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COMMENT

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*HALO* IS NOT THE SAVING GRACE  
FOR THE PATENT SYSTEM

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## INTRODUCTION

A smartphone can contain hundreds of patents on everything from touch screen technology, to cameras, to GPS mapping, and just as the saying goes, “There’s an app for that.” There’s also a patent for that, and worse, we are finding that there is a patent troll for that, too.<sup>1</sup>

Patent law is facing growing pains as it tries to operate within a framework originally created with different technology in mind. As technological advancements have proliferated in recent decades, cracks in the patent system’s foundation have become apparent. As Justice Breyer pointed out, “[t]oday’s patent world is not a steam-engine world. We have decided to patent tens of thousands of software products and similar things where hardly anyone knows what the patent’s really about.”<sup>2</sup> There is a mounting concern among scholars and members of Congress that the patent system is infested with invalid patents.<sup>3</sup> While a precise number of invalid patents currently in force is not measurable,<sup>4</sup> studies suggest that the over-granting of patents is a real threat.<sup>5</sup> Invalid patents increase transaction costs for subsequent innovators: innovators must navigate unnecessary red tape and non-practicing entities (commonly referred to as “patent trolls”) can abuse the patent system by threatening to assert these invalid patents against others.

The patent system can combat the problem of invalid patents at three stages. First, more resources can be dedicated to the United States Patent and Trademark

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<sup>1</sup> *Examining Recent Supreme Court Cases in the Patent Arena: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 114th Cong. 3 (2015) [hereinafter *Hearing*] (statement of Hon. Darrell E. Issa).

<sup>2</sup> Transcript of Oral Argument at 10, *Halo Elecs. Inc. v. Pulse Elecs. Inc.*, 136 S. Ct. 1923 (2016) (No. 14-1513).

<sup>3</sup> See generally 157 CONG. REC. H4420, H4425 (2011); Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent and Trademark Office Grant Too Many Bad Patents?: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. 613 (2015); Mark A. Lemley & Bhaven Sampat, *Is the Patent Office a Rubber Stamp?*, 58 EMORY L.J. 181 (2008).

<sup>4</sup> For a patent to be deemed invalid, a party must bring a lawsuit and succeed in overcoming the presumption of validity. See 35 U.S.C. § 282(a) (2012). Thus, absent a challenge to every patent, the number of invalid patents cannot be verified, or even easily estimated. Further, due to the secrecy of patent applications, statistics regarding the over-granting of patents are unobtainable because there is incomplete data regarding the percent of patent applications issued. See Lemley & Sampat, *supra* note 3, at 182 (“The result has been significant controversy over the underlying question of what percentage of applications actually issue as patents.”).

<sup>5</sup> See Frakes & Wasserman, *supra* note 3, at 648 (claiming that the PTO is over-granting patents to meet deadlines in the face of substantial backlog). The PTO relieves its burden by *granting*, rather than rejecting, patent applications because a PTO rejection is not final. See *id.* at 625 (describing measures an applicant can take after rejection); see also U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 2190 (9th ed., rev. Nov. 2015) (explaining that while the doctrine of prosecution laches may limit the number of continuation applications an applicant may file, the doctrine applies “only in egregious cases of unreasonable and unexplained delay in prosecution” and lacks any “firm guidelines”).

Office (PTO). The initial review of patent applications can be expanded to allow for a more thorough vetting upon initial receipt. Possible measures of reform could include hiring more examiners, increasing the time spent on each patent application, or requiring greater disclosure of prior art by the potential patentee. But reform at this stage would provide an incomplete solution because it would fail to dispose of bad patents that are already in circulation.

A second point at which invalid patents can be confronted is the post-issuance, pre-litigation stage. This approach was followed in the 2011 America Invents Act (AIA).<sup>6</sup> With a concern for invalid patents at the forefront of policy discussions,<sup>7</sup> the AIA bolstered administrative proceedings at this intermediate stage, introducing inter partes review and post-grant review.<sup>8</sup> Congress sought to create an “administrative route more efficient and less expensive than district court litigation.”<sup>9</sup> Still, invalid patents have continued to plague the patent system in the years following the implementation of the AIA.<sup>10</sup> Setting aside the questionable effectiveness of these administrative routes, there is a more immediate question of whether these proceedings by the PTO are even constitutional. The Supreme Court will address this issue in its coming term.<sup>11</sup>

The final stage at which invalid patents can be eliminated is litigation. When optimally structured, litigation is a promising method of correcting errors carried over from the patent issuance stage. An adversarial system provides an opportunity for a judge to have a (potentially) fair view of both parties’ positions. The finality of the decision provides clarity for patent owners and the public. But the current litigation system suffers from procedural defects, making it costly, time consuming, and ill-equipped to handle an abundance of patents. Patent litigation costs in the United States are extremely high, especially as compared to foreign patent systems.<sup>12</sup> In addition to the high costs, parties are tied up for an average of two and a half years before their cases

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<sup>6</sup> Leahy-Smith America Invents Act, 35 U.S.C. §§ 311, 321 (2012) (describing inter partes and post-grant review proceedings).

<sup>7</sup> See 157 CONG. REC. H4420, H4425.

<sup>8</sup> 35 U.S.C. §§ 311, 321.

<sup>9</sup> Filip De Corte et al., *ALA Post-Grant Review & European Oppositions: Will They Work in Tandem, or Rather Pass Like Ships in the Night?*, 14 N.C. J.L. & TECH. 93, 126 (2012).

<sup>10</sup> See *Hearing*, *supra* note 1, at 2 (statement of Hon. Darrell E. Issa) (noting that in 2015, frivolous lawsuits brought by patent trolls are still a concern); see also Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C. L. REV. 1443, 1448 (2014) (discussing the inability for post-grant review and inter partes review to capture enough claims).

<sup>11</sup> See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 639 Fed. Appx. 639 (Fed. Cir. 2016), *cert. granted*, 85 U.S.L.W. 3578 (U.S. June 12, 2017) (No. 16-712).

<sup>12</sup> See GEOGRAPHY, LOCATION, AND STRATEGY, 31 (Juan Alcácer et al. eds., 2017) (commenting that patent litigation costs in the United States range from one to ten million dollars on average, coming in at ten to twenty times higher than costs in Europe).

reach trial.<sup>13</sup> With these substantial burdens, patent litigation is not a realistic option for small companies, nor is the system well-equipped to sort through a large volume of patent disputes. Thus, patent litigation is a good candidate for reform. A more streamlined system will allow increased access to litigation, thereby increasing the number of patents that courts can either dispose of or validate.

This Comment proposes to improve three procedural aspects of patent litigation: the standard for granting enhanced damages, pleading requirements, and venue rules. The rules and jurisprudence currently controlling these elements of patent litigation favor large, wealthy companies, exacerbate the abuse of the system by patent trolls, and ultimately create inefficiencies. Recently, the Court in *Halo Electronics, Inc. v. Pulse Electronics, Inc.* addressed one of these procedural aspects.<sup>14</sup> The Court rejected the established framework for enhanced damages and implemented a new standard. Part I of this Comment addresses the evolution of enhanced damages jurisprudence leading up to *Halo*, and Part II addresses the changes in patent law that the case brought about. I argue in Part III that these changes in the law will fail to serve the goals of the patent system discussed above—namely, implementing a cost-effective, efficient system better equipped to weed out bad patents. Indeed, I argue that *Halo* will likely make invalid patents even harder to eliminate than they were before.

In Part IV, I propose an alternate solution, which seeks to streamline the litigation process by altering the standards of the three procedural aspects of patent litigation discussed above. The solution reigns in the discretion that *Halo* grants district courts in the enhanced damages analysis. Further, it heightens the pleading standard and calls for stricter venue rules. By optimizing these procedural aspects, I propose a litigation structure that allows resources to be allocated to determining the validity and scope of patents, rather than squandered in drawn-out litigation fights or settlements of nuisance suits.

## I. LEGAL BACKDROP FOR ENHANCED DAMAGES IN PATENT LAW

The standard by which enhanced damages are awarded is one variable among many that legislators and policymakers can adjust to optimize the patent litigation system. To better appreciate the significance of the current jurisprudence, it is helpful to recognize the features that have been incorporated into the enhanced damages analysis (and those that have been

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<sup>13</sup> CHRIS BARRY ET AL., 2016 PATENT LITIGATION STUDY 3 (2016), <https://www.pwc.com/us/en/forensic-services/publications/assets/2016-pwc-patent-litigation-study.pdf> [[https://perma.cc/4U9H-g\]N2](https://perma.cc/4U9H-g]N2)].

<sup>14</sup> 136 S. Ct. 1923 (2016).

abandoned) over time, and compare the evolution of analogous doctrines—here, the award of attorney’s fees.

### A. History of Enhanced Damages

The first United States patent laws heavily favored patent holders’ rights by making treble damages mandatory in cases of patent infringement.<sup>15</sup> Subsequent legislation has moved away from this approach: enhanced damages are no longer automatic. Since the establishment of discretionary enhanced damages for patent infringement in 1836,<sup>16</sup> case law has shaped the bounds of this discretion.

Courts have been the primary actors in determining what infringing acts warrant enhanced damages.

One rule established an affirmative duty to exercise due care,<sup>17</sup> subjecting defendants who did not affirmatively search for patents or obtain opinion of counsel to the possibility of treble damages. This approach was later abandoned on the justification that an affirmative duty to exercise due care was needlessly demanding for the new innovator.<sup>18</sup> In *Read Corp. v. Portec, Inc.*, the Federal Circuit adopted a nine-factor test to assist district courts in determining whether to grant enhanced damages in patent infringement

<sup>15</sup> See Patent Act of 1793, ch. 11, 1 Stat. 318 §5 (current version at 35 U.S.C. § 284 (1952)) (“That if any person shall make, devise and use, or sell the thing so invented, the exclusive right of which shall . . . have been secured to any person by patent, without the consent of the patentee . . . shall forfeit and pay to the patentee, a sum, that shall be at least equal to three times the price . . .”); see also Transcript of Oral Argument at 37:23-38:1, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016) (No. 14-1513) (“[H]istorically enhanced damages were automatic, and they were automatic because of a policy judgment that owning a patent entitled you to not have people infringe willfully or not willfully.”).

<sup>16</sup> See Patent Act of 1836, ch. 357, 5 Stat. 117 §14 (1836) (“[W]henver . . . a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case . . .”). The choice to make enhanced damages discretionary was reaffirmed by Congress in the Patent Act of 1952. 35 U.S.C. § 284 (1952) (“[T]he court may increase the damages up to three times the amount found or assessed.”).

<sup>17</sup> See *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983) (“Where . . . a potential 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. Such an affirmative duty includes, *inter alia*, the duty to seek and obtain competent legal advice from counsel . . .”) (citations omitted). For further background on the policy considerations underlying the affirmative duty, see REPORT OF THE INDUS. SUBCOMM. FOR PATENT AND INFO. POLICY OF THE ADVISORY COMM. ON INDUS. INNOVATION 148 (1979) (expressing a desire to foster innovation in the United States by strengthening patent rights and “increas[ing] the assurance that a patent is a valuable piece of property”).

<sup>18</sup> See *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337, 1351 (Fed. Cir. 2004) (Dyk, J., concurring in part and dissenting in part) (“[T]he imposition of the due care requirement has produced nothing of benefit to the patent system . . . . [W]here such reprehensible conduct is absent, it is unnecessary to stretch the law of punitive damages to product the patentee because the patentee can secure a preliminary injunction . . .”).

suits.<sup>19</sup> Although the *Read* factors were not an exclusive set of considerations,<sup>20</sup> the enumeration of factors gave structure to the analysis. This framework served as guidance to both the district courts in their original decisions and to the Federal Circuit in its review of those decisions.

The totality of the circumstances approach espoused by *Read* and subsequent cases faced criticism for setting the threshold for enhanced damages too low. The Federal Circuit viewed the approach as coming too close to a negligence standard and exposing too many potential defendants to enhanced damages.<sup>21</sup> Consequently, in *In re Seagate Technology, LLC*, the Federal Circuit adjusted the standard by adopting a more rigid test which provided that:

[A] patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent . . . . If this threshold objective standard is satisfied, the patentee must also demonstrate that this objectively-defined risk (determined by the record developed in the infringement proceeding) was either known or so obvious that it should have been known to the accused infringer.<sup>22</sup>

By requiring a showing of an objectively high likelihood of infringement, this test elevated the threshold for enhanced damages. The *Seagate* test also allowed defenses raised at the time of litigation—not merely at the time of infringement—to factor into the determination, further increasing the difficulty for plaintiffs to recover enhanced damages against alleged infringers.<sup>23</sup> An undesirable consequence of *Seagate*'s strict test was that it allowed patent owners who were not objectively reckless, but nonetheless malicious, to escape liability.<sup>24</sup>

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<sup>19</sup> See 970 F.2d 816 (Fed. Cir. 1992) (listing the relevant considerations, including whether the infringer deliberately copied, whether the infringer investigated the patent, the infringer's litigation behavior, the infringer's size and financial state, the closeness of the case, the length of the infringer's misconduct, whether any remedial action was undertaken by the infringer, the motivation of the infringer, and whether the infringer made attempts to conceal the misconduct).

<sup>20</sup> See *id.* (describing the factors as "other circumstances which courts appropriately have considered, particularly in deciding on the extent of enhancement").

<sup>21</sup> See 497 F.3d 1360, 1371 (Fed. Cir. 2007) (comparing the prior duty to one "that is more akin to negligence" and faulting this standard for "fail[ing] to comport with the general understanding of willfulness in the civil context").

<sup>22</sup> *Id.*

<sup>23</sup> One contentious aspect of the *Seagate* test was its acceptance of litigation-inspired defenses to shield a defendant from enhanced damages. See *id.* (framing the willfulness question in terms of an objectively high likelihood of infringement, such that "[t]he state of mind of the accused infringer is not relevant"); see also *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1340 (Fed. Cir. 2016) ("Kohler does not dispute that its obviousness defense was created during litigation . . . . Instead, Kohler argues that it is no answer to characterize its obviousness defense as litigation-contrived because *Seagate*'s objective recklessness prong requires analysis of all of the infringer's . . . defenses, *even if those defenses were developed for litigation.*") (emphasis in original) (internal quotation marks omitted).

<sup>24</sup> See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016):

### B. Jurisprudence of Attorney's Fees

While the enhanced damages jurisprudence was fluctuating as courts attempted to craft an optimal standard, case law surrounding attorney's fees was likewise in flux. Similar to the rigid test presented in *Seagate*, the precedent for attorney's fees in *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.* included a test requiring a showing of both subjective bad faith and objective baselessness by clear and convincing evidence.<sup>25</sup> In *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, the Court abandoned this test in favor of a discretionary standard.<sup>26</sup> The Court shifted the power to district courts to determine “whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.”<sup>27</sup> Since the implementation of this discretionary standard, the occurrence of attorney's fees awards has increased.<sup>28</sup>

Although parallels can be drawn between *Brooks Furniture* and *Seagate*—and, as will become apparent, between *Halo* and *Octane Fitness*<sup>29</sup>—attorney's fees and enhanced damages present different policy considerations.<sup>30</sup> Lowering the threshold for attorney's fees can work in favor of either party,<sup>31</sup>

Such a threshold requirement [of objective recklessness] excludes from discretionary punishment many of the most culpable offenders, such as the ‘wanton and malicious pirate’ who intentionally infringes another’s patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee’s business . . . . In the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness—by clear and convincing evidence, no less—should be a prerequisite to enhanced damages.

<sup>25</sup> See 393 F.3d 1378, 1381 (Fed. Cir. 2005) (holding that a case is exceptional if “(1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless”); see also *id.* at 1382 (“[T]he underlying improper conduct and the characterization of the case as exceptional must be established by clear and convincing evidence.”).

<sup>26</sup> 134 S. Ct. 1749, 1755 (2014) (“The framework established by the Federal Circuit in *Brooks Furniture* is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts.”).

<sup>27</sup> *Id.* at 1756.

<sup>28</sup> CHRIS BARRY ET AL., *supra* note 13 at 7 (finding that the percentage of cases in which attorney's fees have been awarded increased after the *Octane Fitness* decision).

<sup>29</sup> See *infra* note 39 and accompanying text.

<sup>30</sup> See Tyler A. Hicks, Comment, *Breaking the “Link” Between Awards for Attorney's Fees and Enhanced Damages in Patent Law*, 52 CAL. W. L. REV. 191, 212-13 (2016) (arguing that Sections 284 and 285 have different policy implications and thus should be treated differently).

<sup>31</sup> See, e.g., Saurabh Vishnubhakat, *What Patent Attorney Fee Awards Really Look Like*, 63 DUKE L.J. ONLINE 15, 25 (2014) (finding, in a study spanning 2003-2013, that “71% of attorney fee awards go to plaintiffs and about 29% to defendants,” but that “the magnitudes of fee awards more clearly favor defendants”). Note, however, that a general trend of lowering litigation costs will dampen patent troll activity, despite the fact that the attorney fees are not categorically contained to one side of litigation. See, e.g., W. Keith Robinson, *Awarding Attorney Fees and Deterring Patent Trolls*, 20 LEWIS & CLARK L. REV. 281, 290 (2016) (“[S]ome interpreted [*Octane Fitness*] as the Court’s way of weighing in on the patent troll debate . . . . Indeed, there is also some empirical evidence suggesting a decline in lawsuits by patent trolls occurred after *Octane Fitness* and *Highmark*.”); Prachi

while lowering the threshold for enhanced damages only stands to benefit the plaintiff.<sup>32</sup> Consequently, a more generous enhanced damages standard contributes to the bargaining power differential between parties, skewing litigation incentives in favor of plaintiffs.

## II. THE *HALO* DECISION

The Court introduced turbulence into the enhanced damages jurisprudence via its *Halo* decision by discarding the two-pronged *Seagate* test.<sup>33</sup> *Halo* also rejected the requirement of clear and convincing proof to establish recklessness and abandoned the tripartite standard of review.<sup>34</sup> In place of these provisions, the Court reintroduced a subjective, fact-intensive inquiry, established a preponderance of the evidence standard for recklessness, and required an abuse of discretion standard of review.<sup>35</sup> Under the new analysis, district courts are tasked with “tak[ing] into account the particular circumstances of each case in deciding whether to award damages, and in what amount.”<sup>36</sup> District courts must “limit[] the award of enhanced damages to egregious cases of misconduct beyond typical infringement”<sup>37</sup> and identify instances in which conduct is “willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.”<sup>38</sup>

Although the *Halo* Court explicitly drew parallels to *Octane Fitness*,<sup>39</sup> it was also loyal to the broader trends apparent in other recent patent decisions. The Court has repeatedly adopted fact-intensive analyses over rigid tests, as is evidenced by recent jurisprudence in the areas of claim construction,<sup>40</sup>

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Agarwal, *Patent Troll: The Brewing Storm of Patent Reform in the United States of America*, 15 J. MARSHALL REV. INTELL. PROP. L. 63, 71 (2015) (“Although neither [*Octane Fitness* nor *Highmark*] pertained to patent trolls, by broadening the scope of discretion for fee-shifting, a patent owner who brings a lawsuit without merit is unlikely to get off the hook and . . . the ‘fee shifting’ provision is likely to discourage patent trolling by making it less lucrative.”); Aria Soroudi, Comment, *Defeating Trolls: The Impact of Octane and Highmark on Patent Trolls*, 35 LOY. L.A. ENT. L. REV. 319, 343-44 (2014) (advancing the proposition that *Highmark* and *Octane Fitness* weaken the threat of patent trolls by introducing the potential for less costly litigation for the defendant).

<sup>32</sup> See Hicks, *supra* note 30, at 212-13 (“If an award of attorney’s fees under Section 285 is a double-edged sword, an enhanced damages award under Section 284 is a single-bladed guillotine available for use only by patentees who prove the infringer acted ‘willfully.’”).

<sup>33</sup> *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928 (2016).

<sup>34</sup> *Id.* at 1934.

<sup>35</sup> *Id.* at 1933-34.

<sup>36</sup> *Id.* at 1933.

<sup>37</sup> *Id.* at 1935.

<sup>38</sup> *Id.* at 1932. Also note that, under this standard, there is no longer room for litigation-inspired defenses to save a patent defendant. Instead, culpability will be measured at the time of infringement, not at the time of litigation. See *id.* at 1933 (analyzing the defendant’s culpability “at the time he acted”).

<sup>39</sup> See *id.* at 1929, 1932, 1934 (citing *Octane Fitness* ten times throughout the opinion).

<sup>40</sup> See *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 835 (2015) (holding that the Federal Circuit must give deference to evidentiary findings by the trial courts for claim construction matters).

patentable subject matter,<sup>41</sup> obviousness,<sup>42</sup> and permanent injunctions.<sup>43</sup> The Court has also expressed its inclination to redistribute power from the Federal Circuit to the district courts,<sup>44</sup> and to bring patent law in line with other areas of civil law.<sup>45</sup>

The features of the *Halo* decision track these trends. The Court replaced a rigid test with an instruction for district courts to award enhanced damages on a case-by-case basis.<sup>46</sup> Under the *Halo* framework, conspicuously absent are guidelines for the district courts to follow.<sup>47</sup> This eschewal of a formal test aligns with the Court's recent jurisprudence. Next, *Halo* shifts power and discretion to the district courts. Without explicit directives, the Federal Circuit will have difficulty overturning the judgment of the lower courts, as there will be no clear test to find the district court to have violated. Furthermore, the heightened abuse of discretion standard of review will make it more difficult for the Federal Circuit to reverse a district court's enhanced damages award. Lastly, *Halo* embodies a reconciliation of the standard for enhanced damages in patent law to that of other areas of civil law.<sup>48</sup>

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41 See *Bilski v. Kappos*, 561 U.S. 593, 604 (2010) (rejecting the machine-or-transformation test as the sole test for patentability and rejecting a categorical rule of excluding all business methods from protection).

42 See *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007) (rejecting the teaching, suggestion, or motivation test as the sole test for determining obviousness because the Federal Circuit applied it too rigidly, and instead proposing a more subjective standard).

43 See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) (criticizing the lower courts for using categorical rules to decide whether to grant a permanent injunction).

44 See Zachary H. Valentine, *A Novel, Nonobvious Approach to Curb Abusive Patent Litigants*, 21 ROGER WILLIAMS U. L. REV. 118, 140 (2016) (recognizing that the effect of recent Supreme Court decisions, including *Octane Fitness* and *Teva*, was to grant more power and discretion to district courts).

45 See, e.g., *eBay*, 547 U.S. at 390 (holding that permanent injunctions should be granted in accordance with traditional principles of equity); see also *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014) (reconciling the attorney's fees analysis with other areas of civil law by rejecting the clear and convincing evidence standard and instead following a preponderance of the evidence standard).

46 See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016).

47 See, e.g., *Simplivity Corp. v. Springpath, Inc.*, No. 4:15-13345-TSH, 2016 WL 5388951, at \*18 (D. Mass. July 15, 2016) (noting that "apart from its emphatic abrogation of *Seagate's* willfulness test, *Halo* itself offered little by way of a concrete standard to assume the mantle").

48 In other areas of civil law, enhanced damages are premised on the finding of some variation of willfulness and are controlled by a discretionary standard. See, e.g., *Meyer v. Cmty. Coll. of Beaver Cty.*, No. 1141, 2008 WL 11010686 (Pa. Commw. Ct. Oct. 15, 2008) ("[T]reble damages under the [Consumer Protection Law] should be supported by the presence of intentional or reckless, wrongful conduct, and should be in furtherance of the remedial purposes of the statute."); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (holding that enhanced damages may be awarded for the retaliatory discharge of an employee if "a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly").

III. IMPLICATIONS OF *HALO*

The features of *Halo* will favor plaintiffs over defendants and large, robust companies over small start-ups. Unlike *Octane Fitness*, which changed the standard for attorney's fees in a manner that afforded plaintiffs and defendants symmetrical protection,<sup>49</sup> *Halo* will only benefit plaintiffs, since only plaintiffs benefit from increased availability of enhanced damages. Moreover, the increased litigation costs, discussed below, will advantage wealthy companies, which are less vulnerable to threats of costly legal battles than are smaller companies.

A. *Litigation Costs During Trial Will Rise*

Under *Halo*, parties litigating the issue of willful infringement will be required to expend vast resources due to the ambiguity and fact-specific nature of the test. The ambiguous standard will make judgments harder to predict and settlements harder to reach, resulting in more drawn-out litigation. The fact-intensive inquiry will inflate discovery costs, leading to unnecessary acquiescence by potential defendants.

The vague language used in *Halo* has led to confusion and has cultivated incompatible definitions across district courts. In the wake of *Halo*, one court expressed its confusion by pointing out, "*Halo*—somewhat confoundingly—ennobles courts 'to punish the full range of culpable behavior,' while also 'limiting the award of enhanced damages to egregious cases of misconduct beyond typical infringement.'"<sup>50</sup> Left without clear directions, some district courts have come to inconsistent conceptions of two significant terms used in *Halo*: "willfulness" and "egregiousness." For example, one district court mentioned that infringement could be willful without rising to the level of egregiousness,<sup>51</sup> while another district court implied that infringement cannot be willful unless it *is* egregious.<sup>52</sup> With very little guidance for district courts, *Halo* sets the stage for inconsistency.

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<sup>49</sup> See Hicks, *supra* note 30, at 212 ("[Attorney's fees] under Section 285 are granted to a party who proves the opposing party acted in bad faith, regardless of whether the party is the patentee or the accused infringer.").

<sup>50</sup> *Simplivity*, 2016 WL 5388951, at \*18.

<sup>51</sup> See *Trs. of Bos. Univ. v. Everlight Elecs. Co.*, 212 F. Supp. 3d 254, 258 (D. Mass. 2016) ("Assuming without deciding that the jury's verdict . . . is sufficient to find subjective willfulness, the Court still finds, in its discretion, that the defendants' conduct did not rise to the level of egregiousness meriting an award of enhanced damages.").

<sup>52</sup> See *C.G. Tech. Dev. LLC v. Big Fish Games Inc.*, No. 2:16-cv-00857-RCJ-VCF, 2016 U.S. Dist. LEXIS 115594, at \*43-44 (D. Nev. Aug. 29, 2016) ("Plaintiffs fail to state a claim for willful infringement because they fail to allege any facts suggesting that Defendant's conduct is 'egregious . . . beyond typical infringement.'). Although both courts are performing similar analyses—enhancing damages upon a finding of egregiousness—the differing conceptual perspectives highlight

The confusion among district courts makes their subsequent damage analyses in patent infringement suits harder for disputing parties to predict. In an unsettled legal landscape, parties will spend more time litigating.<sup>53</sup> The uncertainty will also incentivize plaintiffs to bring more willfulness claims at the outset.<sup>54</sup> Plaintiffs will have the power not only to obtain enhanced damages at trial, but also to exploit the threat of such damages to negotiate higher settlements. Yet another consequence of the lack of guidance is the potential for novel or fringe arguments supporting plaintiffs' willfulness claims to gain traction.<sup>55</sup> All of these possibilities will complicate the litigation process and increase costs in an already expensive litigation system.

To the extent that the district courts and the Federal Circuit *do* have a semblance of a test to follow under *Halo*, it is very fact intensive. Many district courts have interpreted *Halo* as reemphasizing the importance of the *Read* factors in the analysis.<sup>56</sup> Others have considered factors beyond *Read*: some courts examine egregiousness,<sup>57</sup> others weigh the overall amount of

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the lack of a clear framework. While perhaps the discontinuity between the opinions is due to nothing more than imprecision of language, it underscores the observation that, even on a basic level, district courts do not have a uniform framework to follow.

<sup>53</sup> See Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 814 (2002) (discussing legal uncertainty generally and noting "the certainty provided by a settled body of law leads to a reduction in dispute resolution costs, both by narrowing the universe of potential controversies and by facilitating settlement when controversies do arise").

<sup>54</sup> The extent of a law's reach may be ambiguous in the aftermath of a substantive change. In such scenarios, the new law imposes learning costs on judges, lawyers, and the public. A wide swath of litigants will likely try to use the new law to their advantage until courts otherwise restrict its scope. See *id.* at 820-21 (emphasizing the learning costs associated with changes in the law, noting that judges and practitioners must "resolve questions of scope and limitation[] and unravel issues of meaning and effect" while the affected legal actors must figure out the new law's "application to actual transactions and disputes").

<sup>55</sup> Cf. *id.* (suggesting that there is a learning curve that accompanies a change of law as courts and actors attempt to figure out the metes and bounds of the new legal landscape); Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557, 570 (1992) (explaining that one burden associated with standards rather than rules is that "adjudication [under the standard] will also require giving content to the standard") (emphasis added).

<sup>56</sup> See *Georgetown Rail Equip. Co. v. Holland L.P.*, No. 6:13-cv-00366-RWS, 2017 U.S. App. LEXIS 15345, at \*33 (Fed. Cir. Aug. 1, 2017) (affirming the district court's consideration of the nine nonexclusive *Read* factors); *Adrea, LLC v. Barnes & Noble, Inc.*, 227 F. Supp. 3d 303, 312 n.16 (S.D.N.Y. 2017) ("If the court finds willfulness, it then considers the nine factors set forth in *Read* to determine whether the infringer's behavior was sufficiently egregious to warrant enhanced damages."); *Greatbatch Ltd. v. AVX Corp.*, No. 13-723-LPS, 2016 WL 7217625, at \*6 (D. Del. Dec. 13, 2016) (recognizing *Read* factors as nonexclusive factors that can be applied); *Dominion Res. Inc. v. Alstom Grid, Inc.*, No. 15-224, 2016 WL 5674713, at \*21 (E.D. Pa. Oct. 3, 2016) ("While *Halo* changed the test for determining willful misconduct in enhanced damages, we continue to use the *Read* factors to aid our discretion."); *Finjan, Inc. v. Blue Coast Sys., Inc.*, No. 13-cv-03999-BLF, 2016 WL 3880774, at \*16 (N.D. Cal. July 18, 2016) ("This Court finds the *Read* factors present useful guideposts . . .").

<sup>57</sup> See, e.g., *Trs. of Bos. Univ. v. Everlight Elecs. Co.*, 212 F. Supp. 3d 254, 257 (D. Mass. 2016) ("While the *Read* factors remain helpful to this Court's analysis, the touchstone for awarding enhanced damages after *Halo* is egregiousness.").

compensation to the party infringed,<sup>58</sup> and still others consider the extent of consultation with patent lawyers.<sup>59</sup>

Whether relying on the *Read* factors or other factors, these approaches turn on case-specific facts. This fact-intensive analysis will decrease predictability and increase the burden of discovery.<sup>60</sup> More specifically, the *type* of discovery encouraged by *Halo* is especially expensive. Discovery efforts will be heavily focused on evidence of egregiousness and mental states, factors that would not otherwise be relevant to the strict liability offense of patent infringement.<sup>61</sup> Facing the possibility of staggering discovery costs, defendants may settle at higher dollar amounts, even for potentially meritless claims.<sup>62</sup>

A competing line of reasoning suggests that the wide discretion granted to district courts is a feature, not a bug, of the system. Proponents of *Halo* may argue that district courts, well grounded in the facts of each case, will establish patterns in their enhanced damages decisions. Although the boundaries of the *Halo* standard are relatively undefined now, this uncertainty will, the argument goes, be shed as the body of case law becomes more robust. That is, the fact-intensive nature of the doctrine will eventually create clarity and guide future litigants.<sup>63</sup> According to this argument, the case-by-case approach will lead to greater predictability of outcomes which, in turn, will lower litigation costs.

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<sup>58</sup> See, e.g., *Sociedad Espanola De Electromedicina Y Calidad, S.A. v. Blue Ridge X-Ray Co.*, No. 1:10-cv-00159-MR, 2016 WL 3661784, at \*7-8 (W.D.N.C. July 8, 2016) (noting that the *Read* factors are not dispositive and considering an additional factor of whether plaintiff has already been “amply compensated for the Defendants’ infringement”).

<sup>59</sup> See, e.g., *LoggerHead Tools, LLC v. Sears Holdings Corp.*, No. 12-cv-9033, 2016 WL 5112017, at \*4 (N.D. Ill. Sept. 20, 2016) (using evidence regarding consultations with patent lawyers as an indication of good faith).

<sup>60</sup> The pre-*Seagate* enhanced damages jurisprudence was likewise criticized for its contribution to the expense of trials. It was noted that “[t]he willfulness inquiry is a highly subjective, fact-intensive analysis. Because of this, it is expensive and contributes to less predictable trial outcomes.” Jonathan M. Jackson, *If It Ain’t Broke Don’t Fix It: The Pitfalls of Major Reform of the Doctrine of Willful Patent Infringement in the Wake of Knorr-Bremse*, 15 U. BALT. INTELL. PROP. L.J. 37, 72-73 (2006). Note that this same argument rings true in the post-*Halo* landscape, where the standard is once again subjective and case-specific.

<sup>61</sup> See Samuel Chase Means, Comment, *The Trouble with Treble Damages: Ditching Patent Law’s Willful Infringement Doctrine and Enhanced Damages*, 2013 U. ILL. L. REV. 1999, 2016 (2013) (explaining that evidence addressing the willfulness inquiry is often complex, prejudicial, and otherwise superfluous against the backdrop of a strict liability offense).

<sup>62</sup> See Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, Address at the Eastern District of Texas Judicial Conference: The State of Patent Litigation 8 (Sept. 27, 2011) (transcript available at <https://perma.cc/4MUN-NA6P>) (“Our courts are in danger already of becoming an intolerably expensive way to protect innovation or prove freedom to operate. These vast expenses can force accused infringers to acquiesce to nonmeritorious claims. This only serves as an unhealthy tax on innovation and open competition.”).

<sup>63</sup> This argument can be couched in the more general terms of the value of legal precedent and robust case law. See Van Alstine, *supra* note 53, at 824-25 (discussing the beneficial role of precedent and emphasizing that, in contexts of high uncertainty, case law “may be the only effective means of bringing coherence to the law”).

This line of reasoning is unpersuasive on several grounds. First, it rests on the optimistic assumption that patterns will eventually emerge in the jurisprudence. However, the development of a clear and coherent doctrinal framework is not inevitable. With the plethora of approaches that district courts may choose to employ,<sup>64</sup> it could take an overwhelming number of cases before a consensus forms, or one may never form at all. The heightened standard of review will also delay the generation of robust doctrine across jurisdictions.

Second, this argument fails to account for the other shortcomings of *Halo*. Even if some of the ambiguity is resolved over time, the resulting test will nonetheless remain highly fact-intensive. Employing such a fact-intensive test will keep discovery costs high and litigation drawn-out. Finally, as is discussed below, *Halo*'s faults lie not only in the elevation of litigation costs during trial, but also in the lowered threshold for enhancing damages and the skewed incentives that will lead to forum shopping.<sup>65</sup> Even in an ideal scenario where a clear pattern emerges, the presence of such a pattern will be inadequate to compensate for the potentially high damage awards and prevalent forum shopping resulting from *Halo*.

#### B. *The Frequency of Enhanced Damage Awards Will Increase*

In addition to the elevated costs incurred *during* litigation, the total costs may be inflated due to the more generous standard for enhancing damages.<sup>66</sup> The language in *Halo* explicitly reveals the Court's intention to capture more bad actors than it was previously able to under the *Seagate* test.<sup>67</sup> However, by lowering the threshold to capture these bad actors, *Halo* creates a standard that subjects a broad array of defendants to the threat of enhanced damages.

The lower threshold for enhanced damages is a product of multiple facets of the *Halo* decision. The increased flexibility and authority afforded to district courts allows them to be more generous in enhancing damages. Depending on how a district court construes willfulness and egregiousness,<sup>68</sup> and on which factors it decides to place an emphasis,<sup>69</sup> the realm of enhanced damages can be sculpted to fit a court's inclinations. Other aspects of *Halo* also reduce the threshold for awarding enhanced damages. The decreased evidentiary standard for recklessness expands the range of conduct from

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<sup>64</sup> See *supra* notes 53–59.

<sup>65</sup> See *infra* Sections III.B and III.C.

<sup>66</sup> See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016) (rejecting the “unduly confin[ing]” *Seagate* test and thereby lowering the enhanced damages threshold as a consequence).

<sup>67</sup> See *id.* at 1932 (criticizing *Seagate* for “insulating some of the worst patent infringers from any liability for enhanced damages”).

<sup>68</sup> See *supra* text accompanying notes 50–51.

<sup>69</sup> See *supra* text accompanying notes 53–59.

which liability for enhanced damages can arise.<sup>70</sup> Additionally, the heightened standard for review further insulates the district courts, allowing them to grant enhanced damages with less fear of being overturned.

These features allow district courts to award enhanced damages more often, raising the final cost of litigation.<sup>71</sup> The expanded authority to enhance damages will also affect settlement negotiations. Defendants, especially small start-ups, will face increased pressure to settle if there is a greater likelihood of enhanced damages.<sup>72</sup> By lowering the threshold for enhanced damages, the final price tag after trial or after settlement negotiations will be elevated.

### C. *Forum Shopping Will Become More Prevalent as Power Shifts to District Courts*

Not only does *Halo* encourage plaintiffs to bring suit, but it also incentivizes them to forum shop. With the heightened standard of review making it more difficult for the Federal Circuit to overturn district court verdicts, parties will devote more resources at the district court level.<sup>73</sup> The greater emphasis placed on district court proceedings will motivate plaintiffs to find a forum that will be most favorable to them.

Under the Court's recent ruling in *TC Heartland LLC v. Kraft Food Group Brands LLC*, 137 S. Ct. 1514 (2017), patent venue is only proper in the defendant corporation's state of incorporation or "where the defendant has

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<sup>70</sup> See *Halo*, 136 S. Ct. at 1934 (changing the standard to a preponderance of the evidence standard). Note that, although *Halo* lowers the evidentiary standard for recklessness from clear and convincing to preponderance of the evidence, it is not apparent under the sparse guidance that a finding of recklessness is necessary at all. See *id.* at 1932 (listing acceptable grounds for enhancing damages, including a finding that conduct is "characteristic of a pirate"). This interpretation would further lower the threshold for enhanced damages.

<sup>71</sup> At a minimum, district courts will have the *opportunity* to award enhanced damages in a greater variety of scenarios. Although drastic changes have not been observed in the approximately one year following *Halo*, changes may still be on the horizon. See, e.g., QUINN EMANUEL URQUHART & SULLIVAN, LLP, *Enhanced Patent Damages in the Wake of Halo May Not Be So Easy to Come By*, JDSUPRA (Mar. 29, 2017), <http://www.jdsupra.com/legalnews/enhanced-patent-damages-in-the-wake-of-96269/> [<https://perma.cc/NYD2-XPLX>] ("It appears that the initial concern that *Halo* would unleash a wave of decisions granting enhanced damages has not come to pass, although time will tell what the true impact of *Halo* will be."). Shifting litigation incentives reveal themselves over time, and thus a greater body of case law is needed to determine how district courts will exercise their expanded authority.

<sup>72</sup> See Soroudi, *supra* note 31, at 326 ("Because many small companies have no other business alternatives and cannot afford the risks and costs of litigation, they are forced to settle for needless licenses. Patent trolls know this and exploit these small companies for a quick profit.").

<sup>73</sup> Cf. Mateo J. de la Torre, Note, *The Troll Toll: Why Liberalized Fee-Shifting in Patent Cases Will Do More Harm Than Good*, 101 CORNELL L. REV. 813, 836 (2016) ("Indeed, an increased likelihood of an adverse fee award coupled with a decreased ability to challenge such award on appeal will no doubt raise the stakes at the trial level, incentivizing patent litigants to fight even harder and expend more resources at trial.").

committed acts of infringement and has a regular and established place of business.”<sup>74</sup> In response to *TC Heartland*, some courts have nonetheless interpreted patent venue broadly, giving plaintiffs substantial power in choosing where to bring suit.<sup>75</sup> Plaintiffs seek out courts that award higher damages, have greater predictability, have a higher chance to go to trial, are speedier, or some combination of the preceding factors.<sup>76</sup>

These tactics lead to negative consequences. Litigation costs rise as parties fight over venue.<sup>77</sup> Unfairness concerns surface when plaintiffs exploit the unevenness across jurisdictions in order to seek out venues most favorable to them.<sup>78</sup> Given that the Federal Circuit was created, in part, to standardize district-court jurisprudence and decrease the prevalence of forum shopping,<sup>79</sup> the behavior incentivized by *Halo* is problematic as it undermines this policy goal.

Admittedly, the selection of favorable districts by plaintiffs is already a commonplace behavior in patent law. For patent infringement suits, plaintiffs in recent history have tended to concentrate their cases in the Eastern District of Texas, the District of Delaware, and the Eastern District of Virginia.<sup>80</sup> The Patent Pilot Program further concentrates patent cases by funneling cases to willing, expert judges.<sup>81</sup> Even though patent cases are already being channeled into certain jurisdictions, the compounding effects of *Halo* should not be ignored. The different considerations used by district courts in their enhanced damages analyses will exacerbate forum shopping abuses.<sup>82</sup> In their calculus

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<sup>74</sup> See 28 U.S.C. § 1400(b) (1999). Note that this decision was a change to the settled Federal Circuit interpretation allowing patent venue to be as broad as personal jurisdiction. See *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1584 (Fed. Cir. 1990).

<sup>75</sup> See, e.g., *Bristol-Myers Squibb Co. v. Mylan Pharms., Inc.*, No. 17-379-LPS, 2017 U.S. Dist. LEXIS 146372, at \*31 (D. Del. Sept. 11, 2017) (finding it possible that an ANDA applicant “has committed acts of infringement” based on “acts the ANDA applicant non-speculatively intends to take if its ANDA receives final FDA approval”). But see *In re Cray, Inc.*, 871 F.3d 1355, 1363 (Fed. Cir. 2017) (rejecting the Eastern District of Texas court’s generous approach to “regular and established place of business,” instead emphasizing that the physical place must be “a place of the defendant, not solely a place of the defendant’s employee”). With the possibility of a broad interpretation of § 1400(b), it is unclear just how effective *TC Heartland* will be at limiting patent venue, and by extension, forum shopping.

<sup>76</sup> See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 635, 643 (2015) (discussing how courts compete for litigants and listing the various characteristics of courts that draw patent litigants).

<sup>77</sup> See *id.* at 641, 645 (noting the frequency and intensity of venue disputes in patent litigation).

<sup>78</sup> See *id.* at 637 (mentioning the problems brought about by forum shopping, “ranging from reduced trust in the judicial process to uneven playing fields for litigants”).

<sup>79</sup> See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 2 (1989) (discussing the motivations for creating the Federal Circuit, including the desire to “produce horizontal equity, and reduce opportunistic litigation strategies such as forum shopping”).

<sup>80</sup> See Anderson, *supra* note 76, at 651-58 (summarizing patent activity in these three districts and addressing the benefits that each district offers plaintiffs).

<sup>81</sup> See *id.* at 637.

<sup>82</sup> See *supra* text accompanying notes 53–59.

regarding where to file, patent trolls will prioritize jurisdictions in which the district court's approach to enhanced damages is the most generous, all else being equal. Although forum shopping is already rampant in patent law, there is no justification to further cement these nonoptimal litigation incentives.

The full implication of *Halo* on forum shopping will be elucidated by courts' continuing interpretation of *TC Heartland*. Given early responses to *TC Heartland*,<sup>83</sup> plaintiffs, including patent trolls, continue to have significant power in selecting the forum.<sup>84</sup> By allowing diversity among district courts, *Halo* bolsters the threat of forum shopping, making any upcoming changes by the Court or by Congress especially pertinent.

D. *The Confluence of Factors Will Frustrate the Goal of  
an Efficient Litigation Regime*

*Halo*'s ambiguous, fact-intensive test, coupled with depressed evidentiary burdens and heightened standards of review, produces undesirable effects. A plaintiff's higher potential recovery skews the bargaining power in favor of large companies that can afford extensive litigation. The greater prominence afforded to district courts will fuel forum shopping. This will prolong litigation and favor large companies that are able to expend greater resources on fighting for a favorable forum. These factors work together to create a doctrine that is ripe for abuse by patent trolls. Wealthy, patent-holding plaintiffs will be incentivized to bring nuisance suits, spoiling the efficiency of the patent system. More generally, the high costs and protracted arguments will prevent the judicial system from reviewing a high volume of patents.

Not only will *Halo* add cost to an already expensive litigation system, but it will also discourage parties from reaching trial. The threat of high litigation costs and the potential for enhanced damages may sway small defendants to settle even meritless cases. Parties will favor settlement, if the alternative is an incredibly expensive trial.<sup>85</sup> With fewer cases being resolved at trial and expounded upon in court opinions, it will take longer for patterns to emerge in the jurisprudence. Courts will not have the opportunity to affirm the validity of "good" patents or weed out "bad" patents.

*Halo* also has upstream implications. Innovators in crowded fields or in industries dominated by patent trolls may be deterred from pursuing research. They may find that the risk of an infringement suit and the threat

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<sup>83</sup> See *supra* note 75.

<sup>84</sup> Note that a decrease of filings in the Eastern District of Texas in response to *TC Heartland* does not by itself prove that plaintiff's choice of venue has been sufficiently constrained. Many other districts remain available to plaintiffs, thus leaving the door open for forum shopping abuses.

<sup>85</sup> See Soroudi, *supra* note 31, at 325 (noting that patent trolls use the threat of high litigation costs to influence others to yield to licensing settlements).

of treble damages under *Halo*'s uncertain, plaintiff-friendly jurisprudence will outweigh potential profits. In particular, small start-up companies will be disproportionately harmed.<sup>86</sup> These emerging companies will face substantial barriers to entry in the form of nuisance suits. The standard set forth by *Halo* is thus impeding a fundamental aim of the patent system: "to promote the progress of science and the useful arts."<sup>87</sup>

#### IV. PROPOSED SOLUTION

The patent system is intended to balance the competing interests of patent holders, innovators, and the public.<sup>88</sup> To date, no enhanced damages standard has been perfectly calibrated to balance these interests. The *Seagate* standard was under-inclusive, overly-formalistic, and not responsive to the particulars of each case.<sup>89</sup> Nor does the *Halo* test strike the right balance. The fact-intensive and open-ended standard tips the balance too far in the other direction, ultimately empowering large companies and patent trolls. The solution presented in this paper contemplates a middle ground between the *Seagate* and *Halo* doctrines, capturing undesirable behavior while providing a workable and cost-effective framework for courts to follow. In addition to advancing a revised enhanced damages standard, the proposal incorporates changes to the pleading requirements and venue rules. Each of these procedural aspects—enhanced damages, pleading standards, and venue—can be tailored such that the resulting litigation will be less burdensome and thus a better tool for the resolution of patents.

##### A. Limit District Court Discretion in the Enhanced Damages Analysis

The discretion of the district courts should be appropriately cabined. This proposal limits the factors that can be considered during the subjective

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<sup>86</sup> See *id.* (commenting that small companies are especially targeted by patent trolls). But see de la Torre, *supra* note 73, at 838-39 (pointing out that since small firms might also be plaintiffs, efforts to shift the balance more in defendants' favor could harm small, patent-holding firms).

<sup>87</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>88</sup> See 2015 U.S. S. Ct. Briefs LEXIS 6435 at \*15 (citing *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979)):

[T]his Court consistently has considered the . . . delicate balance among the competing public interests of (1) the would-be inventor lured by the promise of patent exclusivity; (2) the subsequent artisan seeking to build on previous advances either by licensing patent technology at a fair price or inventing around the patent; and (3) the public desiring unencumbered use of the public domain.

<sup>89</sup> See Transcript of Oral Argument at 19:13-16, 136 S. Ct. 1923 ("[H]aving taken the bar too low in *Underwater Devises* [the Court] overcompensated in *Seagate*. We think the bar ought to be high. We just don't think it ought to be arbitrarily high as it is now.").

inquiry into the question of willfulness. The analysis should be restricted to a subset of the *Read* factors. Instead of granting district courts the discretion to consider all circumstances, courts should focus on (1) whether there was deliberate copying, (2) whether there were any remedial actions taken by the defendant, (3) whether there were attempts to conceal the defendant's misconduct, and (4) the size and financial condition of the defendant.<sup>90</sup>

These particular *Read* factors are chosen for their salience in the analysis and their objectivity. The presence of deliberate copying is at the core of willful infringement, and thus should be the focus of a court's inquiry.<sup>91</sup> The other three factors involve ascertainable facts: remedial actions, concealment of misconduct, and financial characteristics. Unlike other *Read* factors, which inquire into the subjective motivation of the defendant or presence of a good faith belief, these factors allow for a more straightforward analysis, expediting litigation. The knowledge factor from *Read* is not included here because, as the *Halo* concurrence emphasizes, knowledge alone is not enough for awarding enhanced damages.<sup>92</sup> Accordingly, inquiring into whether the defendant had knowledge of the patent is an inefficient allocation of judicial resources.

By limiting the analysis to four factors, courts' competing interpretations of "willfulness" and "egregiousness" become less problematic. Because courts would have to ground their enhanced damages decisions in the above factors, the outcome of a case would not depend on the particular construction of "willfulness" and "egregiousness." The four enumerated factors, especially the deliberate copying factor, serve as an adequate proxy for willfulness and egregiousness.

With this constrained discretion, district courts will retain some flexibility to consider the circumstances of each case, but parties will know in advance which facts will be most salient. This knowledge will keep discovery costs in check and will narrow the scope of arguments raised in litigation. It will also protect the threshold for enhanced damages from future erosion,<sup>93</sup> thereby decreasing the frequency of such awards. To the extent that the emergence of a pattern from *Halo* was dismissed earlier with skepticism,<sup>94</sup> this proposal offers a greater chance that a pattern will emerge because there would be fewer factors for judges to consider.

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<sup>90</sup> Cf. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 827 (Fed. Cir. 1992) (providing the full set of factors).

<sup>91</sup> See, e.g., *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (discussing the companion case, *Stryker*, and taking issue that the defendant "had all-but instructed its design team to copy [Plaintiff]'s products") (internal quotation marks omitted).

<sup>92</sup> See *id.* at 1936 (emphasizing that mere knowledge does not rise to the level of willful infringement and interpreting the majority's opinion as instead placing a greater emphasis on the egregiousness of the conduct).

<sup>93</sup> See *supra* discussion in Section III.A (discussing how *Halo*'s open-ended standard may open the floodgates for arguments during litigation).

<sup>94</sup> See *supra* text accompanying notes 60–61.

The increased certainty and decreased discovery costs would provide numerous additional benefits. The negotiating power of patent trolls would be reduced and nuisance suits would become less effective.<sup>95</sup> Lower litigation costs would increase parties' willingness to proceed to trial, allowing courts to clear out more invalid patents from the current landscape. Additionally, district court decisions would become more standardized, which may decrease incentives for forum shopping.<sup>96</sup>

### B. *Raise the Pleading Standards for Willful Infringement*

The constrained discretion standard will not completely eliminate the expensive nature of patent litigation. The analysis will still be rooted in the facts of each case, requiring costly discovery. To account for this, the pleading standard for willful infringement should be heightened. A heightened pleading standard would police the claims at an earlier and less costly stage of litigation.<sup>97</sup>

Instead of the current plausibility standard,<sup>98</sup> the threshold should be raised to match the fraud pleading standard. The burden would be on the plaintiff to "state with particularity the circumstances constituting" the willful infringement.<sup>99</sup> In light of the four factors chosen by this proposal, the plaintiff would have to state with particularity circumstances that would implicate deliberate copying, lack of remedial action by the defendant, concealed misconduct, or a strong financial condition of the defendant. Under the current system, a heightened pleading standard would be impractical because it is unclear what factors a district court will deem important to its analysis. Here, however, the exclusive factors provide guidance as to what types of allegations would support a finding of willful infringement. Thus, the change to the pleading standard becomes a workable addition to this proposal. Pleadings that do not meet this standard would be subject to dismissal by the Court.<sup>100</sup>

The justifications for the heightened pleading requirements for fraud are compatible with the enhanced damages context. The high pleading standard

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<sup>95</sup> Cf. Soroudi, *supra* note 31, at 326 (noting that expensive and uncertain litigation benefits patent trolls).

<sup>96</sup> Although uniformity tends to limit a party's incentive to forum shop, this constrained discretion model may only have a marginal impact. Given that other variables affect a plaintiff's decision regarding venue, this factor alone will not be dispositive. See *supra* text accompanying notes 73-79 (discussing other considerations at play with respect to forum shopping).

<sup>97</sup> Previous proposals have suggested requiring plaintiffs to more specifically point out allegedly infringing products and particular patent claims implicated at the pleading stage. Similar to the proposal advanced in this Comment, such heightened pleading standards "could beneficially shift the burden back to the plaintiff to do more diligence before filing a suit." See Jared A. Smith & Nicholas R. Transier, *Trolling for an NPE Solution*, 7 HASTINGS SCI. & TECH. L.J. 215, 235-36 (2015) (discussing the heightened requirements contemplated by the Innovation Act).

<sup>98</sup> See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>99</sup> FED. R. CIV. P. 9(b).

<sup>100</sup> FED. R. CIV. P. 12(b)(6).

for fraud is intended to protect “defendants’ reputations . . . from lightly made allegations of morally reprehensible acts.”<sup>101</sup> Likewise, reputational harm can occur as patent holders allege that companies engaged in egregious or malicious behavior.<sup>102</sup> More notably, the pleading standard for fraud is also justified on the grounds that the heightened requirements will protect potential defendants against “baseless suits filed for nuisance or settlement value.”<sup>103</sup> Again, this rationale can be extended to the willful infringement context. Limiting the number of nuisance suits has been repeatedly articulated as an important policy goal in the patent law sphere.<sup>104</sup>

Although a heightened pleading standard has not yet been adopted, some district courts have already moved toward elevated requirements for willful infringement claims. For example, in *Princeton Digital Image Corp. v. Ubisoft Entertainment SA*, the Delaware district court held that a claim for willful infringement was insufficient because the plaintiff did not adequately allege that the defendant was put on notice. The court further held that the plaintiff did not “sufficiently articulate how [defendant]’s actions . . . amount to an ‘egregious’ case of infringement of the patent.”<sup>105</sup> By mandating a heightened pleading standard across *all* jurisdictions, not only will this protect reputations and limit nuisance suits, but it will also bring with it the benefits that flow from a more uniform litigation system.

The heightened pleading requirement will result in more claims being dismissed at the pleading stage. Considering the staggering expense of

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101 Morwenna Borden, Note, *Particulars of Particularity: Alleging Scierter and the Proper Application of Rule 9(b) to Duty-Based Misrepresentations*, 98 MINN. L. REV. 1110, 1116-17 (2014).

102 The threat of reputational damage is arguably less severe in the patent infringement context given the commonplace nature of willful infringement claims. See Means, *supra* note 61, at 2019 (discussing the frequency of willful infringement allegations).

103 Borden, *supra* note 101, at 1116.

104 See, e.g., *Hearing*, *supra* note 1, at 2 (statement of Hon. Darrell E. Issa) (emphasizing the undesirability of “frivolous lawsuits that amount to litigation extortion”).

105 No. 13-335-LPS-CJB, 2016 U.S. Dist. LEXIS 153207, at \*40 (D. Del. Nov. 4, 2016); see also *CG Tech. Dev., LLC v. Big Fish Games, Inc.*, 2016 U.S. Dist. LEXIS 115594, at \*43-44 (D. Nev. Aug. 29, 2016) (finding a claim for willful infringement insufficient because it “fail[s] to allege any facts suggesting that Defendant’s conduct is ‘egregious . . . beyond typical infringement’” and instead only makes “conclusory allegations”); *Varian Med. Sys. v. Elekta AB*, No. 15-871-LPS, 2016 U.S. Dist. LEXIS 91226, at \*26-27 (D. Del. July 12, 2016) (dismissing plaintiff’s claim on the basis that it “does little more than provide a formulaic recitation of the pre-*Halo* elements of a willful infringement claim” and fails to “articulate how the . . . making, using or offering for sale . . . actually amounted to an egregious case”). Not all jurisdictions have required such bolstered allegations, though. See, e.g., *Scripps Research Inst. v. Illumina, Inc.*, No. 16-cv-661 JLS (BGS), 2016 U.S. Dist. LEXIS 161279, at \*22 (S.D. Cal. Nov. 21, 2016) (requiring merely a plausible allegation of knowledge of the patent); *Malibu Boats, LLC v. MasterCraft Boat Co., LLC*, No. 3:16-CV-82-TAV-HBG, 2016 U.S. Dist. LEXIS 183202, at \*10 (E.D. Tenn. Oct. 28, 2016) (same); *Blitzsafe, Tex. LLC v. Volkswagen Grp. of Am., Inc.*, No. 2:15-cv-1274-JRG-RSP, 2016 U.S. Dist. LEXIS 124144, at \*23-24 (E.D. Tex. Aug. 19, 2016) (same).

discovery for the willfulness inquiry,<sup>106</sup> avoiding this avenue completely in certain cases will make litigation costs more manageable. Knowing in advance that enhanced damages are foreclosed and, accordingly, that less resources will have to be expended during discovery, parties may be more willing to proceed to trial. The heightened standard may also signal to parties that willful infringement should not be awarded in run-of-the-mill infringement cases.<sup>107</sup> The elevated standard could alter the current norm of automatically including willful infringement claims.<sup>108</sup> Over time, this behavioral shift would decrease the average damages awarded in patent litigation.

### C. Limit Choice of Venue

The third feature of this proposal consists of a change in venue rules that will temper forum shopping. If the heightened standard of review as established in *Halo* is maintained, the importance of the role of district courts will remain elevated.<sup>109</sup> This proposal's attempt to standardize jurisdictions by constraining the discretion of district courts will only do so much to curb the forum shopping abuses. Thus, this proposal can be further bolstered by a reform of the venue statute. As the holding in *TC Heartland* is susceptible to a very generous interpretation, a statutory change is a more promising avenue for tightening venue selection.<sup>110</sup>

While the particulars of venue reform are beyond the scope of this paper, any general move toward restricting the plaintiff's choice of venue would complement the aims of this proposal.<sup>111</sup> By reducing the opportunities to litigate over forum, litigation costs will accordingly decrease. This will benefit smaller companies that are not able to afford costly fights over forum. Decreased litigation costs will lead to more cases going to trial and the resolution of more disputes over patent validity. Moreover, limiting forums available to plaintiffs can prevent plaintiffs from choosing excessively "plaintiff-friendly" venues.<sup>112</sup> For example, by removing venues with high

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<sup>106</sup> See Means, *supra* note 61, at 2014 (observing that the United States "is the most expensive jurisdiction in the world for patent litigation," due to the direct and indirect expenses of patent litigation).

<sup>107</sup> This goal was also espoused by *Halo*. See 136 S. Ct. 1923, 1935 (2016) (stating that damages should not be enhanced for "garden-variety cases").

<sup>108</sup> Cf. Means, *supra* note 61, at 2019 (finding that it is common practice to allege willful infringement and likening these claims to "'boilerplate' for any infringement action").

<sup>109</sup> See *supra* text accompanying note 74.

<sup>110</sup> See *supra* Section III.C.

<sup>111</sup> For a more comprehensive discussion of patent venue reform, see generally Ana Santos Rutschman, *Patent Venue Exceptionalism after TC Heartland v. Kraft*, 25 U. MIAMI BUS. L. REV. 29 (2016-2017).

<sup>112</sup> See generally Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1 (2017) (advancing reasons why the Eastern District of Texas is popular among plaintiffs, particularly patent trolls, and advocating for venue reform). If venue is limited to, for example, the state of incorporation, this would prevent

discovery costs from the equation, average litigation costs will be reduced, promoting more cases to proceed to trial instead of settling. Taking power away from plaintiffs in this way may also decrease the occurrence of nuisance suits. Although limiting nuisance suits leads to *fewer* lawsuits, courts would consequently be able to allocate resources to more meritorious patent disputes.

#### CONCLUSION

With an accumulation of invalid patents and a post-issuance administrative system that offers an incomplete—and possibly unconstitutional—solution,<sup>113</sup> litigation becomes the backstop for resolving issues in the patent system. As society continues to move further away from the simple steam-engine world, as Justice Breyer observes,<sup>114</sup> a strong last line of defense is even more important for a healthy patent system. The amassing of invalid patents and the corresponding abuse by patent trolls has been at the forefront of policy and scholarly discussions, but there has yet to be an effective solution.

Rather than providing a viable answer, *Halo* will lead the patent system in the wrong direction by increasing costs and uncertainty and decreasing efficiency and accessibility. By addressing three procedural aspects—enhanced damages, pleading requirements, and venue rules—this Comment’s proposal aims to improve upon a flawed litigation regime. Efforts to reduce litigation costs will result in more cases proceeding to trial. Putting more patents in front of judges will allow a greater quantity of invalid patents to be weeded out. To escape the current trajectory—a future that is flooded with patents of questionable validity and that lacks an adequately equipped litigation structure—the Court should rein in the discretion authorized by *Halo* and simultaneously tighten the pleading and venue rules.

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many companies from filing suit in the Eastern District of Texas. *See id.* at Part II (noting the small population and lack of businesses present in Marshall, Texas).

<sup>113</sup> *See supra* notes 10–11.

<sup>114</sup> *See supra* note 2 and accompanying text.