

Texas Intellectual Property Law Journal
Fall 2006

Article

**ENCOURAGING WILLFUL INFRINGEMENT? KNORR-BREMSE LEAVES DUE CARE IN PATENT
LITIGATION IN A STATE OF FLUX**

Andrew M. Newton^{al}

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*92 I. Introduction

United States patent law is fundamentally based on the recognition of patents as a form of property. “As with real property, a patent owner has a right to exclude others.”¹ This right of exclusion is a negative right; thus, a patentee cannot force someone to use his invention, nor necessarily use it himself, but a patentee “may seek an injunction and compensatory damages from anyone who practices his invention without permission.”² These rights are founded in the Constitution.³ Based on these fundamental rights, the federal courts and Congress have worked at great length to protect patentees from patent infringers. Patent infringement runs contrary to the purpose of the patent system because infringement fails “to promote the Progress of Science and Useful Arts”; infringement relegates inventors to courtroom litigation proceedings as opposed to inventing and promoting the progress of the useful arts.⁴ The widespread disregard of patent rights by infringers and the inconsistency of patent enforcement across circuits motivated the formation of the Federal Circuit, which was created with the intention of strengthening patent rights to encourage innovation while preventing infringement.⁵

“Patenting in the United States . . . is largely done by corporations, not individuals[,]” and, as a corollary, corporations are usually those liable for infringement.⁶ United States patent laws impose upon an infringer an affirmative *93 duty to avoid infringement of known patents.⁷ Thus, if an infringer “has actual notice of another’s patent rights, he has an affirmative duty to exercise due care to determine whether or not he is infringing.”⁸ If the affirmative duty to exercise due care is not satisfied, a court can hold that the infringer engaged in willful infringement.⁹ The doctrine of willful infringement is a powerful means that patent law utilizes to maintain and preserve patent rights.¹⁰

Under the doctrine of willful infringement, if a corporation is found to have infringed a patent that the corporation knew about, the corporation can be subject to the trebling of actual damages,¹¹ and, in exceptional cases, the court may also force the infringer to pay the patentee’s attorney’s fees.¹² Litigation in a patent infringement suit “is [costly,] lengthy and time consuming and can have dire consequences.”¹³ If a manufacturer is found liable for patent infringement, the court can levy serious punishments--in addition to awarding sizeable judgments and attorney’s fees--including barring the manufacturer from selling, making, using, or importing key products.¹⁴ “Patent litigation is an expensive endeavor,” with trial litigation fees averaging over two million dollars per party; therefore, “the threat of an attorney fee award can be quite substantial.”¹⁵

An “infringer is only liable for enhanced damages if the fact-finder determines the infringement was willful.”¹⁶ Unsurprisingly, nearly every patent infringement claim comes coupled with a willful infringement claim due to the possibility of receiving an astronomical enhanced damage award.¹⁷ An infringer may *94 rebut a charge of willful infringement by producing a timely and well-reasoned exculpatory “opinion of counsel” that the infringer has followed.¹⁸ An opinion of counsel is a written evaluation from a certified patent attorney comparing an issued patent with another invention, article, method, process, or composition to determine if the patent is valid or if the patent’s claims have been infringed.¹⁹ Although proof of competent legal advice and the obtainment of an opinion of counsel may present evidence that an accused infringer fulfilled the affirmative duty of due care, the advice and opinion alone do not completely bar a finding of willful infringement.²⁰ Conversely, failing to obtain an opinion of counsel will not automatically result in a mandatory finding of willfulness if the accused infringer can prove he had no knowledge of any existing patent rights.²¹ This dichotomy proved troublesome for the courts until the Federal Circuit introduced the adverse inference doctrine. Under the adverse inference doctrine, the Federal Circuit has long held that an infringer’s failure to obtain or produce an exculpatory opinion of counsel required the fact-finder to infer that the opinion was or would have been unfavorable to the infringer.²²

On September 13, 2004, an en banc Federal Circuit ruling in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*,²³ overruled nearly twenty years of patent infringement precedent and held that an adverse inference should not be drawn from an accused infringer’s assertion of the attorney-client and/or work-product privilege or the failure to obtain an exculpatory opinion of counsel.²⁴ In its holding, the Federal Circuit stressed the importance of the attorney-client privilege, “the oldest of the privileges for confidential communications known to common law.”²⁵ The Federal Circuit also re-asserted that there remains *95 “an affirmative duty of due care to avoid infringement of . . . known patent rights.”²⁶

The *Knorr-Bremse* holding is an important first step in patent reform, for it alleviates some problems created by the adverse

inference doctrine. However, the Federal Circuit missed an ideal opportunity to address several flaws in the doctrine of willful infringement in patent litigation. Specifically, after the re-affirmation of the duty of due care to avoid a finding of willful infringement, the Federal Circuit failed to address what measures would be sufficient to satisfy the duty of due care. How to avoid a finding of willful infringement is unclear to the legal community, much less to infringers that could potentially be liable, such as corporations, inventors, scientists, and technologists.²⁷ Several members of Congress recognized the shortsightedness of the Federal Circuit's decision in Knorr-Bremse and proposed the Patent Reform Act of 2005 in response to the court's failure to address the problems raised in the decision.²⁸ The Act addresses multiple issues involving patent litigation including proposed changes to the doctrine of willful infringement. Unfortunately, if the Act is passed, it will only exacerbate the patent litigation landscape.

Therefore, this Comment will argue that the Federal Circuit should have ruled that obtaining a well-reasoned, timely, competent, and good-faith based opinion of counsel should be sufficient to satisfy the affirmative duty of due care requirement to defeat liability for willful infringement.

Part I of this Comment introduces the foundations of patent law: the history of the willful infringement doctrine, the duty of due care, and the origin of the adverse inference doctrine; it also addresses the Knorr-Bremse decision. Part II describes the practical impact of Knorr-Bremse. Part III discusses the impact and ramifications of the Patent Reform Act of 2005. Finally, Part IV proposes solutions for patent reform.

II. Background

A. The Foundations of Patent Law

1. History of the Willful Infringement Doctrine

"In 1982, the Federal Courts Improvement Act created the Court of Appeals for the Federal Circuit, giving it exclusive appellate jurisdiction over most patent *96 cases,²⁹ [thus] making patent rights more stable and predictable."³⁰ Prior to 1982, there were large disparities among the regional circuits in the treatment patents received, which "led to forum shopping and a greatly weakened patent system."³¹ The formation of the Federal Circuit was designed to reinstate respect for the patent system.³² At the time of the court's formation, the perception of the patent system was that "widespread disregard of patent rights [were] undermining the national innovation incentive."³³ This disrespect for patent rights and patent validity "provided the original motivation for the willful infringement doctrine."³⁴

Willful infringement exists because "intentional disregard of legal patent rights warrants deterrence."³⁵ If an infringer is not subjected to the possibility of treble damages under the willful infringement doctrine, the infringer may determine that it is economically more feasible simply to infringe upon the patent as opposed to paying for a license or inventing around the patent.³⁶ Deterrence for willful behavior by infringers can include trebling of actual damages and in exceptional cases, an award of attorney fees.³⁷ Although "exceptional" is not defined in the statute, the Federal Circuit has "equated a finding of willfulness with a finding that a case is exceptional."³⁸ Due to the prospect of enhanced damages, "potential infringers are less likely to engage in a potentially infringing activity."³⁹

*97 The Federal Circuit has defined willfulness as a form of mens rea, and thus, willfulness requires deliberate or intentional infringement.⁴⁰ Willful behavior is widely used in the law, and although it lacks a "perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."⁴¹ Willful infringement is "a measure of reasonable commercial behavior in the context of the tort of patent infringement."⁴² For an infringer to willfully infringe upon a patent, the patent must exist and the infringer must have knowledge of it.⁴³ Actual knowledge of a patent may be obtained by: "receiving an offer to license, receiving a notice of infringement, or discussing a competing product with a manufacturer."⁴⁴ In addition to having actual knowledge, the Federal Circuit has held that an infringer may have constructive knowledge of a patent "if the infringer has knowledge of a product with a patent number affixed."⁴⁵

In one of its earliest cases, *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, the Federal Circuit took a firm stand against the disrespect of patent rights.⁴⁶ In *Underwater Devices*, the Federal Circuit developed willfulness--a judicially-created doctrine⁴⁷--"into a doctrine that posed a formidable threat to accused infringers."⁴⁸ In the case, the defendant, Morrison-Knudsen (M-K), received notification about the existence of Underwater Devices' (UDI) patent through a licensing

offer.⁴⁹ M-K's in-house attorney drafted a memorandum to his client's regional manager, advising the continuance of the project.⁵⁰ Counsel's most compelling reason to forego a license was: "Courts in recent years, have--in patent infringement cases--found the patents claimed to be infringed upon invalid in approximately 80% of the cases."⁵¹

***98** Based on this statistic, M-K's counsel believed that UDI would not sue due to the risk of the court invalidating UDI's patent.⁵² Invalidation would cause UDI to lose all royalties from previous licensees.⁵³ M-K's counsel stated, "I would recommend we continue to refuse to even discuss the payment of a royalty with Underwater Devices."⁵⁴

The district court noted the defendant's blatant disregard for the patent estate in finding patent validity, infringement, and willful infringement.⁵⁵ In affirming the district court's findings, the Federal Circuit determined that M-K willfully infringed under the "totality of the circumstances."⁵⁶ After the case, the Federal Circuit announced that willful infringement would be based on the "totality of the circumstances presented."⁵⁷ Although the Federal Circuit did not enumerate factors to consider in the "totality of the circumstances" test, the court noted that because M-K's actions were lacking good faith, the company was liable for willful infringement.⁵⁸

After *Underwater Devices*, the Federal Circuit stated that "there [are no] hard and fast per se rules" for willfulness,⁵⁹ but summarized the test for willful infringement as: "whether, under all the circumstances, a reasonable person would prudently conduct himself with any confidence that a court might hold the patent invalid or not infringed."⁶⁰ Soon thereafter, in *Bott v. Four Star Corp.*,⁶¹ the Federal Circuit developed three relevant inquiries for the trier of fact to answer in determining willfulness:

(1) whether the infringer deliberately copied the ideas or design of another; (2) whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that the patent was invalid or that it was not infringed; and (3) the infringer's behavior as a party to the litigation.⁶² ***99** While *Bott* addressed the determination of willfulness, in a later case, *Read Corp. v. Portec, Inc.*,⁶³ the Federal Circuit recognized six additional factors courts may consider when determining damages for a finding of willfulness. These *Read* factors include: (4) the defendant's size and financial condition; (5) the closeness of the case; (6) the duration of the defendant's misconduct; (7) any remedial action taken by the defendant; (8) the defendant's motivation for harm; and (9) whether the defendant attempted to conceal its misconduct.⁶⁴ Since the enumeration of these nine factors, both courts and juries have evaluated all nine factors in deciding willfulness and the amount of damages.⁶⁵ However, the Federal Circuit has warned that this list is not exhaustive; the "totality of the circumstances" surrounding each case should be examined for determining both willfulness and damages.⁶⁶

2. Historical Development of the Duty of Due Care

The callous attitude of M-K towards UDI's patent rights and disrespect for the patent system in general were considerable factors in the Federal Circuit's institution of the duty of due care.⁶⁷ *Underwater Devices* established the principle that notice of a patent infringement accusation creates an affirmative duty for the alleged infringer to use due care in avoiding infringement.⁶⁸ Once a potentially liable infringer discovers a patent, the affirmative duty of due care to avoid infringement of the patent commences.⁶⁹

The Federal Circuit's holdings in *Underwater Devices*, *Read*, and *Bott* not only shaped the doctrine of willful infringement, but also helped to shape and define the affirmative duty of due care. The due care requirement becomes effective immediately upon actual or constructive knowledge of the patent.⁷⁰ A potentially liable infringer may become aware of a patent (1) by receiving notice from the patentee in a cease-and-desist letter; (2) from the U.S. Patent and Trademark ***100** Office, during prosecution of the alleged infringer's own patent; or (3) "independently, such as while researching his field of interest."⁷¹

Although 92% of all patent infringement cases include a claim for willful infringement, not all infringement is necessarily willful.⁷² "The fundamental distinction between willful and [non-willful] infringement . . . lies in an infringer's affirmative duty of due care[,] which arises upon the receipt of actual notice of another's patent rights."⁷³ An honest absence of the knowledge of another's patent rights does not trigger the affirmative duty of due care requirement.

A potential patent-holder has no legal duty to investigate prior art.⁷⁴ Prior art is a patent law term used to refer broadly to

known technical information.⁷⁵ “To be patentable, an invention must be new and nonobvious in view of the prior art.”⁷⁶ Individual inventors, especially, do not have a duty to investigate whether their inventions have already been patented.⁷⁷ The costs associated with the due diligence in determining if other products are considered prior art in light of the invention may be grossly prohibitive.⁷⁸ If inventors were required to extensively investigate any and all products that may be deemed prior art, the expenses incurred in the investigation would be considerable and would likely result in discouraging innovation and invention. Conversely, once an inventor knows of specific prior art relating to his invention, the costs of determining whether or not the invention will infringe upon the prior art decreases dramatically.⁷⁹ Thus, an inventor will not need to investigate every possible avenue of infringement; the inventor will only need to investigate the patent and prior art of which the patentee provided notification. This is the Federal Circuit’s rationale in adopting the affirmative duty of due care.

***101** The Federal Circuit has also noted that the duty of due care to avoid infringement “normally entails obtaining advice of legal counsel although the absence of such advice does not mandate a finding of willfulness.”⁸⁰ Thus, although the Federal Circuit did not expressly state that an opinion of counsel is necessary to fulfill the affirmative duty of due care, it did suggest it. In addition, while a substantial defense to infringement has been considered as one factor in the “totality of the circumstances,” it has not been sufficient in and of itself to fulfill the due care requirement and defeat liability for willful infringement.⁸¹

3. Origin of the Adverse Inference Doctrine

After the Federal Circuit ruled that willfulness is to be based on the “totality of the circumstances” test as developed in *Underwater Devices*, and instituted the duty of due care, the court “introduced the doctrine of adverse inference in *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*”⁸² The doctrine of adverse inference states that a potential infringer’s failure to obtain an exculpatory opinion of counsel or failure to disclose the contents of the opinion should be equivalent to a finding of inculcation.⁸³ Thus, the adverse inference rule enabled courts to presume (1) that if the accused infringer did not procure an exculpatory opinion of counsel, then the accused knew he was infringing and did not want a paper trail confirming the infringement, or (2) that the accused acted with willful ignorance of the possibility of infringement.⁸⁴ In addition, if the accused procured an opinion of counsel but refused to disclose the content based on the attorney-client privilege, courts could view the nondisclosure in a negative light and infer that the opinion inculcated the accused.⁸⁵

The Federal Circuit first applied the adverse inference doctrine in *Kloster Speedsteel v. Crucible Inc.*⁸⁶ In *Kloster*, the Federal Circuit adjusted the relevant inquiries in determining willfulness and elevated the second Bott factor--investigating the patent and forming a good-faith belief that the patent was invalid or un infringed--above the other Bott factors.⁸⁷ This shift in focus thrust the advice of counsel to the forefront of the willfulness determination. Even after establishing ***102** the “totality of the circumstances” test, courts tended to favor the second Bott factor, considering an attorney’s opinion of non-infringement or unenforceability as the strongest evidence against a charge of willful infringement.⁸⁸ In effect, the *Kloster* holding “permitted courts to infer that an accused infringer had acted in bad faith if [the accused had not received an exculpatory opinion of counsel].”⁸⁹

Therefore, under the adverse inference doctrine, “a party that becomes aware of a patent must decide whether to spend resources investigating and securing legal counsel or to proceed and risk enhanced damages.”⁹⁰ In addition, if the attorney-client privilege is asserted by the accused and the advice is not disclosed, Federal Circuit precedent states that “silence on the subject, in alleged reliance on the attorney-client privilege, would warrant the conclusion that [the infringer] either obtained no advice of counsel or did so and was advised that its [actions] . . . would be an infringement” of a valid U.S. patent.⁹¹ The Federal Circuit adhered to precedent in *Kloster* and applied the “totality of the circumstances” test in deciding the issue of willfulness and found the infringer liable for willful infringement.⁹²

The Federal Circuit clarified the application of the adverse inference doctrine in *Rite-Hite Corp. v. Kelley Co.*⁹³ In *Rite-Hite*, the court recognized the serious implications of drawing a negative inference when an accused infringer asserted the attorney-client privilege and refused to disclose the contents of an opinion of counsel.⁹⁴ The court may have realized that in all practicality, the attorney-client privilege is essentially eliminated, as they later made explicit in *Knorr-Bremse*.⁹⁵ Therefore, the court implied that a finding of adverse inference would only be appropriate under certain fact patterns pertaining to the question of willfulness.⁹⁶ However, the court did not describe the fact patterns in which the adverse inference doctrine would apply and instead continued to rely on the doctrine ***103** of adverse inference in *Fromson v. Western Litho Plate & Supply Co.*⁹⁷ In *Fromson*, the Federal Circuit further endorsed the adverse inference doctrine, stating that “[w]here the infringer fails to introduce an exculpatory opinion of counsel at trial, a court must be free to infer that either no opinion was obtained, or if an opinion was obtained, it was contrary to the infringer’s desire to initiate or continue its use of a

patentee's invention.⁷⁹⁸

The adverse inference doctrine became a damning obstacle for accused infringers who wished both to be exculpated from a charge of willful infringement and to invoke the attorney-client privilege. Under the adverse inference doctrine, an infringer faces a tough road to exculpation by failing to obtain an opinion of counsel or by obtaining an opinion but withholding the contents due to privileged client material contained within the opinion. This dilemma has encouraged attorneys "to write one-sided opinions of non-infringement[,] . . . invalidity, [or enforceability,] as attorneys knew that the opinion would later be scrutinized not only by the patent holder, but [also by] a judge and jury."⁷⁹⁹ Although the adverse inference doctrine placed a premium on one-sided opinions of counsel and a great burden upon the attorney-client privilege, the doctrine continued to be honored until *Knorr-Bremse*.

B. The *Knorr-Bremse* Decision

In *Knorr-Bremse*, the Federal Circuit, with the resounding support of more than twenty amicus briefs, overruled nearly twenty years of prior Federal Circuit precedent and held that no adverse inference should be drawn from an accused infringer's assertion of the attorney-client privilege or failure to obtain an exculpatory opinion of counsel.¹⁰⁰ This landmark ruling eliminated the adverse inference doctrine, and as a result, made a willful infringement finding considerably "more difficult to prove, and thus treble damages and attorney's fees, more difficult to obtain, in patent infringement suits."¹⁰¹ In effect, "[t]he Federal Circuit seems to have opened the door for potential infringers to engage in deceptive practices, and has effectively disincentivized parties to seek or heed the advice of counsel" since no adverse opinion will be inferred.¹⁰²

*104 1. Facts of the Case and District Court Ruling

Knorr-Bremse, a German corporation, manufactured and sold air disk brakes for use in heavy-duty commercial vehicles.¹⁰³ *Knorr-Bremse* was the owner of United States Patent Number 5,927,445 (the '445 patent) entitled "Disk Brakes For Vehicles Having Insertable Actuator."¹⁰⁴ *Haldex Brake Products AB* (*Haldex*) was a Swedish corporation that designed air brakes.¹⁰⁵ *Haldex* collaborated with *Dana Corporation* (*Dana*), an American company, to sell *Haldex*'s Mark II brakes in America.¹⁰⁶

Dana imported approximately one hundred units of *Haldex*'s Mark II brake into the United States and installed the Mark II brake in eighteen of *Dana*'s trucks, as well as those of various potential customers.¹⁰⁷ "In 1998, *Knorr-Bremse* orally notified *Dana* of its pending U.S. patent and of patent disputes that had arisen with *Haldex* in Europe" regarding the Mark II brake.¹⁰⁸ After the '445 patent issued in 1999, *Knorr-Bremse* notified *Dana* that it was engaged in infringement litigation against *Haldex* in Europe involving the Mark II design.¹⁰⁹

Despite the warning, *Dana* continued to use and test the Mark II model in the United States.¹¹⁰ In 2000, *Knorr-Bremse* commenced an infringement suit against *Haldex* and *Dana* and moved for summary judgment of literal infringement by the Mark II brake of the '445 patent.¹¹¹ "During discovery, the defendants presented the Mark III [model brake] as a good-faith attempt to design around the patentee's brake and moved for summary judgment of non-infringement"¹¹² The district court disregarded the Mark III model and granted summary judgment in favor of *Knorr-Bremse* based on literal infringement of the Mark II brake.¹¹³

The district court then proceeded to the issue of willfulness where the court noted that *Knorr-Bremse* discussed the '445 patent with *Haldex* in 1999 and *Dana* actually became aware of the patent when *Knorr-Bremse* filed the infringement *105 suit in May 2000.¹¹⁴ However, after receiving notice that infringement claims were pending, both *Haldex* and *Dana* "continued to display, promote, and test their Mark II brakes."¹¹⁵

On the issue of willfulness, *Haldex* stated that it consulted with European and United States counsel regarding *Knorr-Bremse*'s patents but asserted the attorney-client privilege and refused to produce an opinion of counsel or disclose the advice it received.¹¹⁶ In turn, *Dana* claimed that it relied on *Haldex*'s opinions of counsel.¹¹⁷ Based upon *Haldex*'s failure to disclose its counsels' advice, the district court inferred that the advice had been unfavorable to *Haldex* and *Dana*.¹¹⁸ The district court applied Federal Circuit precedent with respect to the adverse inference doctrine and found *Dana* and *Haldex* liable for willful infringement.¹¹⁹

The district court relied on the adverse inference doctrine in finding willful infringement, as *Dana* did not consult or retain counsel and *Haldex* refused to disclose the opinion of its United States attorney.¹²⁰ In addition, several *Read* factors weighed

against the defendants.¹²¹ First, neither defendant had a “substantial defense to infringement . . . [because the ‘445 patent lacked] convincing evidence of obviousness or indefiniteness,” either of which would have affected patent validity.¹²² Second, both defendants continued their allegedly infringing behavior upon learning of the ‘445 patent and neither took any alleviating action.¹²³ Although the district court found for Knorr-Bremse on the issue of willfulness, the court did not assign the payment of enhanced damages from Dana or Haldex “because Knorr-Bremse did not suffer measurable [commercial] damages.”¹²⁴ However, because the defendants engaged in willful behavior by continuing to use the Mark II air disc brake after receiving notice of infringement claims,¹²⁵ “the [district] court awarded attorney’s fees to Knorr-Bremse in accord with § 285.”¹²⁶

*106 2. The Federal Circuit’s Opinion

On appeal, the Federal Circuit sua sponte granted en banc review to reevaluate precedent on the issue of willful infringement and adverse inferences.¹²⁷ The Federal Circuit reversed the district court’s ruling and held that “no adverse inference that an opinion of counsel was or would have been unfavorable flows from an alleged infringer’s failure to obtain or produce an exculpatory opinion of counsel.”¹²⁸ Thus, the Federal Circuit effectively eliminated the adverse inference doctrine from the willfulness inquiry.¹²⁹ This ruling “overturned the adverse inference [doctrine] advanced in Kloster, and returned to the totality of the circumstances standard.”¹³⁰ The court reiterated that “there are no hard and fast per se rules”¹³¹ with respect to willful infringement and opted to deemphasize the advice of counsel and reaffirm the importance of the balance of factors enumerated in *Bott and Read*.¹³²

The Federal Circuit stressed that willful infringement hinges on “whether a prudent person would have sound reason to believe that the patent was not infringed or was invalid or unenforceable, and would be so held if litigated.”¹³³ In effect, the court stated that willful infringement does not hinge on whether the accused received an exculpatory opinion of counsel. “While seeking legal advice is still advisable,” after Knorr-Bremse, legal advice “is no longer mandatory to avoid a finding of willful patent infringement.”¹³⁴ Also, the court expressly stated that a substantial defense, by itself, does not necessarily defeat a claim of willful infringement.¹³⁵ In other words, an accused infringer may still need to show that it received legal advice to avoid a willful infringement finding; thus, the Federal Circuit appears to have created a quandary with respect to the securing of an opinion of counsel. In addition, with respect to willfulness, the Federal Circuit specifically declined to consider whether, as part of the “totality of the circumstances, *107 the jury can or should be told whether or not counsel was consulted.”¹³⁶ “This will be an important practical question at the trial level.”¹³⁷

Although the adverse inference doctrine was eliminated, the Federal Circuit announced that there remains an affirmative duty of due care to avoid infringement of known patent rights.¹³⁸ In his dissent, Judge Dyk disagreed that a potential infringer, having actual notice of another patentee’s rights, has an affirmative duty to exercise due care to determine whether or not he is infringing.¹³⁹ Judge Dyk opined that the due care requirement is inconsistent with Supreme Court cases holding that punitive damages can only be awarded when conduct is reprehensible.¹⁴⁰ Judge Dyk stated “the patent damages statute, the legislative history [and] Supreme Court opinions” do not support the due care requirement.¹⁴¹ He further stated, that “[t]he enhancement statute [35 U.S.C. § 284] merely provides that ‘the court may increase the damages up to three times the amount found . . . or assessed . . .’ No other mention is made of enhancement, willful infringement, or a duty of care.”¹⁴² In addition, there “has been no . . . meaningful legislative history for the current statute [§ 284] . . . nor [does] any of the few Supreme Court cases interpreting section 284 provide any basis for a duty of care.”¹⁴³

III. Analysis

A. Impact and Ramifications of Knorr-Bremse

The Federal Circuit made a substantial improvement in patent litigation by preserving the attorney-client privilege and eliminating the adverse inference doctrine from the test for willful infringement. The adverse inference doctrine has “encouraged undesirable conduct on the part of patentees, their competitors, and attorneys.”¹⁴⁴ The adverse inference doctrine discourages innovators from reading patents,¹⁴⁵ encourages patentees to harass competitors,¹⁴⁶ and inhibits communication *108 between innovators and their attorneys.¹⁴⁷ Prior to Knorr-Bremse, corporations implemented policies forbidding inventors and patent attorneys from patent searching.¹⁴⁸ Corporations attempted to avoid “actual notice,” which triggers the affirmative duty of due care, so that they would not be required to pay for a patent opinion. These corporations encouraged their inventors and patent attorneys to engage in willful blindness so that they could claim ignorance as to the knowledge of

patent disclosures of others.

The Federal Circuit's elimination of the adverse inference doctrine in *Knorr-Bremse* arguably negates some of the reasons for avoiding monitoring the patents of others. The accused infringing defendant no longer has to willfully "blind" himself from others' patent disclosures because the defendant no longer has the duty to obtain an exculpatory opinion of counsel. Thus, the practical effect of *Knorr-Bremse* is that accused infringers will keep their opinions of counsel secret to prevent patentees "from asserting willful infringement solely because an opinion was neither obtained nor revealed."¹⁴⁹ Although the elimination of the adverse inference doctrine is especially important for accused infringers--for it restores the sanctity of the attorney-client privilege and abrogates the nonmonitoring of others' patent estates--the elimination will likely encourage infringement, because courts and patentees will be without the powerful adverse inference sword.

In addition, the Federal Circuit missed an ideal opportunity to explain the affirmative duty of due care requirement and left fundamental questions concerning the duty unexplained. First, the court never defined the scope of the duty, nor indicated whether a failure to abide by the duty of due care would necessarily, or just sometimes, lead to a willful infringement finding.¹⁵⁰ Second, the court did not address whether a review of a complex patent document "by anyone other than a patent agent or patent attorney would [satisfy]" the due care requirement.¹⁵¹ Although it is doubtful that a technical person within a corporation would be able to evaluate the validity of a patent claim due to the abundant intricacies of the patent system, the Federal Circuit could have addressed the issue, as it is especially important information for corporations that are currently paying for opinions of counsel in the range of \$10,000 to \$100,000 per patent.¹⁵² Third, *109 since infringers need not feel obligated to obtain an infringement analysis, or, even if they choose to do so, need not reveal the results of the infringement opinion analysis to the trier of fact, the question remains whether the patentee can expose the infringer's failure to obtain an opinion of counsel to the trier of fact.¹⁵³ Although the court will give a jury instruction explaining that the failure to obtain an exculpatory opinion of counsel should not be a relevant inquiry in determining willful infringement, any statement by the patentee addressing the failure to obtain an opinion of counsel would likely prejudice the accused infringer. The Federal Circuit should have held that the patentee shall be precluded from proclaiming to the jury that the accused infringer did not obtain an exculpatory opinion of counsel to avoid this issue altogether.

Although the Federal Circuit's ruling has already changed the patent law landscape from its prior state, the ruling will have very little impact on the future state of patent law until the court determines what actions will be sufficient to satisfy the duty of due care.¹⁵⁴ Without guidance as to what conduct will suffice to meet the duty of due care in the absence of an opinion of counsel, "obtaining an infringement opinion probably remains the most effective way of fulfilling" the affirmative duty of due care requirement.¹⁵⁵

B. Problems with the Willfulness Doctrine

According to the Federal Trade Commission, "willful infringement is among the least popular patent doctrines."¹⁵⁶ The doctrine is often criticized as ineffectual in deterring deliberate infringement, inaccurate in punishing truly malicious actors, and "the motivation for evasive, undesirable behavior on the part of competitors and their patent attorneys."¹⁵⁷ The Federal Circuit's holding in *Knorr-Bremse* ostensibly "made willful infringement easier for infringing defendants to conceal by eliminating one of the primary tools employed by courts and plaintiffs' attorneys to prove willfulness--adverse inference."¹⁵⁸ Although the Federal Circuit reiterated the importance of deciding a willful infringement claim under the "totality of the circumstances" test, the strength of the willfulness doctrine seems to have taken a blow by the elimination of adverse inference. In addition, *110 the amicus briefs submitted in *Knorr-Bremse* collectively state that the Federal Circuit's willfulness doctrine has done little to help patent owners but has created several detrimental industry effects.¹⁵⁹

One detrimental effect is revealed through the theory of rational ignorance. This theory states that a person having ordinary skill in the art cannot design around a patent, because he fears that he will be liable for triple damages in a later infringement suit because he will have "known" about the patent.¹⁶⁰ A second detrimental effect is "window-dressing" opinions, which are legal opinions written to justify the manufacturers infringing behavior, rather than honestly assessing infringement.¹⁶¹ A third detrimental effect is "patent trolling" whereby law firms and investment companies buy patents from patentees or at bankruptcy auctions and then assert the patent rights against manufacturers.¹⁶² The manufacturer cannot ignore the troll for fear of a finding of willfulness, so the manufacturer will often settle with the troll to avoid expensive, risky litigation.¹⁶³ This, unfortunately, only encourages the troll to assert his rights with even more conviction and to use the settlement as leverage against his next victim.¹⁶⁴

In addition, the willful infringement/written opinion of counsel game is occasionally plagued with corrupt patent attorneys who write dishonest opinions that are really a tool for advocacy rather than objective predictions of infringement.¹⁶⁵ The dual role of the patent infringement opinion letter puts the patent attorney in a ***111** precarious position; he must ignore one of his functions, either as a counselor or an advocate, or he must act dishonestly in order to fully serve the client.¹⁶⁶ “The game is a windfall of extra billable hours given to patent attorneys at the expense of the public, as potential infringers are forced to order unnecessary written opinions to protect themselves against a finding of willful infringement.”¹⁶⁷ The written opinion of counsel game is also corrupt, considering that willfulness “is charged in more than ninety percent of all patent suits, [but] enhanced damages for willful infringement are awarded [only] about one-third of the time.”¹⁶⁸ In light of these findings, the Federal Trade Commission has recommended that Congress, and in turn, the courts, limit findings of willfulness to cases of truly culpable behavior.¹⁶⁹

Nonobjective opinions of counsel are upsetting the patent system, and for this reason, bar associations should establish guidelines as to how patent attorneys are expected to issue infringement opinions.¹⁷⁰ These “codes of conduct [should] instruct patent attorneys to only issue objective opinions that fully disclose the potential for a finding of infringement.”¹⁷¹ One example of truly culpable behavior, which warrants a finding of willfulness and enhanced damages, is the issuance of a nonobjective opinion of counsel. If a patent attorney issues a nonobjective opinion of counsel, the attorney should be held liable for malpractice and should be forced to indemnify the infringer for any damages the infringer is assessed in a willful infringement proceeding based on the faulty opinion of counsel.¹⁷²

C. Due Care Requirement Uncertainty

Determining what actions will be sufficient to satisfy the affirmative duty of due care to avoid willful infringement is an extremely important issue. If a reasonable opinion of counsel is deemed sufficient to guard against treble damages in a patent infringement suit, then this information is of the utmost importance for a potentially infringing defendant corporation. If the potentially infringing defendant corporation can rely on the objective opinion of counsel for repose, even if the opinion is deemed inaccurate in court, then the defendant can ***112** avoid suffering treble damages--which can be well into the tens of millions of dollars, or even much higher.¹⁷³

Predictability is important for business. Without predictability, corporations will overprotect themselves to avoid treble damages. In overprotecting themselves, corporations will elicit multiple opinions of counsel to determine if their acts are potentially infringing. At a range of \$10,000 to \$100,000 per patent opinion, the cost of obtaining multiple exculpatory opinions of counsel alone may routinely exceed a million dollars.¹⁷⁴ To recoup this money, defendant corporations pass the cost on to consumers and make life more expensive for all.

Not only does uncertainty in guarding against treble damages hurt businesses, but it also hurts invention. Inventors will refrain from spending valuable resources to invent new products for fear of facing treble damages during an infringement proceeding on an already patented invention. Alternatively, inventors will avoid entering an area of enterprise altogether for fear of infringement. This, in effect, gives a patentee extra protection and results in extending the patentee’s monopoly beyond its legal rights. In addition, new inventors will be less inclined to create new inventions around the existing patent monopoly for fear of infringement. Although inventing itself may not necessarily be harmed by uncertainty in the due care requirement, the incentive to share inventions with the public and to increase the public’s storehouse of knowledge will decline considerably based on the fear of treble damages, thus stifling progress in the useful arts.

If a reasonable opinion of counsel is not sufficient to guard against treble damages in a patent infringement suit, then what are the parameters to prove that an accused infringer has met the affirmative duty of due care? Maybe the Federal Circuit should follow Judge Dyk’s dissent and hold that due care has no role in patent law because it is inconsistent with the patent statute, legislative history, and recent Supreme Court cases.¹⁷⁵

***113 IV. The Patent Reform Act of 2005**

A. The Act

The Patent Reform Act of 2005 proposes changes to the standard of willful infringement.¹⁷⁶ Under the proposed legislation, in order for the patentee to prevail on a claim of willful infringement, the patentee must prove that the accused infringer either

deliberately copied the invention, or that he continued his infringing acts even after being notified about the potential for infringement by the patentee.¹⁷⁷ Thus, in effect, the Act “reduces the scope of ‘willful infringement’ by raising the standard of proof required [for finding willful infringement].”¹⁷⁸ In addition, “the accused infringer [may] present evidence that he had an informed good faith belief that his conduct was not infringing” to avoid the willfulness charge.¹⁷⁹

The Act also “limits treble damages to specific instances where the defendant [had] received [a] detailed written notice from the patent owner charging infringement[,] [which] identif[ied] the specific patents, claims, and allegedly infringing products or processes.”¹⁸⁰ In addition, the proposed legislation would preclude a willfulness finding “based merely upon the [infringer’s] knowledge of the patent or its contents . . . prior to suit.”¹⁸¹ This provision is in response to the criticism of the existing standard, which discourages inventors and patent attorneys from reading issued patents because of the potential liability for willful infringement.¹⁸²

One significant feature of the Act is that the patentee’s notice to the potential infringer must be sufficient to create a basis for a declaratory judgment.¹⁸³ Another significant feature of the Act is the bifurcation of patent infringement trials to determine infringement and willfulness separately. Under the proposed legislation, “willfulness [cannot] be pled until the patentee wins on the infringement issue.”¹⁸⁴ Thus, the Act would preclude the fact-finder from considering evidence pertaining to willfulness during the infringement/non-infringement determination. *114 Because willfulness evidence can be highly prejudicial and can influence the outcome of the infringement/non-infringement determination, willfulness evidence should be removed entirely from the proceeding.¹⁸⁵

Although dual trials can be a burden on the parties, the witnesses, and the court systems, to say nothing of the additional expense, bifurcation would make the entire patent litigation process more efficient.¹⁸⁶ The bifurcated trial would increase efficiency because once the fact-finder determines that the accused infringer did not infringe upon the patent at issue, the trial ends. Since the majority of patentees tack on a willfulness claim, yet rarely succeed in proving willfulness,¹⁸⁷ the second phase of the trial-- determining willfulness--would generally be unnecessary; this saving outweighs the fact that dual trials may still be needed in certain cases. Therefore, “if the factfinder finds no liability either because the patent is invalid or unenforceable, there is no need for the damages or willfulness trial at all.”¹⁸⁸ Thus, the fact-finder would not be burdened with considering evidence concerning the complex affirmative duty of due care requirement and would not have to determine willfulness.

Although the Act would improve some areas of patent litigation with respect to willful infringement, the Act fails as a whole because it could potentially reward infringers by making the standard of care for willful infringement proceedings too high, thus enabling infringers to impinge further upon protected legal patent rights. The Act is not progressive enough to make a long-standing impact on patent litigation and ostensibly provides more protection to infringers who hurt the patent system by failing to promote progress in the useful arts.

B. Impact and Ramifications of the Act

The proposed changes of the Patent Reform Act of 2005 may ultimately reward patent infringers. The Act unbalances the equilibrium of “protecting patentees versus promoting progress in the useful arts” by placing too great a burden on the patentee to prove that the infringer was engaging in willful infringement. The public is rewarded with great innovation when a proper balance is struck between protecting established inventors rights and encouraging new inventors to make substantial strides to existing inventions. However, placing such a large a burden on the patentee to prove that the accused infringer “deliberately copied or continued *115 with his infringing acts after notification” in order to prevail on a willful infringement claim unbalances the equilibrium in favor of infringers.¹⁸⁹

The Act is another example of reform that will actually motivate infringement by infringers and lead to an overall increase in the volume of patent litigation.¹⁹⁰ If the Act is passed, “[t]he environment this provision would foster creates incentives for precisely the behavior the patent system is supposed to curtail.”¹⁹¹ Although there is considerable concern about patentees pleading a claim of willful infringement in every patent infringement suit--due to the possibility of receiving enhanced damages--the Act provides too much protection to future infringers. Prior to Knorr-Bremse, the adverse inference doctrine placed the burden upon the accused infringer, the more likely culpable party, to avoid a charge of willfulness; the Act places the burden of proving infringement upon the patentee, the more likely innocent party. This burden-shifting helps shield potential infringers from a finding of increased damages for willful infringement and adversely affects small inventors “because their only means to reign in deliberate infringers would be expensive litigation.”¹⁹²

If infringers need not worry about punishment consisting of an increased damages award based on a willfulness finding because the standard for finding willfulness is too high, infringers may infringe at will. A simple solution to this problem could be the adoption of automatic treble damages for certain reprehensible conduct. “In other arenas, such as antitrust [law], automatic treble damages are the norm and have worked [considerably] well.”¹⁹³

Although the Act may foster an environment that protects infringers, the Act will make substantial improvements in patent litigation in two regards. First, requiring the patentee to send notice to the infringer, sufficient to create a declaratory judgment finding, will help mitigate costs for possible infringers. Even though the costs associated with opinions of counsel may still be expensive, costs will be reduced considerably because the infringer will know exactly what claim(s) it is potentially infringing and will only need to fulfill the affirmative duty of due care requirement with respect to the particularly stated claim(s). This requirement makes it unnecessary for the infringer to obtain an over-expansive exculpatory opinion of counsel, because the infringer will know precisely what claim(s) its invention potentially encroaches upon the patentee’s monopoly.

***116** Second, bifurcating patent infringement trials will enable the fact-finder to determine infringement/non-infringement without permitting the fact-finder to hear prejudicial willfulness evidence. “Willfulness evidence is among the most prejudicial and damages evidence is among the most complex.”¹⁹⁴ For this reason especially, patent infringement trials should be bifurcated. Evidence shows “willfulness tends to prejudice juries toward a finding of infringement, whether knowingly or not.”¹⁹⁵ Therefore, the bifurcation of patent infringement trials is essential to avoid prejudicing the accused infringer. If the patentee asserts willful infringement at the start of the trial, the fact-finder will immediately have an inclination to believe that the infringer willfully infringed. Evidence of willful behavior can potentially be construed as probative for liability, thus depriving the accused infringer of an objectively fair trial. By separating infringement proceedings from willfulness proceedings, the fact-finder will not learn of willfulness evidence in phase one, the infringement/non-infringement liability trial, and will determine only if the accused infringer actually infringed upon the patentee’s invention. Bifurcation will remove bias from the infringement/non-infringement portion of the trial and allow the fact-finder to make a decision based on the merits of the case. If the infringer is found to have infringed upon the patentee’s patent, then the second phase of the trial, the willfulness and damages determination, may commence.

V. Proposed Patent Reform Solutions

A. Patent Reform Proposals

Requiring the patentee to send notification to the infringer, sufficient for a declaratory judgment finding, is a sound proposal for patent reform. In addition, the patentee should have an objective, good-faith foundation for stating a claim of willful infringement. It is fundamentally unfair to allow the patentee to claim willfulness in every patent infringement case just to reap enhanced damages awards if he prevails. Ninety-two percent of patentees claim willful infringement, regardless of whether they have a substantive foundation for the claim.¹⁹⁶ This statistic may frighten accused infringers into settling with the patentee to avoid the risk of enhanced damages.

To resolve this situation, the Federal Circuit should hold that a patentee who asserts willful infringement, without proof that the infringer intentionally infringed ***117** upon the patentee’s protected patent after receiving sufficient notification from the patentee, should pay the accused infringer’s attorney’s fees incurred during the willfulness and damages determination. In other words, assuming an infringer is liable for infringement in phase one but not liable for willful infringement in phase two, yet in the complaint, the patentee asserted an unfounded willful infringement claim, then not only should the patentee’s attorney be sanctioned under Rule 11 of the Federal Rules of Civil Procedure (FRCP),¹⁹⁷ but also the patentee should pay the costs incurred by the infringer during the willfulness and damages determination. A penalty of this magnitude will almost certainly disincentivize patentees from unfoundedly claiming willful infringement.

The Federal Circuit could resolve all areas of unpredictability with respect to avoiding a willful infringement penalty by providing one definitive rule in which corporations and inventors alike could rely upon. The idea of “a good faith effort not to infringe” is simply not enough to avoid a finding of willful infringement.¹⁹⁸ Even after removing the adverse inference doctrine and holding that a failure to obtain counsel will not elicit an adverse inference, the danger remains that the jury may still believe the infringer should have consulted counsel.

The Federal Circuit should make the obtainment of a well-reasoned, timely, competent, and good-faith based opinion of counsel sufficient to satisfy the affirmative duty of due care to defeat liability for willful infringement. A well-reasoned opinion of counsel requires a thoughtful, thorough investigation into the validity and enforceability of the patentee's patent. An opinion of counsel is timely if the infringer seeks an exculpatory opinion as soon as the infringer becomes aware of a potentially conflicting patent. An opinion of counsel is considered competent only if the opinion is from a certified patent attorney; an expert in the field of the surrounding technology will not satisfy this requirement. Lastly, a good-faith based opinion of counsel is an unslanted opinion that objectively notifies the infringer of whether or not the infringer will be liable for infringement based on the patent attorney's determination of identified claims and products which the patentee claims to be infringed.

After an infringer has received notification relating to the possibility of infringement, as long as the infringer obtains a well-reasoned, timely, competent, and good-faith based exculpatory opinion of counsel with respect to the claim(s) in which his invention might be infringing, the infringer should be deemed to have fulfilled his duty of due care requirement. This solution may appear to have the effect of crippling small inventors because the cost of obtaining a patent opinion is very high (even though a willfulness judgment would be worse); however, *118 patentees are not looking to squeeze out small inventors. Patent holders are more concerned with reaping a willful infringement windfall from large corporations with deeper pockets.¹⁹⁹

In addition, the court should prevent the patentee from claiming that the accused infringer did not receive an opinion of counsel during the willfulness proceeding. If the patentee is able to tell the jury that "the alleged infringer did not consult counsel prior to engaging in allegedly infringing activity, the jury will likely conclude the alleged infringer did not act with due care."²⁰⁰ Also, if the patentee is able to tell the jury that the alleged infringer did consult counsel and obtain an opinion of counsel but nonetheless is unwilling to reveal counsel's advice, "the jury may well conclude that the advice was negative, despite a Knorr-Bremse jury instruction that no adverse inference should be drawn from the failure to disclose the advice."²⁰¹

Expanding malpractice liability for erroneous opinions of counsel may also further advance the goals of the patent litigation system.²⁰² The relatively corrupt opinion of counsel game could be improved if the Federal Circuit adopted a policy of punishing clients whose attorneys fail to issue good-faith opinions. In addition, if bar associations establish guidelines that instruct patent attorneys to only issue objective infringement opinions of counsel, patent attorneys could feel secure that a potentially infringing client will not "shop" amongst patent attorneys when an attorney denies a client's request for a slanted opinion. This would prevent infringers from attorney shopping until the infringer finds the "right" opinion. If an infringer's attorney issues an opinion of counsel lacking good-faith, the court should automatically rule against the infringer and find that the infringer committed willful infringement. The infringer's obtainment of an opinion of counsel lacking good-faith should not fulfill the due care requirement because the infringer's attorney did not avoid the infringement of known patent rights; therefore, the court should automatically enhance damages and award attorney's fees to the patentee in accord with the patent statutes. The infringer, in turn, should then be eligible for indemnity from its own attorney for committing malpractice and recover the enhanced damages award and attorney's fees from the attorney.

***119 A. Proposal for an Ideal Patent Trial**

The patent litigation system is substantially different from other litigation proceedings, though Judge Dyk has warned "patent law is not an island separated from the main body of American jurisprudence."²⁰³ Therefore, a complete reform to the system, having a new and different, yet consistent, litigation format could alleviate the problems with the current system.

A proposal for an ideal patent litigation trial could proceed by requiring the patentee to alert the infringer by giving written notice--sufficient to establish a declaratory judgment finding--about potentially infringing activities. Notice to the infringer establishes the infringer's affirmative duty of due care to avoid infringement. Satisfying the affirmative duty of due care requirement will not be exorbitantly expensive; the accused infringer will only have to obtain an opinion of counsel on the particular claim(s) within the notification. If the patentee attempts a "kitchen-sink" approach and asserts infringement on all claims of his patent, without a good-faith basis sufficient to establish a declaratory judgment finding, the patentee shall pay for the infringer's legal opinion fees. If the patentee sends a legitimate notification alleging infringement, but also asserts willful infringement without any foundation, not only should the patentee pay the costs incurred by the infringer during the willfulness and damages determination, but also the patentee's attorney should be sanctioned under FRCP Rule 11 for making an allegation without any evidentiary support.

Assuming that the patentee made a legitimate notification claim concerning infringement, the case may proceed to phase one of the bifurcated trial to determine if the patentee's patent is valid and, if so, to determine if the infringer's activities constitute infringement. If the patent is valid and the fact-finder determines that the infringer did infringe upon the patent, the trial may then proceed to the second phase, the determination of willfulness. In order to avoid a potential finding of willfulness in the second phase of a trial, an infringer would be wise to satisfy the affirmative duty of due care requirement.

An infringer's affirmative duty of due care may be satisfied by a well-reasoned, timely, competent, and good-faith based opinion of counsel. Satisfying this requirement is the safest action an infringer can take. If the opinion of counsel is issued in good-faith and the infringer has not engaged in reprehensible (or willful) conduct, the infringer shall not be liable for enhanced damages or attorney's fees. This rule will provide an incentive for infringers to procure a good-faith opinion of counsel to avoid the problems created by the opinion of counsel "window dressing" and "dual role" game. The determination on what constitutes a well-reasoned, timely, competent, and good-faith based opinion of counsel may easily be resolved through a thorough determination by a person familiar with the *120 patent process, such as a federal judge or magistrate. This determination is necessary because the infringer should not be allowed to avoid treble damages by getting an opinion of counsel that may be biased or predetermined. Of course, it is possible that two different patent attorneys may produce opposing opinions of counsel, but as long as each opinion is well-reasoned, timely, competent, and formed with a good-faith basis, then no willful infringement damage awards will ensue. Requiring a judge or magistrate to determine if the opinion of counsel was formed objectively could potentially burden or clog the court's docket, especially when determinations are appealed. However, the benefit derived from such a system would potentially resolve many current problems with the somewhat corrupt opinion of counsel game.

Conversely, if an infringer obtains an opinion of counsel, but the opinion is deemed to lack good-faith after a federal judge or magistrate's review, the infringer should immediately be charged with willful infringement, which will automatically result in awarding the patentee enhanced damages and attorney's fees. This punishment should prevent the opinion of counsel "window dressing" and "dual role" game and also discourage patent attorneys from writing unobjective, slanted opinions. The infringer, in turn, may be recompensed by filing an indemnification action and attorney malpractice claim against its own patent attorney to recover the enhanced damages and attorney's fees award.

Furthermore, if the duty of due care is not satisfied, i.e., no opinion of counsel was obtained, the fact-finder should look to the "totality of the circumstances" test to determine willful infringement. The fact-finder should evaluate the claim of willful infringement in light of the Read factors, and consider both enhancing and mitigating components to the claim. Remember, with this ideal proposal, the failure to obtain an exculpatory opinion of counsel does not matter with respect to the "totality of the circumstances" *121 test; the obtainment of an opinion of counsel only satisfies the duty of due care requirement and a good-faith opinion shall exculpate the infringer from liability for willful infringement. Therefore, if the accused infringer did not obtain an opinion of counsel, the court should look at the "totality of the circumstances" surrounding the willful infringement claim to determine the infringer's liability.

Failing to fulfill the duty of due care is a more risky avenue for an accused infringer because the infringer will not have the support of a well-reasoned, timely, competent, and good-faith based opinion of counsel to buttress its assertion that it did not engage in willful infringement. However, if the accused infringer feels that an opinion of counsel is unnecessary, and relies on the holding in Knorr-Bremse--no adverse inference will be drawn for the failure to obtain an exculpatory opinion of counsel--the infringer should not need to procure an exculpatory opinion and may proceed to the courtroom to prove that it did not willfully infringe upon the patent. If the accused infringer does not obtain an opinion of counsel to satisfy the due care requirement, and the fact-finder deems the infringer guilty of willful infringement after reviewing the "totality of the circumstances," the infringer may be penalized with treble damages and required to pay the patentee's attorney's fees.

VI. Conclusion

The Federal Circuit made progressive strides by eliminating the adverse inference doctrine from patent infringement litigation, but the court ultimately missed an ideal opportunity to provide a definitive means to fulfill the affirmative duty of due care requirement. The uncertainty of the due care requirement in the world of patent litigation is hurting business and innovation alike. The patent litigation system needs serious reform, and although Congress attempted to address this issue with the Patent Reform Act of 2005, the Act will only compound the problem of willful infringement and may further encourage infringement. The Federal Circuit also failed to remove the incentive to produce sham legal opinions, "thus

Knorr-Bremse is unlikely to have any significant impact on the day-to-day practice of infringement opinion issuing patent attorneys.⁹²⁰⁴ The Federal Circuit should have ruled that obtaining a well-reasoned, timely, competent, and good-faith based opinion of counsel should be sufficient to satisfy the affirmative duty of due care to defeat liability for willful infringement. The adoption of the “Proposal for an Ideal Patent Trial” could be the type of reform that the patent litigation system desperately needs. Until the Federal Circuit makes considerable efforts towards, setting a predictable and uniform standard for willfulness so that parties can make informed, strategic decisions,⁹²⁰⁵ the patent litigation system will remain in a state of flux.

Footnotes

^{a1} University of Kansas School of Law. I would like to acknowledge and thank Andrew Torrance and Richard Raimond for their help and guidance in preparation of this Comment. I would also like to thank my family for their unending support.

¹ Professional Inventors Alliance, Injunctions, [http:// www.piausa.org/patent_reform_issues/injunctions/](http://www.piausa.org/patent_reform_issues/injunctions/) (last visited Sept. 17, 2006).

² Carol Johns, Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.: A Step in the Right Direction for Willful Infringement, 20 Berkeley Tech L.J. 69, 72 (2005) (citing 35 U.S.C. §§ 154(a)(2), 283-284 (2000)).

³ U.S. Const. art. I, § 8, cl. 8.

⁴ Id.

⁵ See H.R. Rep. No. 97-312, at 20-22 (1981) (stating that the Federal Circuit was created primarily in response to a spree of forum shopping in patent litigation, a lack of uniformity in patent laws, and a high invalidity rate among litigated patents).

⁶ John R. Allison & Mark A. Lemley, The Growing Complexity of the United States Patent System, 82 B.U. L. Rev. 77, 80 (2002).

⁷ Underwater Devices, Inc. v. Morrison-Knudsen Co., 717 F.2d 1380, 1389 (Fed. Cir. 1983).

⁸ Id.

⁹ Johns, supra note 2, at 73.

¹⁰ Johns, supra note 2, at 73.

¹¹ 35 U.S.C. § 284 (2000) (providing that “the court may increase the damages up to three times the amount found or assessed”).

¹² 35 U.S.C. § 285 (providing that “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party”).

¹³ Debra Koker, Fulfilling the “Due Care” Requirement After Knorr-Bremse, 11 B.U. J. Sci. & Tech. L. 154, 154 (2005).

¹⁴ 7 Donald S. Chisum, Chisum on Patents § 20.03-.04 (2002).

- 15 Kimberly A. Moore, Empirical Statistics on Willful Patent Infringement, 14 Fed. Cir. B.J. 227, 227 (2004).
- 16 Joshua Stowell, Note, Willful Infringement and the Evidentiary Value of Opinion Letters After Knorr-Bremse v. Dana, 2005 Duke L. & Tech. Rev. 0005, P 1 n.6, [http:// www.law.duke.edu/journals/dltr/articles/2005dltr0005.html](http://www.law.duke.edu/journals/dltr/articles/2005dltr0005.html) (citing Ira V. Heffan, Willful Patent Infringement, 7 Fed. Cir. B.J. 115, 119 (1997) (“An infringer is liable for actual damages even if the infringement was unintentional, but the infringer is not liable for enhanced damages without a finding of willfulness.”)).
- 17 Stowell, supra note 16, P 1 n.7 (citing Heffan, supra note 16, at 115-16).
- 18 See Stephen C. Durant & Gene H. Lee, An Analysis of Knorr-Bremse, 11 Intell. Prop. Strategist 3, Nov. 11, 2004 (“[A] good faith reliance on timely and competent advice from counsel can negate a charge of willful patent infringement.”).
- 19 The Intellect Law Group, Patent Infringement Opinion, [http:// www.intellectlawgroup.com/patent_infringement_opinion.htm](http://www.intellectlawgroup.com/patent_infringement_opinion.htm) (last visited Sept. 17, 2006).
- 20 Stowell, supra note 16, P 6 n.27 (citing Cent. Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1577 (Fed. Cir. 1983)).
- 21 Stowell, supra note 16, P 6 n.28 (citing King Instrument Corp. v. Otari Corp., 767 F.2d 853, 867 (Fed. Cir. 1985)).
- 22 Kloster Speedsteel AB v. Crucible Inc., 793 F.2d 1565, 1580 (Fed. Cir. 1986).
- 23 383 F.3d 1337 (Fed. Cir. 2004).
- 24 Id. at 1344.
- 25 Id. (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
- 26 Id. at 1345 (quoting L.A. Gear Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1127 (Fed. Cir. 1993)).
- 27 Koker, supra note 13, at 155.
- 28 See H.R. 2795, 109th Cong. (2005) (H.R. 2795 was introduced by Representative Lamar Smith R-TX and co-sponsored by eleven other representatives).
- 29 Sue Ann Mota, Knorr-Bremse v. Dana Corporation--Willful Patent Infringement May No Longer Be Inferred Either From the Failure to Seek Legal Advice or Invoking the Attorney-Client Privilege, According to the Federal Circuit, 21 Santa Clara Computer & High Tech. L.J. 901, 912 (2005) (citing Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 24 (1982)).
- 30 Mota, supra note 29, at 912. (citing Matthew D. Powers & Steven C. Carlson, The Evolution and Impact of the Doctrine of Willful Patent Infringement, 51 Syracuse L. Rev. 53, 77 (2001)).
- 31 Donald S. Chisum et al., Principles of Patent Law 23 (3d ed. 2004).

32 Mota, *supra* note 29, at 912.

33 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1343 (Fed. Cir. 2004) (citing Advisory Comm. on Indus. Innovation Final Report, Dep't of Commerce (Sept. 1979)).

34 Johns, *supra* note 2, at 74.

35 Knorr-Bremse, 383 F.3d at 1342.

36 See Mark A. Lemley & Ragesh K. Tangri, Ending Patent Law's Willfulness Game, 18 Berkeley Tech. L.J. 1085, 1089 (2003) ("[P]atent law treats those who intentionally infringe a right more harshly than those who act innocently.").

37 Johns, *supra* note 2, at 72.

38 Koker, *supra* note 13, at 157.

39 Michael Abramowicz, A Unified Economic Theory of Noninfringement Opinions, 14 Fed. Cir. B.J. 241, 243 (2004).

40 Stowell, *supra* note 16, P 26 (citing Heffan, *supra* note 16, at 119 n.6).

41 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1343 (Fed. Cir. 2004) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

42 *Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1583 (Fed. Cir. 1996).

43 *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985).

44 Stowell, *supra* note 16, at *26 (citing *Ira V. Heffan, Willful Patent Infringement*, 7 Fed. Cir. B.J. 115, 123 (1997)).

45 Stowell, *supra* note 16, P 26 (citing Heffan, *supra* note 16, at 123).

46 717 F.2d 1380 (Fed. Cir. 1983).

47 Johns, *supra* note 2, at 72.

48 Johns, *supra* note 2, at 72.

49 *Underwater Devices*, 717 F.2d at 1384.

50 *Id.* at 1385.

51 Id.

52 Id.

53 Id.

54 Id.

55 Underwater Devices Inc. v. Morrison-Knudsen Co., 717 F.2d 1380, 1390-91 (Fed. Cir. 1983).

56 Id. at 1390.

57 Id.

58 Id.

59 Rolls-Royce Ltd. v. GTE Valeron Corp., 800 F.2d 1101, 1110 (Fed. Cir. 1986).

60 Ryco Inc. v. Ag-Bag Corp., 857 F.2d 1418, 1428 (Fed. Cir. 1988) (citing Cent. Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1577 (Fed. Cir. 1983)).

61 807 F.2d 1567 (Fed. Cir. 1986).

62 Bott, 807 F.2d at 1572 (citing Lam, Inc. v. Johns-Manville Corp., 668 F.2d 462, 474-75 (10th Cir. 1982)).

63 970 F.2d 816 (Fed. Cir. 1992).

64 Read, 970 F.2d at 827. The numbering of the Read factors is continued from the enumerated Bott factors of note 62.

65 Johns, supra note 2, at 75.

66 See Johns, supra note 2, at 75. (stating that “the list is not exclusive and the ‘totality of the circumstances’ should be examined for willfulness and setting damages”).

67 Peter L. Brewer, Patent Infringement and the Duty of Due Care After Knorr-Bremse, *Intell. Prop. Today* 37 (Aug. 2005).

68 Underwater Devices, Inc. v. Morrison-Knudsen Co., 717 F.2d 1380, 1389-90 (Fed. Cir. 1983).

69 Id.

70 See supra notes 44-45 and accompanying text for a discussion on actual and constructive knowledge.

71 Johns, supra note 2, at 73 (citing Lemley & Tangri, supra note 36, at 1090).

72 Moore, supra note 15, at 232.

73 J. Mark Bledsoe, Knorr-Bremse: Willful Infringement, the Affirmative Duty of Due Care, and the Adverse Inference, *Articles*, Lanier Ford Shaver & Payne, Huntsville, Alabama, Nov. 2004, <http://www.lfsp.com/cgi-bin/news.cgi?id=36&gid=3>.

74 See John R. Harris, Willful Patent Infringement and Treble Damages: The Reason for Legal Opinions 1 (2004), http://www.mmmlaw.com/articles/article_234.pdf. (stating that “[t]here is no legal duty to investigate whether a competitor has patents”).

75 Chisum et al., supra note 31, at 80.

76 Chisum et al., supra note 31, at 80-81 n.10.

77 Harris, supra note 74, at 1.

78 See William F. Lee & Lawrence P. Cogswell, III, Understanding and Addressing the Unfair Dilemma Created by the Doctrine of Willful Patent Infringement, 41 *Hous. L. Rev.* 393, 420 (2004) (“The lack of a general duty [to investigate whether a product is patented] might be understood on the grounds of economic efficiency.”).

79 Stowell, supra note 16, P 21 (citing Lee & Cogswell, supra note 78, at 420).

80 *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 828 (Fed. Cir. 1992).

81 *Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1583 (Fed. Cir. 1996).

82 Stowell, supra note 16, P 7 (citing *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*, 758 F.2d 613, 628 (Fed. Cir. 1985)).

83 Stowell, supra note 16, PP 6-7.

84 See Johns, supra note 2, at 76 (stating that courts could presume either an infringing defendant did not want to commit an infringing opinion to paper or the defendant was acting with willful ignorance).

85 Johns, supra note 2, at 76.

86 793 F.2d 1565, 1580 (Fed. Cir. 1986).

87 Johns, supra note 2, at 76.

88 Johns, supra note 2, at 75 (citing *Comark Commc’ns Inc. v. Harris Corp.*, 156 F.3d 1182, 1190-91 (Fed. Cir. 1998)).

89 Johns, *supra* note 2, at 76.

90 Johns, *supra* note 2, at 76. (citing *Sharper Image Corp. v. Honeywell Int’l Inc.*, 222 F.R.D. 621, 632 (N.D. Cal. 2004)).

91 *Kloster Speedsteel AB v. Crucible Inc.*, 793 F.2d 1565, 1580 (Fed. Cir. 1986).

92 *Id.* at 1579.

93 819 F.2d 1120, 1125 (Fed. Cir. 1987).

94 See *Rite-Hite*, 819 F.2d at 1125 (stating that “this court has upheld the drawing of adverse inferences on the question of willfulness ...”).

95 *Id.* See also *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed. Cir. 2004) (“[T]he inference that withheld opinions are adverse to the client’s actions can distort the attorney-client relationship....”).

96 *Rite-Hite*, 819 F.2d at 1125.

97 853 F.2d 1568, 1572-73 (Fed. Cir. 1988).

98 *Id.* at 1572-73.

99 *Brewer*, *supra* note 67, at 37.

100 See generally *Knorr-Bremse*, 383 F.3d at 1341 (listing *amicus curiae* briefs filed).

101 *Mota*, *supra* note 29, at 901.

102 *Cases and Recent Developments*, 14 Fed. Cir. B.J. 333, 396 (2004).

103 *Knorr-Bremse*, 383 F.3d at 1341.

104 Johns, *supra* note 2, at 79.

105 Johns, *supra* note 2, at 79.

106 *Knorr-Bremse*, 383 F.3d at 1341.

107 *Id.*

108 Johns, supra note 2, at 79.

109 Knorr-Bremse, 383 F.3d at 1341.

110 Id. at 1342.

111 Id. at 1341

112 Johns, supra note 2, at 80.

113 Knorr-Bremse, 383 F.3d at 1342.

114 Id.

115 Johns, supra note 2, at 80.

116 Knorr-Bremse, 383 F.3d at 1342.

117 Id.

118 Id.

119 Id.

120 Id.

121 Johns, supra note 2, at 80.

122 Johns, supra note 2, at 80-81.

123 Johns, supra note 2, at 81.

124 Johns, supra note 2, at 81.

125 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1342 (Fed. Cir. 2004).

126 Johns, supra note 2, at 81.

127 Knorr-Bremse, 383 F.3d at 1341.

128 Id.

129 Johns, *supra* note 2, at 81.

130 Johns, *supra* note 2, at 82.

131 Knorr-Bremse, 383 F.3d at 1346 (quoting *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1110 (Fed. Cir. 1986)).

132 See *id.* at 1342 (“[The] determination of willfulness is made on consideration of the totality of the circumstances.”).

133 *Id.* at 1347 (quoting *SRI Int’l, Inc. v. Advanced Tech. Labs. Inc.*, 127 F.3d 1462, 1465 (Fed. Cir. 1997)).

134 Mota, *supra* note 29, at 915.

135 See Knorr-Bremse, 383 F.3d at 1351 (Dyk, Cir. J., concurring in part and dissenting in part) (“[T]he existence of a substantial defense on the merits will not bar a finding of willfulness.”).

136 Durant, *supra* note 18, at 3.

137 Durant, *supra* note 18, at 3.

138 Knorr-Bremse, 383 F.3d at 1345-46.

139 *Id.* at 1350.

140 *Id.* at 1349.

141 *Id.*

142 *Id.*

143 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1350 (Fed. Cir. 2004).

144 Johns, *supra* note 2, at 70.

145 Lemley, *supra* note 36, at 1100-01.

146 Lemley, *supra* note 36, at 1093-94.

147 Lemley, *supra* note 36, at 1092-93.

- 148 See Robert Greene Sterne et al., *The U.S. Patent Landscape for Electronics Companies*, *Computer & Internet L.*, Sept. 2005, at 1, 18 (“[C]ompanies implemented policies to discourage or forbid patent searching by inventors and patent attorneys.”).
- 149 Bledsoe, *supra* note 73, at 1.
- 150 Sterne, *supra* note 148, at 19.
- 151 Sterne, *supra* note 148, at 19.
- 152 See Edwin H. Taylor & Glenn E. Von Tersch, *A Proposal to Shore Up the Foundations of Patent Law That the Underwater Line Eroded*, 20 *Hastings Comm. & Ent. L.J.* 721, 740 (1998) (“A reliable patent opinion costs at least \$10,000 if the patent has any real complexity. Indeed, an opinion on a set of ‘submarine’ patents will cost well over \$100,000.”).
- 153 Bledsoe, *supra* note 73, at 1.
- 154 Durant, *supra* note 18, at 4.
- 155 Bledsoe, *supra* note 73, at 1.
- 156 Johns, *supra* note 2, at 83 (citing Fed. Trade Comm’n., *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* 16 (2003), <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>).
- 157 Johns, *supra* note 2, at 83.
- 158 Stowell, *supra* note 16, P 3.
- 159 See *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1351 (Fed. Cir. 2004) (“As the amici point out, the due care requirement has fostered a reluctance to review patents for fear that the mere knowledge of a patent will lead to a finding of lack of due care; a cottage industry of window-dressing legal opinions by third party counsel designed to protect the real decision-making process between litigating counsel and the company’s executives; the imposition of substantial legal costs on companies seeking to introduce innovative products; and an enhanced ability of holders of dubious patents to force competitors’ products off of the market through the threat of enhanced damages.”) (citations omitted).
- 160 Koker, *supra* note 13, at 158.
- 161 See *Knorr-Bremse*, 383 F.3d at 1351 (“[W]indow dressing legal opinions by third party counsel [are] designed to protect the real [opinion].”).
- 162 Patent Quality Improvement: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the Comm. on the Judiciary, 108th Cong. 21 (2003) (statement of David M. Simon, Chief Patent Counsel, Intel Corp.), available at <http://judiciary.house.gov/media/pdfs/printers/108th/88545.pdf>.
- 163 *Id.* This is not to say that “patent trolling” is an entirely corrupt business. “Patent trolls” are often legitimate businesses that purchase patents at a premium price from patentees that do not have the requisite financial support to enforce their patent rights

against infringers.

164 Id.

165 Geoffrey Shippides, *Advocacy or Counsel: The Continuing Dual Role of Written Infringement Opinion Letters and the Failure of Knorr-Bremse to Confine the Role of Patent Attorneys Issuing Written Infringement Opinion Letters*, 18 *Geo. J. Legal Ethics* 1069, 1070 (2005) (citing Brief of Amicus Curiae Public Knowledge in Support of Defendant-Appellants at 7-8, *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) (No. 01-1357)).

166 Shippides, *supra* note 165, at 1070 (citing Lemley & Tangri, *supra* note 36, at 1103-05).

167 Shippides, *supra* note 165, at 1072 (citing Brief of Amicus Curiae Public Knowledge in Support of Defendant-Appellants at 9, *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) (No. 01-1357)).

168 Mota, *supra* note 29, at 916 (citing William M. Bulkeley, *Patent Ruling Irks Inventors, A ids Companies*, *Wall St. J.*, Mar. 2, 2005, at B1).

169 Fed. Trade Comm'n, *supra* note 156, at 16.

170 Shippides, *supra* note 165, at 1077.

171 Shippides, *supra* note 165, at 1077 (citing Imron T. Aly, *Encouraging Unprofessionalism: The Magic Wand of the Patent Infringement Opinion*, 12 *Geo. J. Legal Ethics* 593, 614 (1999)).

172 Model Code of Prof'l Responsibility DR 6-101(A)(1) (1980) (an intellectual property attorney that prepares a defective opinion by incorporating the results of a faulty patent search could face disciplinary action).

173 See Stowell, *supra* note 16, P 5 (citing Eric Young, *Patents Spell a Hot Market--For Lawyers*, *E. Bay Bus. Times*, Sept. 12, 2003, available at <http://www.bizjournals.com/eastbay/stories/2003/09/15/focus4.html> ("Consider recent judgments against eBay Inc. for \$29 million, Microsoft Corp. for \$521 million and Research in Motion Ltd. for \$53 million.")).

174 Taylor & Tersch, *supra* note 152, at 740.

175 See *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1349 (Fed. Cir. 2004) ("The duty of care requirement finds no support in the patent damages statute, the legislative history, or Supreme Court opinions.").

176 H.R. 2795, 109th Cong. (1st Sess. 2005).

177 Id.

178 Public Knowledge, H.R. 2795: The Patent Reform Act of 2005, [http:// www.publicknowledge.org/issues/hr2795](http://www.publicknowledge.org/issues/hr2795) (last visited Sept. 17, 2006).

179 H.R. 2795.

180 Professional Inventors Alliance, Willful Infringement, [http:// www.piausa.org/patent_reform_issues/willful_infringement/](http://www.piausa.org/patent_reform_issues/willful_infringement/) (last visited Sept. 17, 2006).

181 Professional Inventors Alliance, *supra* note 180.

182 H.R. 2795: The Patent Reform Act of 2005, *supra* note 178.

183 Professional Inventors Alliance, *supra* note 180.

184 John L. Rogitz, CAFC Happenings, *Intell. Prop. Today* 30, 30 (Aug. 2005).

185 See Moore, *supra* note 15, at 235 (“Eliminating [willfulness] evidence from the trial would greatly simplify the issues and the trial.”).

186 See Moore, *supra* note 15, at 235 (“[B]ifurcating cases actually saves money and time--in short, it is more efficient.”).

187 Moore, *supra* note 15, at 231-32, 234 (willfulness claims were alleged in 92.3% of cases investigated during 1983-2000 with relatively few willfulness determinations).

188 Moore, *supra* note 15, at 235.

189 H.R. 2795, 109th Cong. (1st Sess. 2005).

190 Professional Inventors Alliance, *supra* note 180.

191 Professional Inventors Alliance, *supra* note 180.

192 Professional Inventors Alliance, *supra* note 180.

193 Professional Inventors Alliance, *supra* note 180.

194 Moore, *supra* note 15, at 235.

195 Johns, *supra* note 2, at 85.

196 Moore, *supra* note 15, at 232.

197 See Fed. R. Civ. P. 11(b)(3) (2005) (requiring that any factual allegations made in a pleading have evidentiary support).

198 Cf. Stowell, *supra* note 16, P 5 (“[P]otential infringers may rebut an allegation of willful infringement ... by demonstrating that they made a good faith effort not to infringe.”).

- 199 Stowell, supra note 16, P 1 n.5 (citing Young, supra note 173, at 1.
- 200 Donald J. Curry, Effect of ‘Knorr-Bremse’ on Decisions to Rely on Opinion of Counsel, N.Y.L.J., May 12, 2005, at 1, 2.
- 201 Curry, supra note 200, at 1, 2.
- 202 See Abramowicz, supra note 39, at 290 (“[P]roviding more vigorous judicial policing of opinions of counsel ... through expanded malpractice liability for erroneous opinions, might ... better advance[] the goals of the patent and litigation systems.”).
- 203 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1351 (Fed. Cir. 2004) (Dyk, Cir. J., concurring in part and dissenting in part) .
- 204 Shipsides, supra note 165, at 1081.
- 205 Johns, supra note 2, at 89.