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GLOBAL-TECH APPLIANCES, INC. v. SEB S.A. AND THE CREATION OF A FLEXIBLE BLINDNESS STANDARD FOR INDUCED PATENT INFRINGEMENT

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When assigning liability in patent infringement cases, courts have often struggled with the determination of what mental state is necessary to hold a defendant liable. In Global-Tech Appliances, Inc. v. SEB S.A.*, the Supreme Court determined that knowledge is necessary in cases of induced infringement, but tempered the holding by allowing willful blindness to be a substitute for knowledge. This article argues that the flexibility introduced into induced infringement by willful blindness allows courts to implement a new "flexible blindness" standard. This standard will allow courts to make a fact-centered determination of blameworthiness rather than a difficult examination of the defendant's mental state. In doing so, the assignment of liability will be more reliable and accurate, there will be more deterrence of future acts of induced infringement, and the formal requirement for knowledge will protect innocent parties whose actions aid, but do not induce, infringement.*

I. INTRODUCTION

Bob, the CEO of Acme Supply, Inc., was informed that a widget with enhanced networking capabilities made by the Granny Smith Corporation was selling well in stores. Bob realized that his company, a major widget component manufacturer, could make a large profit if it became involved in that market. Therefore, he approached the Raspberry Corporation about a deal where Acme would supply widgets for Raspberry to make a product that incorporated their networking technology. Raspberry immediately

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agreed. A few days after the new product appeared in stores, Acme received a letter from Granny Smith's lawyer claiming that Acme had induced infringement of Granny Smith's networked widget patents. Bob was not surprised that the Raspberry product infringed since he knew that widgets were a competitive field with many patents. Nonetheless, Granny Smith's claim infuriated Bob because he could legitimately claim that neither he nor his employees knew of the patents and because his company only manufactured components that were in the public domain.

Patent infringement can cover a range of activities which society views as having degrees of blameworthiness, and it is often difficult for courts to assign liability in cases where the defendant has a lesser degree of fault.[1] For instance, in the above hypothetical, Acme neither made nor sold infringing products. Still, the company involved itself in a process that led to the introduction of an infringing product into the market. Statutory definitions of infringement allow punishment for induction of infringement,[2] but courts have had a particularly difficult time determining the level of intent required from the defendant in such induced infringement situations.[3] The Supreme Court recently addressed this dilemma in *Global-Tech Appliances, Inc. v. SEB S.A.*,[4] in which it clarified ambiguous holdings for induced infringement intent.[5] In doing so, the Court rejected a pure

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[1] For a general overview of the types of patent infringement and the liability assigned for each, see Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225, 226–28 (2005); Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575, 1576–77 (2011).

[2] 35 U.S.C. § 271(b) (2006). Federal law allows assignment of liability if the defendant caused another to infringe a patent. *See* further discussion of this statute *infra* Part II.

[3] *Compare* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990) (holding that the alleged inducer must intend to perform acts that constitute induced infringement), *with* Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 553 (Fed. Cir. 1990) (holding that the alleged inducer must intend both to perform acts that constitute induced infringement and to cause the infringement).

[4] 131 S. Ct. 2060 (2011).

[5] *Id.* at 2069.

knowledge requirement by importing the criminal law willful blindness standard into patent law.[6] The Court thereby made it clear that it will attribute knowledge in induced infringement cases, as is does in criminal cases, when the defendant is aware of a high likelihood of infringement and intentionally avoids gaining actual knowledge of that fact.[7] This Recent Development argues that the Supreme Court's methodology allows for implementation of a new standard, which this article will refer to as the "flexible blindness" standard, that allows for a more calibrated assignment of liability by reducing the focus on actual intent. This standard is defined as a flexible, fact-based analysis of the circumstances surrounding infringement with the goal of determining whether the actions of the accused infringer suggest sufficient knowledge or willful blindness to justify assigning liability.

This Recent Development outlines the development of and rationale for the flexible blindness standard. Part II discusses the development of different types of patent infringement and the legal standards that need to be met for liability to be assigned for each type. In Part III, this article presents the holding of *Global-Tech* and its adoption of the knowledge requirement for induced infringement. Part IV briefly reviews prior suggestions for properly assigning liability in induced infringement cases. Part V fits the *Global-Tech* holding into the context of these standards and discusses how it can be used as the basis for a flexible blindness standard. Finally, Part VI reviews some induced infringement holdings that have followed *Global-Tech* in order to determine whether they are consistent with the application of a flexible blindness system.

II. THE STANDARDS OF PATENT INFRINGEMENT LAW

The fundamental tradeoff at the center of the U.S. patent system is giving inventors exclusive use of their inventions in

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[6] *Id.*
[7] *Id.* at 2068–69.

return for the disclosure of those inventions to the public.[8] Enforcement of the legal rights granted to inventors is an essential element of validating this bargain.[9] Courts hold infringing parties liable for a variety of actions, such as using the claimed invention, making the claimed invention, or contributing to others' use of the invention.[10] Early patent cases divided infringement into two categories: direct infringement and indirect infringement.[11] However, in the Patent Act of 1952 ("Patent Act"),[12] Congress further divided indirect infringement into the two separate offenses of contributory and induced infringement.[13] The Patent Act codified the three categories of infringement as direct (35 U.S.C. § 271(a)),[14] induced (35 U.S.C. § 271(b)),[15] and contributory (35 U.S.C. § 271(c)).[16]

Direct infringement refers to circumstances in which someone "without authority makes, uses, offers to sell, or sells any patented invention, within the United States, or imports into the United States any patented invention during the term of the patent."[17] This is the conventional and most common form of patent infringement, as it includes all cases where the defendant is personally involved in the infringing action.[18] It is well established and uncontroversial that direct infringement is a strict liability offense.[19] Accordingly,

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[8] 1-OV DONALD A. CHISUM, CHISUM ON PATENTS § 2 (2011) (describing the Constitution's empowerment of Congress to grant the exclusive rights to use inventions).

[9] *Id.*

[10] For a history of the development of the forms of patent infringement, see generally Lemley, *supra* note 1, at 227–28.

[11] *Id.*

[12] Codified as § 35 U.S.C. (2006).

[13] Lemley, *supra* note 1, at 227.

[14] 35 U.S.C. § 271(a) (2006).

[15] *Id.* § 271(b).

[16] *Id.* § 271(c).

[17] *Id.* § 271(a).

[18] *See* Rantanen, *supra* note 1, at 1576 (discussing the basic types of patent infringement).

[19] *See* Roger D. Blaird & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 800 (2002).

a patent holder can bring suit regardless of the defendant's intentions or any precautions he or she may have taken.[20] Indirect infringement determinations, however, are much more complicated, as the defendant's actions and intentions must be analyzed.[21]

Contributory infringement, the first type of indirect infringement, involves a third party whose "behavior . . . encourages, aids, or permits another to directly infringe a patent."[22] Historically, contributory infringement has most often involved supplying components of the claimed invention.[23] When examining contributory patent infringement, the courts' primary concern is what conduct is necessary to constitute the infringement.[24] Section 271(c) states that in cases of contributory infringement, the party acts "knowing [the supplied component] to be especially made or especially adapted for use in an infringement" of the patent.[25] This intent requirement is ambiguous because the statute fails to state whether a party only needs to intend to commit the acts that constitute contributory infringement or whether the party also needs to intend that the third party infringe.[26]

Induced infringement covers the remaining indirect infringement cases, those where someone "actively induces infringement of a patent" by another.[27] The distinction between contributory and induced infringement is summarized by noting that while contributory infringement involves the sale of components or parts to the direct infringer, induced infringement

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[20] *Id.* at 1589–1609.

[21] *See id.* (summarizing the conventional views of conduct that constitutes direct and indirect infringement).

[22] *Id.* at 1590–91.

[23] Lemley, *supra* note 1, at 227.

[24] *See* Rantanen, *supra* note 1, at 1589–1609.

[25] 35 U.S.C. § 271(c) (2006).

[26] *See* Rantanen, *supra* note 1, at 1589–1609 (discussing the various standards implemented by the courts in response to the statutory language of § 271).

[27] 35 U.S.C. § 271(b).

covers "'other acts' that direct, facilitate, or abet infringement."[28] The same intent ambiguity that plagues contributory infringement is also seen with induced infringement, as evidenced by the United States Court of Appeals for the Federal Circuit issuing two conflicting standards for induced infringement within one calendar year.[29] The Federal Circuit later settled this issue in *DSU Medical Corp. v. JMS Co., Ltd.*,[30] when it confirmed that the third party's intent to infringe is necessary, stating that " 'knowledge of the acts alleged to constitute infringement' is not enough."[31]

A parallel question is whether knowledge of the infringement is necessary to create liability for induced and contributory infringement, or whether a less stringent requirement for the defendant's mental state would be adequate. In *Aro Manufacturing Co. v. Convertible Top Replacement Co.* (*Aro II*),[32] the Supreme Court held that knowledge was required for contributory infringement under § 271(c).[33] In that case, the Court held that the legislative history of the Patent Act made it clear that the Act codified existing case law,[34] and, therefore, the defendant is required to know "that the combination for which his component

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[28] Lemley, *supra* note 1, at 227 (quoting for emphasis in original).

[29] *Compare* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990) (defining a broad standard in which the alleged inducer only must intend to perform acts that aid the direct infringer), *with* Manville Sales Corp. v. Paramount Systems, Inc., 917 F.2d 544, 553 (Fed. Cir. 1990) (stating a narrower standard in which the alleged inducer must both intend to perform acts that aid the direct infringer and intend to cause infringement).

[30] 471 F.3d 1293 (Fed. Cir. 2006).

[31] *Id.* at 1305 (quoting Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1363 (Fed. Cir. 2003)).

[32] 377 U.S. 476 (1964).

[33] *Id.* at 488.

[34] The Supreme Court directly stated that "[i]n enacting § 271(c), Congress clearly succeeded in its objective of codifying this case law." *Id.* at 487. The case law referenced dated back to at least 1897, when "Circuit Judge Taft . . . thought it 'well settled' that 'where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement . . . .'" *Id.* at 486–87 (quoting Thomson-Houston Elec. Co. v. Ohio Brass Co., 80 F. 712, 721 (6th Cir. 1897)).

was especially designed was both patented and infringing."[35] Following this holding, one question remained: did this knowledge requirement also apply to § 271(b) and induced infringement? This was the question addressed by *Global-Tech* in May 2011.

III. GLOBAL-TECH'S KNOWLEDGE STANDARD FOR INDUCED INFRINGEMENT

Most individuals deem the culpability of someone who intentionally copies a patented design for personal profit to be much greater than that of someone who unknowingly makes and supplies a small component of a product that then infringes a patent. These two extremes of perceived guilt are reflected in § 271, where the categories of infringement are defined and liability is assigned.[36] For example, the high culpability of direct infringement is matched by § 271(a)'s strict liability requirements.[37] On the other hand, contributing a component for a product that infringes only creates liability when, according to § 271(c), the contributor acts "*knowing* the [component] to be especially made or especially adapted for use in an infringement."[38] Furthermore, § 271(c) provides an exception for goods that have significant legitimate use aside from the infringing purpose.[39] A range of activities exists between these two extremes where culpability is less certain. Should we punish a party who actively makes an effort not to know whether the component they sell will be used in a patented product? What about a party that ignores the known fact that most products in a given field are patented when they supply the essential component of such a product? And what of a party who is indifferent to the fact that his product's use

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[35] *Id.* at 488.

[36] 35 U.S.C. § 271(a)–(c) (2006); s*ee supra* Part II (containing a more detailed definition of the types of patent infringement).

[37] *Id.* § 271(a).

[38] *Id.* § 271(c) (emphasis added).

[39] *Id.* (stating that sellers will not be liable for downstream infringement when the goods are "not a staple article or commodity of commerce suitable for substantial non-infringing use").

infringes a patent? These are fact-dependent inquiries where reasonable parties, and courts, might disagree as to whether the manufacturer should be held liable under patent law.

A. *The Law Prior to* Global-Tech

Prior to *Global-Tech*, the courts were perceived as being very friendly towards defendant indirect infringers due in part to the *DSU* and *Aro II* holdings which, when combined, effectively require proof of actual knowledge of a patent's existence and an intent to induce a third party to infringe that patent.[40] This is a very high hurdle to clear.[41] For example, even in cases with strong evidence of knowing patent infringement, courts have often concluded that seeking the advice of counsel would immunize the defendants.[42] The mere fact that the defendant received an attorney's opinion that he was not infringing was enough to counterbalance strong evidence of knowledge of an existing patent, and a failure to procure such evidence was "circumstantial evidence of intent to infringe."[43]

This exact issue is addressed in the America Invents Act,[44] which states that:

> [t]he failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that

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[40] *See, e.g.*, Vivian Lei, *Is the Doctrine of Inducement Dead?*, 50 IDEA 875, 883–94 (2010) (arguing that the combination of requiring actual knowledge of infringement and the near immunizing effect of obtaining the advice of counsel would kill the induced infringement doctrine).

[41] *Id.*

[42] *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 699 (Fed. Cir. 2008) (holding that opinion-of-counsel evidence was an indication of lack of knowledge, and that failing to procure such advice was "circumstantial evidence of intent to infringe").

[43] *Id.*

[44] Leahy-Smith America Invents Act, H.R. 1249, 112th Cong. (2011) (enacted by Congress in the fall of 2011 as the first major overhaul of the patent system in 60 years).

> the accused infringer . . . intended to induce infringement of the patent.[45]

Therefore, the America Invents Act will reduce the incentive for manufacturers to seek advice of counsel and will take away a tool that a plaintiff could previously use to prove induced infringement. While the *Global-Tech* case predated this legislation, the change is indicative of the difficult environment facing those attempting to protect their patents by proving induced infringement.

B. *The* Global-Tech *Decision*

The disputed technology at the center of *Global-Tech* was a deep fryer for home use invented by the French company SEB S.A. ("SEB").[46] SEB obtained the patent at issue in 1991. Its novelty was a safety feature that prevented the hot interior from transferring heat to the exterior housing that users contact during operation.[47] This product was a commercial success. As a result, Sunbeam Products, Inc., a U.S. competitor of SEB, entered the market.[48] To accomplish entry, Sunbeam contracted with Pentalpha Enterprises, Ltd., a Chinese appliance manufacturer, to supply similar fryers for Sunbeam to sell in the U.S.[49] Pentalpha is a wholly owned subsidiary of Global-Tech Appliances, Inc., and both companies were named as defendants in the *Global-Tech* infringement suit.[50]

To fulfill its contract with Sunbeam, Pentalpha purchased a SEB fryer in Hong Kong, reverse engineered that product, and created a new fryer that, aside from superficial features, was identical to the SEB model.[51] The copied SEB fryer lacked a U.S. patent marking, as it was specifically manufactured for overseas

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[45] *Id.* § 17.
[46] Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2063 (2011).
[47] *Id.* at 2063–64.
[48] *Id.* at 2064.
[49] *Id.*
[50] *Id.*
[51] *Id.*

sale.[52] Pentalpha retained counsel to perform a right-to-use study, but did not inform that attorney of the existence of the SEB product from which the Pentalpha fryer was derived.[53] The attorney failed to find the SEB patent and therefore issued a non-infringement opinion regarding the patents he did find.[54] Pentalpha then began supplying the fryers to Sunbeam and other appliance retailers, including Fingerhut Corporation and Montgomery Ward & Co.[55]

After the new fryers were introduced into the market, SEB brought suit against Sunbeam for direct infringement as well as against Pentalpha and Global-Tech for induced infringement.[56] While Sunbeam settled, the case against Pentalpha and Global-Tech went to trial with the jury finding that both companies had induced infringement.[57] On appeal,[58] the defendants argued "that SEB did not adequately prove inducement" as they did not prove Pentalpha had actual knowledge of patent infringement.[59] The Federal Circuit did not accept this narrow interpretation of the mental state necessary for induced infringement. Instead, it held that a defendant who was "deliberately indifferent" to a patent's existence could be found to have induced infringement.[60] This more plaintiff-friendly requirement allowed SEB to prove induced infringement without evidence as to Global-Tech's or Pentalpha's actual mental state.

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[52] *Id.* SEB did not mark fryers designated for sale outside the U.S. with U.S. patent information, likely because SEB did not anticipate needing to protect its U.S. intellectual property rights in such a situation. *Id.*

[53] *Id.* This omission is significant since a right-to-use study's sole purpose is to identify potential infringement of patents by the product in question. An attorney with access to the SEB fryer would both be more likely to discover SEB's patents and would be more likely to find that Pentalpha's fryer would infringe those patents.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] SEB v. Montgomery Ward & Co., 594 F.3d 1360 (Fed. Cir. 2010).

[59] *Id.* at 1368.

[60] *Id.* at 1376–77.

The Supreme Court granted certiorari to determine whether the asserted "deliberate indifference" standard is appropriate for § 271(b) induced infringement analysis.[61] In its decision, the Court acknowledged that "both the language of § 271(b) and the pre-1952 case law that this provision was meant to codify are susceptible to conflicting interpretations."[62] The deciding precedent, however, was the *Aro II* holding that § 271(c) contributory infringement requires that "the violator of § 271(c) must know 'that the combination for which his component was especially designed was both patented and infringing.'"[63] In writing for the majority, Justice Alito reasoned, given that both § 271(b) and § 271 (c) originated from the same common law doctrine, that § 271(b) should use the same "knowledge" standard.[64] The Court therefore held that the Federal Circuit standard was inappropriately broad, stating that it "would thus be strange to hold that knowledge of the relevant patent is needed under § 271(c) but not § 271(b)."[65]

Had the Court stopped here, it would have set a very high bar for proving induced infringement due to the inherent difficulties in proving actual knowledge of infringement.[66] It is particularly difficult to ascertain knowledge of patent infringement since patents are highly technical documents that are open to multiple interpretations.[67] The knowledge determination difficulty is compounded by the fact that most modern patent litigants are large corporations whose institutional knowledge is difficult to determine.[68] Therefore, a strict knowledge standard would likely

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[61] *Global-Tech*, 131 S. Ct. at 2060.
[62] *Id.* at 2067.
[63] *Id.* (quoting Aro Mfg. Co. v. Convertible Top Replacement Co. (*Aro II*), 377 U.S. 476, 488 (1964)).
[64] *Id.* at 2068.
[65] *Id.*
[66] *See* Rantanen, supra note 1, at 1580–81.
[67] *See id.* at 1581.
[68] *See id.* at 1610–11 (discussing how the large number of people who make up a corporation, the multiple tiers of authority in a corporation, and the variation of knowledge between individuals in the corporation all combine to make corporate knowledge a very complex topic).

lead to a situation where induced infringement would be very difficult to prove and rarely enforced.

Perhaps recognizing this difficulty, the Supreme Court did not decide *Global-Tech* based on a pure knowledge standard.[69] Instead, it adopted a proposal from the plaintiff-appellee's brief that suggested importing the criminal law concept of willful blindness into patent law.[70] In doing so, the Court held that (1) if the defendant has a subjective belief "that there is a high probability that a fact exists" and (2) if the defendant takes "deliberate actions to avoid learning of that fact," then that defendant can be considered to have knowledge of the infringement.[71] The Court made a point of criticizing the Federal Circuit's allowance of "a finding of knowledge when there is merely a 'known risk' that the induced acts are infringing" or when there is "only 'deliberate indifference' to that risk."[72] The Supreme Court holding differed from the Federal Circuit mainly in that "the Federal Circuit's test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities."[73] The Court may have considered this a critical distinction because § 271(b) defines the infringer as a party who "actively induces infringement."[74]

The incorporation of willful blindness clearly means that actual knowledge of the infringement is not necessary, but the dismissal of the Federal Circuit's standard raises the question of what mental states *are* acceptable. In addition, the court did not address what actions are sufficient to trigger the "active efforts" requirement that was lacking in the Federal Circuit analysis.[75] These are questions that courts must and will likely answer in future induced

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[69] *Global-Tech*, 131 S. Ct. at 2068.
[70] Brief for Respondent at 33–38, Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060 (2011) (No. 10-6).
[71] *Global-Tech*, 131 S. Ct. at 2070.
[72] *Id.* at 2071 (using quotes as emphasis to define the standard used in SEB v. Montgomery Ward & Co., 594 F.3d 1360 (2010)).
[73] *Id.*
[74] 35 U.S.C. § 271(b) (2006).
[75] *Global-Tech*, 131 S. Ct. at 2071.

infringement cases. To find suggestions on how these questions should be answered, one should first examine the previously proposed models of how to define induced infringement.

IV. PREVIOUSLY SUGGESTED INDIRECT INFRINGEMENT STANDARDS

The ambiguity of the mental state required for indirect infringement and the resultant instability in the law described above prompted debates over the proper standards that should be applied in courts.[76] Recent law review articles have suggested various systems of fine-tuning for the intent system in induced infringement.[77]

A. *A Stepped Scale of Induced Infringement*

Mark Lemley, a leading patent law scholar, has advocated for the application of a stepped scale, where the degree of involvement and level of intent are inversely proportional when assigning liability for induced infringement.[78] At one extreme of this model, intent is irrelevant to assignment of liability when someone makes, uses, or sells a patented item (a high level of involvement), thus aligning with the established law that direct infringement is a strict liability offense.[79] At the other extreme, no mental state can result in liability being assigned for merely being aware of an infringing act by another.[80]

In the middle ground, Lemley's proposed system has two categories: (1) someone who is "[c]ausing" infringement will be

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[76] *See*, *e.g.*, Lemley, *supra* note 1, at 228–32 (reviewing the debate over the meaning of induced infringement).

[77] *See id.* at 227–28 (proposing a tiered system that would balance level of intent required with the degree of involvement in the acts); Rantanen, *supra* note 1, at 1589–1609 (advocating for an objective recklessness standard in place of the current knowledge standard).

[78] Lemley, *supra* note 1, at 244.

[79] *Id.*

[80] *Id.* This also aligns with current law in that induced infringement liability is assigned to a party who "*actively* induces infringement," as stated in 35 U.S.C. § 271(b) (emphasis added).

held liable when he has "[k]nowledge of acts caused," and (2) "[a]ssisting" infringement will be punishable only when linked with "[k]nowledge plus intent to infringe."[81] In the first category, a party causing infringement by another is analogized to the controlling party in an employer-employee or master-servant relationship.[82] The rationale for assigning liability without intent to infringe in such a relationship is that "[h]olding a defendant who directs the agent's behavior liable based only on intent to encourage the acts, rather than intent to infringe a known patent, avoids letting the mastermind escape while punishing the servant."[83] The second intermediate category of infringement, assisting infringement, covers an act that "consists merely of helping another in some way," where the assisting party lacks an element of control over the direct infringer.[84] In that context, the assisting party is not as closely connected to the infringement. Therefore, "it makes little sense to hold them liable if they did not in fact know that the act they were encouraging was wrong."[85]

The primary benefit of this stepped, or tiered, system is to provide a much clearer guide of "how involved the defendant must be in the act of infringement to be liable for inducement."[86] As such, the system is a suggestion of how to implement a method that more accurately and precisely assigns liability, particularly in cases where the defendant's conduct is not clearly blameworthy. One criticism of this model is that it lacks a safe harbor provision for protecting "good faith" inducers from pre-suit liability, therefore allowing too much blame to attach to good faith parties under the "causing infringement" branch.[87] Regardless of the

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[81] *Id.*
[82] *Id.* at 242.
[83] *Id.*
[84] *Id.* at 242–43.
[85] *Id.*
[86] *Id.* at 231.
[87] Timothy R. Holbrook, *Symposium Review: The Intent Element of Induced Infringement*, 22 SANTA CLARA COMPUTER AND HIGH TECH L.J. 399, 411–12 (2006). Holbrook argues that the standard for inducement should be intent to induce infringement. *Id.* at 412. His disagreement with Lemley appears to

potential benefits of a tiered system, its implementation is unlikely due to the Federal Circuit's choice in *DSU* to require that induced infringement always include the intent to encourage infringement.[88] The Federal Circuit's foreclosure of finding induced infringement with only the intent to aid the actions that constitute infringement makes it difficult to have a tiered system because it eliminates the "causing infringement" tier. Without this tier, there would be fewer levels of intent available to match to various levels of conduct. Consequently, it would be difficult to create a stepped system with easily distinguishable levels where a court could assign liability with high precision.

B. *Using Objective Recklessness as an Induced Infringement Standard*

A recent article by patent scholar Jason Rantanen suggests that courts adopt an objective recklessness standard in place of the current knowledge test.[89] According to Rantanen, both the current system of the law and previous attempts to modify it suffer from attempts to use traditional tort principles of mens rea that are inappropriate in modern patent law.[90] Since patents are complex and detailed documents whose scope is difficult, if not impossible, to determine, "one can virtually never be certain that conduct infringes a patent short of a final judgment."[91] Rantanen argues that combining this difficulty with the ambiguous nature of corporate knowledge renders a mens rea determination vague and

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originate from a moralistic standpoint, and centers on how much blame should rightfully attach to those acting in good faith regardless of their degree of involvement in the inducement of infringement. *Id.* Holbrook would implement a sliding scale such as that advocated by Lemley only after first applying a good faith test as a threshold. *Id.*

[88] DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1304 (Fed. Cir. 2006).

[89] Rantanen, *supra* note 1, at 1581 (suggesting "that the fault element of indirect infringement should be articulated as an objective, risk-based inquiry, asking whether a high risk that the relevant conduct infringed a patent would have been obvious to a person in the accused party's place").

[90] *Id.* at 1580.

[91] *Id.* at 1581.

indeterminate.[92] As a solution, he suggests objective recklessness as an alternate induced infringement standard that would allow an "actor-centric," fact-based analysis of whether "the high risk of infringing a patent would have been obvious to a person in the accused party's position."[93]

The advantage of this system is that it would allow courts to be more flexible and more effectively deter induced infringement without being bound by the difficult task of determining the true intent of the putative infringer.[94] If courts enforced a standard which asks the single question of "whether the relevant conduct infringes a patent," defendants would be more effectively deterred after realizing that "[c]opying a patented product . . . is a high risk activity."[95]

The objective recklessness system, however, is not without its downsides. For instance, abandoning the mens rea determination for induced infringement allows parties acting in true good faith, but recklessly, to be found liable based on the infringements of others. This outcome is counter to the idea implicit in bringing induced infringement charges rather than direct infringement charges: to punish the truly culpable party who is in control of creating an infringement.[96] Therefore, while the use of the objective recklessness standard may give courts more flexibility in assigning liability, it also may be an overcorrection that creates a new problem of over-enforcement.

C. *Strict Liability for Induced Infringement*

The common element in both the stepped scale and objective recklessness systems is an effort to implement a system that would more accurately and precisely assign liability, particularly in cases where the defendant's conduct is not clearly blameworthy. This effort is considered unnecessary by those who would abandon

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[92] *Id.*
[93] *Id.* at 1622–23.
[94] *Id.* at 1611.
[95] *Id.* at 1624.
[96] *See, e.g.*, Lemley, *supra* note 1, at 228.

consideration of mens rea and instead assign liability whenever the defendant aided the direct infringer, regardless of the defendant's intent to aid infringement.[97] This strict liability has been justified by noting that "[i]t is unclear why a direct infringer who did not know and could not have known of his infringement should be held strictly liable, while an indirect infringer who knows most of his end users are infringing, albeit without his direct encouragement, should escape liability."[98] A strong argument against this approach, similar to the one made against the objective recklessness standard, is that the potential for good faith actors to be punished is quite high.[99] Perhaps for this reason, the Federal Circuit explicitly rejected this standard in *DSU* when it said that "the inducer must have an affirmative intent to cause direct infringement."[100]

V. FLEXIBLE BLINDNESS AS AN ALTERNATIVE APPROACH TO INDUCED INFRINGEMENT

In *Global-Tech*, the Supreme Court stated "that induced infringement . . . requires knowledge that the induced acts constitute patent infringement."[101] By emphasizing the knowledge

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[97] *See, e.g.*, Lynda J. Oswald, *The Intent Element of "Inducement to Infringe" Under Patent Law: Reflections on Grokster*, 13 MICH. TELECOMM. & TECH L. REV. 225, 241–46 (2006) (arguing for a strict liability standard of induced infringement through assignment of liability for any party intending to aid the acts that constitute infringement); Michael N. Rader, *Toward A Coherent Law Of Inducement To Infringe: Why The Federal Circuit Should Adopt The Hewlett-Packard Standard For Intent Under § 271(B)*, 10 FED. CIR. B.J. 299 (2000) (making a similar argument that induced infringement should have a strict liability intent standard).

[98] Oswald, *supra* note 97, at 241.

[99] Holbrook, *supra* note 87, at 408–09 (arguing that punishing good faith parties for induced infringement would lead to "reduced competition, potentially higher prices, and even worse the existence of invalid patents").

[100] DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1306 (Fed. Cir. 2006).

[101] Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011) (confirming the Federal Circuit's decision in *DSU* and foreclosing the debate over whether induced infringement requires intent to cause the infringing acts alone, or whether it requires intent to induce acts that are known to be infringements).

requirement, the Court made it clear that the broader "deliberate indifference" standard used by the Federal Circuit was not a stringent enough method of assigning liability.[102] In examining the deliberate indifference standard, the Supreme Court found it inadequate in two ways:

> First, it permits a finding of knowledge when there is merely a "known risk" that the induced acts are infringing. Second, in demanding only "deliberate indifference" to that risk, the Federal Circuit's test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities.[103]

Following the implementation of the knowledge requirement in *Global-Tech*, the open question is whether the inclusion of willful blindness significantly broadens a pure knowledge standard. The willful blindness standard expanded the pure knowledge standard at least slightly, since a party who is willfully blind by definition lacks knowledge but is still assigned liability under the willful blindness standard as a result of his more culpable conduct.[104] On the other hand, Justice Kennedy's dissent in *Global-Tech* noted that willful blindness can be equated with actual knowledge, as "[f]acts that support willful blindness are often probative of actual knowledge."[105] While Justice Kennedy's observation is true in some cases, the Supreme Court's flexible language in *Global-Tech* will likely allow assignment of liability in cases in which willful blindness is not easily equated to actual knowledge. If so, the *Global-Tech* holding is advantageous insofar as it will allow for a more nuanced and objective interpretation of induced infringement cases that can be referred to as a flexible blindness standard. Flexible blindness could offer the advantages of previously proposed alternate induced infringement standards, while still providing significant protection for innocent parties.

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[102] *Id.* at 2071 (quoting SEB v. Montgomery Ward & Co., 594 F.3d 1360, 1376–77 (Fed. Cir. 2010)).

[103] *Id.*

[104] *See, e.g.*, Timothy P. O'Toole, *Patently Unusual: How a Recent Supreme Court Patent Decision Alters the Landscape for Proving Criminal Knowledge*, 25 WESTLAW J. WHITE-COLLAR CRIME 1 (Aug. 25, 2011) (discussing the history of willful blindness and its relation to the *Global-Tech* holding).

[105] *Global-Tech*, 131 S. Ct. at 2073 (Kennedy, J., dissenting).

A. *Flexibility in the Language of the Willful Blindness Standard*

Parsing the language of *Global-Tech* reveals that the Supreme Court left significant room for interpretation in applying the willful blindness standard. For instance, the willful blindness standard requires that "the defendant must subjectively believe that there is a high probability that a fact exists."[106] By including the phrase "high probability," the Court grants trial courts significant discretion to decide when the defendant is willfully blind. This discretion allows examination of the evidence to determine whether the facts of the case justify assigning the high probability label and subsequently allowing liability for induced infringement.

The *Global-Tech* standard also requires that the defendant undertake "active efforts" to avoid knowledge of infringement,[107] a requirement that was absent in the Federal Circuit's deliberate indifference standard.[108] Since this prevents liability in cases where the defendant only fails to act, the permissible range to make a finding of induced infringement is reduced. Having a reduced range, however, does not mean that willful blindness will be restricted to a narrow range of activities. This was demonstrated in *Global-Tech* by the Supreme Court's willingness to examine circumstantial evidence.[109] For instance, one of the key pieces of evidence the Court considered in finding Pentalpha and Global-Tech willfully blind was the fact that Pentalpha obtained "an overseas model of SEB's fryer."[110] This was considered an active effort to avoid knowledge,[111] despite the possibility that such an action may have an innocent explanation. One potential innocent interpretation would be that the overseas model would be the most readily available to Pentalpha at its overseas headquarters. By giving credence to the incriminating interpretation, the Supreme Court has indicated that there is considerable leeway in

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[106] *Id.* at 2070 (majority opinion).
[107] *Id.*
[108] *Id.* at 2071.
[109] *Id.*
[110] *Id.*
[111] *Id.*

defining what constitutes an active effort to induce infringement. Given this leeway, and the flexibility allowed by the "high probability" language, the Supreme Court has laid out a standard which can appropriately be labeled flexible blindness.

B. *The Shift to and Significance of Fact-Dependent Analysis*

While both a pure knowledge examination and a willful blindness test depend on circumstantial evidence to assign liability, willful blindness is inherently more concerned with the facts of the case as it includes considerations beyond the defendant's mental state.[112] A knowledge analysis will only consider facts to the extent that they inform the determination of a defendant's mental state. In contrast, a willful blindness analysis will be more concerned with the context of the situation. The debate will revolve around the defendant and whether his behavior was blameworthy enough to meet the standard. Stated another way, a court examining pure knowledge asks what the mental state is, whereas a court examining willful blindness asks if the actions of the defendant reveal an effort to avoid the consequences of the law through ignorance. The analysis is framed in a more objective manner simply by considering the surrounding circumstances as a central part of a willful blindness test.

It is illustrative to examine one fact from *Global-Tech* in light of this distinction. As discussed above, the method chosen by Pentalpha to obtain a fryer led to them having a model without any U.S. patent markings.[113] When considering this fact in a pure knowledge examination, it would probably be considered an inconsequential or indeterminate fact since it does not provide solid circumstantial evidence of actual knowledge.[114] In the

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[112] *See, e.g.*, O'Toole, *supra* note 104, at 3 (listing the essential elements of willful blindness as both the defendant's subjective belief and his actions to avoid knowledge, with the latter being a factual determination that is absent from a knowledge test).

[113] *Global-Tech*, 131 S. Ct. at 2064 (2011).

[114] In fact, the lack of patent markings on the copied fryer could even be considered evidence of *lack* of knowledge since Pentalpha could not have learned of the patent through their detailed examination.

flexible blindness context, however, this fact is considered a key piece of evidence in light of the surrounding circumstances.[115] This fact, and others like it, are indicative of the acceptability of Pentalpha's actions, but are much less relevant to a pure knowledge determination.[116]

Therefore, flexible blindness allows a court to examine a larger range of facts and perform an analysis that considers the appropriateness of conduct rather than the difficult determination of actual intent. This distinction is perhaps even more important in patent law than criminal law, since more often than not in the modern era the defendant in an induced infringement case is a corporation.[117] The large number of people involved in corporate decision making, the difficulty in assigning knowledge to an artificial entity, and the difficulty of assigning intent to that entity all make a pure knowledge examination very difficult.[118] Allowing examination of the facts of the situation to frame the alleged inducement should alleviate this problem by providing alternate means to consider culpability.

C. *Comparison of Flexible Blindness and Previously Suggested Induced Infringement Standards*

In his examination of induced infringement, Rantanen criticized the knowledge standard because "infringement is a

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[115] *Global-Tech*, 131 S. Ct. at 2071. The Supreme Court's analysis in *Global-Tech* considered the use of the overseas model in light of a number of other facts. *Id.* This consideration included the fact that John Sham (Pentalpha's president) was familiar with the U.S. patent system, the known U.S. destination for the product, and the failure to inform their patent attorney of the source of the idea for their product. *Id.* Given these facts, the method of obtaining the fryer was considered to be suspicious. *Id.*

[116] *Id.* For instance, it seems unlikely that a court considering Pentalpha's knowledge of the SEB patent would spare much thought about Pentalpha's knowledge of the intended destination of the product. In the Supreme Court's determination of willful blindness, however, that fact was considered as part of the overall circumstances of the case. *Id.*

[117] *See* Rantanen, *supra* note 1, at 1580 (noting that most patent suits in recent years involve corporate defendants).

[118] *Id.* at 1610–11.

probabilistic assessment that is virtually never certain."[119] Instead, he suggested an alternative that was fact-driven, and therefore a more flexible and accurate measure of infringement.[120] His argument for the superiority of fact-dependence is that "[b]y employing an objective standard of fault that can be adjusted to account for high- and low-risk activities, the inducement doctrine can be more precisely set to achieve optimal deterrence of activities that lead to patent infringement."[121] This rationale led to his proposal of using objective recklessness as a fact-centric analysis to gain the benefits of fact-dependence.[122] Because flexible blindness implements this same fact-dependence to a certain degree, it should also incur some of the same benefits that would be present in objective recklessness, specifically the flexibility in assigning liability and the increased deterrence of induced infringement.

The other proposed alternative induced infringement standard, Lemley's stepped intent approach, centers on "the defendant's conduct."[123] This proposal focused on the appropriateness of requiring different levels of intent based on the degree of the defendant's involvement.[124] When comparing this theory to the flexible blindness standard, it is apparent that the willful blindness aspect of flexible blindness creates a middle tier of conduct where actual knowledge is not required to assign liability. Therefore, by considering the conduct of willfully avoiding knowledge, flexible blindness has implemented a stepped system that is analogous to the Lemley proposal. Consequently, flexible blindness should have some of the benefits of the stepped system, namely its better matching of culpability and punishment.

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[119] *Id.* at 1581.
[120] *Id.*
[121] *Id.* at 1582.
[122] *Id.*
[123] Lemley, *supra* note 1, at 242.
[124] *Id.*

D. *Reasons to Maintain the Knowledge Requirement*

Flexible blindness, while it shares some similarities with both the Lemley and Rantanen proposals, does not broaden the standard as much as either of those alternatives. Because the knowledge requirement remains central in flexible blindness, the added fact-dependence and focus on the defendant's conduct act only to add the flexibility into the standard. Given that there are arguments for loosening the intent standard for induced infringement present in both alternative proposals, it must be determined why courts should retain the knowledge requirement at all. The rationale for doing so may be linked to the desire to avoid the weaknesses of those alternatives that are introduced by the shift in focus away from the knowledge standard.

For instance, courts may be leery of over-punishment since the "law must take equal care to avoid imposing liability on those who participate in the stream of lawful commerce merely because their products can be misused."[125] The need to protect lawful commercial participants is also written into the statutory language of contributory infringement, where parties who supply a product that can be used to infringe a patent are usually considered innocent if that product also has "substantial noninfringing use."[126] There is a fine balance between allowing enough flexibility to punish blameworthy parties and providing a means for frivolous and improper suits to flourish. Eliminating the knowledge requirement may cross that line.

Another reason to maintain the knowledge standard is that its abandonment would, by definition, allow for the punishment of good faith actors. It seems reasonable to make third-party liability a rare occurrence based on the rationale that "the [induced infringement] doctrine should not create a windfall for patentees against innocent parties [when] . . . [t]here always are direct infringers that the patentee could pursue, even if doing so is

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[125] *Id.* at 228.
[126] 35 U.S.C. § 271(c) (2006).

impractical."[127] Therefore, just as with the protection of innocent commercial actors, good faith parties are best protected by maintaining certain aspects of the knowledge requirement.

A third reason to maintain the knowledge standard is the possibility that fears about inducers using opinion-of-counsel to immunize themselves from prosecution are overblown.[128] Advocates of abandoning the knowledge standard often use these fears to justify a move to broader application of induced infringement.[129] The fears are to a certain extent based on the assumption "that lawyers would readily violate their ethical obligations to their clients by essentially lying about their opinions on infringement, validity, and enforceability."[130] A shift away from a knowledge standard could be an overreaction to unlikely unethical behavior.

E. *Significance of a Two-Element Willful Blindness Standard*

Another factor that contributes to the flexibility of the *Global-Tech* standard is the lack of a motive element in the components the Court chose to include in its definition of willful blindness.[131] In comparing the *Global-Tech* willful blindness standard to those used in various circuit courts, it becomes apparent that the *Global-Tech* willful blindness standard lacks a third requirement present in many jurisdictions: that the defendants act with the motive of avoiding liability.[132] For instance, the Ninth Circuit Court of Appeals recently considered a standard that required that the

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[127] Holbrook, *supra* note 87, at 408 (arguing that indirect infringement standards should be kept narrow in general).

[128] *Id.* at 410.

[129] *See, e.g.*, Rader, *supra* note 97, at 314–16 (arguing that a narrow knowledge standard would allow inducers to obtain opinion letters that would shield them from liability).

[130] Holbrook, *supra* note 87, at 410.

[131] Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2070 (2011).

[132] *See, e.g.*, Case Comment, *Recent Case: Criminal Law—Willful Blindness—Ninth Circuit Holds that Motive Is Not an Element of Willful Blindness.*, 121 HARV. L. REV. 1245, 1249 (2008) [hereinafter *Harvard Recent Case*] (discussing the significance of a circuit split in the components of the willful blindness test).

defendant "(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution."[133] The Ninth Circuit decided, however, that the motive-based third step was unnecessary.[134] The court considered it appropriate to punish any parties who acted to avoid gaining knowledge of criminal activity.[135] The only concession to motive was an acknowledgment that the "deliberately avoided" language of the second requirement protects those who are in a situation where they do not have a choice in their actions.[136]

Some scholars criticized this decision for "blurr[ing] the distinction between knowledge and recklessness and, for some defendants, the distinction between just and unjust punishment."[137] The less restrictive rule with no motive requirement arguably results in a standard that "does not distinguish between more and less culpable forms of willful blindness [and] lowers the underlying crime's *mens rea* standard from knowledge to recklessness."[138] While such blurring is seen as a bad thing in the criminal justice system where the "beyond a reasonable doubt" standard is preeminent,[139] in the context of patent law, a *de facto* recklessness standard may be appropriate considering the advantages offered by Rantanen's objective recklessness standard. In fact, those who argue for an objective recklessness standard should consider the structure of the willful blindness rule a very positive aspect of the *Global-Tech* holding.

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[133] U.S. v. Heredia, 429 F.3d 820, 824 (9th Cir. 2005) (quoting U.S. v. Baron, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996)) (internal quotations omitted).
[134] U.S. v. Heredia, 483 F.3d 913, 919–21 (9th Cir. 2007). This citation refers to the decision upon rehearing en banc, overturning the panel decision.
[135] *Id.*
[136] *Id.* at 920.
[137] *Harvard Recent Case*, *supra* note 132, at 1252.
[138] *Id.* at 1249–50.
[139] *Id.*

VI. INDUCED INFRINGEMENT IN CASES FOLLOWING GLOBAL-TECH

Ultimately, the best test of any approach is to examine its implementation in the courts. In the limited time since *Global-Tech*, a number of courts have interpreted and utilized its holding.[140] An extensive treatment of *Global-Tech* was seen in two district court post-trial motion decisions in *ePLUS, Inc. v. Lawson Software, Inc*.[141] The first holding implemented the *Global-Tech* induced infringement standard in the context of ruling on a motion for judgment as a matter of law in which the defendant claimed that the plaintiff offered no evidence of actual knowledge.[142] The second dealt with a motion to modify and clarify an injunction issued just before the *Global-Tech* decision.[143] The court denied the motions and upheld the induced infringement conviction on the grounds that there was enough evidence for a jury to find "that it was *more likely than not* that [the defendant] had knowledge of the patents-in-suit," despite a lack of evidence as to actual knowledge.[144] Furthermore, the court upheld a jury instruction which stated that "[k]nowledge of the patent may be established by finding that . . . [the defendant] *deliberately disregarded* a known risk that [the plaintiff] had a protective patent."[145] The defendant had noted the similarity of that "deliberately disregarded" instruction to the Federal Circuit's disapproved "deliberate indifference" standard.[146] The key distinction noted by the Federal

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[140] *See, e.g.*, ePLUS, Inc. v. Lawson Software, Inc. *(ePLUS II)*, 2011 U.S. Dist. LEXIS 114493 (E.D. Va. 2011); Meadwestvaco Corp. v. Rexam PLC., 2011 U.S. Dist. LEXIS 92947 (E.D. Va. 2011); Synqor, Inc., v. Artesyn Techs., Inc., 2011 U.S. Dist. 91668 (E.D. Tex. 2011); ePLUS, Inc. v. Lawson Software, Inc. (*ePLUS I*), 2011 U.S. Dist. Lexis 89950 (E.D. Va. 2011).

[141] *ePLUS II*, 2011 U.S. Dist. Lexis 114493; *ePLUS I*, 2011 U.S. Dist. LEXIS 89950.

[142] *ePLUS I*, 2011 U.S. Dist. LEXIS 89950 at *14–18.

[143] *ePLUS II*, 2011 U.S. Dist. LEXIS 114493, at *7–14.

[144] *ePLUS I*, 2011 U.S. Dist. Lexis 89950, at *16 (emphasis added).

[145] *ePLUS II*, 2011 U.S. Dist. LEXIS 114493, at *9; *ePLUS I*, 2011 U.S. Dist. Lexis 89950, at *17–18.

[146] *ePLUS II*, 2011 U.S. Dist. LEXIS 114493, at *11; *ePLUS I*, 2011 U.S. Dist. Lexis 89950, at *15–16.

Circuit that made deliberate disregard allowable was that "[w]hereas disregard implies 'deliberate actions to avoid confirming a high probability of wrongdoing,' indifference does not."[147] These holdings all point to a fact-dependent, flexible, induced infringement standard that centers its analysis on the defendant's blameworthiness. Therefore, it seems likely that the court saw *Global-Tech* as promoting a flexible blindness standard, as opposed to a strict knowledge requirement with limited exceptions.

A second case, *Synqor, Inc., v. Artesyn Technologies, Inc.*,[148] also implemented the *Global-Tech* induced infringement standard.[149] The court recognized the requirement for knowledge, but also emphasized that "[k]nowledge may be proven by direct or circumstantial evidence."[150] Accordingly, the defendants' argument that there was no direct knowledge of the infringement was considered irrelevant in the face of significant circumstantial evidence.[151] While the court did not mention willful blindness, it examined circumstantial facts, such as the common practice of labeling of documents with patent numbers and the competitive nature of the field to infer that knowledge of infringement was likely.[152] Therefore, the treatment was consistent with the flexible blindness standard's emphasis on fact-dependent analysis in assigning knowledge to a party.

Similarly, in *Meadwestvaco Corp. v. Rexam PLC.*,[153] the lack of knowledge of a competitor's manufacturing process was considered a sufficient issue of material fact to deny summary judgment.[154] The "complete ignorance . . . creates suspicion as to [the defendant's] credibility, and a reasonable jury could conclude

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[147] *ePLUS II*, 2011 U.S. Dist. LEXIS 114493, at *11.
[148] 2011 U.S. Dist. 91668 (E.D. Tex. 2011).
[149] *Id.* at *9–13.
[150] *Id.* at *10.
[151] *Id.* at *12–13.
[152] Id. at *11–13.
[153] 2011 U.S. Dist. LEXIS 92947 (E.D. Va. 2011).
[154] *Id.* at *48.

that [the defendant] intentionally blinded itself."[155] Once again, the court was willing to accept circumstantial evidence to infer that the defendant took the active step required by *Global-Tech*, despite being presented with little evidence of actual mental state.

Therefore, the clear trend is for the willful blindness standard to be implemented flexibly, allowing for a fact-dependent analysis. This trend suggests an approach consistent with flexible blindness is being utilized, and that the Supreme Court's holding in *Global-Tech* is facilitating the use of this standard which will provide many of the benefits envisioned by previously proposed induced infringement alternatives.

VII. CONCLUSION

In holding that induced infringement under § 271(b) requires that the defendant have knowledge of the patent being infringed,[156] the Supreme Court retained strong protections for businesses and individuals whose innocent actions could be construed as suspicious. On the other hand, the Court's importation of willful blindness as a knowledge substitute ensures that guilty actors cannot escape liability through intentional ignorance. Perhaps most importantly, the Supreme Court's language imbued the standard with enough flexibility to allow the liability analysis to shift to a fact-dependent examination of the defendant's conduct, rather than an interpretation of his mental state.

This flexibility is the cornerstone of this Recent Development's proposal to use the *Global-Tech* holding as the basis for implementing a flexible blindness standard. Under such a standard, the court's central consideration should be the factual circumstances surrounding a party's behavior, with the goal being to determine whether those circumstances suggest sufficient culpability to justify assignment of liability. The flexible blindness standard offers many of the benefits of proposed alternatives through the use of a fact-dependent analysis of defendant

[155] *Id.* at *47.
[156] Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060 (2011).

culpability. Therefore, induced infringement cases utilizing the *Global-Tech* standard should provide a more accurate alignment of blameworthiness and liability, while simultaneously acting as a more effective deterrent against future induced infringement.