Abstract

Minding Patent Infringement

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The Patent Act of 1952 provides at 35 U.S.C. § 271(b) that "[w]hoever actively induces infringement of a patent shall be liable as an infringer." This provision codified long-standing precedent deriving from tort law that those who aid and abet direct patent infringement shall be liable for indirect infringement.

Contrary to the views of most scholars, opinions from the Supreme Court and lower courts from the mid-19th century through the passage of the 1952 Act repeatedly held that aiding and abetting direct patent infringement solely required specific intent merely to further the acts that constituted direct infringement, and did not require knowledge of the patent-in-suit. Because Congress codified this precedent, the Supreme Court should find in the pending Global-Tech v. SEB case that Section 271(b) does not require the inducer to know of the applicable patent.

Importantly, this result is sensible as a policy matter. First, it places system and method patent claims on more equal footing. Second, it eliminates a strategy of "willful blindness," whereby potential indirect infringers forgo searching for patents prior to undertaking their potentially infringing behavior--even when it is not costly to do so - to avoid charges of indirect infringement. Third, for those infringers that are aware of patents prior to infringement, it ends the self-serving and generally meaningless "opinion of counsel" defense strategy, whereby outside counsel immunize indirect infringers by writing conclusory-but usually outcome-determinative-letters stating that the patent-at-issue is not infringed, invalid, or unenforceable.