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## Supreme Court Rules That Knowledge Of Patent Is Required For Liability For Inducing Patent Infringement, But Willful Blindness Is Enough

Under section 271(b) of the Patent Act, a defendant in a patent infringement lawsuit may be held liable for inducing the infringement of a patent, i.e., causing another person to directly infringe a patent. However the language of the statute is not clear as to what conduct or intent is required for one to be liable for inducing infringement. Section 271(b) simply provides: "Whoever actively induces infringement of a patent shall be liable as an infringer."

The U.S. Supreme Court recently grappled with the meaning of Section 271(b) in *Global Tech Appliances, Inc. v. SEB S.A.*, U.S., No. 10-6, 5-31-2011, acknowledging that the statutory language regarding induced infringement is ambiguous, and attempting to clarify the requirements for liability under this section.

In *Global Tech*, defendant was accused of inducing infringement of a patent for an innovative deep fryer owned by SEB S.A. Defendant had purchased an SEB fryer in Hong Kong (thus it lacked U.S. patent markings), copied all of the fryer's features except for cosmetics, retained an attorney to conduct a right-to-use study without telling the attorney that it had copied SEB's design, and ultimately sold its fryers to companies that then resold them in the United States. A jury found defendant liable for inducing infringement and the Federal Circuit affirmed, stating that one may be liable for induced infringement where he "knew or *should have known* that his actions would induce actual infringements." At issue before the Supreme Court was whether the standard applied for finding induced infringement (i.e., that defendant *knew or should have known*) was appropriate.

In considering Section 271(b), the Court explained that the phrase "induces infringement" could merely require that "the inducer lead another to engage in conduct *that happens* to amount to infringement," (i.e., no knowledge that the induced act constitutes infringement) or "the inducer must persuade another to engage in conduct that the inducer *knows* is an infringement." (Emphasis added.) In other words, as the Court pointed out, the statute fails to give any indication as to what, if any, intent is required for a defendant to be liable for inducing patent infringement.

After considering case law pre-dating enactment of the law on contributory patent infringement (including induced infringement) and finding it conflicting, the Court turned its attention to its decision in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) ("*Aro II*"). In *Aro II*, the Court determined the intent required for contributory infringement under Section 271(c). Under Section 271(c), a party is liable for patent infringement where it "offers to sell or sells . . . a component of a patented [invention] . . ., constituting a material part of the invention, *knowing the same to be especially made or especially adapted for use in an infringement of such patent . . .*" In *Aro II*, the Court concluded that for contributory liability to attach under Section 271(c), *knowledge* of the existence of the patent that is infringed is necessary.

Based on the *Aro II* decision and the fact that Section 271(b) and 271(c) incorporate a similar ambiguity as to intent, the Court concluded in *Global Tech* that the same knowledge standard for contributory infringement under Section 271(c) is necessary for induced infringement under Section 271(b). Thus, the Court held that "induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement." A "deliberate indifference to a known risk that a patent exists is not the appropriate standard under § 271(b)."

The analysis does not end there however. The next step is the determination of what constitutes "knowledge" for liability for inducing infringement. Despite finding a "deliberate indifference" insufficient to meet this knowledge requirement, *Global Tech* Court went on to affirm the lower court rulings against the defendant in this case finding that the evidence was sufficient to support a finding of knowledge based on the defendant's "willful blindness." The Court reviewed the history of the doctrine of willful blindness and concluded that for the doctrine to apply, two requirements must be met: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." In justifying the imposition of liability based on a defendant's willful blindness, the Court distinguished willful blindness from recklessness and negligence explaining: "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 actually known of the critical facts."

In *Global Tech*, the facts that sufficed to amount to willful blindness for liability for inducing infringement included defendant's decision to copy an overseas model of SEB's fryer (lacking patent markings) and its failure to inform its attorney from whom it sought a right-to-use opinion of that fact. Based on these facts, the Court concluded that defendant "subjectively believed there was a high probability that SEB's fryer was patented, that [defendant] took deliberate steps to avoid knowing that fact, and that it therefore willfully blinded itself to the infringing nature of [purchasers'] sales."

In summary, under the Court's *Global Tech* decision, one may be liable for inducing infringement if he knew that the acts induced constitute an infringement. While a deliberate indifference to a known risk that a patent exists is insufficient to demonstrate induced infringement, willful blindness is enough.

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