

IN THE
SUPREME COURT OF THE UNITED STATES

COMMIL USA, LLC, *Petitioner*,
v.
CISCO SYSTEMS, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICUS CURIAE*
MUSC FOUNDATION FOR RESEARCH DEVELOPMENT
IN SUPPORT OF COMMIL USA, LLC

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QUESTION PRESENTED

Under 35 U.S.C. § 271(b), “[w]hoever actively induces infringement of a patent shall be liable as an infringer.” The question presented is:

1. Whether a good-faith belief that a patent is invalid is a defense to inducement liability under § 271(b).

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**STATEMENT OF INTEREST
OF *AMICUS CURIAE***

Medical University of South Carolina Foundation for Research Development (“MUSC FRD”) is a not-for-profit research foundation that has served as the technology transfer office of MUSC since 1995.¹ The foundation has filed over 200 new patent applications, has had over 50 U.S. patents issued, and has spawned over thirty startup companies. These startup companies have had products approved by the FDA, they have been acquired by publicly-traded corporations, and they have attracted substantial investment dollars. These startup companies have also created jobs and contributed to the nation’s economy.

MUSC FRD has no stake in the outcome of this case other than a deep and abiding interest in supporting and promoting consistency in the

¹ Under Supreme Court Rule 37.6, *amicus curiae* MUSC FRD states that no counsel for a party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than MUSC FRD or its counsel made a monetary contribution to this brief’s preparation or submission. Consent for the filing of this brief in support of Commil USA, LLC, was received from counsel for Commil by email dated Jan. 26, 2015, and from counsel for Cisco Systems, Inc., by email dated Jan. 26, 2015.

development of the law, affecting patents and other forms of intellectual property.

SUMMARY OF ARGUMENT

Neither the patent statutes nor any relevant precedent of this Court (including *Global-Tech v. SEB* (2011) discussed herein) supports the Federal Circuit's new, but ill-considered, rule that a defendant's good-faith belief that a patent is invalid is a defense to induced infringement under 35 U.S.C. § 271(b). On the contrary, the Federal Circuit's new rule directly conflicts with the presumption of validity awarded to patents under 35 U.S.C. § 282 and with this Court's holding in *Microsoft v. i4i* (2011) that § 282 requires an invalidity defense to be proven with clear and convincing evidence. Furthermore, the Federal Circuit's new rule will require courts to develop an expansive new body of case law for induced infringement, contrary to this Court's guidance in *Limelight v. Akamai* (2014).

For at least these reasons, MUSC FRD respectfully asks this Court to vacate the Federal Circuit's decision in this case and remand this case to the Federal Circuit with instructions to follow this Court's guidance regarding the proper application of induced infringement law.

ARGUMENT

- I. The Federal Circuit erred in ruling that a defendant’s good-faith belief that a patent is invalid is a defense to induced infringement under 35 U.S.C. § 271(b) because Congress and this Court never created such a defense.**

The Solicitor General expressed the following views in its Brief For The United States As *Amicus Curiae* (hereafter “U.S. Br.”):

The court of appeals erred in holding that a person who knowingly induces another to engage in infringing conduct may avoid liability under [35 U.S.C.] Section 271(b) by demonstrating that it had a good-faith belief that the infringed patent was invalid. This Court’s review is warranted *to prevent defendants from avoiding inducement liability on a ground that is inconsistent with the text, structure, and purposes of the relevant Patent Act provisions.*

U.S. Br. at 6 (emphasis added).

MUSD FRD fully agrees. One of the most relevant opinions of this Court concerning the Question Presented in this case—both for what it

holds and what it does not hold—is that of *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). In *Global-Tech*, this Court considered whether a party who “actively induces infringement of a patent” under § 271(b) must know that the induced acts constitute patent infringement.²

After reviewing the language of the statute enacted by Congress and related case law, this Court

² Sections (a), (b), and (c) of 35 U.S.C. § 271 are cited in this brief.

35 U.S. § 271 - Infringement of patent:

(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, 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, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

held that “induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” *Global Tech*, 131 S. Ct. 2060, 2068 (2011). Notably, this Court, citing *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) (*Aro II*), held that under the related language of contributory infringement, “a violator of § 271(c) must know ‘that the combination for which his component was especially designed was both patented and infringing,’ 377 U.S., at 488,” and that the knowledge required for liability under § 271(c) necessarily “compel[s] this same knowledge for liability under § 271(b).” *Global-Tech*, 131 S. Ct. at 2067.

This Court in *Global-Tech* further held that the knowledge required for liability under § 271(b) could be inferred from evidence of “willful blindness” on the part of the inducer, such as “willful blindness” to the high probability that the relevant article of manufacture (in that case, a fryer) was patented. 131 S. Ct. 2060, 2068–72 (2011). As such, this Court signaled that behavior of a would-be inducer to mitigate liability by avoiding “knowledge” through “willful blindness” to the high probability of an article being patented would be to no avail.

Noticeably absent from the *Global-Tech* opinion—and, indeed, counter to this Court’s

treatment of inference knowledge in its decision—is a requirement that to find induced infringement, an inducer must (1) know that its inducement resulted in actual infringement of the patent (*i.e.*, know that its inducement actually brought about each claim limitation of the patent), and (2) know the infringed patent to be valid (*e.g.*, know that the claims of the patent are not anticipated or obvious) so that allegedly induced acts will give rise to liability for infringement of a valid patent.³

On the contrary, under a principled, fair reading of *Global-Tech*, additional knowledge of (1) or (2) is not required. Instead, *Global-Tech* and the earlier cases on which it relied (*e.g.*, *Aro II*) simply require knowledge of the patent and the patent’s applicability to the conduct at issue. *See* Brief of Petitioner at 15–20 (Jan. 20, 2015) (hereafter “Commil Br.”) (discussing *Global Tech* and *Aro II*); *id.* at 24–27 (discussing *Global Tech* and this Court’s other earlier cases).

³ MUSC FRD distinguishes between a “patent” and a “claim” of a patent. Determinations of patent eligibility, allowability, infringement, and invalidity are all accomplished on a claim-by-claim basis, *e.g.*, as reflected for validity in the second sentence of section (a) of 35 U.S.C. § 282 - Presumption of validity; defenses. *See* note 4, *infra*.

The Solicitor General's brief concurs:

Global Tech does not resolve whether the defendant must know in addition [to a patent's existence] that the conduct actually infringed the patent. But regardless of how that question is ultimately decided, *Section 271(b) neither requires knowledge of the patent's validity nor suggests a good-faith belief in invalidity is a proper defense.*

U.S. Br. at 11 (emphasis added).

Induced infringement under § 271(b) requires that the alleged inducer must have knowledge of the patent and the patent's applicability to the conduct at issue. This statute, as enacted by Congress, does not require knowledge of the patent's validity status. Accordingly, the Federal Circuit "erred in holding a person who knowingly induces another to engage in infringing conduct may avoid liability under Section 271(b) by demonstrating that it had a good faith belief that the infringed patent was invalid." U.S. Br. at 6.

II. The Federal Circuit’s new rule conflicts with the presumption of validity awarded to patents under 35 U.S.C. § 282 and this Court’s holding in *Microsoft v. i4i* (2011) that § 282 requires an invalidity defense be proven with clear and convincing evidence.

A presumption of validity does not apply to claims of a patent application being prosecuted before the U.S. Patent & Trademark Office (“PTO”). See § 2173.02 MANUAL OF PATENT EXAMINING PROCEDURE (9th Ed., Mar. 2014). But after completion of prosecution at the PTO, and upon issuance of a patent application as a bona fide patent, each claim of the patent is thereafter presumed valid. 35 U.S.C. § 282(a).⁴ Nowhere in § 282 did Congress provide any

⁴ 35 U.S.C. § 282 - Presumption of validity; defenses

(a) In General.— A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

(b) Defenses.— The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

indication that anything less than the full presumption of validity should be given a patent. § 282(b) provides for invalidity as a defense to patent infringement. But that paragraph says nothing about a reasonable belief of invalidity as a possible defense to induced infringement.

Given the presumption of validity, a defendant must prove with “clear and convincing evidence” that a patent claim is invalid in a court proceeding. *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2242 (2011). In contrast, a plaintiff need only show by a “preponderance of the evidence” that a defendant infringes a valid patent. *Centricut, LLC v. The ESAB Group, Inc.*, 390 F.3d 1361, 1367 (Fed. Cir. 2004); *see also* Roger Allan Ford, *Patent Invalidity*

(1) Noninfringement, absence of liability for infringement or unenforceability.

(2) Invalidity of the patent or any claim in suit on any ground specified in part II as a condition for patentability.

(3) Invalidity of the patent or any claim in suit for failure to comply with—

(A) any requirement of section 112, except that the failure to disclose the best mode shall not be a basis on which any claim of a patent may be canceled or held invalid or otherwise unenforceable; or

(B) any requirement of section 251.

(4) Any other fact or act made a defense by this title.

Versus Noninfringement, 99 CORNELL L. REV. 71, 103 (U. Chi. Pub. L. & Legal Theory Working Paper No. 454, 2013).

Justifications and policy reasons for the elevated burden of proof associated with the presumption of validity include respect for: (1) the examination process at the PTO through which patent claims are honed before issuance (*i.e.*, deference to the PTO), and (2) the increased incentive for a patent holder to invest in the development and commercialization of his or her patented technology (*i.e.*, patent certainty). See Douglas G. Lichtman & Mark A. Lemley, *Presume Nothing: Rethinking Patent Law's Presumption of Validity*, in COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 307–15 (Geoffrey A. Manne & Joshua D. Wright Eds., Cambridge University Press, 2011).

In *Microsoft v. i4i*, this Court recognized the presumption of validity that § 282 confers, and it affirmed that § 282 requires an invalidity defense be proven with clear and convincing evidence. 131 S. Ct. at 2251–53 (2011). The Federal Circuit's new rule that permits a good-faith belief of invalidity as a defense to induced patent infringement cannot be reconciled with this Court's precedent. This Court has never stated or suggested that a "good-faith belief" equates

to “clear and convincing evidence.” Such a new rule presumes the validity of the defendant’s belief and improperly shifts the evidentiary burden from the defendant to the plaintiff. The plaintiff must then prove that the defendant’s belief is unreasonable, versus the defendant first proving with clear and convincing evidence that a patent is invalid.

Moreover, under the Federal Circuit’s new rule, a defendant accused of inducing patent infringement need only show a “good-faith belief” that an asserted patent is invalid in order to escape liability. The defendant no longer must provide “clear and convincing evidence,” and it may negate a patent without ever meeting any standard of proof other than its own subjective “reasonable belief.” Such a subjective standard is counter to this Court’s requirement of providing objective clear and convincing evidence of invalidity.

Furthermore, the defendant’s alleged good-faith belief may be presented as evidence that it never intended to induce infringement. That is, a defendant may undermine a plaintiff’s induced infringement case with nothing more than a wrongly-held subjective belief of invalidity. *See Patek, Brann, Frischling, Mueller & Waldbaum, Proposed Subcommittee Report on Federal Circuit En Banc Review of Good-Faith Belief in Invalidity as a Defense*

to *Indirect Infringement*, PAT. INFRINGEMENT SUBCOMM., ABA SECT. INTELL. PROP. L., at 13–14 (Sept. 23, 2013) (hereafter “ABA Report”); *see also* Commil’s Br. at 52.

These outcomes conflict with the presumption of validity awarded to patents under § 282 and this Court’s holding in *Microsoft v. i4i* (2011). As the late Judge Giles Rich, a principal drafter of the 1952 Patent Act, once said:

[§] 282 creates a presumption that a patent is valid and imposes the burden of proving invalidity on that attacker. That burden is constant and is to convince the court of invalidity by clear and convincing evidence.

Microsoft, 131 S. Ct. at 2243 (quoting *American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1360 (Fed. Cir. 1984)).

III. The Federal Circuit’s new rule requires courts to develop a new body of law for induced infringement, contrary to this Court’s guidance for § 271(b) in *Limelight v. Akamai* (2014).

In *Limelight Networks, Inc. v. Akamai Techs, Inc.*, this Court held that a defendant is not liable for

inducing patent infringement under 35 U.S.C. § 271(b) when no single party has directly infringed the patent under § 271(a). 134 S. Ct. 2111, 2115 (2014). This holding overturned the Federal Circuit’s ruling that liability for patent infringement may be imposed “when a defendant carries out some steps constituting a method patent and encourages others to carry out the remaining steps – even if no one would be liable as a direct infringer in such circumstances” *Id.* at 2116.

Had this Court affirmed the Federal Circuit’s ruling, the affirmance would have brought about “dramatic changes in the law of infringement,” and it would have imposed liability for induced infringement “on greatly enlarged grounds, such as merely advising or encouraging acts that may constitute direct infringement,” even when no direct infringement exists. *Akamai Techs, Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1319 (Fed. Cir. 2012) (en banc) (J. Newman, dissenting). Judge Linn also dissented. He, with Judges Prost, Dyk, and O’Malley joining, acknowledged that “[b]roadening the doctrine of inducement, such that no predicate act of direct infringement is required, is a sweeping change to the nation’s patent policy that is not for [the Federal Circuit] to make.” *Id.* at 1342 (citing this Court’s instructions in *Mayo Collaborative Servs. v. Prometheus*, 132 S. Ct. 1289, 1305 (2012), about the

need to “recognize the role of Congress in crafting more finely tailored rules where necessary.” *Id.* at 1305.).

In reversing the Federal Circuit, this Court observed that the Federal Circuit’s position “would deprive § 271(b) of ascertainable standards.” *Limelight*, 134 S. Ct. at 2117. The Federal Circuit “would require courts to develop two parallel bodies of infringement law: one for liability for direct infringement, and one for liability for inducement.” *Id.* at 2118. This Court further observed:

[W]hen Congress wishes to impose liability for inducing activity that does not itself constitute direct infringement, it knows precisely how to do so. The courts should not create liability for inducement of non-infringing conduct where Congress has elected not to extend that concept.

Id.

In this same vein, the Federal Circuit’s new rule in this case would also bring about drastic changes in the law of induced infringement. Further and contrary to this Court’s guidance in *Limelight*, the Federal Circuit’s new rule would require courts to develop an extensive new body of case law on induced infringement. This case law will expand the Federal

Circuit's ruling, and it will help guide defendants to avoid induced infringement liability in newer, more creative ways.

Indeed, under the Federal Circuit's new rule, courts would need to develop case law to answer a number of difficult questions. For example, Judge Reyna in his dissent from the denial of rehearing en banc in *Commil II*, identifies the following questions:

(a) Is the new rule a question of fact, a question of law, or a question of law with an underlying factual basis?

and

(b) Should the question of good-faith belief of invalidity be tried along with the invalidity issues, or perhaps before any other issues are heard given its determinative effect on the outcome of the case?

Commil II, 737 F.3d 699, 703 (Fed. Cir. 2013) (Reyna, J., dissenting from denial of rehearing en banc) (joined by Rader, C.J., Newman, Lourie, Wallach, JJ.)

Peter Strand of Shook, Hardy & Bacon, L.L.P., identifies two additional questions:

(c) What evidence is needed to support a good-faith belief of invalidity?

and

(d) What is the burden of proving “a good-faith belief”—clear and convincing evidence?

Peter Strand, *New “Belief” Defense To Induced Infringement: Fixing What Isn’t Broken?*, in IPQ NEWSL., at 4 (Shook, Hardy & Bacon, L.L.P., Nov. 2013).

The extent to which courts will be required to develop new case law to answer these four evidentiary and procedural questions is disconcerting. Even more troubling are four issues that the ABA’s Patent Infringement Subcommittee of the IP Section identified. These issues reinforce the above identified issues as some of the problems arising from the Federal Circuit’s ruling:

(1) *Commil*’s recognition of a good-faith belief of invalidity as a defense cannot be reconciled with the presumption of validity (§ 282) (*see* Sect. II, *supra*);

(2) There is no established precedent for using good-faith belief of invalidity to prove lack of intent to induce;⁵

(3) The majority opinion impermissibly transfers rules governing willfulness determinations to inducement; and

(4) The majority opinion provides no guidance on how to administer a good-faith belief of invalidity defense.

ABA Report at 13–16.

Requiring the courts to answer these questions and no doubt many others is contrary to this Court’s guidance in *Limelight v. Akamai* when such answers will be founded on erroneous readings of the patent statutes and this Court’s precedents. Congress makes

⁵ A panel of the Federal Circuit subsequently cited *Commil I* approvingly in *Bose Corp. v. SDI Technologies*, 558 Fed. Appx. 1012, 1022 (Fed. Cir. Mar. 14, 2014) (non-precedential) (“evidence of an accused inducer’s good-faith belief of invalidity may negate the requisite intent for induced infringement”). Judge Clevenger’s opinion however reversed the district court’s grant of summary judgment; the district court had absolved SDI of indirect infringement liability. He held that a fact issue existed regarding the date when SDI began to rely on its opinion of counsel that the asserted patent was invalid. *Id.* at 1023; see also Richard M. Marsh, Jr., *The Aftermath of Akamai: Induced Infringement and Opinions of Counsel*, in *LANDSLIDE*, at 4–5 (A.B.A. Sect. Intell. Prop. L., 2014).

new laws, not the courts. The Federal Circuit has not respected Congress' role in this case.

CONCLUSION

MUSC FRD asks this Court to vacate the Federal Circuit's opinion in this case, and remand it to the court with instructions to follow this Court's guidance regarding the law of induced infringement and that a subjective belief of invalidity is not a defense to a patent that is presumed valid until clearly and convincingly proven invalid.

Respectfully submitted,

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