

No. 10-6

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IN THE  
**Supreme Court of the United States**

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GLOBAL-TECH APPLIANCES INC. and  
PENTALPHA ENTERPRISES, LTD.,

*Petitioners,*

*v.*

SEB S.A.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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**AMICUS CURIAE BRIEF OF  
INTELLECTUAL PROPERTY  
OWNERS ASSOCIATION IN  
SUPPORT OF NEITHER PARTY**

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DOUGLAS K. NORMAN, *President*  
KEVIN RHODES, *Chair*  
AMICUS BRIEF COMMITTEE  
INTELLECTUAL PROPERTY  
OWNERS ASSOCIATION  
1501 M Street, NW  
Suite 1150  
Washington, DC 20005  
(202) 507-4500

GARY M. HOFFMAN  
*Counsel of Record*  
JEFFREY K. SHERWOOD  
MEGAN S. WOODWORTH  
1825 Eye Street, NW  
Washington, DC 20006  
(202) 420-2653  
hoffmang@  
dicksteinshapiro.com

**TABLE OF CONTENTS**

|  | <i>Page</i> |
|--|-------------|
| TABLE OF CONTENTS .....  | i           |
| TABLE OF APPENDICES .....  | ii          |
| TABLE OF CITED AUTHORITIES .....   | iii         |
| INTEREST OF <i>AMICUS CURIAE</i> .....   | 1           |
| I. INTRODUCTION .....  | 2           |
| II. SUMMARY OF THE ARGUMENT .....  | 4           |
| III. ARGUMENT .....  | 6           |
| A. The Federal Circuit’s “Deliberate Indifference of a Known Risk” Standard May Create Liability for Induced Infringement Without Evidence of the Culpable Intent Required By <i>Grokster</i> .<br>..... | 6           |
| B. The Federal Circuit’s Test Imposes Undue Burdens On Businesses. ....  | 10          |
| C. IPO’S Three-Part Standard Strikes The Appropriate Balance. ....   | 11          |
| IV. CONCLUSION .....   | 14          |

**TABLE OF APPENDICES**

APPENDIX — MEMBERS OF THE BOARD OF  
DIRECTORS, INTELLECTUAL PROPERTY  
OWNERS ASSOCIATION ..... 1a

**TABLE OF CITED AUTHORITIES**

|  | <i>Page</i>   |
|--|---------------|
| <b>CASES</b>   |               |
| <i>Aro Mfg. Co. v.</i><br><i>Convertible Top Replacement Co.,</i><br>377 U.S. 476 (1964) .....   | 9             |
| <i>Bonito Boats, Inc. v.</i><br><i>Thunder Craft Boats, Inc.,</i><br>489 U.S. 141 (1989) .....   | 2             |
| <i>DSU Medical Corp. v. JMS Co., Ltd.,</i><br>471 F.3d 1293 (Fed. Cir. 2006) .....   | 4, 11         |
| <i>In re Seagate Tech., LLC,</i><br>497 F.3d 1360 (Fed. Cir. 2007) <i>cert. denied sub</i><br><i>nom. Convolv, Inc. v. Seagate Tech., LLC,</i><br>No. 07-656, 2008 U.S. LEXIS 2153 (2008)<br>..... | 9, 10, 11     |
| <i>Knorr-Bremse Systeme Fuer Nutzfahrzeuge</i><br><i>GmbH v. Dana Corp.,</i><br>383 F.3d 1337 (Fed. Cir. 2004) .....   | 11            |
| <i>MGM Studios, Inc. v. Grokster, Ltd.,</i><br>545 U.S. 913 (2005) .....   | <i>passim</i> |
| <i>SEB S.A. v. Montgomery Ward &amp; Co., Inc.,</i><br>594 F.3d 1360 (Fed. Cir. 2010) .....  | 8, 11, 14     |
| <i>Sony Corp. of Am. v.</i><br><i>Universal City Studios, Inc.,</i><br>464 U.S. 417 (1984) .....   | 6, 13         |

*Cited Authorities*

*Page*

|   |       |
|---|-------|
| <i>Underwater Devices Inc. v. Morrison-<br/>Knudsen Co.,<br/>717 F.2d 1380 (Fed. Cir. 1983)</i> ..... | 9, 11 |
|---|-------|

**STATUTES**

|                       |               |
|-----------------------|---------------|
| 35 U.S.C. § 271 ..... | <i>passim</i> |
|-----------------------|---------------|

## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Intellectual Property Owners Association (IPO) is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in U.S. intellectual property rights.<sup>1</sup> IPO's membership includes more than 200 companies and a total of over 11,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property. IPO regularly represents the interests of its members before Congress and the United States Patent and Trademark Office and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the appendix.<sup>2</sup>

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Both parties in this case consented to the filing of *amicus briefs* in support of either party or neither party by letters submitted to this Court on November 10 and 15, 2010.

2. IPO procedures require approval of positions in briefs by a three-fourths majority of directors present and voting.

## I. INTRODUCTION

As is often true in patent cases, this case requires careful balancing of competing public and private considerations. As the Court noted in *Bonito Boats*,

Article I, § 8, cl. 8, of the Constitution gives Congress the power ‘[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’ The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’

*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); see also *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (“[T]he administration of copyright law is an exercise in managing the [same] tradeoff.”).

On the one hand, if the intent requirement for active inducement of infringement is too easily satisfied, there is a risk that 35 U.S.C. § 271(b) may “compromise legitimate commerce or discourage innovation having a lawful purpose.” *Grokster*, 545 U.S. at 937. On the other hand, Section 271(b) is for all practical purposes nullified if a patent owner must prove that the defendant actually intended for its customers, consumers or other users of its products or services to infringe another’s patent. Rarely, if ever, does a defendant actually intend to cause

its customers to engage in the legal wrong of patent infringement, and even more rarely would it be possible to prove such intent. The defendant may intend to cause the underlying acts by its customers that are alleged to constitute direct infringement, but typically the defendant believes that the acts it induces do not infringe.

In many cases no direct evidence exists that the defendant actually knew of the asserted patent before the action was filed. Absent the smoking gun to the contrary, however, there may be circumstantial evidence that the defendant knew of a greater, more specific risk of patent infringement than the inherent risk that some patent claim may exist that covers the use of any product or service launched into the marketplace. The evidence may further show that the defendant chose to disregard that known risk, with the result being the action alleging active inducement of infringement under Section 271(b). In such cases, if the totality of such circumstantial evidence is sufficient, Section 271(b) should treat it as legally analogous to direct evidence that the defendant actually knew of the asserted patent before the action was filed.

This Court previously stated that liability for inducement should be premised upon “purposeful, culpable expression and conduct.” *Id.* In the context of claims for active inducement of patent infringement arising under 35 U.S.C. § 271(b), applying *Grokster’s* culpable intent standard suggests a middle ground between the Federal Circuit’s “deliberate indifference” standard applied in this case and the standard enunciated in the *en banc* portion of the Federal Circuit’s



opinion in *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293, 1306-07 (Fed. Cir. 2006) (*en banc* in relevant part), arguably requiring not only proof of actual pre-suit knowledge of the particular asserted patent, but also the specific intent to encourage the legal wrong of infringement of that patent by others. A middle ground more appropriately balances the competing public and private considerations underlying the patent laws than does either extreme.

As explained more fully in the following Argument, IPO's proposed standard would require:

- conduct by the defendant actively encouraging the underlying acts that constitute direct infringement of a patent by another;
- purposeful disregard of a known and substantial risk that patent infringement would arise from those acts; and
- a causal connection between the allegations of direct infringement and the known risk of patent infringement that the defendant disregarded.

For the reasons stated below, IPO urges the Court to adopt this middle ground position.

## II. SUMMARY OF THE ARGUMENT

The “deliberate indifference of a known risk” test articulated by the Federal Circuit in *SEB* risks diverting focus from the culpability described in *Grokster* that is required for a finding of vicarious liability for

infringement by another. Because sellers of goods or services almost always know that *some* risk exists of infringement of *some* patent, the Federal Circuit's test too easily devolves into negligence – *i.e.*, that the defendant knew or should have known of the risk of patent infringement, no matter how remote that risk or how unrelated any known risk may have been from the allegations of patent infringement in the action. Additionally, the Federal Circuit's test skirts too close to shifting the burden to the defendant to establish a sufficient level of care in identifying and eliminating all reasonable infringement risks.

A “purposeful, culpable expression and conduct” to encourage acts that constitute direct infringement of a patent, *cf. Grokster*, 545 U.S. at 937, should require conduct actively encouraging the acts that constitute direct infringement of a patent, with a purposeful disregard of a known risk that is causally connected to the direct infringement alleged in the action. By requiring causation between the risk that is knowingly and purposefully ignored and the direct infringement, this standard ensures that the focus properly remains on whether the defendant's disregard of the risk is *culpable* in the context of the resulting charge of infringement. This approach is thus consistent with *Grokster*.

Actual pre-suit knowledge of the asserted patent – proven by direct or circumstantial evidence – and intent to induce the acts that constitute its infringement clearly would satisfy this standard. But actual knowledge of the asserted patent should not be an absolute requirement. Putting one's proverbial head in the sand – perhaps

taking care *not* to know of the particular patent that is later asserted – should not allow one to avoid liability for inducement; to so hold would gut Section 271(b). In any event, knowledge of any risk of potential infringement does not suffice; rather, there must be purposeful disregard of a risk that is specific, known, and that leads to the direct infringement claim.

### III. ARGUMENT

#### A. The Federal Circuit’s “Deliberate Indifference of a Known Risk” Standard May Create Liability for Induced Infringement Without Evidence of the Culpable Intent Required By *Grokster*.

The Court has recognized the analogies between patent and copyright law; thus, the test for inducing patent infringement should be in harmony with that for copyright infringement. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984) (drawing analogy from patent to copyright law in view of their “historic kinship”). In *Grokster*, the Court premised liability for inducing copyright infringement by another on “purposeful, culpable expression and conduct”:

[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of

technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on ***purposeful, culpable expression and conduct***, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

*Grokster*, 545 U.S. at 936–37 (internal citations omitted) (emphasis added).

The Federal Circuit’s “deliberate indifference of a known risk” test, however, may create liability absent the culpable intent required by *Grokster*. Most notably, the Federal Circuit’s standard fails to articulate what qualifies as a “known risk,” including what level of risk must be known and ignored, the plausibility of that risk, and whether any connection must exist between that risk and the actions alleged to constitute direct infringement by another. Clarity and specificity on these issues determine whether the defendant’s intent to cause the acts alleged to infringe was in fact “culpable” or not.

The Federal Circuit expressly declined to “establish the outer limits of the type of knowledge needed for inducement” and suggested that, in some circumstances, “constructive knowledge” would be sufficient. *SEB*, 537 F.3d at 1378. The implications of this uncertainty are problematic. It is hardly a secret that there is inherent risk that a claim from at least one of the millions of unexpired U.S. patents may cover a customer’s use of any new product or service that is released to the market. Taken to an extreme, the Federal Circuit’s open-ended standard might require investigation of this inherent risk before a company releases any product or service. Like assessing negligence, accusations of inducement under the Federal Circuit’s test would turn on whether a reasonable defendant “should have known” about a particular patent infringement risk.

Thus, the Federal Circuit’s “deliberate indifference” standard not only runs the risk of devolving into negligence, but also risks shifting the burden to the defendant to establish that it met a standard of care in identifying and eliminating any reasonable infringement risks created by any potential uses of its products or services. Under the Federal Circuit’s standard, a plaintiff, who ordinarily must prove the defendant’s affirmative intent to induce, would merely have to allege the existence of a risk that the defendant ignored. The defendant would then have to refute the allegation by showing that it did not act with “deliberate indifference of a known risk.” *See id.* at 1377–78 (“Pentalpha did not produce any exculpatory evidence. As noted, proof of knowledge through a showing of deliberate indifference may be defeated where an accused infringer establishes that he actually believed that a patent covering the

accused product did not exist. But here Pentalpha did not argue that it or its employees actually believed that an SEB patent did not exist.”). This shift, which essentially creates an affirmative duty of care to avoid inducing infringement, is not consistent with *Grokster*’s requirement of culpable intent.<sup>3</sup>

Moreover, if inducement equates to the encouragement of any act by another that is later found to infringe a patent, the intent element is meaningless and active inducement of infringement becomes strict liability for all practical purposes, which is also inconsistent with the relevant statutory scheme. 35 U.S.C. § 271(a) imposes strict liability for direct infringement. *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 484 (1964) (“Not only does [35 U.S.C. § 271(a)] explicitly regard an unauthorized user of a patented invention as an infringer, but it has often and clearly been held that unauthorized use, without more, constitutes infringement”). Subsection (c) expressly requires

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3. The duty of care erected by the Federal Circuit’s “deliberate indifference” standard is analogous to that which the court struck down *en banc* in *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) *cert. denied sub nom. Convolv, Inc. v. Seagate Tech., LLC*, No. 07-656, 2008 U.S. LEXIS 2153 (2008). In *Seagate*, the court overruled its own earlier precedent that stated “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 before the initiation of any possible infringing activity.” *Id.* at 1368-69 (quoting *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983)).

“knowing” of the asserted patent for contributory infringement. Subsection (b), on the other hand, on its face does not require actual knowledge of a patent as an absolute predicate for active inducement of its infringement. But active inducement of direct patent infringement by another does require culpable intent, which in the *Grokster* context means an intentional encouragement of uses of a product or service by customers that constitute copyright infringement. 545 U.S. at 919 (“[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

**B. The Federal Circuit’s Test Imposes Undue Burdens On Businesses.**

The Federal Circuit’s “deliberate indifference” standard, by in essence resurrecting the duty of due care that *Seagate* removed from the Federal Circuit’s willful infringement jurisprudence, would have a chilling effect on business due to the extreme level of care and resulting financial burden that may be required prior to introducing a product or service to the market. Although *Grokster* made clear that “ordinary acts incident to product distribution” cannot support liability, 545 U.S. at 937, this new standard seemingly may require a company to perform a patent search and obtain a legal clearance opinion prior to launching a product or service in order to demonstrate it is not deliberately ignoring risks.

Under the “deliberate indifference” standard, a company might fear that it should perform these tasks for every foreseeable potential use of a new product or service. These activities cost significant time and money. *See, e.g., Seagate*, 497 F.3d at 1385 (Newman, J., concurring) (“I am sympathetic when told of the disproportionate burdens that a rigorous reading of *Underwater Devices* has placed on otherwise law-abiding commercial enterprise.”); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1345 (Fed. Cir. 2004) (recognizing “the burdens and costs of the requirement . . . for early and full study by counsel of every potentially adverse patent of which the defendant had knowledge”). As such, IPO submits that the Federal Circuit’s standard may “compromise legitimate commerce or discourage innovation,” just as this Court warned against in *Grokster*. 545 U.S. at 937.

### **C. IPO’S Three-Part Standard Strikes The Appropriate Balance.**

For claims of active inducement of patent infringement arising under 35 U.S.C. § 271(b), applying the “culpable intent” standard from *Grokster* suggests a middle ground between the Federal Circuit’s “deliberate indifference” standard articulated in *SEB* and an absolute requirement of knowledge of the particular patent-in-suit, along with the specific intent to induce the legal wrong of infringement, that followed from the Federal Circuit’s ruling in *DSU Medical*.

As discussed above, a plaintiff can rarely, if ever, directly prove the actual intent to induce the legal wrong



of infringement of a known patent. But stopping one step short of that, by requiring actual pre-suit knowledge of the patent asserted in the litigation, unjustifiably forecloses liability in egregious situations where the accused infringer knew of a specific risk of infringement, induced acts that resulted in infringement of that patent and yet acted purposefully to make sure there was no direct evidence establishing that it actually knew of the patent-in-suit. In those circumstances, courts should retain flexibility to impute culpable intent. Moreover, for the reasons discussed above, this Court's culpable intent requirement necessitates a nexus between the risk that is knowingly and purposefully ignored and the conduct that induces direct infringement.

Therefore, the IPO proposes a three-part test for active inducement of patent infringement: (a) conduct by the defendant actively encouraging the underlying acts that constitute direct infringement of a patent; (b) purposeful disregard of a known risk of patent infringement arising from those acts; and (c) a causal connection between the known risk of patent infringement arising from those acts and the direct infringement.

Liability under this standard would extend to those defendants who knew of the patent asserted in the lawsuit yet purposefully disregarded the risk that the actions the defendant was encouraging would constitute direct infringement. Liability might also be established if the evidence showed that the defendant purposefully made sure *not to know* about the patent-in-suit, despite evidence showing that the defendant had reason to know

of the risk of its existence and the risk that the actions the defendant was inducing would constitute direct infringement. *See Grokster*, 545 U.S. at 933-34 (explaining that the appellate court erred in reading *Sony* to foreclose inducement liability “unless the distributors had specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information”) (quotation omitted). Part three of the test ensures that liability always would require purposeful disregard of a *known risk causally connected to the direct infringement*. Circumstantial evidence of such purposeful disregard may include, for example, evidence of a defendant’s copying a competitor’s product, ignoring patent markings on competitive products, or knowing of lawsuits filed against competitors marketing similar products.

To be clear, however, Section 271(b) does not impose strict liability for another’s direct infringement. Regardless of whether the defendant intended to induce the actions by another that result in direct infringement, *Grokster* makes clear that culpability must be proven, whether by evidence that the defendant had actual knowledge of the asserted patent at the time the defendant induced the actions by another found to directly infringe, or by imputing culpability if the evidence shows the defendant purposefully disregarded a risk that is specific, known, and that leads to the direct infringement claim.

Companies operating in industries where hundreds or thousands of patents may be in force are not disregarding the risk of patent infringement by

introducing and selling their products or services. Thus, “ordinary acts incident to product distribution,” *Grokster*, 545 U.S. at 937, including introducing and marketing a new product despite the inherent risk that use of the product may be covered by a patent, without more, would not give rise to liability under IPO’s proposed standard.

#### IV. CONCLUSION

The Federal Circuit’s standard in *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360 (Fed. Cir. 2010) creates too low of a burden upon the patentee to establish an alleged infringer’s intent to induce infringement. As this Court explained in a copyright context, “purposeful, culpable expression and conduct” must be demonstrated to establish liability for inducing infringement. *Grokster*, 545 U.S. at 937. To merely require proof of a “deliberate indifference of a known risk” risks a finding of liability without the culpability required by the Court in *Grokster*. The appropriate standard requires a patentee to establish conduct by the defendant actively encouraging the underlying acts of direct infringement, a purposeful disregard of a known risk that patent infringement would arise from those acts, and a causal connection between the known risk of infringement arising from those acts and the direct infringement.

Respectfully Submitted,

DOUGLAS K. NORMAN, *President*  
KEVIN RHODES, *Chair*  
AMICUS BRIEF COMMITTEE  
INTELLECTUAL PROPERTY  
OWNERS ASSOCIATION  
1501 M Street, NW  
Suite 1150  
Washington, DC 20005  
(202) 507-4500

GARY M. HOFFMAN  
*Counsel of Record*  
JEFFREY K. SHERWOOD  
MEGAN S. WOODWORTH  
1825 Eye Street, NW  
Washington, DC 20006  
(202) 420-2653  
hoffmang@  
dicksteinshapiro.com

## **APPENDIX**

**APPENDIX<sup>1</sup> —  
MEMBERS OF THE BOARD OF DIRECTORS,  
INTELLECTUAL PROPERTY OWNERS  
ASSOCIATION**

|  |  |
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1. IPO procedures require approval of positions in briefs by a three-fourths majority of directors present and voting.

*Appendix*

|  |  |
|--|--|
| George William Johnston<br>Hoffman-La Roche Inc. | Jeffrey L. Myers<br>Adobe Systems Inc.               |
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| Steven W. Miller<br>Procter & Gamble Co.         |  |

*Appendix*

Wayne Sobon  
Accenture Global  
Services GmbH

Daniel J. Staudt  
Siemens Corp.

Brian K. Stierwalt  
ConocoPhillips

Thierry Sueur  
Air Liquide

James. J. Trussell  
BP America, Inc.

Danise Van Vuuren-Nield  
The Coca-Cola Co.

Roy Waldron  
Pfizer, Inc.

Michael Walker  
DuPont

BJ Watrous  
Hewlett-Packard Co.

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Amgen, Inc.

Paul D. Yasger  
Abbott Laboratories