

Five Practical Tips to Avoid Willful Infringement After *Halo*

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The decision in *Halo Electronics, Inc. v. Pulse Electronics, Inc.* made it easier for a plaintiff to show willful patent infringement by lowering the standard of proof to preponderance of the evidence (i.e., more likely than not) from the higher clear and convincing evidence standard (i.e., substantially more likely than not). As a result, now a defendant must be extremely careful when dealing with cease and desist letters or other allegations of patent infringement to avoid a finding of willfulness. With this new lower standard in mind, five practical tips are provided below to help avoid willful infringement after *Halo*.

First, avoid intentionally copying a patented product or process. If there is evidence of intentional copying, the plaintiff will be well positioned to show that the defendant is a bad actor. If the plaintiff can demonstrate that the defendant acted egregiously or in bad faith they may be entitled to an award of enhanced damages, which can reach three times the amount of the original award.

Second, any notification, such as a cease and desist letter, received accusing you of patent infringement should be addressed immediately. Even the shortest delay could be construed as willfulness.

Third, you should perform a thorough and detailed analysis to determine if you are actually infringing on the asserted patent. There are many patent assertion companies that make money by purchasing patents from third parties and then asserting them. Any legitimate cease and desist letter will include a patent number and a product alleged to be infringing. If the letter appears legitimate, you should thoroughly investigate the matter to determine whether the claim of infringement is valid.

Fourth, if you believe you are infringing on a patent, consider stopping the sale of your product or redesigning it to avoid further infringement. Another option may be to respond to the patent owner to discuss licensing their patent(s).

Fifth, before you decide to redesign your product or if you believe no infringement has occurred, you should contact a licensed patent attorney to perform an independent detailed infringement analysis of the patent and your product to verify your findings. This should be done as quickly as possible and most certainly before the start of any litigation. All opinions should be in writing as a verbal opinion will not adequately protect you. A good patent attorney will be able to understand what it is you are making and how you are making it. They may also be able to assist you in redesigning your product or process, help you reach a licensing agreement with the patent owner, or provide you with a written non-infringement opinion stating that your product or process does not infringe upon the asserted patent.

In closing, by following these five tips, you will make it more difficult for the plaintiff to prove you willfully infringed on their patent(s).



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