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Enhanced Damages Analysis Post-Seagate

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Enhanced Damages Analysis

Post *Seagate*:

Does a jury finding, by clear and convincing evidence, of Willful Infringement by the new Objective Recklessness standard, establish some necessary enhancing of damages by fulfilling the first two Read factors automatically?

By: Christopher Comiskey
With section 284 of the Patent Act, the Congress provided permissively that a court “may” enhance damages. Shortly after the birth of the Court of Appeals of the Federal Circuit, the court ‘grafted’ a showing of willfulness as a necessary precursor to enhancing damages.\(^1\) For almost a quarter century the rule has required a threshold fact finding before allowing a District Court to exert its own ‘discretion’ as to how much to enhance damages, if at all. While the District Courts have had freedom to exert there discretion, the Federal Circuit has required that they weigh out a set of nine factors and articulate how those factors support there discretionary enhancement.\(^2\)

Following *In re Seagate*\(^3\) in 2007, the standard the fact finder must use to establish willfulness became more stringent. Since then the Judiciary has developed a jurisprudence that must honor the fact founds by a jury and must still pretend to weigh out the Read factors. An illogical result is shown under the current framework by an analysis that assesses the relative values of the Read factors and how two of the factors are automatically established by the findings made by the new willfulness standard. If a district court is truly to have the discretion to enhance damages then changes must be made.

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\(^1\) *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983).

\(^2\) *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-27 (Fed. Cir. 1992).

\(^3\) *In re Seagate Tech.*, 497 F.3d 1360, 1371 (Fed. Cir. 2007).
I. Enhanced Damages

“Because patent infringement is a strict liability offense, the nature of the offense is only relevant in determining whether enhanced damages are warranted.”

Enhanced damages are a punitive damage, also known as a collateral assessment. There is a long common law pedigree for assessing a multiple of the compensatory damages to punish wrong doers. It wasn’t until 35 U.S.C. §284 that legislated exemplary damages in patent infringement cases. Section 284 permits additional damages up to double the compensatory damages awarded.

Before settling on willful as the standard of the egregiousness of the conduct that would permit an enhancement of damages the courts used other language to define the type of conduct worthy of punishing. There was: wanton disregard or malicious behavior, bad faith, egregious conduct. It wasn’t until 1991 when the Federal Circuit came around to making willfulness the sole standard necessary for enhancing damages. Later that same year the Federal Circuit made clear that a district court's analysis of whether to increase damages is a two-step process. The fact finder must first

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4 Id.
5 See Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994). (The principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree. ... Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.).
6 35 U.S.C. §284 (Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement…the court may increase the damages up to three times the amount found or assessed.).
7 Beatrice Foods Co. v. New England Printing & Lithographing Co., 923 F.2d 1576, 1578 (Fed. Cir. 1991) (quoting Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 277 (Fed. Cir. 1985)) Seagate, 497 F.3d at 1368. Thus, ‘bad faith’ is more correctly called ‘bad faith infringement,’ and it is merely a type of willful infringement. Jurgen. {{because not making a good faith attempt to avoid infringing is precisely the UWDevices std. for willful infringement, so that was “bad faith infringement”. And the Supreme Court in GM removed the Bad Faith part.}}
8 First, the court must determine whether willful infringement (or another circumstance justifying an enhanced award) is proven, a finding of fact which we review only for clear error. Id., 917 F.2d at 543, 16 U.S.P.Q.2d at 1625-26. Second, if the court finds such a basis proven, it must still determine whether or not, under the totality of the circumstances, increased damages are warranted. This determination is
make a finding of willfulness, and then the judge may decide how much to enhance damages.\textsuperscript{9}

Some courts have held that a jury finding of willful infringement is only advisory and does not require a court to enhance damages.\textsuperscript{10} While these holdings are all pre-Seagate, even the Federal Circuit had said that there is no ‘per se’ rule that a court should enhance damages.\textsuperscript{11} Once the fact finder has found willfulness it is the District Court’s discretion to make the determination as to how much to enhance those damages.\textsuperscript{12} The district court makes that determination by weighing out Read factors.\textsuperscript{13} Use of these factors in patent cases is in line with punitive damage considerations in other tort contexts.\textsuperscript{14} These factors are viewed in a totality of the circumstances view, to determine the degree of culpability in a more nuanced way than the pass/fail of the willfulness determination.\textsuperscript{15}

\textsuperscript{9} \textit{Id.}
\textsuperscript{10} White v Mar-Bel, Inc. (1975, CA5 Fla) 509 F2d 287, 185 USPQ 129, reh den (1975, CA5 Fla) 511 F2d 1402.
\textsuperscript{11} Knorr-Bremse
\textsuperscript{12} WMS Gaming Inc. v International Game Tech. (1999, CA FC) 184 F3d 1339, 51 USPQ2d 1385.
\textsuperscript{13} The paramount determination in deciding to grant enhancement and the amount thereof is the egregiousness of the defendant's conduct based on all the facts and circumstances. See Rite-Hite Corp. v. Kelley Co., 819 F.2d 1120, 1125-24 (Fed. Cir. 1987).
\textsuperscript{14} Hodges v. S.C. Toof & Co., No. 12, 833 S.W.2d 896, 1992 Tenn. LEXIS 312, at 14-15 (Tenn. April 20, 1992), where the court stated that, in determining the amount of a punitive damage award, the factfinder should consider, among other factors: defendant's size and financial condition; the reprehensibility of defendant's conduct; the duration of defendant's misconduct; whether defendant attempted to conceal his misconduct; whether defendant had been punitively sanctioned previously for the same acts; and defendant's motivation for harm.
\textsuperscript{15} Inasmuch as a finding of willful infringement does not mandate enhancement of damages, the above factors taken together assist the trial court in evaluating the degree of the infringer's culpability and in determining whether to exercise its discretion to award enhanced damages and how much the damages should be increased. (false distinction as two separate questions, the jury finding of willful infringement determines (1) that there should be enhanced damages, if the court is going to then enhance above 0% it is using its discretion for that determination.) To enable appellate review, a district court is obligated to explain the basis for the award, particularly where the maximum amount is imposed. For the latter, the court's assessment of the level of culpability must be high.
The relative values of Read factors are an important, but often overlooked and misunderstood, aspect of Read factor analysis. The Read factors were initially a listing, by no means an exclusive listing, of how individual District Courts had enhanced damages and what behavior they based the enhancement on. Since Read and Jurgens, courts are required to weigh out the nine factors and articulate how those factors support their discretionary enhancement. So even though the list is not meant to be an exhaustive one, in practice courts are taught to enhance based on how the factors balance out. It is important to determine which factors can logically weigh in favor of enhanced damages, which can weigh against enhanced damages, and which factors can weigh in favor or weigh against. Next, it is equally important to determine as a measure of logic and based on how courts have weighed each of the factors, relative to one another.

The first Read factor is: (1) whether the infringer deliberately copied the ideas or design of another. This factor should only weigh in favor of enhancing damages. If it exists, then that weighs towards a showing of culpable behavior. However some courts have held that the “lack of copying” tips against enhancing damages. Not having culpable behavior should weigh neutrally towards enhancing damages.

The second Read factor is: (2) whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed. This factor should only weigh against enhancing damages. It can only be a measure of a lack of culpable behavior.

16 Read, 970 F.2d at 827.
17 Read, 970 F.2d at 827.
19 Read, 970 F.2d at 827.
However some courts have held that “no good faith belief” tips against enhancing damages.\textsuperscript{20} Lacking any good faith belief does not show culpable behavior.

The third \textit{Read} factor is (3) the infringer's behavior as a party to the litigation.\textsuperscript{21} This factor enters a different category than the previous two, in that it considers behavior after the filing of suit, whereas the first two factors consider behavior pre-litigation. This factor should be able to weigh either for or against enhancing damages. If the accused infringer behaves very well during litigation, this could serve to militate the enhancing of damages. If the accused infringer behaves awfully during litigation this factor would suggest they are more culpable and that damages should be enhanced.

The fourth \textit{Read} factor is: (4) Defendant's size and financial condition.\textsuperscript{22} The fifth \textit{Read} factor is: (5) Closeness of the case.\textsuperscript{23} Similar to the third factor, both the fourth and the fifth should be able to weigh either for or against enhancing damages. A defendant’s size and financial condition could be large and strong, and in that case factor four could weigh in favor of enhancing damages. If the defendant company was small and financially weak, factor four could weigh against enhancing damages. If the case for infringement was very close, that could weigh against an enhancement of damages. While if it was an open-shut case of infringement, then that could weigh in favor of

\textsuperscript{20} TruePosition, 611 F. Supp. 2d at 413; Joyal Products, Inc. v. Johnson Electric North America, Inc., 2009 U.S. Dist. LEXIS 15531 (D. N.J. 2009) ("Simply put, [the infringer] does not dispute the [patent owner's] allegations that [the infringer] never investigated or formed a good faith belief that the '015 patent was invalid or not infringed. The Court, therefore, finds that this factor weighs in favor of enhanced damages."); Funai, 593 F. Supp. 2d at 1115 ("The Court concludes that this factor favors an award of enhanced damages."); QPSX Devs. 5 Pty Ltd. v. Nortel Networks, Inc., 2008 U.S. Dist. LEXIS 21076 (E.D. Tex. 2008) ("the lack of any evidence that [the infringer] attempted to avoid infringement weigh[es] heavily in favor of enhanced damaged."); Tristrata, 314 F. Supp. 2d at 361.

\textsuperscript{21} Read, 970 F.2d at 827.

\textsuperscript{22} Id.

\textsuperscript{23} Read, 970 F.2d at 827.
enhanced damages. The important distinction to keep in mind in the case of factors 3 through 5, is that facts could allow the factors to effect the balance either in favor of, or against enhancing damages.

The sixth Read factor is: (6) duration of defendant's misconduct. This factor should only weigh in favor of enhancing damages. If it exists, then that weighs towards a showing of culpable behavior. Most courts get this right, and will give this factor no weight if there is no duration of the defendant’s misconduct after notice of infringement. Not having that culpable behavior should weigh neutrally towards enhancing damages.

The seventh Read factor is: (7) Remedial action by the defendant. This factor should only weigh against enhancing damages. It can only be a measure of a lack of culpable behavior. If the defendant took remedial action upon notice of infringement, that could only serve to weigh against enhancing damages, no action would be neutral. However some courts have held that “no remedial action” tips in favor of enhancing damages. Failure to perform any remedial actions does not show culpable behavior.

The eighth Read factor is (8) Defendant's motivation for harm. This factor should only weigh in favor of enhancing damages. If it exists, then that weighs towards a showing of culpable behavior. Most courts have held that the “lack of a

24 Read, 970 F.2d at 827.
26 Read, 970 F.2d at 827.
28 Read, 970 F.2d at 827.
motivation for harm” is neutral towards enhancing damages. Not having culpable behavior should weigh neutrally towards enhancing damages.

The ninth Read factor is (9) Whether defendant attempted to conceal its misconduct. This factor should only weigh in favor of enhancing damages. If it exists, then that weighs towards a showing of culpable behavior. Most courts have held that the “attempt to conceal misconduct” is neutral towards enhancing damages. Not having culpable behavior should weigh neutrally towards enhancing damages.

The graphic below demonstrates how the preceding argument regarding which factors can support enhancing damages, which can actually weigh against enhanced damages, and which can do both all line up.

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29 TruePosition, 611 F. Supp.2d at 413; Baden, 2007 U.S. Dist. LEXIS 70776.
30 Read, 970 F.2d at 827.
31 E.g., Kowalski v. Mommy Gina Tuna Resources, 2009 U.S. Dist. LEXIS 26127 (D. Hawaii 2009) (the infringers “made no effort to conceal their infringing operation. Therefore, this factor is neutral as to awarding enhanced damages.”); Funai, 593 F. Supp. 2d at 2009; Baden, 2007 U.S. Dist. LEXIS 70776.
II. Willful Infringement

A. Pre-Seagate

In 1983 the standard for willful infringement was set forth in *Underwater Devices*, the alleged infringer had an affirmative duty to exercise due care and to seek and obtain competent legal advice from counsel when there was a reason to believe that his or her activity may be infringing on a patent holder's rights.\(^{32}\) The *Underwater Devices* standard was more like a negligence standard and it required the patent holder to demonstrate by clear and convincing evidence that the infringer acted in disregard of his or her patent.\(^{33}\) There was no requirement that the infringer obtain an opinion of counsel to determine if his actions were infringing.\(^{34}\) However without an opinion of counsel letter a jury could infer that the infringer did not obtain an opinion of counsel or that the counsel's opinion advised the infringer that his activities were infringing the patent.\(^{35}\) This adverse inference meant that a court placed the burden on the defendant to ensure they were not infringing, and that the best evidence to demonstrate that the defendant met this burden was to seek an opinion of counsel.\(^{36}\)

B. Seagate

The new willfulness standard announced in *Seagate* created something more akin to an objective recklessness standard. It required that a jury find by clear and convincing evidence that the infringer acted despite (1) an objectively high likelihood that its actions constituted infringement of a valid patent; then that said likelihood was

\(^{32}\) *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983).

\(^{33}\) *Addington v. Texas*, 441 U.S. 418, 419-20 (1979) (The Court noted that, in general, the proof standard applied in any particular case “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”); *Am. Med. Sys. Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1530 (Fed. Cir. 1993).

\(^{34}\) *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1109 (Fed. Cir. 1986).


either known or should have been known to the accused infringer.\textsuperscript{37} The first objective prong is a threshold issue that must be established before going on to the second prong, the subjective prong.\textsuperscript{38}

\section*{C. Comparing the standards}

“[T]he Court has left it up to future cases to develop the application of this new standard.”\textsuperscript{39} Before developing the application of this new standard to the old Read factors enhanced damages analysis, it would be helpful to address the similarities and the differences between the \textit{Underwater Devices} negligence like standard to this new \textit{Seagate} objective recklessness like standard. In simple and common terms, after a finding of infringement, willful infringement is found: in the \textit{Underwater Devices} standard when, there was knowing of some small amount of risk, and not forming a good faith belief for why that risk is even smaller or non-existent; in the Seagate standard when, there was knowing of a high risk, and acting anyway (continuing on course, despite knowledge of the high risk).

Both standards require some degree of knowledge of risk and then continuing in the face of that knowledge. But while in \textit{Underwater Devices} there is willful infringement after a small amount of knowledge (or degree of awareness of likelihood), under the Seagate standard there is a much larger degree of awareness of the risk required. So both standards involve two parts to compare, a degree of awareness of risk of infringement and the actions taken with their respective awarenesses. Under \textit{Underwater Devices} after its requisite level of awareness is shown, the infringer must

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\textsuperscript{37} \textit{Seagate.}, 497 F.3d at 1371.
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\textsuperscript{38} \textit{Id.}
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\textsuperscript{39} \textit{Id.}. Similar language to that used in Read after listing factors, “these are reasons for enhancing damages courts gave, for which we didn’t overturn, i.e. not an exclusive listing”
\end{flushleft}
take actions to disprove the risk; whereas under the *Seagate* standard, once that high level of risk is known the level required for action is just that the infringer doesn’t change. In summary, the old standard had a lower level of knowledge, but once that exist action must be taken to disprove it, on the other hand, the new standard has a much higher threshold level of knowledge of the risk that must be shown, but once that is established a far lesser degree of action is required by the infringer to show willfulness.

**III. Analysis of District Court (and on appeal) results after findings of Willful Infringement**

It will now be instructive to determine the relative values of each *Read* factor after having determined which factors can and should weigh in favor, against, or in either direction when determining enhanced damages. Such a determination will be based on logic as well as a comparison of how courts have weighed the factors against each other in practice. The presumption is that each factor is not weighed equally, such that a 5-4 split is not dispositive for the majority holder. Cases where one factor was weighing in favor of enhanced damages and only one factor was weighing against enhancement, while all the other factors were neutral, are ripe for determining those relative values.

A couple of examples can help illustrate how these relative values will be determined. In cases where deliberate copying was clear, and remedial actions were great, while all other factors were neutral, and the court decided to enhance damages, we can say that factor (1) has a greater relative value than factor (7). Another factor in determining how great that relative difference is, would be how much damages were enhanced from 0 to 200%. Rarely does the calculus come out so clearly, but inferences

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40 A factor as previously determined can only weigh in favor of enhanced damages or neutrally.
41 A factor as previously determined that can only weigh against enhancing damages or neutrally.
can be drawn from more complicated combinations of factors.

The table below displays how a small sampling of courts have weighed each Read factor and the corresponding percentage of enhanced damages. If the court found that a factor weighed in favor of enhanced damages that column received a (+) plus sign. If the court found that a factor weighed against enhanced damages that column received a (-) minus sign. If the court found that a factor was neutral that column received a 0. Other language courts use to represent a neutral weight implicitly acknowledges that some factors can only weigh for or against, not both. Some factors might ‘support’ or ‘not support’ enhancing damages.

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42 *St. Regis Paper Co. v. Winchester Carton Corp.*, 410 F. Supp. 1304, 1309, 189 USPQ 514, 518 (D. Mass. 1976) ("Double damages [appropriate]. If defendant were the giant and plaintiff the small independent, I would make it treble . . . .");
43 *Crucible, Inc. v. Stora Kopparbergs Bergslags AB*, 701 F. Supp. 1157, 1164, 10 USPQ2d 1190, 1196 (W.D. Pa. 1988) ("Because the court still considers the [willfulness] question to be a close one . . . double, and not treble damages are appropriate.");
Compiling the data from the table, a broad, general picture describing the relative values of the Read factors starts to emerge. Just making a determination for each factor between being weighed higher or lower than the rest, to the first approximation, we can develop a more useful metric for the balance courts are required to articulate.\textsuperscript{48} Deliberate copying (1), a good faith belief of non-infringement(2), and the closeness of the case (5), are all factors that generally garner more weight than all the other factors. The graphic below represents these new relative values.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{read_factors_graph.png}
\caption{Read Factors}
\end{figure}

46 \textit{Russell Box Co. v. Grant Paper Box Co.}, 203 F.2d 177, 183, 97 USPQ 19, 23 (1st Cir. 1953) (Enhanced damages supported in part by findings "that the defendant had failed to preserve its records and had failed to cooperate as it should at the trial on the issue of damages."), \textit{cert. denied}, 346 U.S. 821, 98 L. Ed. 347, 74 S. Ct. 37 (1953).

47 Also the table reports a 0 (neutral) value for those factors that the court reports weighed in a direction opposite to that which is logical which we determined can only be for or against enhanced damages, but not both. For example, in both \textit{Trueposition} and \textit{Kowalski}, there was a lack of deliberate copying, and the courts there reported that factor weighed against enhancing damages, so on the table they received neutral weights instead of a (-) minus sign. The last five cases are all pre-Read. Not all columns are filled in because the court did not consider those factors in determining how much to enhance damages.

48 While any such analysis is going to be flawed because it is based on determinations made by different judges, with different sets of facts, with the additional random factor of the discretion of the court, much more accurate metric could be developed as a guide. By collecting more data, and using a higher order statistical approximation than used here.
IV. De Facto result under Read Analysis

Armed with the new standard for willful infringement, our adjusted scale for weighing the Read factor, the language from *Jurgens* that honors a jury finding, and the direction from the Federal Circuit to work out the application of their new willful standard, an argument based on the former case law but logically applied to the new standard can produce new results never thought of, or it might suggest we revert to old rules.

A. *Jurgens* – jury facts found must be respected, not reweighed by judge

In 1996, a three judge panel of the Federal Circuit reaffirmed a general principle of our judicial system as it applies specifically to jury findings of willful infringement in patent cases. The finder of law can not reweigh a factual determination made by the finder of fact. Matters of fact are implicitly established if a particular jury finding can only be reached when certain factual questions are determined. *Jurgens* confirmed this principle by holding that the factors that a jury must find by clear and convincing evidence under the *Underwater Devices* standard for willful infringement became facts that the judge could not reweigh when considering how much, if at all, to enhance damages.

The second Read factor was the only factor predetermined by a jury

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49 *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1573 (Fed. Cir. 1996) (Because the jury had rejected CBK's assertion that it acted in good faith (2) as a matter of fact, the court did not have discretion to reweigh the evidence about the competency of the opinion or CBK's reliance on it. Although a trial court many times has discretion to weigh the closeness of the case (5) and the scope of the infringer's investigation in deciding whether to increase a damages award, it does not have discretion to reweigh this evidence once the matter has been decided by the jury and the court finds evidence sufficient to support the jury determination…Because the two factors relied upon to mitigate an increased damages award were not appropriate, the district court abused its discretion in light of the jury's findings of willful infringement and bad faith.) This analysis was performed before *In re Seagate*.

50 Id.

51 That they had a reason to believe they could be infringing, and that they then did not obtain (in good faith) competent legal advise that told other wise

52 *Jurgens*, 80 F.3d at 1573.
finding of willful infringement at the time *Jurgens* was decided, since the willful standard was still *Underwater Devices*. The effect to our graphic would be that the second factor would be neutral, and this result does not suggest any per se rule.

Anything can still happen. But wait, what about factor (5), the closeness of the case. If a jury found by clear and convincing evidence that there was not only infringement, but willful infringement, how close could the case really be? And can a judge reweigh that finding?
If not the graphic changes a bit more significantly, as displayed below.

In this situation the potential outcome that could still be affected by those factors a judge would still have the discretion to weigh becomes a bit narrower.

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53 The bars in blue in the graphic represent regions under which the judge may still exert his discretion. The bars in black represent the level which is necessary, for which the judge can not reweigh.
However we could imagine an extreme case where the judge found no deliberate copying, good litigation behavior, small size and poor finances, minimal duration of the misconduct, many remedial actions taken, no motivation for harm, and no concealment of conduct. The graphic below demonstrates this extreme case.

But still, even in this extreme case, it would not be unreasonable for a judge, at his discretion, to decide to not enhance damages at all, or to some minimal amount.
B. Jury finding of willful, with its new objective and subjective prongs, establish facts similar to 3 Read factors, and potentially the 3 strongest (1,2,5)

A more interesting result is produced when performing similar analysis to that done above\textsuperscript{54} under the new stricter standard for finding willful infringement as established under *Seagate*. Under *Jurgens*, the second Read factor was predetermined to be neutral because the jury had found by clear and convincing evidence that the infringer had not formed a good faith belief that they were not infringing. The first prong under *Seagate*\textsuperscript{55} also establishes as a matter of fact that the infringer did not have a good faith belief that they were not infringing. But also, the second prong under *Seagate*\textsuperscript{56} establishes as a matter of fact that the infringer was deliberately copying. Now, perhaps more convincingly, the closeness of the case factor has been established to weigh in favor of enhanced damages under the more difficult to prove *Seagate* objectively reckless standard.

The graphic below shows what factors the judge will have discretion to weigh post-*Seagate*.

\textsuperscript{54} where the relatively weighted Read factors were applied to the post-*Jurgens* respecting jury findings regime
\textsuperscript{55} First prong of *Seagate* willfulness standard: Objectively high likelihood that its actions constituted infringement.
\textsuperscript{56} Second prong of *Seagate* willfulness standard: Subjective knowledge that their actions were very likely infringing. This fact is essentially the answer to the first Read factor of deliberate copying.
Again, imagining an extreme case where the judge found all factors left to his discretion to weigh against enhancing damages, where there was good litigation behavior, small size and poor finances, minimal duration of the misconduct, many remedial actions taken, no motivation for harm, and no concealment of conduct. The graphic below demonstrates this extreme case.
Under the new standard in *Seagate* and the respect given to jury findings in *Jurgens*, a per se minimal enhancing of damages is required by a jury finding of willful infringement, even in the most extreme case when a judge will find that all the factors which he is at his discretion to weigh are against enhancing damages.
V. Suggestions for the Future

These logical inconsistencies in the law result in a mockery of the judicial process. The status quo is not an option. A consistent approach is necessary to respect the foundations of the theory of punitive damages. The Federal Circuit must direct the lower courts in a fashion that would give more certainty. This may be achieved by either more fully embracing the implications borne out of combining *Jurgens* and *Seagate*, or completely discarding the illusion that a jury has any say towards enhancing damages by putting true discretion to enhance damages, solely back in the hands of judges. Five general propositions are made to address the inconsistencies in the future.

A. Give more guidance to District Courts for how to enhance damages

After jury has found willful infringement by clear and convincing evidence, give district court discretion as to how much to enhance between 1 and 2 times, such that there is some built in enhancement, honoring jury finding. This proposed automatic 100% enhancement would give a jury finding of willful infringement actual meaning, rather than merely a result that shifted the real decision over to the judge to then really decide if damages should be enhanced.

By initiating a minimum level of enhancement for the judge to start from, the two part inquiry necessary to enhance damages gains a more empirical foundation. The graphic below reproduces the last graphic that displayed the extreme case post-*Seagate* where a judge found all factors that he had discretion on weighed against enhancement. At the bottom of the graphic the values are totaled, and the total falls on an example scale of percentages to enhance.
A pointed direction to the lower courts that specified what is at the judges discretion and how he can weigh those factors to arrive at an enhancement of damages somewhere between 100 to 200% would be easy to follow, and it would provide certainty, while still honoring the fact finder.
B. The district court then using the tools it already has

Generally the balance between finders of fact and finders of law is ‘checked’ by a number of tools the judge has in his arsenal. The district court can ‘fight’ the proposed automatic enhancement of 100% by Judgment as a Matter Of Law, overturning the willful infringement finding.\(^57\) A JMOL ruling is appropriate if they have found that there is not substantial evidence in the record that supports the jury's finding, or that there is not substantial evidence in the record for a reasonable jury to conclude that there was willful infringement.\(^58\)

Or, if there is substantial evidence in the record for a reasonable jury to conclude willful infringement, then the district court could order a New Trial.\(^59\) If that finding is far against the weight of the evidence a new trial may be ordered.\(^60\) For example, while there might be enough evidence that a jury could base there finding on, if there is much more evidence to the contrary, and it is much more credible, for example because the witness whose testimony the jury relied upon also gave contradictory testimony.

\(^57\) Federal Rule of Civil Procedure 50(b).
\(^58\) Pannu v. Iolab Corp., 155 F.3d 1344, 1348 (Fed. Cir. 1998) (quoting Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 893 (Fed. Cir. 1984)). “‘Substantial’ evidence is such relevant evidence from the record taken as a whole as might be accepted by a reasonable mind as adequate to support the finding under review.” Perkin-Elmer Corp., 732 F.2d. at 893. In assessing the sufficiency of the evidence, the court must draw all reasonable inferences from the evidence in the light most favorable to the nonmovant. Id.; Richardson-Vicks, Inc. v. Up John Co., 122 F.3d 1476, 1479 (Fed. Cir. 1997). The appropriate inquiry is whether a reasonable jury, given the facts before it, could have arrived at the conclusion it did. Dawn Equip. Co. v. Kentucky Farms, Inc., 140 F.3d 1009, 1014 (Fed. Cir. 1998). The court may not determine the credibility of the witnesses nor “substitute its choice for that of the jury between conflicting elements of the evidence.” Perkin-Elmer Corp., 732 F.2d at 893.
\(^59\) Federal Rule of Civil Procedure 59.
\(^60\) See Allied Chem. Corp. v. Daflon, Inc., 449 U.S. 33, 36 (1980). In making this determination, the trial judge should consider the overall setting of the trial, the character of the evidence, and the complexity or simplicity of the legal principles which the jury had to apply to the facts. Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir. 1960), cert. denied, 364 U.S. 835 (1960). Unlike the standard for determining judgment as a matter of law, the court need not view the evidence in the light most favorable to the verdict winner. Allied Chem. Corp., 449 U.S. at 36. A court should grant a new trial in a jury case, however, only if “the verdict was against the weight of the evidence . . . [and] a miscarriage of justice would result if the verdict were to stand.” Williamson v. Conrail, 926 F.2d 1344, 1352 (3d Cir. 1991).
C. Removing those Read factors that would have already been necessarily found by jury finding of willful infringement

If the Federal Circuit does not wish to force an automatic enhancement as I propose, then they could just remove those factors from the Read analysis that are necessarily established by the jury finding, and which insist such an automatic enhancement of damages: (1) deliberate copying; (2) good faith belief of non-infringement; (5) closeness of case. This would remove the current illusion that produces the bothersome inconsistencies in the law. It would honor the jury finding, while still leaving the enhancement of damages to the discretion of the judge.

D. Further Streamline the Read factors at the same time

If the court were to take the suggestion of removing factors 1, 2, and 5, then they also should consider removing factor 3, behavior in litigation. Enhanced damages are intended to punish pre-litigation behavior. The punishment for behavior during litigation is an assessment of Attorney’s Fees.\footnote{35 U.S.C. §285.} Keeping distinct punishments for distinct behaviors promotes greater certainty.

E. Going back and Fixing \textit{Seagate} or amending § 284

The concurrences in \textit{Seagate}, by both Judge Gajarsa and Judge Newman, suggest that the court should “eliminate the grafting of willfulness onto §284.”\footnote{Seagate, 497 F.3d at 1376-85.} The leaning of the judiciary seems to be towards keeping the enhancement of damages within the discretion of the court, to be weighed on a per case basis, with regard to the specific facts of the case, and not relying on a rote calculation. This can be achieved either by the hands of Congress, in amending §284, or by the courts reversing the holding in \textit{Beatrice} that first ‘grafted willfulness onto §284.’ To punish culpable infringers, the law can be
changed by leaving the sole discretion to enhance damages to the district court, whether willful or another reason they find.

Certainty was a major impetus to form the Federal Circuit. When investigating the need for a new court the House Report concluded that, "current law lacks uniformity or is inconsistently applied." That uncertainty is costly for innovators and businessmen alike. The Federal Circuit itself has reassigned to judges matters usually held for a jury, when for reasons of certainty and uniformity, policy demanded as much. Removing the need for a jury finding of willfulness, and allowing the court to enhance damages at its own discretion would achieve the same goals which have been championed in both the Federal Circuit’s formation and its direction making judges claim construers.

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64 Id.