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Insuring Failure: How Crowd-Sourcing Sites May be Forced Into the Role of Patent Insurance

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INSURING FAILURE: HOW CROWD-SOURCING SITES MAY BE FORCED INTO THE ROLE OF PATENT INSURANCE

*Spencer S. Haley**

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I. INTRODUCTION

Crowd-sourcing is a form of investment model in which a creator or start-up company makes a promise to investors in return for the funds that are used to complete a project.¹ Crowd-sourcing is typically facilitated by a website based service, such as Kickstarter, that charges an amount based on the total amount of funds raised by the creator or start-up.²

Startups that rely on crowd-sourcing are producing solutions to novel challenges.³ Even public entities, such as the U.S. government, are using crowd-sourcing to solve economic and scientific problems.⁴

Crowd-sourcing may be one manifestation of a brave new world of high technology innovation in which markets are no longer defined by economies of scale and developed distribution networks.⁵ Unfortunately, crowd-sourcing and similar innovations have come into being at a time when the proliferation of high technology patents has made it difficult in some industries to acquire all the legal rights necessary to bring new products to the market.⁶

In practice, many technology developers ranging from tech giants to public researchers deliberately ignore potential infringement issues often fail to run patent checks and take no action when confronted with a cease and desist letter.⁷ This pattern may hold for tech startups, which are heavily incentivized to ignore potential patent infringement issues.⁸

¹ Edmund W. Kitch, *Crowdfunding and an Innovator's Access to Capital*, 21 GEO MASON L. REV. 887, 889–90 (2014) (discussing the nature of crowd-sourcing).

² *Welcome Entrepreneurs*, INDIEGOGO.COM, <https://learn.indiegogo.com/crowdfunding-on-indiegogo/> (last visited Sept. 13, 2016).

³ See Cat Zakrzewski, *Thousands Can Fact-Check The News With Grasswire*, TECHCRUNCH (Aug. 5, 2014), <http://techcrunch.com/2014/08/05/thousands-can-fact-check-the-news-with-grasswire/> (discussing a new crowd-funding based startup that allows users to check the validity of news reports through the use of a search engine).

⁴ See Kyle Russell, *The Department of Energy Needs Your Help To Cut The Soft Costs Of Solar*, TECHCRUNCH (Nov. 5, 2014), <http://techcrunch.com/2014/11/05/the-department-of-energy-needs-your-help-to-cut-the-soft-costs-of-solar/> (discussing a U.S. government project with the aim of soliciting ideas from entrepreneurs that will provide winners with a \$25,000 contribution to their crowd-sourcing project).

⁵ Daryl Lim, *Beyond Microsoft: Intellectual Property, Peer Production and the Law's Concern with Market Dominance*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 291, 300–01 (2008).

⁶ Mark A. Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19, 19–20.

⁷ *Id.* at 20–21.

⁸ See Sean M. O'Connor, *Crowdfunding's Impact on Start-up IP Strategy*, 21 GEO. MASON L. REV. 895, 898 (2014) (discussing the reasons why startups fail to procure patents); see also Stuart J.H. Graham & Ted Sichelman, *Why Do Start-Ups Patent?*, 23 BERKELEY TECH. L.J. 1065, 1086 (2008) for a discussion of why some companies acquire patents to protect themselves from patent lawsuits and why entrepreneurs may have a disincentive to file for patents to avoid infringement litigation.

While many companies and researchers continue to produce new products despite the threat of litigation,⁹ crowd-sourcing sites that partner with tech startups may be particularly susceptible to litigation threats because crowd-sourcing sites may rely on a business model that produces a small profit (five percent in Kickstarter's case)¹⁰ from an individual instance of hosting a tech startup. Under this model a very successful technology project may yield around \$50,000 in profit for Kickstarter,¹¹ but litigation costs to defend against a patent lawsuit in lower stakes cases (under \$1 million) average over \$600,000.¹² Despite the advantages that crowd-sourcing offers to innovators, patent litigation may soon threaten the relationship between crowd-sourcing companies and tech startups, specifically through litigation brought under § 271(b) of the Patent Act.¹³

The Supreme Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.* may cause crowd-sourcing sites to rethink their relationships with tech startups due to the implications of the Court's holding that willful blindness may equate to a showing of induced infringement.¹⁴

If a tech startup is found to have committed direct infringement under § 271(a), then it may be possible for legitimate companies and paper-holding trolls¹⁵ alike to sue the startup's project sponsors (including crowd-sourcing sites) through strategic use of notice under a theory of knowledge or willful blindness.¹⁶

By notifying a crowd-sourcing company of a client startup's infringement (both real and imagined), the company will be placed in the unenviable position of deciding between two equally unsatisfactory legal postures.¹⁷ The crowd-sourcing site can ignore the notice and demonstrate willful blindness to possible

⁹ Lemley, *supra* note 6, at 21–22.

¹⁰ Start a project, KICKSTARTER, <https://www.kickstarter.com/learn?ref=nav/> (last visited Sept. 13, 2016).

¹¹ Kickstarter Stats, KICKSTARTER, https://www.kickstarter.com/help/stats?ref=about_subnav/ (last visited Sept. 13, 2016).

¹² JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 131–32 (Princeton Univ. Press 2008).

¹³ 35 U.S.C. § 271(b) (2010).

¹⁴ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2061–63 (2011).

¹⁵ Maayan Perel, *From Non-Practicing Entities (NPEs) To Non-Practiced Patents (NPPs): A Proposal for a Patent Working Requirement*, 83 U. CIN. L. REV. 747, 749 (2014) (describing Non-practicing entities, or “patent trolls.” The key defining feature of a patent troll is that it makes money off of its patents by litigating, rather than producing products.).

¹⁶ John David Evered, *Inducement of Patent Infringement After Global-Tech and Akami: A Deadly Weapon Against New Enabling Technologies?*, 23 TEX. INTELL. PROP. L.J. 43, 50–52 (2014) (explaining how a complaint or letter giving notice of infringement could fix defendant with constructive knowledge of infringement and a scicuter of willful blindness).

¹⁷ *Id.*

infringement, or it can investigate the claim.¹⁸ Investigating the claim will only provide a defense in subsequent litigation if the defendant's belief that the plaintiff's patent has not been infringed is deemed reasonable,¹⁹ and the company may still be required to defend or settle the lawsuit.²⁰ This posture pushes the hypothetical crowd-sourcing site away from its original function as an enabler of innovation and into the historically problematic role of patent insurance²¹ by forcing a crowd-sourcing platform to evaluate potential startups on the basis of litigation risk. This possibility is problematic because patent insurance may be fundamentally unfeasible due to the costs involved and the difficulty of ascertaining patent rights.²² Neither of these outcomes is desirable in a society where technological innovation and judicial efficiency have been enthroned as paramount values.²³

Part II of this Note will set up the discussion regarding crowd-sourcing sites and induced infringement by examining the legal dispute between the company 3D Systems and the startup Formlabs. This dispute provides relevant context because Formlabs began its life as a crowd-sourcing project on Kickstarter, and Kickstarter was briefly a co-defendant under a theory of induced infringement.²⁴ Part II will also explain the reasons that this suit, which concluded with Kickstarter dodging all liability for induced infringement, may not be representative of the pattern that future litigation will take. Part II will also examine the unique legal position of the plaintiff 3D Systems, and the variety of possible plaintiffs that might want to sue a crowd-sourcing company for induced infringement.

In Part III, this Note will analyze the Supreme Court's decision in *Global-Tech* and how the Supreme Court's clarification of the *mens rea* requirement of § 271(b) of the Patent Act places crowd-sourcing companies in a precarious legal position. This Part will analyze how the actual knowledge requirement will be an easy bar for plaintiffs to meet through the strategic use of notice and the broad utilization of circumstantial evidence in patent litigation. Part III will also

¹⁸ *Id.*

¹⁹ *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1928 (2015). See BESSEN & MEURER, *supra* note 12, at 48–50 for a discussion and examples of why it may be bad business strategy to investigate the validity of technology patents.

²⁰ See Evered, *supra* note 16, at 52–53.

²¹ See J. Rodrigo Fuentes, *Patent Insurance: Towards a More Affordable, Mandatory Scheme?*, 10 COLUM. SCI. & TECH. L. REV. 267, 268–70, 283–89 (2009) (describing the traditional problems associated with patent insurance).

²² BESSEN & MEURER, *supra* note 12, at 53–54.

²³ See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and Useful Arts” by granting intellectual property rights).

²⁴ *3D Sys., Inc. v. Formlabs, Inc.*, No. 13 CIV. 7973, 2014 WL 1904365, at *1 (S.D.N.Y. May 12, 2014).

analyze crowd-sourcing companies' potential liability under the willful blindness standard the Court outlined. This Part will include a brief overview of some of the problems inherent in importing the willful blindness standard to patent law.

In Part IV, this Note will suggest that the problems arising from the litigation of induced infringement claims may force crowd-sourcing sites to adopt a model of behavior that is analogous to patent insurance. Part IV will examine the reasons patent insurance has traditionally failed and will link these failures to the high level of uncertainty that is generated by the patent system itself.

In Part V, this Note will summarize the issues facing crowd-sourcing sites. Part V will conclude that the *Global-Tech* standard may create an undesirable result in the context of crowd-sourcing.

II. 3D SYSTEMS VERSUS FORMLABS AND KICKSTARTER

In 2012, established 3D printing company 3D Systems submitted a claim for patent infringement in South Carolina state court against tech startup Formlabs and crowd-sourcing site Kickstarter.²⁵ Soon thereafter, 3D Systems voluntarily dismissed the suit against both companies only to refile exclusively against Formlabs in the Southern District of New York.²⁶ While the initial South Carolina state action was still active, 3D Systems and Formlabs attempted to settle the dispute.²⁷ Although 3D Systems and Formlabs were unable to resolve their differences during the initial talks, the New York federal action ultimately settled, and Formlabs consented to a licensing agreement.²⁸

The result of this litigation appears to demonstrate the legal system working at its best: Formlabs was able to bring an innovative and cost-effective new product to the market, and 3D Systems' property rights were validated.²⁹ 3D Systems even acknowledged that the dispute changed its entire view of IP litigation, and Kickstarter dodged all the potential negative legal consequences.³⁰

²⁵ Michael Weinberg, *3DP IP Wars Update: Formlabs to pay 3D Systems sales royalties*, MAKEZINE.COM, <http://makezine.com/2014/12/03/3dp-ip-wars-update-formlabs-to-pay-3d-systems-sales-royalties/> (last visited Sept. 12, 2016) (noting not only that the case represented the first time a 3D printing manufacturer sued another 3D printing manufacturer, but also that many aspects of the litigation were captured on film by a documentary film crew).

²⁶ *3D Sy., Inc. v. Formlabs, Inc.*, No. 13 CIV. 7973, 2014 WL 1904365, at *1 (S.D.N.Y. May 9, 2014).

²⁷ Sean Higgins, *3D Systems gets 6-month stay for settlement talks over patent lawsuit*, SPAR 3D, <http://www.sparpointgroup.com/news/3d-systems-gets-6-month-stay-for-settlement-talks-over-patent-lawsuit> (last visited Sept. 13, 2016).

²⁸ Weinberg, *supra* note 25.

²⁹ See sources cited *infra* note 46.

³⁰ See sources cited *infra* note 50.

3D Systems, Inc. v. Formlabs, Inc. concluded on a seemingly positive note, but future cases may come out quite differently. Potential plaintiffs considering patent litigation must consider their own strategic objectives within a complex set of situational variables that depend on the context surrounding the legal proceedings.³¹ 3D Systems, the plaintiff in this case, may have found itself in a position that does not necessarily characterize all potential litigants. Given the small overall profit that crowd-sourcing sites may derive from a single project,³² it may be that litigation threats from both legitimate companies and patent trolls will force crowd-sourcing sites to screen and evaluate projects more thoroughly.

Two primary forms of litigation threats may impact a crowd-sourcing company's relationship with startups. First, a legitimate company may determine that its interests would be best served by seeking damages rather than a license.³³ Companies may perceive the negative aspects of licensing as limiting the expected rents the company can collect from other companies in similar licensing arrangements, a reduction in possible damages in future actions, and the promotion of future litigation.³⁴

A legitimate company might even attempt to use its patents as offensive tools to prevent the emergence of competitors that rely on crowd-sourcing for capital.³⁵ Such a company may have good reason to sue the crowd-sourcing site in conjunction with its startup client. By suing the crowd-sourcing platform, a litigating company may attempt to discipline crowd-sourcing providers and make clear that aiding the development of competitors will be met with legal consequences.³⁶

Secondly, crowd-sourcing sites may face legal threats from patent trolls, companies that hold patents for the purpose of making money through litigation threats rather than by producing actual products.³⁷ Patent trolls often have very different incentives and strategic motivations than legitimate companies:

Their ability to make money licensing has depended on their willingness to litigate. In some situations, these companies have adopted a strategy of litigating to obtain damages rather than

³¹ See generally JOHN W. SCHLICHER, SETTLEMENT OF PATENT LITIGATION AND DISPUTES: IMPROVING DECISIONS AND AGREEMENTS TO SETTLE AND LICENSE (2011) (discussing economic modeling techniques used in patent litigation settlements).

³² See Kickstarter Stats, *supra* note 10.

³³ SCHLICHER, *supra* note 31, at 78–79, 119–24.

³⁴ *Id.* at 119–23.

³⁵ See Graham & Sichelman, *supra* note 8, at 1068.

³⁶ See *id.*

³⁷ Perel, *supra* note 15.

licensing on the theory that the net profits from litigating would exceed the net profits from licensing even with the attendant risk.³⁸

The most common form of troll typically relies on suing several parties over the same patent issue.³⁹ For this reason, it would be consistent for a troll to sue a crowd-sourcing company, both to bring an additional defendant and because the crowd-sourcing company may have deeper pockets than its startup client.⁴⁰ The most common form of troll relies on the fact that it is almost always cheaper to settle a patent lawsuit than to defend.⁴¹

“Super Trolls” pose an even more disturbing threat to the relationship between crowd-sourcing companies and startups may come from so called “super trolls.” Super trolls are distinguished from traditional trolls by two key characteristics. First, super trolls tend to purchase patents for innovative technologies from companies that fail⁴² and therefore may be more likely to target companies that are involved in emerging technology fields. Second, super trolls are generally legally sophisticated and tend to litigate in order to achieve the maximum amount of recovery.⁴³

3D Systems’s claim was inherently different from the kinds of actions that could threaten the relationship between crowd-sourcing companies and startups. At the time of litigation, 3D Systems’s patents were on the verge of expiration.⁴⁴ 3D Systems may have realized that it would be unable to use patent litigation as a bludgeon to remove the threat of competition.⁴⁵ This proposition is reinforced by the fact that Formlabs and 3D Systems were not competing in the same market;⁴⁶ for these reasons, even successful litigation

³⁸ SCHLICHER, *supra* note 31, at 172.

³⁹ John P. Hanish, *Effectively Defending Against Patent Trolls And The Effects Of Increasing Troll Litigation On Patent Law And Patent Dispute Procedures*, in *THE IMPACT OF RECENT PATENT LAW CASES AND DEVELOPMENTS, 2014 EDITION: LEADING LAWYERS ON ANALYZING CHANGING STANDARDS, REVIEWING NEW CASE LAW, AND UPDATING CLIENT STRATEGIES 5* (Thomson Reuters/Aspatore 2014), 2013 WL 6683686, at *5.

⁴⁰ See O’Connor, *supra* note 8, at 898 (noting the fact that many tech startups have no revenue during their first few years of existence).

⁴¹ See Hanish, *supra* note 39, at 5–6.

⁴² See *id.* at 10.

⁴³ *Id.*

⁴⁴ Curt Woodward, *Formlabs to Pay 8 Percent of Net Sales in Patent Lawsuit Settlement*, XCONOMY (Dec. 4, 2014), <http://www.xconomy.com/boston/2014/12/04/formlabs-to-pay-8-percent-of-net-sales-in-patent-lawsuit-settlement/>.

⁴⁵ See Lim, *supra* note 5, at 292–93, for a discussion of how intellectual property may be used to bar competitors from market entry.

⁴⁶ Signe Brewster, *Formlabs, 3D Systems settle their 3D printing patent battle*, GIGAOM (Dec. 1, 2014, 5:20 PM), <https://gigaom.com/2014/12/01/formlabs-3d-systems-settle-their-3d-printing-patent-battle/> (discussing the proposition that Formlabs created an entirely new market); see Brian C. Bianco, *A Five-Point Plan for Creating an Effective Patent Litigation Strategy*, in *LITIGATION STRATEGIES*

would have yielded no long-term advantage. A technology giant possessing newer patents or facing competition from upstart competitors may find that suing a crowd-sourcing company could be in its best interests. However, this posture will not be practical for firms that are unwilling to pursue extremely expensive and difficult litigation.⁴⁷

Additionally, the rapid decay of 3D Systems's patents may have changed its calculus regarding the advantages of a licensing agreement. With only a few years left on its patents,⁴⁸ a licensing agreement may have been highly appealing to 3D Systems.

3D Systems's expected damages may have been too low to justify pursuing a claim against Kickstarter. A recent trend in patent cases involves calculating damages based on a more nuanced approach than the entire market value (EMV) of the infringing product.⁴⁹ In this case, Formlabs's product was the first of its kind and represented a truly unique innovation.⁵⁰ This fact could skew a potential recovery toward a lower amount, making damages far less attractive in the context of bringing in another defendant who may be more legally sophisticated.

Finally, 3D Systems's behavior may be attributable to a novel IP strategy.⁵¹ These factors jointly suggest that in the context of 3D Systems's dispute with Formlabs, 3D Systems may have simply found it inconvenient to sue or settle with Kickstarter. It does not necessarily follow, however, that this pattern will hold true in every case. Legitimate companies and trolls alike may be able to take advantage of the *Global Tech* standard and force crowd-sourcing companies to change their behavior regarding which startups they sponsor.

III. GLOBAL TECH

Until 2011 when the Supreme Court decided the case of *Global Tech Appliances, Inc. v. SEB S.A.*, § 271(b) of the Patent Act had languished under a

FOR INTELLECTUAL PROPERTY CASES, 2013 EDITION: LEADING LAWYERS ON ANALYZING KEY DECISIONS AND EFFECTIVELY LITIGATING IP CASES 2 (Thomson Reuters/Aspatore 2013), 2013 WL 2951773, at *2 (discussing the importance of understanding the market relationship of adverse patent litigants).

⁴⁷ Geoffrey D. Aurini & Bryan K. Wheelock, *Evaluating and Addressing the Complexities of Various Intellectual Property Cases*, in LITIGATION STRATEGIES FOR INTELLECTUAL PROPERTY CASES, 2015 EDITION: LEADING LAWYERS ON ANALYZING KEY DECISIONS AND EFFECTIVELY LITIGATING IP CASES 1, 5 (Thomson Reuters/Aspatore 2015), 2015 WL 4975035, at *1, *5 (discussing the strategic implications of using patent litigation to remove competition).

⁴⁸ Woodward, *supra* note 44.

⁴⁹ Aurini & Wheelock, *supra* note 47.

⁵⁰ Brewster, *supra* note 46.

⁵¹ *See* Weinberg, *supra* note 25.

veil of uncertainty concerning its *mens rea* requirement.⁵² In *Global Tech*, the Supreme Court finally illuminated this area of law by holding that § 271(b) of the Patent Act requires knowledge, rather than negligence or recklessness.⁵³ In adopting the knowledge requirement, the Supreme Court explicitly rejected the Federal Circuit’s position that deliberate indifference to the known risk of infringement may satisfy the requirements of § 271(b).⁵⁴

However, the Court did not stop at merely discrediting the “affirmative indifference” standard, but also held that willful blindness could satisfy the *mens rea* requirement.⁵⁵ The Court reasoned that this standard was necessary to prevent defendants from “deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.”⁵⁶

The Court articulated the willful blindness standard:

(1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate steps to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have known the critical facts.⁵⁷

This standard clearly encompasses the bad faith behavior of the *Global Tech* defendant, which manipulated its patent search process to avoid detecting the existence of the plaintiff’s patent.⁵⁸ Given that a variety of actors completely ignore patents to cut costs,⁵⁹ what remains unclear is whether failure to conduct a patent search can constitute willful blindness. The requirements of the willful blindness standard are further obscured by the doctrine’s status in the circuit courts and the specific facts of *Global Tech*. First, as Justice Kennedy alluded to in his dissent, by importing the willful blindness standard into patent

⁵² Kristen M. Hagen, *EYES WIDE SHUT: Induced Patent Infringement and the Willful Blindness Standard*, 17 MARQ. INTELL. PROP. L. REV. 305, 306–08 (2013) (describing the history of the judicial interpretation of § 271(b) of the Patent Act).

⁵³ *Global Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068, 2070 (2011).

⁵⁴ *Id.* at 2071.

⁵⁵ *Id.* at 2068–69, 2071.

⁵⁶ *Id.* at 2068–69.

⁵⁷ *Id.* at 2070–71.

⁵⁸ *Id.*

⁵⁹ See Lemley, *supra* note 6, at 20–22.

law, the Court really imported multiple standards that vary to a degree.⁶⁰ Second, although the Court found the evidence in *Global Tech* to be more than sufficient to support a finding of willful blindness, the overall passive nature of the defendant's actions in *Global Tech* makes it questionable as to whether the willful blindness standard is truly as stringent as the Court claimed.⁶¹ Finally, the Court did not elaborate on what constitutes a "high probability of" wrongdoing.⁶²

A more general issue regarding the *Global Tech* standard is that proving knowledge is, as a practical matter, fairly easy as patent litigation regularly involves circumstantial evidence and the inference of facts.⁶³ In the context of patent litigation, the existence of a notice letter alone is strong evidence of knowledge.⁶⁴

Under a knowledge and willful blindness standard, a potential litigant could place a crowd-sourcing company on notice that one of the company's clients is infringing and thereby generate knowledge of the patent.⁶⁵ Even if the claim is illegitimate, the fact-driven analysis inherent in the knowledge standard can impede the company's ability to dismiss the lawsuit or achieve summary judgment.⁶⁶

The inability to escape litigation in this scenario may be likely to occur despite the Court's opinion in *Commil USA, LLC v. Cisco Systems, Inc.*, which noted that federal court judges are authorized to dismiss "frivolous" patent law suits.⁶⁷ The *Commil* opinion stated that a patent is presumed valid until proven otherwise.⁶⁸ The implication is that it may be unclear that a particular suit is frivolous without fact-driven discovery or a request for reexamination by the USPTO.

Entities like patent trolls may be able to take advantage of the *Global Tech* standard to place crowd-sourcing companies and startups in a precarious legal position. If this kind of litigation becomes common, then crowd-sourcing companies may be forced to screen potential startups for litigation risks. This additional evaluation could force crowd-sourcing companies into a position

⁶⁰ See Jeremy Adler, *See No Evil: How the Supreme Court's Decision in Global-Tech Appliances, Inc. v. SEB S.A. Further Muddles the Intent Element of Induced Infringement*, 11 NW. J. TECH. & INTELL. PROP. 569–71 (2013) (discussing of how the willful blindness doctrine is not universally accepted, how the *Global Tech* standard is unclear regarding what version of willful blindness the Court intended, and how the *Global Tech* standard muddles the different rationales of punishment that exist in the criminal and patent law contexts); Hagen, *supra* note 52, at 315–18 (for a discussion of the possible interpretations of the *Global Tech* standard).

⁶¹ See Adler, *supra* note 60, at 572.

⁶² *Id.* at 571–72.

⁶³ Evered, *supra* note 16, at 45, 48, 50–52.

⁶⁴ *Id.* at 50.

⁶⁵ See *id.*

⁶⁶ *Id.* at 52–53.

⁶⁷ 135 S. Ct. 1920, 1930–31 (2015).

⁶⁸ *Id.* at 1928–29.

analogous to patent insurance, in effect, causing crowd-sourcing companies to evaluate and bet on the risks attached to their startup partners.

IV. HOW CROWD-SOURCING COMPANIES MAY BE FORCED INTO THE ROLE OF PATENT INSURANCE

With patent insurance, the insured pays an insurer a fee with the expectation that in the event of patent litigation, the insurance company will pay out a sum that allows the insured to properly litigate the claim.⁶⁹ The two types of patent insurance are generally distinguished by the type of litigation they cover. Offensive patent insurance pays out in the event that the insured needs to litigate a claim against an infringer, while defensive patent insurance covers the possibility that a company will be sued for patent infringement.⁷⁰ Defensive patent insurance presents the best model for understanding the dilemma faced by crowd-sourcing companies in induced infringement actions because plaintiffs targeting crowd-sourcing companies for induced infringement inherently place those companies in the position of analyzing the cost of defending against a claim.

In theory, patent insurance should provide a cost-effective method of managing the uncertainty inherent in the costs of patent litigation, but for many reasons, patent insurance has traditionally proven to be cost ineffective and prohibitively expensive.⁷¹ This expense is in part related to the cost of ascertaining the likelihood that a client is a litigation risk.⁷² If crowd-sourcing companies are forced to evaluate clients in a similar fashion, then the selection process used by these companies may become skewed against startups.

Only one percent of patents are ever likely to be infringed, but the risk assessment process is expensive and riddled with uncertainty.⁷³ While it is true that insurance companies providing patent insurance may have good reason to suspect that their potential clients are more likely to infringe,⁷⁴ crowd-sourcing sites may suspect that potential startups are susceptible to infringement actions due to the inability of most startups to procure patents for defensive use. If crowd-sourcing sites are forced to bear the cost of induced infringement actions, then their priorities in the project application and assessment portion of their business may become more expansive and expensive due to the inclusion of enhanced litigation risk management. The costs associated with betting on

⁶⁹ Fuentes, *supra* note 21, at 267–68.

⁷⁰ *Id.* at 269.

⁷¹ *Id.* at 283–89.

⁷² *Id.* at 287–89.

⁷³ *Id.* at 288.

⁷⁴ *Id.*

the validity of patent rights by crowd-sourcing companies may produce a reciprocal effect resulting in the under-utilization of crowd-sourcing by startups.

By their nature, patents present complications and uncertainties about risk. The failure of patent insurance may be linked to the general failure of patent rights to perform with the same efficiency as tangible property.⁷⁵ While the institutions governing tangible property regimes provide clear notice of property boundaries, patents often (1) have unpredictable boundaries that can only be resolved through litigation (particularly in fast-paced technology sectors), (2) have obscured claim language crucial to understanding the parameters of the boundaries, and (3) require an assessor to check against a vast and fragmented collection of other competing rights.⁷⁶ These factors make patent insurance costly. A typical defensive patent insurance policy may cost more than \$13,000 a year.⁷⁷

Imposing these costs on crowd-sourcing companies may stifle innovation. Some might regard such a change in the way crowd-sourcing companies do business as a natural part of the trade-off inherent in the patent system. nevertheless, the change is distressing because this failure may result from a lack of clarity and uncertainty that the patent system itself has perpetuated. Crowd-sourcing sites, which have proven themselves socially beneficial engines of innovation, should not be shackled to the unfortunate shortcomings of the patent system.

V. CONCLUSION

As crowd-sourcing sites become increasingly popular platforms for small tech startups, other actors may seek to exert their patent rights when infringement inevitably occurs. While this is the intended function of the patent system, the side effect of holding crowd-sourcing companies liable under § 271(b) may well change the way these companies evaluate the projects they support. The *Global Tech* standard may impose costs on crowd-sourcing companies that resemble those found in the patent insurance market. This shift represents a cost to innovation which is at odds with the entire rationale of intellectual property: the development of more ideas. The changing nature of technology innovation and patent litigation may force courts and policy makers to reconsider how liability for induced infringement should be allocated in the future.

⁷⁵ BESSEN & MEURER, *supra* note 12, at 52–54.

⁷⁶ *Id.*

⁷⁷ Fuentes, *supra* note 21, at 284.