

## Client Alert

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# Supreme Court to Consider Good-Faith Belief of Invalidity Defense

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On December 5, 2014, the Supreme Court granted certiorari in *Commil v. Cisco* to decide whether an infringer's good-faith belief of patent invalidity is a defense to induced infringement. The case could prove significant for patent litigation and, as discussed below, also represents the fourth case before the Court this term involving intent or knowledge standards under federal law.

### THE SUPREME COURT'S FOCUS ON INTENT

This Supreme Court Term is turning into a blockbuster for cases involving intent standards under federal law. The Court now has four pending cases that involve the type of intent or knowledge necessary to establish civil or criminal liability (or, in *Commil*, the kind of intent available as a defense to liability) under four different statutory schemes:

- In *Omnicare v. Laborers District Council Construction Industry Pension Fund*, which was argued on November 3, the Court is considering whether, for purposes of a claim under Section 11 of the Securities Act of 1933, a plaintiff may plead that a statement of opinion in a securities registration statement was “untrue” merely by alleging that the opinion itself was objectively wrong, or whether the plaintiff must instead allege that the statement was subjectively false – requiring allegations that the speaker's actual opinion was different from the one expressed.
- *Elonis v. U.S.*, which was argued on December 1, presents the question whether a criminal prohibition on threats (18 U.S.C. § 875(c)) requires proof of the defendant's subjective intent to threaten, or whether it is enough to show that a “reasonable person” would regard the statement as threatening.
- Finally, in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores*, which has not yet been scheduled for argument, the Court will decide what kind of knowledge an employer must have of an employee's religious practice and need for an accommodation in order to be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire her based on that practice.

Although each of these cases is governed by different statutory schemes (and, in the case of *Elonis*, constitutional standards), they present some common arguments. The defendants generally contend that fairness interests should preclude a finding of liability for conduct they did not understand as wrongful (or at least not illegal) at the time they acted. The plaintiffs and the government counter that legitimate enforcement interests should not be frustrated by difficult-to-establish intent standards (or difficult-to-disprove intent defenses). How the Court will balance these interests will likely vary from case to case, depending on the particulars of the statutes at issue and the perceived strengths of the competing interests in the different settings in which the cases arise.

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*Commil* presents a very similar situation. As explained in more detail below, the question presented in *Commil* relates to whether an infringer's good-faith belief of the invalidity of a patent negates the intent required for inducement of infringement. Like the defendants above, Cisco argues that its good faith belief that Commil's patent was invalid should preclude a finding that it had the requisite intent to induce others to infringe Commil's patent. Commil, in turn, argues that such a defense would create an "unwarranted and unnecessary escape hatch that will serve only to increase the expense of litigation and release defendants who are inducing infringement of valid patents from all liability."<sup>1</sup> With such strong arguments on both sides, it is expected that the patent bar will closely watch *Commil*.

## ABOUT COMMIL

A party that induces infringement is liable for infringement.<sup>2</sup> To induce infringement, the defendant must "knowingly induce[] infringement and possess[] specific intent to encourage [another party's direct] infringement."<sup>3</sup>

In *Commil v. Cisco*, Commil sued Cisco for infringing patents relating to improving wireless network "hand-offs." These hand-offs occur when a device changes wireless access points on a network. Cisco was aware of Commil's patents as early as 2004 or 2005, but nonetheless sold products that allegedly induced infringement of Commil's patents. An East Texas jury in a first trial found that Cisco was infringing, but the district court granted a partial new trial on the issues of inducement and damages due to counsel's potentially prejudicial statements to the jury.

At the second trial, Cisco argued that it should not be liable for induced infringement because it believed in good faith that Commil's patents were invalid and thus not infringed. The district court disagreed and excluded related evidence. The jury subsequently determined that Cisco was liable for inducement.

On appeal, the Federal Circuit agreed with Cisco that "evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement."<sup>4</sup> Accordingly, the court of appeals held that the district court erred by excluding evidence of Cisco's good faith belief that the patent was invalid.

Judge Newman dissented, arguing that Cisco's argument that it should have a defense of good-faith belief of invalidity was contrary to the principles of tort liability. In Judge Newman's view, "[a] mistake of law, even if made in good faith, does not absolve a tortfeasor."<sup>5</sup>

## THE PETITION FOR CERTIORARI IN COMMIL

On January 23, 2014, Commil petitioned the Supreme Court for *certiorari*, challenging both: (i) the Federal Circuit's approval of Cisco's good-faith belief of invalidity defense; and (ii) a jury instruction regarding inducement.

<sup>1</sup> Petition for Certiorari, p. 19, *Commil USA, LLC v. Cisco Systems, Inc.*, Nos. 13-896 and 13-1044 (Oct. 16, 2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/Commil-v.-Cisco-Petition.pdf>.

<sup>2</sup> 35 U.S.C. § 271(b).

<sup>3</sup> *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006).

<sup>4</sup> *Commil USA, LLC v. Cisco Systems, Inc.*, 720 F.3d 1361, 1368-69 (Fed. Cir. 2013).

<sup>5</sup> *Id.* at 1374.

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At the Court's request, the Solicitor General filed a brief on whether *certiorari* should be granted. The Solicitor General supported the grant of *certiorari* on the first issue, arguing that such a defense would be hard to refute and would make it more difficult for patentees to sue infringers.<sup>6</sup>

The Court granted Commil's petition on December 5, 2014, limited to the first question presented. The case will likely be argued in the spring, and a decision is expected by the end of June.

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<sup>6</sup> Brief for the United States as *Amicus Curiae*, p. 15, *Commil USA, LLC v. Cisco Systems, Inc.*, Nos. 13-896 and 13-1044 (Oct. 16, 2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/10/Commil-v.-Cisco-OSG-invitation-brief.pdf>.