

B.3 Infringement

3.2 INDIRECT INFRINGEMENT—ACTIVE INDUCEMENT

[Patent holder] alleges that [alleged infringer] is liable for infringement by actively inducing [someone else] [some other company] to directly infringe the [] patent literally or under the doctrine of equivalents. As with direct infringement, you must determine whether there has been active inducement on a claim-by-claim basis.

[Alleged infringer] is liable for active inducement of a claim only if [patent holder] proves by a preponderance of the evidence:

- (1) that the acts are actually carried out by [insert name or other description of alleged direct infringer] directly infringe that claim;
- (2) that [alleged infringer] took action during the time the [] patent was in force that was intended to cause and led to the infringing acts by [insert name or other description of alleged direct infringer]; and
- (3) that [alleged infringer] was aware of the [] patent and knew that the acts, if taken, would constitute infringement of that patent.

[addition to the end of (3) above when willful blindness concerning the [] patent's existence is at issue:]

or that [alleged infringer] believed there was a high probability that the acts by [insert name or other description of alleged direct infringer] would infringe a patent [by patent holder] and [alleged infringer] took deliberate steps to avoid learning of that infringement.

[alternative addition to the end of (3) above when knowledge of the patent is undisputed but willful blindness concerning infringement of that patent is at issue:]

or that [alleged infringer] believed there was a high probability that the acts by [insert name or other description of alleged direct infringer] infringed the [] patent and took deliberate steps to avoid learning of that infringement.

If you find that [alleged infringer] was aware of the patent, but believed that the acts it encouraged did not infringe that patent, [alleged infringer] cannot be liable for inducement.

In order to establish active inducement of infringement, it is not sufficient that [insert name or other description of alleged direct infringer] itself directly infringes the claim. Nor is it sufficient that [alleged infringer] was aware of the act(s) by [insert name or other description of alleged direct infringer] that allegedly constitute the direct infringement. Rather, in order to find active inducement of infringement, you must find either that [accused infringer] specifically intended [insert name or other description of alleged direct infringer] to infringe the [] patent or that [accused infringer] believed there was a high probability that [insert name or other description of alleged direct infringer] would infringe the [] patent, but deliberately avoided learning the

infringing nature of [insert name or other description of alleged direct infringer]’s acts. The mere fact, if true, that [alleged infringer] knew or should have known that there was a substantial risk that [insert name or description of alleged direct infringer]’s acts would infringe the [] patent would not be sufficient to support a finding of active inducement of infringement.

Authorities

35 U.S.C. § 271(b); *Commil USA, LLC v. Cisco Sys.*, 575 U.S. 632 (2015); *Global-Tech Appliances, Inc. v. SEB S. A.*, 563 U.S. 754, 765-70 (2012); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 843 F.3d 1315, 1331 (Fed. Cir. 2016); *Muniauction Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329-30 (Fed. Cir. 2008); *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (“[I]nducement requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement.”) (citation and internal quotation marks omitted); *MGM Studios Inc. v. Grokster*, 419 F.3d 1005 (Fed. Cir. 2005); *Insituform Techs., Inc. v. CAT Contracting, Inc.*, 385 F.3d 1360, 1377-78 (Fed. Cir. 2004) (inducer must have actual or constructive knowledge of the patent); *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys., LLC*, 350 F.3d 1327, 1342 (Fed. Cir. 2003) (no inducement where evidence did not show defendant knew or should have known that his actions were encouraging infringement); *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1363-66 (Fed. Cir. 2003) (no infringement where lack of intent to induce).

35 U.S.C. § 298 (“The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent.”).

Committee Comments

The underlined language in the instruction incorporates the “willful blindness” standard addressed by the Supreme Court in *Global-Tech Appliances, Inc. v. SEB S. A.*, 563 U.S. 754, 769-70 (2012). The Committee is of the opinion that in cases where willful blindness is not an issue, the underlined language should be omitted to reduce the possibility of juror confusion.

An earlier version of this instruction included a belief in invalidity as a ground for finding no induced infringement. That instruction was based on *Commil USA, LLC v. Cisco Sys.*, 720 F.3d 1361 (Fed. Cir. 2013), in which a divided panel of the Federal Circuit held that an accused infringer’s “evidence of a good-faith belief of invalidity may negate the requisite intent for induced infringement.”

In June of 2015, however, the Supreme Court reversed, holding that “a belief as to invalidity cannot negate the scienter required for induced infringement.” *Commil USA, LLC v. Cisco Sys.*, 575 U.S. 632 (2015).