



21st Annual Advanced Patent Law Institute

Indirect Infringement and Divided Infringement

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***Commil* and *Akamai* - the aftermath**

Induced Infringement

> 35 U.S.C. § 271

- 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.

Commil v. Cisco

- > 2007: Commil sues Cisco
- > May 2010: jury verdict \$3.7 million
- > December 2010: new trial granted
- > April 2011: jury verdict \$63.7 million + \$10.3 million prejudgment interest
- > June 2013: Federal Circuit opinion
 - Affirm-in-part, vacate-in-part, and remand

Federal Circuit: *Commil v. Cisco*

- > Held: Accused infringer's good-faith belief of patent invalidity **could potentially negate** finding of intent;
- > Held: District Court's Jury instructions erroneous:
 - "The jury . . . was not instructed that in order to be liable for induced infringement, Cisco must have had knowledge that the induced acts constitute patent infringement."
 - Instead, jury was instructed that intent requirement can be satisfied if defendant knew **or should have known** that its actions would induce direct infringement.
 - Negligence or recklessness is NOT sufficient.
- > Did not reach issues of infringement and damages.

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- > May 2015: Supreme Court opinion
 - Vacate and remand

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