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Supreme Court Moves to Clarify Induced Infringement Standard

In its most recent pronouncement on patent law, the U.S. Supreme Court once again corrected the Federal Circuit's understanding of induced infringement under 35 U.S.C. §271(b).

On May 26, 2015, in *Commil USA, LLC v. Cisco Sys.*, 191 L. Ed. 2d 883 (U.S. 2015), the Supreme Court addressed the Federal Circuit's holding that "evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement." Both courts agreed "that liability for induced infringement can only attach if the defendant knew of the patent and knew as well that 'the induced acts constitute infringement,'" *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (U.S. 2011). However, in *Commil v. Cisco*, the Supreme Court refused the Federal Circuit's conflation of invalidity and non infringement.

Specifically, the Supreme Court mandated that validity and infringement be treated as separate issues. An accused inducer of infringement may certainly attempt to invalidate a patent, but the court reasoned, invalidity is "not a defense to infringement, it is a defense to liability." Therefore, the court concluded that a belief in patent invalidity cannot negate liability for a defendant who had the requisite knowledge of the patent and that the induced acts are infringing under §271(b).

The *Commil v. Cisco* case is the second decision by the current Supreme Court that clarifies the acts and defenses that are actionable under a theory of induced infringement. Although the court in 2014 required direct infringement for inducement liability, thereby appearing to make it harder for owners to enforce their patents, this most recent case appears to balance the scales. See, *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111 (U.S. 2014). Indeed, it appears to the authors that the Supreme Court is telegraphing a pro-patent position toward claims that are strategically crafted and allow direct infringement to be more easily proven, e.g., method claims with steps that may be performed by a single entity.

In light of this Supreme Court guidance related to induced infringement, entities are well advised to perform a careful technical audit of claimed limitations of patents of interest against products or processes of interest. Additionally, a competent non-infringement opinion may provide practicing companies with negating evidence of willfulness and potentially provide helpful evidence relating to scienter for induced infringement.

This document is intended to provide you with general information regarding induced patent infringement. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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