



# New Supreme Court message: Be an owl, not an ostrich

Owls keep their eyes open. They search, study and take advantage of opportunity while keeping their risk low. Ostriches, according to myth, put their heads in the sand, which is not a great survival instinct.

In May, the Supreme Court confirmed that those who take an owl's approach to competition will have less risk than those who ignore warning signs, but the chance of being held to have "induced" someone else's patent infringement, even if you don't infringe, is still significant.

*Global-Tech v. SEB* confirmed that to be an "inducer," a jury must believe you know the actions you induce in someone constitute patent infringement. However, the case left risk for those who actually do not know they are enabling others to infringe. In fact, the defendant was held liable for inducement *even though* it had received a "freedom to operate" opinion from a patent attorney.

In the future, jurors may be told they can find that a defendant "purposely closed his eyes to avoid knowing what was taking place around him." This is standard in

criminal matters, called "willful blindness." It will now be used in patent cases. The patent owner will need to persuade a jury to draw two conclusions: (1) The defendant "believed there was a high probability" of infringement and (2) He "took deliberate actions" to avoid learning it.

Before this case, patent owners had to prove you knew of a patent and intended to induce an infringer to do things you knew would infringe. Ostrich activity could shield you from liability. I have heard organizations tell members of Congress they *intentionally* do not review patents (to reduce the chance they will be found to be a "willful" infringer). Ostriches risk they might be liable as an infringer but hope ignorance protects them from increased damages.

Problem: many companies do things that make them appear to be willfully blind when, really, they are merely ignorant. When a new product comes on the market, they will "take a look at it" — customers ask them to, they see it at a trade show or they simply buy one. They may reverse engineer it. Some

say, "When we develop products, we do market research and gather as much information as possible." Some actually adopt functionality from competitors. Their suppliers help them, designing new components, changing materials and generally doing what they can to keep their customer happy.

Those people, when accused of inducing infringement, will tell the jurors, "I didn't know of the patent. There isn't a copy of it in my files, and no one sent me one."

## But will they be believed?

Their internal communications talk about how they "meet the customer's needs" by creating an "alternate source of supply." They speak about "intense challenges" from competition. The customer's main source of supply may have patent numbers on its website or on its products. Other normal business activities that, alone, may not show intent, together, can lead a jury to say the defendant intended to induce infringement. Without evidence of *proactive* steps to avoid inducing infringement, juries may

decide there was "willful blindness."

Owls reduce the risk of being misunderstood, by taking deliberate actions to avoid the problem. Owls review websites of competitors — and the competitors of customers — looking for patent notices. They look for potential problem patents and engage in "design around" activities. And they work closely with attorneys. In the *Global-Tech* case, poor communication prevented the attorney opinion from shielding the defendant; the defendant had failed to tell the lawyer they derived the new product from a competitor's.

Our firm asserts clients' patents, and we defend clients when accused of infringement. However, one of the best investments clients make is when they use our services to compete while reducing the risk of infringement. No program can be perfect, but a thoughtful strategy greatly reduces the chance that a client will infringe, and a program's affirmative steps are evidence the client was not an ostrich, but an owl.

**For more information, please contact [garnold@arnold-iplaw.com](mailto:garnold@arnold-iplaw.com), visit [www.usptclaw.com](http://www.usptclaw.com) or call (713) 972-1150. ●**

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