

I Can See Your *Halo*: Defending Willful Infringement Claims at Trial After *Halo*

Bert Greene

©2019 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston
Houston | Austin | Hanoi | Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman
Duane Morris – Affiliate Offices | Mexico City | Sri Lanka | Duane Morris LLP – A Delaware limited liability partnership

1

*“Remember those walls I built
Well, baby, they're tumbling down”*

Halo Increased the Likelihood that the Jury Will Decide Willfulness

- Because *Seagate*'s **objective prong** was a question of law for the court, defendants could get rid of willfulness on **summary judgment** and keep it from ever getting to the jury
- In the post-*Halo* era, it's all about the accused infringer's **subjective intent** – now it is much harder to keep willfulness from the jury

2

*“I found a way to let you win
But I never really had a doubt”*

Halo Made It Easier to Prove Willfulness

- *Halo* lowered the burden of proof for willfulness
- “[P]atent-infringement litigation has always been governed by a **preponderance of the evidence** standard. . . . Enhanced damages are no exception.”

Halo Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923, 1934 (2016)
(emphasis added)

*“Hit me like a ray of sun
Burning through my darkest night”*

But in Some Ways, *Halo* Also Made It Harder to Prove Willfulness

- *Halo* made it clear that willfulness requires more than a “typical infringement case” – it requires something seemingly much darker: “**egregious infringement behavior**”
- “Egregious infringement behavior” is behavior that is “willful, wanton, **malicious**, bad-faith, deliberate, consciously wrongful, **flagrant**, or—indeed—**characteristic of a pirate**.”

Halo, 136 S. Ct. at 1932 (emphasis added)

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: I Can See Your Halo: Defending Willful Infringement Claims at Trial After Halo

Also available as part of the eCourse

[Patent Damages: Recent Developments Offering Opportunities and Indicating Limitations](#)

First appeared as part of the conference materials for the
24th Annual Advanced Patent Law Institute session

"Damages: Recent Developments Offering Opportunities and Indicating Limitations"