

In The  
United States Court of Appeals  
For The Federal Circuit

**BMC RESOURCES, INC.,**

*Plaintiff-Appellant,*

v.

**PAYMENTECH, L.P.,**

*Defendant-Appellee.*

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US COURT OF APPEALS  
FOR FEDERAL CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS IN CASE NO. 3:03-CV-1927,  
JUDGE BARBARA M.G. LYNN.

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**BRIEF OF *AMICUS CURIAE***  
**COMCAST CABLE COMMUNICATIONS LLC IN SUPPORT OF**  
**DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE**

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Comcast Cable Communications LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

n/a

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Comcast Cable Communications LLC ("*Amicus*") is a provider of television, high-speed internet, and telecommunications services. As such, *Amicus* has an interest in not being sued for patent infringement in situations where its network is used to perform some limited part of an infringing act. For example, *Amicus* is concerned that a rule of divided infringement may subject it to liability when its network is used in combination with a third party's system, even if it does not direct or control any infringing activity and could not be held liable for contributory or induced infringement. Similarly, *Amicus* is concerned that certain steps performed in the operation of its network, in combination with steps performed by independent third parties, could subject *Amicus* to liability for divided patent infringement.

The parties have consented to Comcast filing this *amicus* brief. *Amicus* has no direct stake in the result of this appeal, and the parties have not contributed to the preparation of this brief.

### **I. INTRODUCTION**

It is a fundamental rule of patent law that a defendant infringes a patent only by practicing each and every element of the claimed invention. In this case, the district court correctly applied that rule, refusing to hold the defendant liable for practicing only some elements of the claimed invention. The appellant urges this

Court to hold that, because *when taken together* the conduct of multiple, independent defendants satisfies all the elements of the patent, Paymentech and independent third parties could individually be liable for patent infringement even though they did not act together or under the direction of a single entity.<sup>1</sup> The appellant's proposed expansion of liability to include non-infringing acts by independent parties is unprecedented in patent law, conflicts with the statutory scheme for indirect liability, and is unwise.

## II. BACKGROUND

BMC owns patents covering a method and apparatus for processing debit card transactions without a PIN number. By their terms, the claims of those patents require acts by retail customers, debit networks, financial institutions, and a provider of payment processing services. Paymentech is a provider of payment processing services. But the parties agreed that Paymentech did not perform seven of the thirteen steps of the '298 patent and four of the seven steps of the '456 patent. *BMC Resources v. Paymentech L.P.*, No. 3:03-CV-1927-M, 2006 WL

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<sup>1</sup> The parties refer to this theory as "joint infringement." To avoid confusing this novel theory with the well-established doctrine of "joint and several liability" in patent law, we use the term "divided infringement" instead. See Mark A. Lemley et al., *Divided Infringement Claims*, 33 AIPLA Q.J. 255 (2005). Notably, some of the cases upon which BMC relies in support of its theory—*FMC Corp. v. Upright, Inc.*, 816 F. Supp. 1455, 1461 (N.D. Cal. 1993); *McDermott v. Omid Int'l*, 723 F. Supp. 1228, 1236 (S.D. Ohio 1988); and *Shields v. Halliburton Co.*, 493 F. Supp. 1376, 1389 (W.D. La. 1980)—speak to joint and several liability; they do not stand for the proposition that parties may be joint infringers.



306289 at \*5 (N.D. Tex. Feb. 9, 2006) (magistrate), *aff'd*, *BMC Resources v. Paymentech L.P.*, No. 3:03-CV-1927-M, 2006 WL 1450480 (N.D. Tex. May 24, 2006). The magistrate held that BMC could prove infringement in such a divided situation only if there were “a close relationship or connection” between Paymentech and the parties performing the other steps “such that the party accused of infringement directs or controls the actions of the other party.” *Id.* at \*4. The magistrate found such a relationship between Paymentech and the merchant customers, but no such relationship of direction or control between Paymentech and either the debit networks or the financial institutions. The only evidence of any relationship between those parties was the existence of an arm’s-length contractual relationship with the debit networks.

The district court affirmed the magistrate’s decision after an independent review. It found no evidence that Paymentech directed or controlled the behavior of the financial institutions. It rejected BMC’s claim that all that was required to find liability for divided infringement was “some connection” between the parties. *BMC Resources v. Paymentech L.P.*, No. 3:03-CV-1927-M, 2006 WL 1450480 at \*6 (N.D. Tex. May 24, 2006). And it also rejected the argument that this Court had decided the issue in a single line of dictum in *On Demand Machine Corp. v. Ingram Industries, Inc.*, 442 F.3d 1331, 1333-34 (Fed. Cir. 2006).

### III. ARGUMENT

#### A. Liability for Divided Infringement Is Unprecedented

Both the Supreme Court and this Court have long made it clear that direct infringement is proven only by showing that a defendant practices each and every element of the claimed invention. *See Warner-Jenkinson Corp. v. Hilton Davis Corp.*, 520 U.S. 17 (1997) (holding that the doctrine of equivalents, like literal infringement, must be tested element by element); *Canton Bio-Med., Inc. v. Integrated Liner Techs., Inc.*, 216 F.3d 1367, 1370 (Fed. Cir. 2000); *Gen. Foods Corp. v. Studiengesellschaft Kohle mbH*, 972 F.2d 1272, 1274 (Fed. Cir. 1992). Thus a process or method claim is “directly infringed only when the process is performed.” *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993); *Union Pac. Res. Co. v. Chesapeake Energy Corp.*, No. 4:96-CV-726-Y, 1998 U.S. Dist. LEXIS 14684, at \*11 (N.D. Tex. May 20, 1998) (noting that direct infringement requires performance of each step of a method claim); *see also Avery Dennison Corp. v. UCB Films PLC*, No. 95 C 6351, 1997 WL 567799, at \*3 (N.D. Ill. Sept. 4, 1997) (holding that defendant could not be a direct infringer because it allegedly performed only the first step of the claimed method).

This rule derives from the text of the statute itself, which defines the scope of liability for patent infringement. 35 U.S.C. § 271(a) provides that “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.” The plain text of the statute requires that, in order to be held liable for patent infringement, a party must have made, used, sold or offered for sale the patented invention. The statute does not authorize a finding of liability for direct infringement against one who does not meet the statutory requirements.

Where a defendant participates in infringement but does not directly infringe the patent, the normal recourse under the law is to indirect infringement. But “indirect infringement, whether inducement to infringe or contributory infringement, can only arise in the presence of direct infringement.” *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir 2004). In *Dynacore*, the plaintiff sued more than a dozen companies whose products, it alleged, could be used in a manner that indirectly infringed its patent. This Court, however, held that because the plaintiff could not show that either the named defendants or their customers directly infringed the patent in suit, it could not “even reach the question of the defendants’ vicarious liability for indirect infringement.” *Id.* at 1277.

Patent owners have periodically sought to avoid the strictures of the all-elements rule, but this Court has never endorsed such an effort. In the one Federal Circuit case to consider such a claim on the merits, *Cross Medical Products v.*

*Medtronic Sofamor Danek*, 424 F.3d 1293 (Fed. Cir. 2005), the Court rejected the patentee's effort to combine the acts of surgeons with the acts of a medical device manufacturer to find direct infringement of an apparatus claim. The Court refused to attribute the acts of surgeons in making the claimed apparatus to the medical device manufacturer because the medical device manufacturer representative, who appeared in the operating room and identified instruments for the surgeons, did not *direct* the surgeons' actions. *Id.* at 1311. While the Court remanded the case for a determination of whether the surgeons directly infringed by making the claimed apparatus—surgical implants used to stabilize and align the bones of a patient's spine—and whether the medical device manufacturer could be held vicariously liable for such infringing acts, the Court expressly rejected the patentee's theory of divided infringement. *Id.*

More recently this Court touched upon the divided infringement issue in *On Demand Machine Corp. v. Ingram Industries, Inc.*, 442 F.3d 1331 (Fed. Cir. 2006). *On Demand* dealt with a patent covering systems and methods of manufacturing a single copy of a book. *Id.* at 1333. The issue on appeal was whether the district court properly construed the claims, and whether no reasonable jury could have found liability applying the correct claim construction. *See id.* This Court rejected the trial court's claim construction. But the plaintiff-cross appellant argued that the

district court verdict could still stand, even under the correct claim construction, because the district court instructed the jury that:

It is not necessary for the acts that constitute infringement to be performed by one person or entity. When infringement results from the participation and combined action(s) of more than one person or entity, they are all joint infringers and jointly liable for patent infringement. Infringement of a patented process or method cannot be avoided by having another perform one step of the process or method. Where the infringement is the result of the participation and combined action(s) of one or more persons or entities, they are joint infringers and are jointly liable for the infringement.

*Id.* at 1333-34. This Court noted in dictum that it “discern[ed] no flaw in this instruction as a statement of law,” *id.*, but it did so without any analysis of the issues presented in this case, and the Court immediately returned to the claim construction issues that were presented by the appeal. *Id.* Moreover, the Court’s remark had no impact on the outcome of the case. Rather, the Court concluded that, based on the correct claim construction, no reasonable jury could find infringement. *Id.* at 1334.

District courts faced with a divided infringement theory have also generally refused to find liability where one party did not control or direct each step of the patented process. *See, e.g., BMC Resources, Inc. v. Paymentech, L.P.*, No. 3:03-CV-1927-M, 2006 WL 306289 at \*6 (N.D. Tex. Feb. 9, 2006) (“No court has ever found direct infringement based on the type of arms-length business transaction

present here.”); *Faroudja Labs v. Dwin Elecs., Inc.*, No. 97-20010-SW, 1999 WL 111788 at \*3 (N.D. Cal. Feb. 24, 1999); *cf. Mobil Oil Corp. v. Filtr̄ol Corp.*, 501 F.2d 282, 291-92 (9th Cir. 1974) (expressing doubt over the possibility of divided infringement liability).

**B. Plaintiffs Should Be Permitted to Aggregate the Conduct of Multiple Defendants Only When One Defendant Directs That Infringement Occur**

There may be limited circumstances in which a patent may be infringed by a combination of entities and in which it would be just to hold one or both entities liable for the resulting infringement. For example, where one party performs some steps of a process and directs another to perform the last step solely to avoid liability for infringement, it might be unfair to let that mastermind escape liability. Indeed, those cases that have found liability for conduct performed by two or more parties have typically done so only where the parties collaborated so closely that they were effectively acting as a single entity. In those cases, the coordinator, “through its connection with the entity performing only part of the process, is in actuality performing the combination of each and every step of the claimed method.” *Marley Mouldings, Ltd. v. Mikron Indus., Inc.*, No. 02C 2855, 2003 U.S. Dist LEXIS 7211 (N.D. Ill. Apr. 29, 2003). *See also Shields v. Halliburton Co.*, 493 F. Supp. 1376, 1389 (W.D. La. 1980) (employees in a joint venture working together on a single oil platform).

Liability in this situation might reasonably exist where the defendant directs and controls the acts of a third party and those combined acts infringe. In other words, infringement might be found in those cases in which the defendant either performs or controls another's performance of each claim element. But, for purposes of determining whether a defendant controls a third party, it should not suffice for a defendant simply to direct a particular *result* which might or might not satisfy the relevant claim limitations depending on how the third party chooses to attain that result. Where two parties merely enter into an arm's-length commercial relationship, and neither specifically requires the other to perform steps covered by the claim, neither party should bear collective responsibility for the result.

Instead, liability should be limited to those situations in which a defendant directs the acts of a third party in such a way that all the claimed steps necessarily will be performed. That direction could take the form of an express contractual requirement imposing upon the third party the obligation to perform the remaining steps in such a way that infringement will result. But in each case, the defendant must actually bear responsibility for the performance of each step, either by performing the step itself, or by directing another to do so, such that infringement is the necessary and intended result of the parties' combined actions.

Such a limitation is consistent with the rules governing indirect liability, which preclude a finding of inducement unless the defendant actively seeks to

cause a third party to infringe. Requiring that a defendant have directed the performance of each step would permit patentees to enforce their rights against defendants who try to avoid liability by deliberately outsourcing certain functions, while preventing overzealous plaintiffs from creating a doctrine that swallows the carefully crafted rules of indirect infringement and subjects the makers of legitimate products and services to the risk of liability every time a third party uses their wares.

Applying these standards to BMC's charges against Paymentech properly results in a finding of no infringement, because the magistrate and the district court both found that Paymentech did not direct or control the acts of the financial institutions. Likewise, Paymentech should not be held liable for infringement to the extent that it did not direct or control how the debit networks designed or operated their networks, and thus did not control whether the design or operation of those services would satisfy the elements of the claims. In that situation, neither the financial institutions, the debit networks, nor the payment services provider, Paymentech, bears responsibility for the actions of the other.

**C. Divided Infringement Conflicts with the Rules Governing Indirect Infringement**

Expanding the rules governing direct infringement to reach the independent conduct of multiple actors would subvert the statutory scheme for indirect infringement. Direct infringement is a strict-liability offense, but it is limited to



those who practice each and every element of the claimed invention. By contrast, indirect liability requires evidence of “specific intent” to induce infringement, *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990), or knowledge that a good is specially adapted for aiding infringement and has no other significant use. 35 U.S.C. § 271(c). Under BMC’s proposed approach, there would be no reason for a patentee ever to bring a claim for contributory infringement. Rather than suing an entity that sells “a component of a patented machine” under § 271(c), and be forced to make the requisite showing that the component is not suitable for non-infringing uses, the patentee could simply aggregate that entity’s conduct with the conduct of the purchaser of the component, and bypass § 271(c)’s requirements altogether.

This Court has recognized the risk of expanding liability for direct infringement in this way. Indeed, in *Joy Technologies, Inc. v. Flakt, Inc.*, it refused to extend the scope of direct infringement to encompass providing a device that performs one step in a patented process because “[t]o hold that the sale of equipment which performs a patented process is itself a direct infringement would make that portion of § 271(c) relating to the sale of an apparatus for use in practicing a patented process meaningless.” 6 F.3d 770, 774 (Fed. Cir. 1993); *see also E.I. DuPont de Nemours and Co. v. Monsanto Co.*, 903 F. Supp. 680, 735 (D. Del. 1995) (“Similarly, in this case, it seems that if Monsanto were liable as a

direct infringer under § 271(a) for making and selling a component of the claimed process, then § 271(c), which imposes liability for ‘sell[ing] a . . . material . . . for use in practicing a patented process’ would be superfluous.”). The result would be unreasonably to expand liability for indirect infringement by conflating it with direct infringement.

Indirect infringement is limited for a reason. The further removed a defendant is from an actual act of direct infringement, the greater the risk that holding it liable will chill legitimate pro-competitive activity. Contributory infringement is limited to the sale of non-staple items of commerce specially adapted for infringement. Were it otherwise, the sale of any number of products or services with legitimate uses could give rise to patent infringement. Consider a patent on a *method* of improving data delivery over the Internet. Both personal computer manufacturers and telephone companies make equipment that performs steps that—in combination with other steps—may infringe that patent. Were the patent owner to allege that Dell and Verizon engaged in direct infringement because they performed such steps in combination with steps performed by third parties using their systems, the courts would (properly) reject such a claim out of hand. Dell and Verizon are not themselves infringing. Nor are they instructing anyone else to infringe. A similar analysis would apply for system claims, particularly because, under the statute, Dell or Verizon can be liable for supplying

a device only in the limited circumstances of contributory infringement—where the device has no substantial use other than to infringe the patent. This Court should not upset that statutory scheme.

**D. Divided Infringement Conflicts With the Symmetry Between Literal Infringement and Anticipation**

Adopting a theory of divided infringement would also conflict with the well-known principle of patent law that “that which infringes if later anticipates if earlier.” *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556, 1573 (Fed. Cir. 1986) (citing *Peters v. Active Mfg. Co.*, 129 U.S. 530, 537 (1889)). This Court has been quite clear that anticipation occurs only if each and every element of the patent claim is present in a prior art reference. Any effort to combine references to invalidate a patent can occur, if at all, only under the law of obviousness. If this Court were to hold that a defendant infringed by practicing only some of the elements of the patented invention, it would soon be faced with parallel “divided anticipation” arguments that sought to combine two different references to invalidate a patent under section 102 without invoking the tougher standards of section 103.

**E. Patentees Can Avoid Many Divided Infringement Issues With Proper Claim Drafting**

Refusing to create a new cause of action for divided infringement will not necessarily leave patentees without a remedy. Instead, proper claim drafting can

resolve many, if not most, instances of divided infringement. Here, for example, BMC's assignor drafted its patent claims to require acts by four different parties. BMC could have drafted its claims to focus on one entity and whether it supplies or receives any given element. Lemley et al. give patent practitioners examples of how to redraft claims to avoid this problem. Mark A. Lemley et al., *Divided Infringement Claims*, 33 AIPLA Q.J. at 272-75.

Of course patentees who fail to take adequate care in drafting claims will not be able to take advantage of such remedies. But this Court has consistently held that patentees, not the public, must bear the burden of bad claim drafting. See *Johnson & Johnston v. R.E. Service Co.*, 285 F.3d 1046 (Fed. Cir. 2002); *Sage Prods. Inc. v. Devon Indus. Inc.*, 126 F.3d 1420 (Fed. Cir. 1997) (“[A]s between the patentee who had a clear opportunity to negotiate broader claims but did not do so, and the public at large, it is the patentee who must bear the cost of its failure to seek protection for this foreseeable alteration of its claimed structure.”). This Court should not create a new and dangerous cause of action solely to help patentees remedy their own drafting errors.

#### IV. CONCLUSION

For the above-mentioned reasons, *Amicus* respectfully requests that this Court affirm the district court's application of a divided infringement theory to find liability for patent infringement where one entity does not perform or control the performance of all the steps of a claimed method, or make, use, sell or offer to sell a claimed system, either directly or with the participation of an entity whose conduct it controls.

Dated: December 6, 2006

Respectfully submitted,



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