40

While the Court in *Global-Tech* emphasized that “willful blindness” was a more stringent burden of proof than “deliberate indifference,”¹¹⁷ the case’s particular facts effectively weaken its potency and render it easier to prove. One commentator stated “there was little in the record to justify a ‘high probability’ that SEB had patented the fryer in question.”¹¹⁸ It might have been reasonable for *Global-Tech* to believe that SEB had not patented the particular features *Global-Tech* copied, and nothing in the record indicated the patenting habits of a French company in the kitchen sector.¹¹⁹ The Court itself in *Global-Tech* stated that “a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing *and who can almost be said to have actually known the critical facts.*”¹²⁰ Thus, the Federal Circuit going forward may feel increasingly emboldened to find induced infringement under an easy-to-meet standard following a rare Supreme Court affirmance of the Federal Circuit.

¹¹⁴ See Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575, 1617-18 (2011). Professor Rantanen argues that intentional tort *mens rea* principles, while pervasive in patent law, are completely inappropriate to apply to inducement or contributory infringement. Although Professor Rantanen’s argument exceeds the scope of this Note, many of his points are directly relevant to the analysis here.

¹¹⁵ Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75, 95 (2005). *But see* Mary LaFrance, *Supreme Court’s Definition of Active Inducement in Patent Infringement*, 2011 EMERGING ISSUES 5695 at 4–5 (2011) (arguing that the Court in *Global-Tech* could not have required a defendant to be willfully blind to a patent’s validity for inducement since that would make liability under § 271(b) only possible if the infringement was “willful” for purposes of enhanced damages under 35 U.S.C. § 284).

¹¹⁶ Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1577 (2003).

¹¹⁷ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2071 (2011) (distinguishing willful blindness from the Federal Circuit’s test of “deliberate indifference”).

¹¹⁸ Robert Mann, *Commentary: Bad Facts Swing Pendulum to Rare Federal Circuit Affirmance*, SCOTUSblog (June 1, 2011, 5:28PM), <http://www.scotusblog.com/2011/06/commentary-bad-facts-swing-pendulum-to-rare-federal-circuit-affirmance/>.

¹¹⁹ *Id.*

¹²⁰ *Global-Tech*, 131 S. Ct. at 2070–71 (emphasis added). *But see* Rantanen, *supra* note 114, at 1616–17 (“[T]here is reason to at least suspect that the ‘high probability’ that the court had in mind is significantly lower than substantial certainty, given the facts before it, and its use of the ‘high probability’ language as opposed to that of virtual or substantial certainty. If that is the case, the Court has essentially adopted a subjective recklessness standard for knowledge despite its explicit assertion to the contrary . . .”).

F. *Circumstantial Evidence, Although Imperfect, Already Serves as a Useful Tool to Infer Intent to Induce Infringement*

¶41 Rather than introduce a wholly new doctrinal concept to bring defendants under the purview of § 271(b), the Court should have relied on old-fashioned circumstantial evidence to infer intent. Rarely will there be a smoking gun indicating that a defendant was certainly aware of the consequences of its actions. Before *Global-Tech*, courts were already grappling with the lack of proof in induced infringement cases by using circumstantial evidence. The Federal Circuit in *Water Technologies Corp. v. Calco, Ltd.*¹²¹ explicitly recognized the necessity of circumstantial evidence to prove inducement when direct evidence was unavailable.¹²²

¶42 To be sure, many of the issues of application that plagued the Court and prompted it to turn to willful blindness were likely rooted in the unsatisfactory nature of circumstantial evidence. The use of circumstantial evidence is imprecise and can sometimes lead to a finding of “hindsight intent,” that is, a court’s belief that a defendant knew it was inducing infringement all along because it turned out that a patent existed, it was valid, and it was infringed.¹²³ But willful blindness carries with it these same problems along with the issues discussed above. The vices inherent in the use of willful blindness make it an unviable alternative to the current practice of inferring actual knowledge from available evidence.

VI. CONCLUSION

¶43 The Supreme Court’s use of willful blindness has added another wrinkle in the muddled area of intent to induce patent infringement. By invoking a doctrine that itself has problems of justification and application, the Court has introduced a host of new policy and practical issues into inducement analysis. The rationale for willful blindness in criminal cases, questioned itself, is not readily translatable to the patent context. Additionally, practical application of willful blindness to induced infringement is fraught with issues. Ultimately, the Court opened a can of worms by making an already confused area of law even more complex with ambiguities and uncertainties. This Note advocates for a return to the admittedly imprecise, yet simpler, use of circumstantial evidence to infer intent to induce infringement.

¹²¹ 850 F.2d 660, 668 (Fed. Cir. 1988) (“While proof of intent is necessary, direct evidence is not required; rather, circumstantial evidence may suffice.”).

¹²² *Id.* at 669.

¹²³ Stark & Harasymiak, *supra* note 29, at 19–20.

