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Confirmation of Test for Willful Infringement

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The Supreme Court has refused to review the Federal Circuit's August 20, 2007 ruling on willful patent infringement in *In re Seagate Technology, LLC*. This means that the lower court's decision will remain the last word on the issue.

Patent holders have historically used the threat of a willful infringement claim as a powerful club to deter allegedly infringing activity. Prior to *Seagate*, a potential infringer could avoid the risk of willful infringement and the possibility of multiple (or "enhanced") damages only by getting a non-infringement opinion from an independent patent lawyer *before* commencing the allegedly infringing activities. This was a costly burden on any party concerned with potential infringement.

The Federal Circuit's new rule has, to some extent, leveled the playing field. Now a patent holder seeking enhanced damages must prove by "clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." Moreover, the risk of infringement must have been known or at least obvious to the infringer. The presence or absence of a patent lawyer's opinion may still be relevant, but is no longer decisive.

The Supreme Court's denial of review finalizes this major shift in patent law that will alter the settlement value of many infringement claims by making it more difficult for patent holders to recover enhanced damages. It is part of a larger trend that has seen the erosion of some important elements of patent protection and an increase in the practical ability of manufacturers to challenge the applicability of third party patents.