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Practice Considerations Post-*Commil* *USA, LLC v. Cisco Systems, Inc.*

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While the Supreme Court's section 101 decisions may garner the biggest headlines, the high court has also invested significant efforts in the area of induced infringement. *Commil v. Cisco*, decided on May 26, 2015, marks the Supreme Court's third foray into induced infringement in the past half-decade.

First, in *Global-Tech Appliances, Inc. v. SEB S.A.*, the Supreme Court held willful blindness could satisfy the knowledge requirement for induced infringement. Then, in *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, the Supreme Court held that induced infringement required underlying direct infringement. Now, in a twist on *Global-Tech*, the Supreme Court in *Commil v. Cisco* has held that an accused infringer's good-faith belief in the invalidity of a patent cannot provide a defense to induced infringement.

In reaching its decision in *Commil*, the Court noted that § 271(b) requires that the defendant "actively induces infringement," and that because infringement and invalidity are separate issues under the Patent Act, belief regarding validity cannot negate the scienter requirement under § 271(b). Recognizing that its decision might seem at odds with the "simple truth" that someone cannot be induced to infringe an invalid patent, the Court restated the often-overlooked principle that invalidity is an affirmative defense that can preclude enforcement of a patent against otherwise infringing conduct. In other words, invalidity is a defense to liability but not to infringement.

While a good-faith belief in invalidity may no longer be a defense to induced infringement under *Commil*, the Court's rationale in *Global-Tech* and related case law is still intact. That is, a good-faith belief in non-infringement may be used to overcome allegations of indirect infringement. As a result, practitioners should expect an increase in the number of non-infringement opinions and their introduction into the evidentiary record, especially where the underlying litigation relies substantially on allegations of induced infringement—as frequently pled in the electronic, automotive and pharmaceutical disciplines.

Practitioners should also carefully consider the possible extension of the holding in *Commil* to allegations of willful infringement. At present, willful infringement carries a knowledge requirement, i.e., objective recklessness. And willful infringement may be overcome by a showing that the accused infringer had a reasonable belief in the invalidity of the patent. *Black & Decker, Inc. v. Robert Bosch Tool Corp.*, 260 Fed. Appx. 284, 292 (Fed. Cir. 2008). Yet, if the Court's demarcation between infringement and invalidity in induced infringement applies equally to willful infringement, the *Commil* decision could simplify a patentee's case by rendering irrelevant the accused infringer's belief of invalidity—effectively rewriting the standards for proving willful infringement.

Accordingly, in view of *Commil*, practitioners should perform a careful evaluation of pre-litigation strategies. The mere existence of an invalidity opinion will no longer protect a party from allegations of induced infringement, and it may not offer them any protection from a charge of willful infringement either. In both instances, however, a non-infringement opinion may offer that same protection.

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