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In *Commil USA LLC v. Cisco Systems, Inc.* (No. 13-896), the Supreme Court held that an accused inducer's belief that an asserted patent is invalid is not a defense to induced patent infringement. The decision reverses a Federal Circuit panel decision from June 25, 2013, which created a new defense to induced infringement under 35 U.S.C. §271(b) based on an accused inducer's alleged "good-faith belief" in the invalidity of the asserted patent. Defendants accused of induced infringement can therefore no longer rely on belief of invalidity to negate the intent element of inducement.

*Commil* does, however, reinforce the high standard of knowledge necessary to sufficiently prove an allegation of induced infringement under the Court's prior opinion in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). In *Commil*, the Court confirmed that "in an action for induced infringement, it is necessary for the plaintiff to show that the alleged inducer knew of the patent in question and knew the induced acts were infringing." Accordingly, mere knowledge of the patent or that the induced acts "might infringe" is insufficient to prove inducement; the accused infringer must have known the acts actually met all of the limitations of the asserted claims.

# Practical considerations

Allegations of induced infringement under §271(b) require proof of intent to induce infringement, or "scienter." §271(b) states: "Whoever actively induces infringement of a patent shall be liable as an infringer." The Supreme Court's decision highlights the distinction between infringement *per se* and invalidity *per se*, recognizing the "scienter element for induced infringement concerns infringement; that is a different issue than validity…. And because infringement and validity are separate issues under the [Patent] Act, belief regarding validity cannot negate the scienter required under §271(b)."

Where possible, to negate scienter accused inducers should develop evidence showing lack of knowledge of the asserted patent(s). Moreover, although the *Commil* case rejects a belief of *invalidity* as a defense to induced infringement, the opinion endorses a belief of *non-infringement* as a viable defense to the intent requirement. A good-faith belief of non-infringement can be premised on a "reasonable" interpretation of the asserted claims and assertions that the acts accused of infringement were not believed to be covered by the claims under such a reasonable interpretation. As a practical matter, alleged inducers should focus intent-based defenses to induced infringement on claim construction based non-infringement arguments.

# Background

Commil sued Cisco for patent infringement related to technology involved in connectivity to short-range wireless networks. As part of a jury trial, Cisco sought to establish a good-faith belief in the invalidity of Commil's patent as a defense to the allegation of induced infringement. The district court excluded the evidence on the assumption that a mere belief in invalidity is not a defense to inducement. On appeal, a split Federal Circuit panel reversed, concluding that a good-faith belief in invalidity was a viable defense to induced infringement. Commil's petition for rehearing *en banc* at the Federal Circuit fell one vote short, soliciting support from five judges through two dissenting opinions. The Supreme Court's *Commil* opinion overturns the panel decision and removes a good-faith belief of invalidity as a defense to induced infringement.

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# Key Contacts


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| Dr. Adam Pivovar<br>Washington, DC | apivovar@cooley.com<br>+1 202 842 7889 |



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